The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of *Pennoyer v. Neff*

*John B. Oakley**

TABLE OF CONTENTS

I. INTRODUCTION 593
II. BORCHERS'S OVERALL STRATEGY 595
A. *The Plan of Attack* 595
B. *Weak Points* 599
III. JUSTICE FIELD AND HIS OPINION IN *PENNOYER* 601
A. *Parsing* Pennoyer 601
B. *Definitional Problems of the Limited View* 616
1. The "No Limits" Limited View 618
2. The "Some Limits" Limited View 618
3. *Nuff v. Annoyer*: A Parable of the Empty Nature of the Limited View 622
4. Expanding the Limited View 626
C. *The Integrity of the* Pennoyer *Opinion* 631
1. Double-Talk About Dicta 632
2. *Galpin v. Page*: The Case of the Missing Case 645
3. Jumping to Jurisdictional Conclusions 670
4. Summary and Appraisal 684
IV. FROM *PENNOYER* TO *MENEFEE* 685
A. *The Cases That Borchers Cites* 685
1. Overview 685

* Professor of Law, University of California, Davis. B.A., 1969, University of California, Berkeley; J.D., 1972, Yale University. I am grateful to Kevin Johnson for organizing the Symposium; to Vik Amar, Fritz Juenger, and Rex Perschbacher for their wise counsel; and to Julie Hokans and Stacey Sheston for their cheerful research assistance

HeinOnline -- 28 U.C. Davis L. Rev. 591 1994-1995

2. Borchers's First Three Ostensible Counter-Examples to the Expansive View 690
3. Borchers's Next Six Cases 708
4. Borchers's Last Strike 724
B. The Cases That Borchers Does Not Cite 732
1. *York v. Texas* 732
2. *Scott v. McNeal* 732
3. From *Pennoyer* to *York* to *Scott*: The Timing Problem, Retrospectivity, Res Judicata, and the Time-Lag Hypothesis 737
4. State Court Cases Expounding the Expansive View 744
V. CONCLUSION 746
A. "Hint and Run" History 747
B. The Vice of Pragmatic Instrumentalism 748
C. The Virtue of International Shoe *as a Model for Jurisdictional Reform* 751

HeinOnline -- 28 U.C. Davis L. Rev. 592 1994-1995

I. INTRODUCTION

Professor Borchers's thoughtful but flawed paper renews his attack on the current constitutional law of state-court personal jurisdiction.[1] That law consists, essentially if not exclusively, of the "minimum contacts" doctrine of *International Shoe*.[2] Borchers thinks that the "minimum contacts" standard has proven to be pernicious in practice, at least as it has been worked out in fits and starts by a Supreme Court that has failed to follow the promising path to reform suggested, "albeit faintly,"[3] by *International Shoe*'s focus on fairness rather than territoriality. In Borchers's view, the territorial concerns of current law are the product of myth and metaphor.[4] He concludes that the only defensible role for the Supreme Court to play as a "Super Court"[5] invalidating state-court civil judgments for lack of personal jurisdiction is to demand that states respect the same constraints of "substantive" and "procedural" due process that cabin state action against individuals apart from the exercise of personal jurisdiction.[6]

Central to Borchers's call for reform is the revisionist history of *Pennoyer v. Neff* that he elaborated earlier in an influential article.[7] He relies on this history to level the playing field of precedent, urging the Supreme Court to consider his recommendations untrammelled by concern for eighty years of "unpersuasive,"[8] "unconvincing,"[9] and "unsatisfactory"[10] case law occasioned by the Supreme Court's unexplained decision in 1915[11]

---

[1] Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990). Despite my many and serious criticisms of his historiography, I am thankful to Professor Borchers for provoking a re-examination of the intellectual history of a troubled sector of current law. I trust that the length of this critique does him honor, notwithstanding the negative conclusions that I am forced to draw.

[2] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[3] Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 590 (1995) [hereafter *Jurisdictional Pragmatism*].

[4] *Id.* at 580-81; *see also* Borchers, *supra* note 1, at 56.

[5] *Jurisdictional Pragmatism*, *supra* note 3, at 563.

[6] *Id.* at 576-79.

[7] Borchers, *supra* note 1.

[8] *Jurisdictional Pragmatism*, *supra* note 3, at 575.

[9] *Id.* at 576.

[10] *Id.*

[11] Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915).

HeinOnline -- 28 U.C. Davis L. Rev. 593 1994-1995

to adopt an erroneously expansive view of the due process principles announced in 1878 in *Pennoyer.* His arguments have all the trappings of sound historical research. He takes the reader on a well-documented tour of the relevant records to build an imaginative case that, a generation of Justices after *Pennoyer,* the Court unwittingly wandered from the conservative conception of due process that the *Pennoyer* Court meant to propound. He does not claim the mantle of truth, and seeks only to establish that his revisionist view is plausible enough to make history irrelevant, and thus to justify consideration of his modern recommendations free of the dead hand of the past.

The seductiveness of his arguments is increased by the complicated and musty nature of the cases in question, which often turn on arcane distinctions between anachronistic forms of action and methods of procedure. It is tempting to take his arguments at face value, and to get back to improving the future satisfied that in the eyes of a competent scholar there is no conclusive reason to let concern for historical continuity constrain the scope of reform.

I share Borchers's dissatisfaction with the current law of "minimum contacts" and "tag jurisdiction," but not his belief that jurisdictional rules rarely pose issues of individual rights or federal structure serious enough to warrant constitutional regulation. Borchers's philosophy of constitutional law figures only tangentially in this article, however. My principal concern is to demonstrate that Borchers's revisionist history is based on wishful thinking and little else. I conclude that this is "hint and run" history, an instrumental approach to historical inquiry that treats history as an exercise in rhetoric rather than the search for historical truth.[12]

Stripped of its historical cover, Borchers's program of reform is more radical than he admits. Notwithstanding his claim that he advocates merely a return to the Supreme Court's original understanding of the limited role of due process in regulating state-court personal jurisdiction, redirection of current law along Borchers's alternative "path to a more pragmatic era of jurisdiction"[13] would require the Supreme Court to disavow its

---

[12] *See infra* text accompanying notes 515-16.

[13] *Jurisdictional Pragmatism, supra* note 3, at 564.

HeinOnline -- 28 U.C. Davis L. Rev. 594 1994-1995

consistent view for nearly 120 years that the Due Process Clause of the Fourteenth Amendment conditions the validity of state-court judgments on compliance with territorial limits on state-court personal jurisdiction.

Part II summarizes the major claims of Borchers's attack on current law as set forth both in his earlier article and his present paper, identifies those claims that I challenge here, and outlines the principal elements of my criticism. Part III examines closely the contents and historical context of Justice Field's opinion for the Court in *Pennoyer*, and rebuts Borchers's attack on the integrity and reasoning of that opinion. Part IV investigates and rejects Borchers's claim that his limited view of *Pennoyer* is supported by ten subsequent cases decided after *Pennoyer* but before the limited view was unquestionably rejected thirty-seven years later in *Riverside & Dan River Cotton Mills v. Menefee*.[14]

Part V is my Conclusion. I elaborate there my charge that Borchers's "hint and run" history reflects indifference to historical truth. I seek to connect Borchers's instrumental use of history to the instrumental theory of law entailed by his utility-maximizing "jurisdictional pragmatism."[15] I end on a constructive note, and one resonant with the theme of this Symposium, by suggesting how reform of this troubled field of law might proceed if inspired by a different kind of pragmatism — one that takes precedent seriously, as a genuine constraint, but seeks nonetheless to interpret what the law requires in light of changing social circumstances. This is the pragmatism of the common law, and its application to constitutional law is exemplified by *International Shoe*.

II. BORCHERS'S OVERALL STRATEGY

A. The Plan of Attack

Borchers's campaign against the mistaken constitutionalization of state-court personal jurisdiction proceeds in seven stages. In the first three, he builds his historical claim that *International Shoe* grew out of a mistaken conception of

---

[14] 237 U.S. 189 (1915).

[15] *See Jurisdictional Pragmatism*, *supra* note 3, at 582.

HeinOnline -- 28 U.C. Davis L. Rev. 595 1994-1995

precedent. In the next two, he criticizes the analytical and normative shortcomings of the development of the law from *International Shoe* to the present. In the final two stages, he describes and justifies his preferred view of the constitutional law of state-court personal jurisdiction.

(1) Prior to *Pennoyer*, Supreme Court regulation of state-court personal jurisdiction was premised on "federal common law."[16]

(2) *Pennoyer* added a "constitutional dimension" to state-court personal jurisdiction, but not, as is commonly understood, by "incorporating the territorial principles of jurisdiction into the due process clause."[17] Borchers does not deny that the discussion of the Due Process Clause in *Pennoyer*, although dicta, was meant to announce the Court's view that the Fourteenth Amendment had limited the power of state courts to enforce personal judgments. But he distinguishes between the "expansive" view and the "limited" view of what *Pennoyer* announced. According to Borchers's "limited" view, the Due Process Clause was understood in *Pennoyer* only to require an opportunity for a collateral attack on the validity of a judgment before it was enforced by a court of the judgment-rendering state.[18] Contrary to the "expansive" view, by which *Pennoyer*'s reference to the newly enacted Due Process Clause was meant to invalidate state-court judgments against nonresidents absent service of process or prejudgment attachment of property in conformity to the principles of territorial jurisdiction discussed at length in Justice Field's opinion for the Court,[19] the limited view set up only a single constitutional criterion: state courts must allow defendants at least one opportunity for collateral attack of a prior judgment against them on whatever grounds for invalidity — such as defective service of process — might be available under state law.

(3) The Supreme Court did not commit itself unambiguously to the expansive view of due process regulation of state-court personal jurisdiction for nearly forty years, until its

---

[16] Borchers, *supra* note 1, at 23 n.10.

[17] *Id.* at nn.10 & 11.

[18] *Id.* at 40 n.132.

[19] *Id.* at 38 n.125.

HeinOnline -- 28 U.C. Davis L. Rev. 596 1994-1995

decision in *Riverside & Dan River Cotton Mills v. Menefee*.[20] It compounded this unnecessary but fundamental mistake with three decades of obfuscatory case law in which ephemeral doctrines of fictitious agency and consent were unpredictably used to enforce or evade *Pennoyer*'s ostensible limits on state-court personal jurisdiction.[21]

(4) *International Shoe*, far from being an innovative reconceptualization of the constitutional law of state-court territorial jurisdiction with respect to in personam judgments, was a fundamentally flawed exercise in anachronistic legal reasoning as limited in scope as it was in imagination.[22] The new mantra of "minimum contacts" merely substituted fictitious presence for fictitious consent as the touchstone of the constitutional law of state-court jurisdictional power over foreign corporations,[23] but by expressly incorporating fairness concerns into the determination of corporate presence, it had a benign effect, initially, in expanding the power of state courts to protect injured forum residents.[24]

(5) The potential for mischief inherent in the amorphous principles of *International Shoe* was demonstrated by *Hanson v. Denkla*,[25] after which the Supreme Court was "mercifully silent" for nearly twenty years.[26] Since returning to the field in *Shaffer v. Heitner*, the Court has repeatedly interfered with the legitimate exercise of state-court personal jurisdiction in a series of capricious and essentially unprincipled opinions.[27] The legitimation of "tag" jurisdiction in *Burnham v. Superior Court* was a fitting culmination to the muddled development of the constitutional law of state-court personal jurisdiction since *Pennoyer*.[28]

(6) The Court should confess error, abandon the expansive view of due process regulation of state-court personal jurisdiction suggested by *Pennoyer* and established by *Menefee*, and permit

---

[20] 237 U.S. 189 (1915); *see also* Borchers, *supra* note 1, at 51 n.203.

[21] Borchers, *supra* note 1, at 52-53.

[22] *Id.* at 54-55.

[23] *Id.* at 54-55 nn.218-22.

[24] *Id.* at 55 nn.221-22.

[25] 357 U.S. 235 (1958).

[26] Borchers, *supra* note 1, at 63 n.268.

[27] *Id.* at 64-78.

[28] *Jurisdictional Pragmatism*, *supra* note 3, at 563-64; Borchers, *supra* note 1, at 78-87.

HeinOnline -- 28 U.C. Davis L. Rev. 597 1994-1995

state legislatures to determine the scope of state-court personal jurisdiction, subject only to the minimal constraints of substantive[29] and procedural[30] due process that modern law otherwise imposes on state economic and social regulation.[31]

(7) This "rationality-plus-fair-hearing test"[32] should be the doctrinal core of a new constitutional régime of "jurisdictional pragmatism."[33] This new standard would be analytically and normatively superior to current law. As a legal matter, a régime in which "the due process clause places almost no limitations on personal jurisdiction"[34] so that "constitutional invalidation of state court assertions of jurisdiction [would be] so rare as to be of little interest"[35] would cohere far better with other constitutional principles of due process, and would thus separate "the values deserving of constitutional protection from the spurious rationales."[36] As a normative matter, this would give state and federal legislatures far more practical control over the scope of state-court personal jurisdiction, and the "institutional position"[37] of these institutions is "superior to courts"[38] when it

---

[29] Borchers argues that if the modern standards of "substantive due process" are applied to state-court personal jurisdiction, the Constitution demands only that the state's assertion of jurisdiction be rationally related to a legitimate state interest — absent, that is, the extraordinary circumstance that the proceeding threatens a fundamental right such as voting, speech, or privacy, or that jurisdiction is based on a suspect classification such as race. This "rational basis" test is a weak one because it might foreclose a state from providing its courts as a general forum for resolving any and all disputes, but would not support the invalidation of the state judgment in any case to have reached the Supreme Court since *International Shoe*.

[30] In Borchers's view, modern standards of "procedural due process" also impose only a weak constraint on state-court personal jurisdiction. Borchers claims that the essence of procedural due process is the requirement of a "fair hearing," and since civil litigation involves claims to property rights by both sides, inconvenience to the defendant alone cannot establish that "the location of the forum prevents a fair hearing." He argues that any civil dispute "has to be resolved *somewhere*," and that no case considered by the Supreme Court after *International Shoe* put the defendant to "a realistic dilemma of defending or defaulting." Thus procedural due process, like substantive due process, imposes only "a distant outer limit on state court exercises of jurisdiction" rarely if ever implicated in the real-world proceedings of state courts.

[31] *Jurisdictional Pragmatism*, *supra* note 3, at 564; Borchers, *supra* note 1, at 87-105.

[32] *Jurisdictional Pragmatism*, *supra* note 3, at 579.

[33] *Id.* at 569.

[34] *Id.* at 564.

[35] *Id.*

[36] *Id.* at 579.

[37] *Id.*

[38] *Id.* at 564.

HeinOnline -- 28 U.C. Davis L. Rev. 598 1994-1995

comes to constructing "jurisdictional rules . . . in such a way as to make people's lives better, not worse."[39]

Underlying Borchers's program of constitutionally deregulated jurisdictional pragmatism is a fundamental normative claim about the nature of procedure. The Supreme Court's confusion on this normative point has bred the analytical chaos of current law.[40] "Stripped of its constitutional clothing, personal jurisdiction is a subject whose dimensions are almost completely procedural."[41] Once jurisdictional rules are properly understood as "a procedural subject," it follows that they should be shaped by a "utilitarian assessment" of the social costs of jurisdictional wrangling, both case-by-case and with respect to "dispute resolution generally."[42] In Borchers's view, jurisdictional rules exist to serve social policy rather than to protect individual rights. Courts should thus have a voice in jurisdictional matters only in the rare case in which the rules are invidiously motivated or irrationally conceived.[43]

B. Weak Points

I do not endorse the first stage of Borchers's argument, in which he asserts that full faith and credit law prior to *Pennoyer* was merely a matter of "federal common law" and incorporated principles of "public international law," such that the "constitutionalization" of territorial principles of personal jurisdiction by *Pennoyer* was a conceptual departure from prior law. It is true that the extension of full faith and credit principles to federal courts was the creature of statute, rather than Article IV of the Constitution, and thus it is arguably true that the con-

---

[39] *Id.*

[40] *Id.* at 583 (footnote omitted).

> Lacking any clear foundation, the Court has constantly reversed itself on such fundamental questions as whether personal jurisdiction is a personal right or whether it implicates federalism and sovereignty concerns. Disagreement on the fundamental justification for the Supreme Court's regulation of state court jurisdiction has inevitably led to unpredictability and the attendant costs.

Id.

[41] *Id.* at 582.

[42] *Id.*

[43] *Id.* at 577-78.

HeinOnline -- 28 U.C. Davis L. Rev. 599 1994-1995

struction of the full faith and credit statute was grounded in common law rather than the Constitution, but the same cannot be said of cases in which state courts were permitted to deny recognition to invalid sister-state judgments. The statute could not excuse what the Constitution required.

The constitutional status and proper understanding of the pre-*Pennoyer* full faith and credit cases are not crucial, however, to my present critique of Borchers's revisionist history. I seek to demonstrate that his argument from history fails at its second and third stages, in which he contends that *Pennoyer* adopted only a limited view of the scope of due process regulation of state-court personal jurisdiction, and that the expansive view upon which current law is based did not become settled law for another thirty-seven years — and even then only by the ipse dixit of the *Menefee* Court in 1915.

I deal in Part III with the second stage of Borchers's historical argument. Part III is divided into three sections. First, for baseline purposes, I explicate in Part III-A the structure and reasoning of Justice Field's opinion in *Pennoyer*. Second, I show in Part III-B that Borchers's limited view — the purported alternative construction of *Pennoyer* that he offers to account for the irrefutable presence in *Pennoyer* of language announcing the Court's view that state-court personal jurisdiction must conform to due process constraints on state power — is essentially vacuous. Borchers's limited view has no content, providing no new procedural or substantive protections for property rights impaired by state judgments violative of *Pennoyer*'s territorial limits on state-court personal jurisdiction. Third, I refute in Part III-C Borchers's claim that the *Pennoyer* opinion was internally flawed and inconsistent with the recent precedent of *Galpin v. Page*. I examine *Galpin* in detail to demonstrate the fundamental error of Borchers's description of that case. Part IV deals with the third stage of Borchers's historical argument. In Part IV-A, I examine each of the ten post-*Pennoyer* cases that Borchers cites as supportive of the limited view. In Part IV-B, I discuss the implications of several cases that Borchers failed to cite.

Borchers claims that the expansive view is either an invention or an accident: an invention to the extent that it was intended by the *Pennoyer* Court at all, an accident to the extent that later courts adopted the expansive view by ipse dixit in

HeinOnline -- 28 U.C. Davis L. Rev. 600 1994-1995

defiance of intervening contrary authority. I conclude that the historical record provides no support for this argument, and that the limited view is Borchers's own invention.

III. JUSTICE FIELD AND HIS OPINION IN *PENNOYER*

A. Parsing Pennoyer

Borchers's limited view is a construction of *Pennoyer*'s invocation of the Fourteenth Amendment as a constraint on state-court personal jurisdiction. But Justice Field's opinion in *Pennoyer* consists of twenty-seven paragraphs, with the Fourteenth Amendment not discussed until the twentieth paragraph. It is therefore useful, if tedious, to explicate the structure and reasoning of *Pennoyer* as a whole in order to view in context the language about the Fourteenth Amendment.

Paragraph 1. Justice Field began his opinion for the Court by declaring: "This is an action to recover the possession of a tract of land, of the alleged value of $15,000, situated in the State of Oregon."[44] The plaintiff below, Neff, "asserts title to the premises by a patent of the United States issued to him in 1866."[45] The defendant below, Pennoyer, "claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment."[46]

Paragraph 2. The judgment in question was rendered in February 1866 in favor of an attorney, Mitchell, who recovered less than $300 upon a claim for unpaid legal fees. At the time of both the commencement of the action and the rendition of the judgment, Neff was a nonresident of Oregon. Neff was not personally served with process, and did not enter an appearance. "[J]udgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication."[47]

---

[44] Pennoyer v. Neff, 95 U.S. 714, 719 (1878).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 720.

HeinOnline -- 28 U.C. Davis L. Rev. 601 1994-1995

Paragraph 3. The Oregon Code of Civil Procedure authorized such constructive service against a nonresident owner of property in Oregon. But Field took pains to note that the Code contained two other relevant provisions. "It also provides, where the action is for the recovery of money or damages, for the attachment of property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, 'unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and in the last case, only to the extent of such property at the time the jurisdiction attached.'"[48] Field clearly regarded the Oregon Code's assertion of jurisdiction over nonresident individuals who have neither appeared nor been "found within the State" — served with process while in Oregon — to present a problem of construction insofar as it was limited, as a matter of state law, "'to the extent of such property at the time the jurisdiction attached.'" Immediately after quoting this proviso, he continued:

> Construing this latter provision to mean that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.[49]

Much of the balance of the opinion would seek to substantiate this claim that, as a matter of general principles of law, state-court personal jurisdiction is territorially limited. But without resolving whether the *right* construction of the Oregon Code as a matter of state law was the suggested one that would conform to the "general, if not universal" principle of territorially limited personal jurisdiction — a construction that would deem the Oregon Legislature to have limited its state courts' jurisdiction in suits against nonresidents by constructive service of process to suits against the property itself — Field emphasized that Neff's property was not "brought under the jurisdiction of the court"

---

[48] *Id.*
[49] *Id.*

HeinOnline -- 28 U.C. Davis L. Rev. 602 1994-1995

until it was sold in execution of Mitchell's personal judgment against Neff.[50] This was merely the "enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein."[51]

It is significant that Field never resolved whether this exercise of personal jurisdiction contrary to the "general, if not universal" principle condemning the extraterritorial assertion of personal jurisdiction was, for that reason, invalid as a matter of state law — as it would be if state law were indeed construed in conformity to "general, if not universal" principles of law.[52] Judge Deady had ruled against Neff on this issue in the federal circuit court, but went on to invalidate the Oregon judgment in *Mitchell v. Neff* on other state-law grounds.[53] As Field put it: "The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon

---

[50] *Id.*

[51] *Id.*

[52] *See infra* text accompanying notes 155-73.

[53] Judge Deady rejected Neff's argument that the Oregon Code should be construed in conformity with general principles of law so as to require prejudgment attachment of a nonresident's property when the ownership of property in Oregon was the only statutory basis for proceeding against the nonresident by constructive service of process.

> [T]he power of the state over the property within its limits, of non-residents, being supreme, . . . in my judgment, the mode of exercising this power is a matter for the state to determine. In the exercise of this power it may require that the proceedings be strictly in rem and commenced by the seizure of the property, or it may, *as provided in this state*, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name — nominally — for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and *then* authorize the seizure and disposition of the property so as to satisfy the same.

Neff v. Pennoyer, 17 F. Cas. 1279, 1281 (C.C.D. Or. 1875) (No. 10,083) (emphasis added). Judge Deady nonetheless ruled in Neff's favor, holding for other reasons that the judgment in *Mitchell v. Neff* was invalid as a matter of state law. Judge Deady held the judgment invalid because of a substantive defect in the affidavit by which Mitchell swore that he had no knowledge of Neff's whereabouts in California and thus no means of mailing him a copy of the summons and complaint (Mitchell's affidavit was conclusory, and failed to allege any facts showing that due diligence had been exercised in attempting to discover Neff's whereabouts), and because of a technical defect in the affidavit attesting to the fact of constructive service by publication (the affidavit was signed by the "editor" of the newspaper, but state law required that it be signed by the "printer" of the newspaper). *Id.* at 1286-87.

HeinOnline -- 28 U.C. Davis L. Rev. 603 1994-1995

which the order of publication was obtained, and in the affidavit by which the publication was proved."[54]

Paragraph 4. Acknowledging "some difference of opinion among the members of this court" with respect to the rulings of the court below on the defects of the affidavits relating to constructive service of process by publication, Field announced that "[t]he majority are of the opinion" that the defects in the affidavit supporting the order of publication could be reviewed only by appeal, and could not be collaterally attacked, and also that the affidavit of proof of publication was sufficient despite the description of the affiant as the "editor" of the newspaper, rather than the "printer" as required by the Oregon Code.[55] The articulation of this split of opinion within the Court strongly suggests that Field was here in the minority, but wanted to retain authorship of the opinion of the Court.[56]

---

[54] Pennoyer v. Neff, 95 U.S. 714, 720 (1877). The phrase "[t]he court below did not consider that an attachment of the property was essential to its jurisdiction" is awkward but unambiguous. The jurisdiction of the court below — the Federal Circuit Court for the District of Oregon — was unchallenged, the court having subject-matter jurisdiction on the basis of diversity of citizenship, and having personal jurisdiction over Pennoyer, a resident of Oregon. Justice Field obviously did not conflate "the court below" in the case at hand — in which by writ of error the Supreme Court was reviewing the judgment of a federal circuit court — with the Oregon state circuit court that had granted to Mitchell a default judgment against Neff. The sentence continues on to refer to the reasoning of "the court below" in holding "that the judgment [of the Oregon state circuit court] was invalid." It follows that "its jurisdiction" must refer to jurisdiction *of* the property — or in more modern terms, jurisdiction *over* the property — upon which the Oregon state circuit court relied in ordering its sale.

[55] *Id.* at 721.

[56] Referring to the view of the majority about the sufficiency under the Oregon Code of the affidavit proving the publication of notice of the suit, Field writes, "The term 'printer,' in *their* judgment, is there used not to indicate the person who sets up the type — . . . it is rather used as synonymous with publisher." *Id.* at 721 (emphasis added). Were Field in agreement with the majority, the more natural term would have been "our judgment." Moreover, the typical means by which a difference of opinion among the Justices is announced is by the separate opinion of the concurring or dissenting Justices. Of course, Field could hardly write the majority opinion holding Mitchell's judgment invalid under general principles of territorial jurisdiction, and then write a separate concurring opinion declaring that the judgment below should have been affirmed on the considerably narrower grounds relied upon by the court below.

In the next paragraph, as he begins his discourse on "principles of public law respecting the jurisdiction of an independent State over persons and property," *id.* at 722, Field reverts to the more familiar use of a self-referential possessive pronoun to refer to the reasoning of the opinion he is writing: "If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding *our* dissent

HeinOnline -- 28 U.C. Davis L. Rev. 604 1994-1995

Paragraph 5. Field now turned to the alternative contention of Neff in the court below:

> [T]hat the judgment in the State Court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding in rem; that is, by a direct proceeding against the property for that purpose.[57]

Field declared that this contention, if sound, required affirmance of the court below "notwithstanding our dissent from the reasons for which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property."[58] Although the independence of the States of the Union had been limited by their cession of some of the "rights and powers" of sovereignty

> in the government created by Constitution . . . except as restrained and limited by that instrument, [the States] possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons and property without its territory.[59]

Field cited to Story's treatise on conflicts of law and Wheaton's treatise on international law as authority for these two principles of public law.

Paragraphs 6-10. Field next distinguished between "direct" jurisdiction, which cannot be asserted extraterritorially, and the indirect exercise of jurisdiction that occurs because "the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it."[60] Citing several state and federal cases, Field elaborated on the extent of states' indirect juris-

---

from the reasons upon which it was made." *Id.* (emphasis added).

[57] *Id.* at 721-22.

[58] *Id.* at 722.

[59] *Id.*

[60] *Id.* at 723.

HeinOnline -- 28 U.C. Davis L. Rev. 605 1994-1995

diction over nonresidents, including the protection of state citizens by recourse against the property of nonresidents

> to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property within the State, there is nothing upon which the tribunals can adjudicate.[61]

The critical requirement in such cases is that "'the proceeding . . . be substantially a proceeding in rem.'"[62]

Paragraphs 11-13. Here Field declared that *Cooper v. Reynolds*[63] was the authoritative case governing the power of a state to assert jurisdiction indirectly against nonresidents by attaching their in-state property as the basis for adjudicating personal claims against them, serving process only by publication. Field noted that *Cooper*'s upholding of such attachment jurisdiction was not predicated on the fact that there the defendants were mere absentees, who had fled the state or gone into hiding: that the defendants "were not non-residents, was not made a point in the decision."[64] He also noted that he had dissented in *Cooper* on the ground that "some of the objections to the preliminary proceedings in the attachment suit were well taken."[65] Nevertheless, he declared himself in full agreement with the majority opinion in *Cooper* insofar as it held that when a nonresident defendant

> "is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court, . . . the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of

---

[61] *Id.* at 723-24.

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

[63] 77 U.S. (10 Wall.) 308 (1870).

[64] 95 U.S. at 726.

[65] *Id.* Field's grounds for casting the only dissenting vote in *Cooper*, *see* 77 U.S. (10 Wall.) at 321 (Field, J., dissenting), were thus the same as Judge Deady's for invalidating Mitchell's judgment in the federal circuit court. As noted previously, *see supra* note 56 and accompanying text, there is a strong suggestion in Field's majority opinion in *Pennoyer* that he was among the minority of Justices who would have affirmed the ruling below for the reasons given by Judge Deady.

HeinOnline -- 28 U.C. Davis L. Rev. 606 1994-1995

> the demand which the court may find to be due to the plaintiff. . . . [T]he court, in such a suit, cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."[66]

The requirement of attachment prior to judgment, Field insisted, is necessary "for the proper protection to citizens of other States."[67] If "judgments in personam" could be "obtained ex parte against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, . . . they would be the constant instruments of fraud and oppression."[68]

Paragraph 14. Field then explained why constructive service of process by publication or otherwise was less oppressive in "all actions which are substantially proceedings in rem," such as *Cooper*, than in a case such as *Neff v. Pennoyer* in which in-state property was seized only after the judgment was rendered.

> The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.[69]

---

[66] *Id.* at 725-26 (quoting *Cooper*, 77 U.S. (10 Wall.) at 317-19 (1870)).

[67] *Id.* at 726.

[68] *Id.; see also infra* note 306 (further elaborating paras. 12-14).

[69] *Id.* at 727. It is a commonplace to criticize Field for this distinction, since the likelihood of the owner of property receiving actual notice of suit in virtue of a prejudgment attachment is only marginally greater than the prospect of constructive service by publication affording actual notice to a nonresident defendant. Such criticism fails to take note either of the "fingers-crossed" language of Field's justification — substituted service, he wrote, "*may* be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act," *id.* (emphasis added), or of the fact that Field had received no support from his fellow Justices for his dissent in *Cooper*, where he contended in vain that a state court had not acquired jurisdiction by service of process by publication in a true quasi in rem case where the defendant's property had been seized prior to judgment. Field evidently faced a similar choice in *Pennoyer*. *See supra* note 56. He could again argue that service of process by publication was ineffective, either in general or, following Judge Deady below, as a technical matter on the facts of record in the case at hand. Or he could agree with the majority that service by publication "may be sufficient" in some cases, and speak for the Court in fashioning a "bright line" test that would invalidate judgments based on service by publication

HeinOnline -- 28 U.C. Davis L. Rev. 607 1994-1995

But Field nonetheless grounded his insistence on prejudgment attachment in quasi in rem cases on a general norm of territorial sovereignty rather than fair notice.[70]

---

unless accompanied by a prejudgment attachment of property. Viewed in this light, Field's choice may well have been Hobson's choice, and the conventional criticism undeserved. *See infra* note 239 and accompanying text.

[70] As with Field's defense of the sufficiency of notice by publication in quasi in rem cases on the ground that prejudgment seizure would provide a supplemental source of notice, Field's indifference to the effectiveness of actual notice by personal service of process beyond the borders of the state is often criticized as incoherent. Indeed, if the nerve of *Pennoyer* were the imperative of fair notice, the place of personal service of process would be of scant relevance. But as noted above, *see supra* note 65 and accompanying text, Field had been reduced to lonely dissent in a previous case, *Cooper*, in which the Court upheld the validity of a default judgment in a quasi in rem case in which process had been served by publication. *See also infra* note 314 (discussing facts of *Cooper*). The only theory with majority support that Field could deploy to nullify the sort of sharp practice by which Mitchell had deprived Neff of his land was an insistence on prejudgment attachment based on the territoriality norm by which *Cooper* could be distinguished from *Pennoyer*. Thus, territoriality became the nerve of *Pennoyer*, and the development of an independent due process norm of fair notice did not come to full fruition until Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

But Field's efforts in *Pennoyer* to draw attention to the oppressive potential of service of process by "mere publication," unlikely to provide notice in fact, 95 U.S. at 726, are undeserving of denigration simply because he chose — or was forced by the views of his brethren — to subsume the imperative of notice to the imperative of territorial power over the defendant. The notice concerns Field voiced in *Pennoyer* served as a stepping-stone to *Mullane*, figuring prominently in McDonald v. Mabee, 243 U.S. 90, 91-92 (1917), and thus influencing Milliken v. Meyer, 311 U.S. 457, 463 (1940), as well as *International Shoe* and *Mullane*.

McDonald, like *Cooper*, involved constructive service of process by publication and an ensuing default judgment against an absentee who was arguably still domiciled in the forum state — but unlike *Cooper* the judgment against the absentee was in personam rather than quasi in rem. On a strict reading of *Pennoyer*, the conclusion that the defendant was still a forum-state resident at the time of suit would be the end of the matter — the judgment would be valid because the defendant remained subject to the territorial power of the state, and entitled only to such notice as state law might require. (This is not to say that *Pennoyer*'s conception of due process would permit the state to dispense with any effort at notice whatsoever, but unquestionably states had broad leeway to authorize service of their own residents by constructive means, such as publication, that were unlikely to provide actual notice.) In a significant extrapolation of the due process constraints on state-court personal jurisdiction announced in *Pennoyer*, Justice Holmes declared for a unanimous Court that territorial power over the absent defendant was not conclusive of the sufficiency of service by publication.

At the time the suit in question was begun, the defendant was domiciled in the forum state, Texas,

> but had left the State with intent to establish a home elsewhere, his family, however, still residing there. He subsequently returned to Texas for a short time and later established his domicile in Missouri. The only service upon him was by publication . . . after his final departure from the State, and he did not

HeinOnline -- 28 U.C. Davis L. Rev. 608 1994-1995

appear in the suit.

McDonald, 243 U.S. at 91. Had the defendant's change of domicile been completed by the time of suit, ordinary *Pennoyer* principles of territorial sovereignty would have uncontroversially invalidated the judgment. But Holmes refused to apply without reservation the converse principle of *Pennoyer*, that territorial power trumped any due process concern for fair notice. Holmes noted that "[s]ome language of *Pennoyer v. Neff* would justify" invalidation of a judgment predicated on service by publication as to an absentee who was not technically a nonresident, "but we shall go no farther than the precise facts of this case require." *Id.* at 92. The claim that a due process right to fair notice was trumped by the sovereign power of Texas over the person of a resident defendant, whether present in the state or not, was attenuated by the transitional status of the defendant's Texas residency. "[I]n States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can only be secured by a pretty close adhesion to fact." *Id.* at 91. The absentee remained "technically domiciled" in Texas, and this might permit Texas to assert personal jurisdiction based on some form of constructive rather than personal service. *Id.* at 92.

> Perhaps in view of his technical position and the actual presence of his family in the state, a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind someone who has left a State, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.

Id.

In *Milliken*, Justice Douglas summarized *McDonald* as having held that "the traditional notions of fair play and substantial justice implicit in due process" required that substituted service over an absent defendant domiciled in the forum state be "reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard." Milliken v. Meyer, 311 U.S. 457, 463 (1940) (citation omitted). By this standard, personal service of process on a forum-state resident while he was present in another state was fully effective. The domicile of the defendant afforded the forum state the territorial power required by *Pennoyer*, and the extraterritorial location of service was immaterial so long as the means of service satisfied the *McDonald* standard of fair notice. (In a careless aside, Justice Douglas claimed that there were "intimations to the contrary" in *Pennoyer* about the permissibility of extraterritorial service on a forum-state resident, 311 U.S. at 463 (citing 95 U.S. at 733), but these "intimations" are unfounded in light of Justice Field's express and frequently repeated limitation of his discussion to the power of states to impose valid judgments on *non*residents.)

Thus *McDonald* and *Milliken* began the process of distinguishing territoriality-based due process constraints on jurisdictional power from fairness-based due process constraints on the means by which that power was exercised. In *International Shoe*, the *McDonald-Milliken* "traditional notions of fair play and substantial justice" reading of the Due Process Clause with respect to notice was reintegrated with *Pennoyer*'s reading of the Due Process Clause with respect to territorial power.

> [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

HeinOnline -- 28 U.C. Davis L. Rev. 609 1994-1995

> [W]here the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of State, and process published within it, are equally unavailing in proceedings to establish his personal liability.[71]

Paragraph 15. Field now turned to the holding of the court below that it was immaterial to Oregon's power to exercise jurisdiction by constructive service of process on nonresidents owning property within the state, where the effect of the judgment was limited to execution upon such property, whether the sei-

---

> maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

International Shoe's conflation of fair notice concerns with territorial power concerns did not stand *Pennoyer* on its head by subsuming power to notice where *Pennoyer* had subsumed notice to power. Rather, *International Shoe* drew on both lines of authority to fairly identify "traditional notions of fair play and substantial justice" as the core concern of due process, and the justification for both the territorial limitation of the jurisdictional power of states and the requirement that states exercise jurisdictional power. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949), completed the process of recognizing territorial power and fair notice as independent due process constraints in service of the more abstract goal of "fair play and substantial justice," sweeping aside arguments based on the resident or nonresident status of the concluded parties and the in rem or in personam status of the judgment by which they would be concluded as irrelevant to the sufficiency of the fair notice to which the parties were entitled. *Id.* at 311-13. This was not so far afield from *Pennoyer* as is commonly supposed. In light of Justice Field's position in *Cooper v. Reynolds* and the concern over oppressive use of constructive service that he expressed in formulating *Pennoyer*'s territoriality principle of in personam jurisdiction as a means of distinguishing the in rem holding of *Cooper*, *Mullane* is more vindication than rebuke of the fair notice concerns that Field incorporated, as imperfectly as the circumstances would permit, into the reasoning of *Pennoyer*.

[71] Pennoyer v. Neff, 95 U.S. 714, 727 (1877). Obviously this is unconvincing if Field's real concern were the adequacy of notice. Extraterritorial personal service would provide equally effective notice as personal service within the state in which a nonresident is sued. But as noted above, *supra* note 65 and accompanying text, *Cooper* had resolved the issue of the sufficiency of notice by publication in quasi in rem actions despite Field's dissent. The only theory for restraining state assertions of jurisdiction upon constructive service of process by publication that a majority would support was apparently a theory of territoriality rather than a theory of the necessity of actual notice. This required Field to subordinate notice concerns to territorial sovereignty concerns.

HeinOnline -- 28 U.C. Davis L. Rev. 610 1994-1995

zure of the property occurred before or after judgment was entered against the nonresident. "In either case," Judge Deady had declared,

> the result is the same; while the latter mode of proceeding has this to commend it over the former, that it does not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen [plaintiff] in or to it is satisfactorily established.[72]

What was a practical virtue of Oregon law to Judge Deady was a distinct vice to Justice Field. Allowing the property to remain unencumbered during the pendency of suit would create a standing possibility of its disposition by the defendant during the course of the proceedings, thus pulling the jurisdictional rug from beneath the court. But more fundamentally, this feature of the Oregon statute as construed by Judge Deady was jurisdictional heresy under Field's conception of the distinction between the lack of power of states to exercise "direct" or in personam jurisdiction extraterritorially and their conceded power to "affect" the interests of non-residents indirectly by exercising quasi in rem jurisdiction over such property of nonresidents as may be found and seized within their territory.[73]

> [T]he answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine [a nonresident's] obligations at all [absent appearance or personal service within the state] is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend on facts to be ascertained after it has tried the cause and rendered the judgment. . . . The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. . . . [T]he validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.[74]

Paragraphs 16-18. Field now turned from his statement of general principles of "public law" to cases in which the validity of sister-state judgments had been examined to determine

---

[72] Neff v. Pennoyer, 17 F. Cas. 1279, 1281 (C.C.D. Or. 1875) (No. 10,083).

[73] *See Pennoyer*, 95 U.S. at 723; *see also supra* notes 60-62 and accompanying text (referring to paras. 6-10 of *Pennoyer*).

[74] *Pennoyer*, 95 U.S. at 728.

HeinOnline -- 28 U.C. Davis L. Rev. 611 1994-1995

whether they were entitled to "full faith and credit" under Article IV of the Constitution and the implementing statute enacted by Congress in 1790, which declared that such judgments "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."[75] "In the earlier cases," Field declared,

> "it was supposed that the Act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered."[76]

After reviewing many cases to this effect, Field began the discussion that bears centrally on the limited or expansive view to be taken of his announcement, two paragraphs later, that the enforcement of invalid judgments was forbidden by the Due Process Clause of the Fourteenth Amendment.

> In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute

---

[75] Act of May 26, 1790, ch. 11, 1 Stat. 122.

[76] *Pennoyer*, 95 U.S. at 729.

HeinOnline -- 28 U.C. Davis L. Rev. 612 1994-1995

> nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered.[77]

Paragraph 19. "Be that as it may," Field continued, "the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them."[78] As "tribunals of a different sovereignty," the federal courts were "bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them."[79]

Paragraph 20. Now Field declared that the validity of "such judgments" — *i.e.*, the "judgments of this character" referred to in paragraph 19 as entitled to no faith and credit in a federal court,[80] which in turn referred to paragraph 18's discussion of "a personal judgment . . . [by] the court [that] has no jurisdiction over the person of the defendant by reason of his non-residence, . . . which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party"[81] — could be "questioned" and "resisted" as a denial of due process of law under the Fourteenth Amendment.[82] Here is Field's exact statement, just one sentence in length, whose expansive or limited construction is in issue in my debate with Borchers:

---

[77] *Id.* at 732.

[78] *Id.*

[79] *Id.* at 733. Although the federal courts were not subject to the Full Faith and Credit Clause of Article IV of the Constitution, which refers only to the obligations of sister states, the implementing statute applied to "every court within the United States" and hence extended the full faith and credit obligation to the courts of the federal system. *See* Act of May 26, 1790, ch. 11, 1 Stat. 122. As Field had already discussed in paragraphs 16-18, 95 U.S. at 729-32, the Full Faith and Credit Clause and Act had been construed in a series of cases culminating in *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851), as preserving "international law" principles denying "binding force" to personal judgments against nonresidents of the forum state absent voluntary appearance or personal service of process within the forum state.

[80] *Pennoyer*, 95 U.S. at 732.

[81] *Id.*; *see also supra* note 70 (stating that Justice Douglas in *Milliken* was careless in treating due process language of *Pennoyer* as embracing judgments based on substituted service of forum-state resident while absent from forum state).

[82] *Pennoyer*, 95 U.S. at 733.

HeinOnline -- 28 U.C. Davis L. Rev. 613 1994-1995

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[83]

In the balance of this paragraph, Field acknowledged that "difficulty may be experienced" in giving "due process of law" a definition "which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden."[84] But there could "be no doubt" that "to give such proceedings any validity" the court must have subject-matter jurisdiction by "the law of its creation" and — in light of his previous qualifications here referring only to nonresident defendants[85] — "if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."[86]

Paragraph 21. Field continued on to discuss the due process status of substituted service of process, this time expressly limiting his discussion to "non-residents."[87] Subject to exceptions "hereinafter mentioned," involving "personal status" cases and cases in which substituted service "may be considered to have been assented to in advance," the "substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where . . . the action is in the nature of a proceeding in rem."[88] Otherwise "'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'"[89]

---

[83] *Id.*

[84] *Id.*

[85] *Id.; see also supra* note 70.

[86] *Pennoyer*, 95 U.S. at 733.

[87] *See supra* notes 70-71 (discussing Field's limitation of his due process discussion to nonresident defendants).

[88] *Pennoyer*, 95 U.S. at 733.

[89] *Id.* at 734 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 405 (6th ed. 1890)).

HeinOnline -- 28 U.C. Davis L. Rev. 614 1994-1995

Paragraphs 22-23. Field next declared that substituted service against nonresidents was consistent with due process in all proceedings "where the direct object is to reach and dispose of property," including "cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings in rem . . . ."[90] Thus Field sought to make clear that substituted service was proper in what we would now call "quasi in rem" proceedings as well as "true" in rem proceedings taken directly against property rather than against individual claimants of title to the property.[91] Field also distinguished appellate proceedings from "proceedings in courts of first instance," and indicated that due process did not override state law with respect to "such notice" of appeal "personal or constructive, as the State creating the tribunal may provide."[92]

Paragraph 24. Field now announced the holding of the Court, but without resolving whether it was premised only on the "Be that as it may" invocation of full faith and credit principles in paragraph 19, or also on the due process principles discussed thereafter. "It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff [Neff] herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy."[93]

Paragraphs 25-27. Field concluded his opinion with his promised elaboration of the exceptional status of cases involving (1) the "civil status and capacities" of its inhabitants vis-à-vis nonresidents; (2) state laws requiring that nonresidents "entering into a partnership or association within its limits, or making contracts enforceable there," appoint a local agent for service of process

---

[90] *Id.*

[91] *See generally infra* text accompanying notes 275-78 (discussing fact that "quasi in rem" did not become standard jurisdictional classification until *after* Court's decision in *Pennoyer*).

[92] *Pennoyer*, 95 U.S. at 734.

[93] *Id.* Note that Field expressly relied upon Neff's status as a nonresident defendant to Mitchell's suit, contrary to Justice Douglas' suggestion in *Milliken v. Meyer* that Pennoyer addressed the status of service of process, constructively or by extraterritorial personal service, against absent residents of the forum state. *See supra* notes 70-71.

HeinOnline -- 28 U.C. Davis L. Rev. 615 1994-1995

"in legal proceedings instituted with respect to such partnership, association, or contracts," and in default of such appointment of a local agent permitting effective service to be made upon "a public officer designated for that purpose;" and (3) cases involving substituted service against "corporations or other institutions for pecuniary or charitable purposes" created under state law and subjected thereby to "other than personal service upon their officers or members."[94] In the present case, however, "there is no feature of this kind," the question presented being "only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."[95] The judgment below, holding the judgment invalid, was thus affirmed.

B. Definitional Problems of the Limited View

Borchers contends that Justice Field did not mean to declare that the Fourteenth Amendment set uniform constitutional criteria for the validity and effectiveness of state-court personal judgments. Under the rubric of the limited view of *Pennoyer*, Borchers attributes to Field a more modest theory of the due process obligations of state courts with respect to their recognition and enforcement of jurisdictionally suspect judgments.

The critical passages bearing upon Borchers's construction of *Pennoyer* begin with paragraph 5, where Field announced that the Court did not agree with the reasoning of the court below, and therefore needed to address the contention of Neff "that the judgment in the State court against the plaintiff was void" for lack of either personal service of process within the state, voluntary appearance, or "a direct proceeding against [Neff's] property" by "a proceeding in rem" in which the property was attached prior to judgment.[96] Field's observation that "[i]f these positions are sound, the ruling of the Circuit Court as to the validity of that judgment must be sustained, notwithstanding our

---

[94] *Pennoyer*, 95 U.S. at 734-35.

[95] *Id.* at 736. Note that, once again, Field limited the discussion of the validity of personal judgments without personal service or voluntary appearance to judgments against nonresidents. *See supra* notes 70-71.

[96] *Pennoyer*, 95 U.S. at 721-22.

HeinOnline -- 28 U.C. Davis L. Rev. 616 1994-1995

dissent from the reasons upon which it was made,"[97] led to his examination in paragraphs 6-18 of the "well-established principles of public law"[98] that had been incorporated into constitutional and statutory law as threshold criteria for the validity of judgments entitled to full faith and credit. Field concluded this examination by noting in paragraph 18 that for lack of any "mode of directly reviewing" an invalid judgment "or impeaching its validity within the State where rendered," these full faith and credit principles of jurisdictional validity had been applied only when enforcement of an invalid judgment was sought "without the State in which it is rendered, implying that in such State it may be valid and binding."[99] Field did not endorse this implication, sidestepping it in paragraph 19. "Be that as it may," he declared, full faith and credit principles of extraterritorial judgment recognition were applicable in a federal court even if it sat within rather than without the territory of the judgment-rendering state.[100]

Field's reference to the Fourteenth Amendment followed immediately, in paragraph 20, and bears quoting again.

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[101]

The "central mystery of *Pennoyer*," Borchers claims, is "what role is the due process clause supposed to play in personal jurisdiction?"[102] Considering the fundamental role of his narrow construction of *Pennoyer* to his argument for constitutional reform, Borchers is surprisingly vague and inconsistent about the details of his limited view. Just what due process constraint, more limited in scope than that of the expansive view he rejects, did *Pennoyer* impose on state-court personal jurisdiction?

---

[97] *Id.* at 722.
[98] *Id.*
[99] *Id.* at 732.
[100] *Id.* at 732-33.
[101] *Id.* at 733.
[102] Borchers, *supra* note 1, at 38.

HeinOnline -- 28 U.C. Davis L. Rev. 617 1994-1995

1. The "No Limits" Limited View

Borchers's first attempt to articulate the limited view emphasized that the Due Process Clause, so construed, said *nothing* about the "rules of jurisdiction" binding on state courts. This was primarily a definition by distinction. The expansive view imposed "jurisdictional rules" on the states; the limited view did not.

> The expansive view of *Pennoyer* is that the Court intended for the due process clause to provide both a mechanism for challenging, either interstate or intrastate, state court assertions of personal jurisdiction, *and* the contents of the *jurisdictional rules* themselves. Put another way, *Pennoyer*, under this view, meant to *render unconstitutional any state court assertion of personal jurisdiction beyond the territorial principles* and allow a defendant to attack the judgment either intrastate or interstate. . . .
>
> . . . The limited view of *Pennoyer* is that Field intended for the due process clause to provide an avenue for challenging a state's exercise of personal jurisdiction in all cases, whether or not recognition of the judgment was sought interstate or intrastate, but *did not intend to have the due process clause dictate the contents of those rules of jurisdiction.* Put another way, Field, under the limited view, intended for defendants to have at least one chance to ensure that a state followed its own rules of jurisdiction, whatever those rules might be.[103]

In his present paper, Borchers reaffirms this "no limits" definition of the limited view:

> As I suggested earlier, the Court may *not have meant the Due Process Clause to limit* a state court's jurisdiction, but, rather, to guarantee a defendant at least one chance to contest jurisdiction.[104]

2. The "Some Limits" Limited View

The "no limits" limited view is not the only version Borchers has suggested, however. At a different and later point in his original paper, Borchers again defined the limited view by distinguishing it from the expansive view, but this time he implied

---

[103] *Id.* at 38-40 (emphasis added).

[104] *Jurisdictional Pragmatism*, *supra* note 3, at 569 (emphasis added).

HeinOnline -- 28 U.C. Davis L. Rev. 618 1994-1995

that the limited view imposes *some limits* on state courts in the interstate-recognition context, and that the "no limits" view of the limited view was applicable only in the intrastate-recognition context. This passage occurs in his discussion of *Menefee*,[105] in which the Supreme Court reversed a state court's assertion of personal jurisdiction over a nonresident corporation on appeal from a contested judgment entered after the defendant had appeared specially and moved unsuccessfully to quash service of process on an alleged corporate agent within the state. *Menefee* was thus doubly inconsistent with the limited view, because it not only read the Due Process Clause to impose jurisdictional limits on state courts, but also failed to insist that any due process challenge to state jurisdictional authority be raised by collateral attack. This prompted the following response by Borchers:

> [T]he Court seemed to assume that a due process challenge can be made at any time, and the limited reading of *Pennoyer* simply had the effect of postponing the inevitable. The assumption that a due process challenge can always be made, however, is wrong. *The difference between the limited and expansive readings is the difference between allowing the judgment some effect (intrastate recognition) or no effect.* This is not a problem of timing, it is a problem of the fundamental role of due process in personal jurisdiction. In order to deny a judgment any effect, one must adopt the expansive thesis that the due process clause is the source of jurisdictional limitations that operate directly on the states. *Menefee* came no closer to explaining this thesis, however, than *Pennoyer* or any of *Menefee*'s other predecessors.[106]

The emphasized language juxtaposes, perhaps carelessly, the expansive view's mandate that a judgment rendered in violation of due process standards of territorial jurisdiction be given "no effect" by any state court, and the limited view's tolerance that such a judgment be given "some effect" in the intrastate-recognition context, so that the state that renders such a judgment is untrammeled by the Due Process Clause in giving effect to that judgment in its own courts. If this "difference between the limited and expansive" views is the *only* difference, the result is that the limited view does impose *some limits* — some due pro-

---

[105] Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915).

[106] Borchers, *supra* note 1, at 50-51 (emphasis added).

HeinOnline -- 28 U.C. Davis L. Rev. 619 1994-1995

cess rules of jurisdiction — in the *interstate-recognition* context. The "some effect/no effect" dichotomy thus implies that the Due Process Clause *did impose* on states a new constitutional obligation to *deny* recognition to a *foreign* judgment that was invalid under *Pennoyer*'s prohibition of the extraterritorial assertion of state-court personal jurisdiction. While full faith and credit principles *permitted* states to deny recognition to invalid foreign judgments, they did not *require* that states treat such judgments as ineffective.[107] Borchers nowhere explains, so far as I can tell, how it is that his limited view of *Pennoyer* somehow *compelled* states to give "no effect" to a foreign judgment if it was invalid under the *Pennoyer* standards.

Suppose states A and B had identical statutes authorizing the sort of extraterritorial personal jurisdiction condemned by *Pennoyer*. It is Borchers's unambiguous contention that the limited view would permit state A to enforce its own in personam default judgment if it had been obtained by constructive or extraterritorial service of process on a nonresident in strict conformity to the state A statute. But what if state A were asked to enforce a judgment obtained in identical fashion in state B in strict compliance with the identical terms of the state B statute? Under the emphasized language quoted above, it would seem that state A would be compelled by the limited view to give the state B judgment "no effect," even though it was rendered in strict conformity to state B law and state A would have every reason of comity to enforce a state B judgment that was valid under a statutory scheme shared by both state A and state B. Yet if state A were not compelled to deny recognition to the state B judgment because of its invalidity under the *Pennoyer* standards — if all that the limited view would require is that state A permit the defendant in the state A enforcement action to attack the validity of the state B judgment based on some deviation from the prescribed statutory state B procedure for asserting extraterritorial personal jurisdiction — then the emphasized language is seriously misleading, and the proper dichotomy between the limited view and the expansive view is *full*

---

[107] *See Jurisdictional Pragmatism*, *supra* note 3, at 566 ("[T]he Supreme Court cases of this era did not hold that the Full Faith and Credit Clause placed any affirmative limitations on jurisdiction.").

HeinOnline -- 28 U.C. Davis L. Rev. 620 1994-1995

effect (in both the intrastate- and interstate-recognition contexts) versus *no effect*. Even in the interstate-recognition context, the judgment-recognition state would remain free under this conception of the limited view to give effect to a foreign judgment that was invalid by *Pennoyer*'s criteria, if it chose to do so for traditional nonconstitutional reasons of comity.[108]

I think this is indeed Borchers's preferred "no limits" conception of the limited view: as stated in his first attempt to define the limited view, the Due Process Clause imposes no "rules of jurisdiction" at all on state courts, even in the interstate-recognition context.[109] But given the fundamental importance Borchers attaches to his "intrastate" versus "interstate" judgment-recognition dichotomy,[110] it is surprising that Borchers leaves this issue unexamined, and indeed implies inconsistently that the "some limits" conception of the limited view of due process might require that a *Pennoyer*-invalid foreign judgment be given "no effect" when collaterally attacked in any state other than the judgment-rendering state. This carelessness (at best) or inconsistency (at worst) is also indicative of the essentially empty nature of the limited view, which seems to be more a rhetorical device than a serious effort at construing *Pennoyer*.

---

[108] The limited view would apparently limit this discretion to the minimal extent that the judgment-recognition state would have to permit the judgment-debtor an opportunity to attack the judgment collaterally on any grounds of invalidity provided by the law of the judgment-rendering state. As I argue below, *see infra* text accompanying notes 114-15, if this is the extent of the due process guaranteed to litigants by the limited view, the limited view is virtually devoid of content. Litigants had ample opportunity under the common-law forms of action to attack judgments collaterally, and unless the Due Process Clause also changed the jurisdictional rules by which the validity of a judgment was to be determined on collateral attack, this supposed federal due process right of collateral attack would amount to little — at most a right to penetrate whatever state-law presumptions might protect the validity of a judgment absent defects apparent on the face of the record. For present purposes, however, what is important is not the vacuous nature of a due process right of a nonresident defendant to attack collaterally a prior in personam default judgment on whatever state-law grounds might be available, but rather that this attribute of the limited view is never suggested by Borchers to be specific to the interstate-state recognition context as opposed to the intrastate-recognition context. It therefore can have no influence on the "some effect/no effect" dichotomy by which the limited view is said to permit states to give "some effect" to *Pennoyer*-invalid judgments in the intrastate-recognition context but "no effect," apparently, in the interstate-recognition context.

[109] *See* Borchers, *supra* note 1, at 40.

[110] *See id.* at 26 n.25.

HeinOnline -- 28 U.C. Davis L. Rev. 621 1994-1995

3. *Nuff v. Annoyer:* A Parable of the Empty Nature of the Limited View

In light of these definitional difficulties, I find Borchers's limited view to be far more mysterious than anything in *Pennoyer v. Neff.* He is much more clear about what the limited view *is not* — about what, by contradistinction, the expansive view is — than vice versa. As this definition by contrast suggests, the limited view — by which I mean hereafter the "no limits" version — is in fact a negative view, the *negation* of the expansive view, rather than a truly alternative, positive *construction* that leaves any force or content to *Pennoyer*'s unambiguous statement that the ratification of the Fourteenth Amendment changed the rules of state-court personal jurisdiction.

I take it that Borchers means to say that *Pennoyer* guaranteed a party whose property rights were affected by a putatively invalid state-court judgment the opportunity to bring a proceeding to attack collaterally that judgment and establish its invalidity, but that in such a proceeding the party could invoke only whatever jurisdictional defects might invalidate the judgment under the law of the judgment-rendering state. By this limited view of *Pennoyer,* a state court system would not be compelled by the due process principles of *Pennoyer* to deny recognition to its own judgment if it complied fully with state standards of validity yet was invalid under the constitutional criteria for validity imputed to *Pennoyer* by the expansive view.

Borchers claims that this reading of *Pennoyer* is merely "plausible."[111] In my view it goes beyond the implausible and approaches the incomprehensible. By nullifying rather than limiting the due process part of *Pennoyer,* Borchers's limited view would make of *Pennoyer* merely a restatement of existing principles of common law with no greater constitutional import than they had already been given under the full faith and credit cases that exempted state courts from any constitutional obligation to enforce invalid sister-state judgments.

To illustrate the empty nature of the limited view of the constitutional principles of due process enunciated in *Pennoyer,* let us imagine a slightly altered version of the litigation that

---

[111] Borchers, *supra* note 1, at 40.

HeinOnline -- 28 U.C. Davis L. Rev. 622 1994-1995

took place between Mitchell, Neff, and Pennoyer so that it takes place in the purely "intrastate" environment to which Borchers refers in elaborating his limited view. As Professor Perdue has shown, Mitchell was quite a scoundrel,[112] and it is not difficult to imagine that his success in divesting Neff of his land in satisfaction of a claim supported only by Mitchell's self-serving and conclusory affidavit might have inspired Mitchell to return to that well for a second dip.

So let us suppose that Mitchell looks around for another choice property owned by an out-of-stater, and, sure enough, finds a desirable parcel ripe for the plucking. Let's call this victim Nuff. Mitchell knows what to do next, for he has merely to repeat the course of his action against Neff. Mitchell sues Nuff for a purported breach of contract, claiming only a modest amount of damages — no need to tie up too much of his capital when he seeks to buy the property at the inevitable judgment sale. Invoking the familiar provisions of the Oregon Code that worked so well in his earlier action against Neff, Mitchell files affidavits asserting that he has a claim against Nuff, that Nuff is a nonresident, and that Nuff owns property in Oregon. There being no one around to contest these sworn assertions, the wishing well works just as well the second time as the first. Notice is published, Nuff does not appear, Mitchell gets a default judgment, a writ of execution issues, the land is sold by the Sheriff, and Mitchell buys it for the modest amount of his purported and now judicially established claim. Just to be cautious, he waits out the one-year period within which Nuff can return to reclaim the land or receive restitution of its value.[113] He then sells the land to Annoyer, a local land specula-

---

[112] *See generally* Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 482-90 (1987).

[113] *See Pennoyer*, 95 U.S. at 719 (quoting § 57 of the Oregon Code of Civil Procedure in the statement of facts preceding the case).

> [T]he defendant against whom publication is ordered, or his personal representative, . . . may . . . upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just; and, if the defence be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected.

HeinOnline -- 28 U.C. Davis L. Rev. 623 1994-1995

tor. Shortly thereafter Nuff arrives in Oregon with his family, intending to make his new home on the property he now finds in the possession of Annoyer. Nuff has the resources to buy another home for his family, and thus establishes his domicile in Oregon. Once his family is settled, he consults legal counsel on his rights against Annoyer. All these events have occurred after 1868 and the ratification of the Fourteenth Amendment, but before the Supreme Court has announced its decision in *Pennoyer.*

What is Oregon counsel going to advise Nuff to do? Exactly what counsel advised Neff to do; to bring an action in ejectment against the person in possession of the land sold in execution of Mitchell's default judgment. But because Nuff is a citizen of Oregon at the time he brings suit, his ejectment action can only be brought in an Oregon state court. Nuff need not wait around for the Supreme Court's decision in *Pennoyer v. Neff* in order to have an opportunity to attack collaterally the validity of the judgment obtained by Mitchell. He simply asserts his title to the land, and asks the state court to eject Annoyer. In defense of this action, Annoyer of course will answer that he, not Nuff, holds superior title. At the trial of the action Nuff will introduce into evidence his deed to the land, and rest his case. Annoyer will then introduce into evidence his own deed to the land, but because on its face it is later in time than Nuff's title and is not a conveyance from Nuff, Annoyer knows that he had better not rest his case yet. Annoyer will also seek to introduce into evidence the judgment and writ of execution by which Mitchell acquired the title that he deeded to Annoyer, and upon which Annoyer's claim of superior title indisputably depends. Nuff will object to the validity of the judgment upon which Annoyer must rely, and it matters not a whit whether he phrases his objection in evidentiary terms by objecting to the introduction of the judgment and writ of execution into evidence, or phrases his objection in terms of the legal effect to be given to the judgment and writ of execution if they are introduced into evidence. Either way the Oregon

HeinOnline -- 28 U.C. Davis L. Rev. 624 1994-1995

court is going to have to pass on the validity of the judgment by which Mitchell divested Nuff of his title to the land.

If Borchers's limited view of *Pennoyer* is correct, it makes absolutely no difference whether that decision has come down before Nuff brings his ejectment action. Nuff does not need Borchers's illusory constitutional right to attack collaterally the judgment upon which Annoyer's title depends; he has that right already under the most ordinary principles of state law as they have existed in every State of the Union for as long as the Union has existed. And it does not matter whether the property of Nuff against which Mitchell's judgment was executed was real property or personal property. By an action of replevin, trover, trespass, conversion, or debt, if not ejectment, the putative owner of property could always bring an action to contest the rights of ownership of the actual possessor of the property or to recover money wrongfully paid by a stakeholder under color of a writ of execution.[114]

Pennoyer's promise of constitutional limits to the power of states to impose binding judgments against nonresidents is wholly empty for Nuff, and Annoyer's victory is complete, unless Nuff can rely on the expansive view of *Pennoyer* in the following way. Should the Oregon state court decide that everything done in Mitchell's suit against Nuff was consistent with Oregon's state law governing the validity of judgments such as that obtained by Mitchell against Nuff, *Pennoyer* gives Nuff a new and independent ground for demanding recovery of his land. By the expansive view, *Pennoyer* establishes that Nuff has a federal constitutional right to nonrecognition of that judgment. Again, it matters not a whit whether the constitutional argument is articulated as a ground for denying the admission of the judgment and writ of execution into evidence, or as a ground for declaring the judgment, once admitted into evidence, to be void as a matter of law. If the expansive view of

---

[114] *Pennoyer*, 95 U.S. at 730. The case cited by Justice Field as the most recent and comprehensive restatement of full faith and credit principles, Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873), relied upon just such a collateral attack on an invalid state judgment by an action in trespass seeking damages from the beneficiary of the invalid judgment. *See generally* EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM 32-40, 46-50 (2d ed. 1988) (summarizing common-law forms of action and their incorporation into American state law).

HeinOnline -- 28 U.C. Davis L. Rev. 625 1994-1995

Pennoyer is correct, Nuff can appeal an adverse decision on his new federal ground to the highest available state court, and if unsuccessful there, can bring the judgment in Annoyer's favor before the United States Supreme Court on writ of error. The writ of error, it should be recalled, provided for review as of right, not as a matter of discretion, whenever a state court held against a claim of a federal right.[115] So *Pennoyer* is powerful medicine for curing the ills of Mitchell's poisoned well, but only on the expansive view. On the limited view, it is totally ineffectual, and does not alter Nuff's position in any way whatsoever. Nuff said, you might say.

4. Expanding the Limited View

When I presented the parable of *Nuff v. Annoyer* at the Symposium for which these papers were prepared, Borchers contended in reply that the limited view of *Pennoyer* did in fact add something significant to the legal arsenal of dispossessed plaintiffs seeking in court to redress the wrong of an invalid default judgment, because it conferred on parties such as Nuff a new right of collateral attack to restrain the enforcement of any judgment that was invalid as a matter of state law.[116] It is difficult to comprehend the legal pedigree and jurisdictional effect of this supposed fruit of the limited view tree, which derives from Justice Field's statement in *Pennoyer* that, following the adoption of the Fourteenth Amendment, "the *validity* of such judgments may be *directly questioned*, and their *enforcement* in the State *resisted*, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[117] Based on his symposium comments, I take Borchers to mean that a nonresident defendant who be-

---

[115] *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4011, at 600-02 (1977).

[116] In fairness, Borchers's reply to my argument at the symposium should not be taken as exhaustive of whatever objections he might raise in reply. Borchers had submitted his paper several months in advance, and I had the chance to review it in detail. I had not completed this paper by the date of the Symposium, and although I had worked out my central claims and had discussed them with Borchers, he had not had the opportunity to study them and frame a considered response.

[117] *Pennoyer*, 95 U.S. at 733 (emphasis added).

HeinOnline -- 28 U.C. Davis L. Rev. 626 1994-1995

came aware of the threat to his property posed by a default judgment that was invalid as a matter of state law could bring an action prior to the execution of that judgment to restrain the enforcement of the invalid judgment. If the judgment creditor objected that no such action was permitted under state law, the judgment debtor and injunctive action plaintiff could insist on the right to "directly question" the judgment and "resist" its enforcement as a matter of federal due process under *Pennoyer*'s construction of the Fourteenth Amendment. Voilà, the limited view.

But either there's no there there, or there's so much that the "limited" view loses its limiting effect, and becomes even more expansive than the expansive view Borchers seeks to discredit. As I have argued in the parable of *Nuff v. Annoyer*, there was no lack of existing remedies under state law for the Nuffs and Neffs of the world to attack collaterally judgments that were invalid as a matter of state law by bringing an action to recover possession of property that had passed to another under color of an invalid judgment, or to recover damages from the beneficiary of the invalid judgment if specific relief were not feasible or equitable — as might be the case if state law protected the good faith purchaser of property under color of a judgment later deemed void. I know of no basis for supposing that state law generally foreclosed the equally common equitable remedy of a suit to restrain enforcement of an invalid but unexecuted judgment — the familiar equitable prerequisite of an inadequate remedy at law would easily be met in the case of a Nuff or a Neff, in which real property was at stake and a third party might gain good title if the execution were to proceed. The only reason why such an equitable action would not be available would be the existence, in Oregon as in most states,[118] of a right to redeem property affected by a default

---

[118] *See supra* note 113 (quoting right of redemption under § 57 of Oregon Code of Civil Procedure). Justice Hunt's dissent in *Pennoyer* declared that the quoted provisions of the Oregon Code were "nearly a transcript" of the "nearly identical" New York Code of Civil Procedure that had been in effect for 30 years at the time *Pennoyer* was decided, and that similar provisions were in force in many other states. 95 U.S. at 738-40 (Hunt, J., dissenting). As all concerned were doubtless aware, the New York Code had been drafted by David Dudley Field, Justice Field's brother, while Justice Field and his brother were practicing law together in New York. *See* THE OXFORD COMPANION TO THE SUPREME

HeinOnline -- 28 U.C. Davis L. Rev. 627 1994-1995

judgment against a nonresident upon constructive service of process, and the existence of such a right would render superfluous the limited view's supposed guarantee of a pre-execution right to restrain the enforcement of the judgment.

It is true that many states made it difficult to prevail in suits to invalidate a judgment by holding that recitals in a default judgment of jurisdictional facts were conclusive of the existence of those facts.[119] Justice Field observed that, under the Court's recent restatement of full faith and credit principles in *Thompson v. Whitman*,[120] "the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence."[121] Borchers may mean to contend that, as a corollary to the limited view's due process right to restrain the enforcement of an invalid judgment, states were *obligated* to inquire into jurisdictional facts to the extent previously merely *permitted* under *Thompson*'s reading of the full faith and credit clause and statute. If so, he has sawed through much of the philosophical limb upon which the limited view sits. Federal law would now be displacing state law in determining the outcome of a collateral attack in state court on the validity of a prior state-court judgment, which is just what the limited view seeks more generally to deny. The corollary is a sensible one, but only because the expansive view is more sensible yet.[122]

COURT OF THE UNITED STATE 290 (Kermit Hall ed., 1992). Justice Field had in turn drafted the California Code of Civil Procedure during his brief service in the California legislature. *Id.* For more on Field's background, see *infra* note 142.

[119] Today, this seems a bizarre bit of jurisdictional bootstrapping, because it is part of the modern black-letter law of claim and issue preclusion that a judgment cannot have preclusive effect on a party over whom the court lacked jurisdiction, and a party cannot be precluded from relitigating facts that were not actually contested by it or a privy in the previous litigation. RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 34 (1982). It is noteworthy that this modern unanimity on matters of res judicata is a consequence of the expansive view of due process that Borchers means in part to dispute — it is a matter of the limits on state judicial power imposed as a matter of federal, not state law, by virtue of the Fourteenth Amendment.

[120] 85 U.S. (18 Wall.) 457 (1874).

[121] *Pennoyer*, 95 U.S. at 730.

[122] This corollary also has the salty smell of a salvage job. Although Borchers twice cites *Thompson v. Whitman* in his original article, *see* Borchers, *supra* note 1, at 25 n.21, 32 n.81, nowhere does he invoke it as a precursor of the limited view. If the corollary is the meat of the limited view, Borchers's previous elaboration of it has been remarkably skeletal.

It is possible to tease out of Borchers's earlier article some evidence that a due

HeinOnline -- 28 U.C. Davis L. Rev. 628 1994-1995

It is far more radical and "de-limiting" to conceive of the limited view as entailing a Fourteenth Amendment right to sue to restrain the enforcement of an invalid state judgment. If indeed Justice Field were thirty years ahead of his time in recognizing the existence of an implied private right of action to enforce the Fourteenth Amendment,[123] this federal right to

---

process right to penetrate state-court jurisdictional presumptions was part of Borchers's original conception of the limited view. This evidence contradicts, however, Borchers's claim that the limited view has "authenticity" as a plausible construction of what Justice Field and the rest of the *Pennoyer* Court actually intended to be the effect of their invocation of the Due Process Clause. *See id.* at 43. While not citing *Thompson*, Borchers does refer extensively to Justice Field's opinion in Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874), and in the course of this discussion he cites (without elaboration of the point) to that part of *Galpin* where Field discusses state-court presumptions of jurisdictional facts in terms similar to *Thompson*. *See* Borchers, *supra* note 1, at 32 n.75 (citing *Galpin* 85 U.S. at 372-73). But if a due process right to penetrate state-court jurisdictional presumptions is indeed a corollary of the limited view, founding it on *Galpin* is problematic for Borchers. Borchers excoriates Field for having "conspicuously ignored *Galpin* in *Pennoyer*," and draws the "inescapable inference" that Field "abandoned the task" of reconciling *Galpin* and *Pennoyer*, "realizing that the rationales, if not the holdings, of the cases were inconsistent." Borchers, *supra* note 1, at 38. Thus when Borchers later invokes *Galpin* in support of the limited view and argues that "the limited view comes closer than the expansive view to reconciling *Pennoyer* with *Galpin* and similar cases," *id.* at 43, he is arguing at cross-purposes with his own prior argument that *Pennoyer*, as understood by Field, was inconsistent with *Galpin*.

Borchers cannot have it both ways. If *Galpin* is the touchstone for the limited view, or at least so much of the limited view as grants a due process right to penetrate state-court jurisdictional presumptions, the limited view is *pro tanto* not a construction of the actually intended scope of due process regulation of state-court personal jurisdiction under *Pennoyer*, and must instead be a counterfactual alternative view of due process that *Pennoyer* could have and should have adopted, but in fact did not. Borchers eschews this treatment of *Pennoyer*, however, because it would move the focus of his criticism of the wrong turn taken by the constitutional law of state-court territorial jurisdiction four decades further back in the chain of that precedent he seeks to realign. Although he is unsparing in his criticism of *Pennoyer*, by focusing on *Menefee* as the weak link in that chain he can argue for a reinterpretation of *International Shoe* that conflicts with precedent since 1915, but ostensibly coheres with the underlying cases from 1878 until 1915.

As I later discuss in depth, *see infra* text accompanying notes 174-263, there was in fact no inconsistency between Field's opinions for the Court in *Galpin* and *Pennoyer*. The *ratio decidendi* of *Galpin* became unavailable in *Pennoyer* once the *Pennoyer* majority decided that in *Pennoyer*, unlike in *Galpin*, there was no defect in the affidavits by which process was constructively served on a nonresident defendant. This presented Field with the opportunity to write for the Court in *Pennoyer* an opinion that echoed and made authoritative the expansive view of due process that he had earlier outlined in his opinion on circuit in *Galpin* after the remand of that case from the Supreme Court. Thus in my reading of history *Galpin* is a precursor of the expansive view, not the limited view.

[123] *Cf. Ex parte* Young, 209 U.S. 123 (1908) (declaring implied right of action to enjoin enforcement of arguably unconstitutional state statute where no adequate remedy of law

HeinOnline -- 28 U.C. Davis L. Rev. 629 1994-1995

sue would not have been actionable only in state court. In 1875 Congress had enacted the general federal question statute that remains in effect to this day.[124] Given this unrestricted choice of forum between state and federal court, what nonresident seeking to invalidate a personal judgment by default upon constructive service of process would choose to sue in state court, when the federal courts, as "tribunals of a different sovereignty, exercising a distinct and independent jurisdiction,"[125] would be free to follow the expansive view of *Pennoyer* in the guise of full faith and credit principles, if not of due process of law? The limited nature of Borchers's limited view lies in the restriction of the criteria of validity to such as were provided by state law, but the private right of action implied under such view would have given every party who invoked it automatic access to federal court, where state-law criteria of invalidity would not have applied even by Borchers's own limited reading of *Pennoyer*.

I conclude that the limited view is either vacuous or self-destructing. Conceived as simply the guarantee of a right to attack invalid judgments collaterally, but on state law grounds, it adds nothing to the existing opportunities under state law to avoid (by right of redemption) or to void (by collateral attack) an invalid judgment. Conceived as limiting the preclusive effect under state law of default judgments that purport to determine jurisdictional facts, it has some modest content, albeit unelaborated and somewhat contradictory of the limited view's more general claim that due process does not limit the jurisdictional power of state courts. Conceived as a federal right of collateral attack on invalid state judgments independent of and supplemental to whatever means of collateral attack might exist under state law, it cancels out its own limiting effect because such a suit would inevitably be brought in federal court, where *Pennoyer*'s federal standards for nonrecognition of invalid state judgments would unquestionably apply.

---

exists to permit due process issue to otherwise be raised).

[124] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (1988)).

[125] *Pennoyer*, 95 U.S. at 732-33.

HeinOnline -- 28 U.C. Davis L. Rev. 630 1994-1995

C. The Integrity of the Pennoyer *Opinion*

Borchers concedes that the expansive view is "not an implausible reading of *Pennoyer*," noting that the sole dissenter in *Pennoyer*, Justice Hunt, "took the expansive view," and that two prominent contemporary commentators on constitutional law upon whom Field relied in his opinion, Justice Joseph Story of the United States Supreme Court and Justice Thomas Cooley of the Michigan Supreme Court, had written in a similar vein.[126] Borchers argues only that the "limited" view is also plausible, and that because "*both* views were plausible, . . . *Pennoyer* itself did not settle the role of due process as a limitation on the reach of state courts."[127]

In his earlier article, Borchers declared that "Field's analytical approach presented so many conundrums that it is probably not possible to catalog all of them."[128] Having tarred Field with this rather broad brush, Borchers elaborated upon two "difficult[ies],"[129] and made passing reference to two others.[130] In his present paper he continues to denigrate Field, accusing him of "sloppy" work,[131] and referring to the "ignoble birth" of the constitutional doctrine he attacks.[132] The first count of Borchers's indictment deals with the timing and necessity of Field's invocation of the Due Process Clause, and suggests that Field was a rube. The second count deals with the failure of the *Pennoyer* opinion to cite an earlier case authored by Field, *Galpin v. Page*,[133] and suggests that Field was a rogue. The uncharged misconduct consists of Field's

---

[126] Borchers, *supra* note 1, at 39.

[127] *Id.* at 43.

[128] *Id.* at 37.

[129] *Id.* at 37, 38.

[130] *Id.* at 35 & n.108.

[131] *Jurisdictional Pragmatism*, *supra* note 3, at 574.

> [T]he idea that the Constitution regulates personal jurisdiction did not arise from careful consideration of the consequences of transmuting common-law concepts to constitutional ones. Rather, the idea arose in sloppy language in *Pennoyer* that ultimately bred conflicting authorities which the Supreme Court finally resolved in *Menefee*.

Id.

[132] *Id.*

[133] 85 U.S. (18 Wall.) 350 (1873).

HeinOnline -- 28 U.C. Davis L. Rev. 631 1994-1995

supposedly unnecessary discussion of principles of in personam jurisdiction and his supposed invention, without citation to authority, of a common-law principle requiring prejudgment attachment for the valid exercise of in rem jurisdiction. I next consider and reject each of these charges.

1. Double-Talk About Dicta

Conventional wisdom acknowledges one critical flaw in *Pennoyer* as the fountainhead of territorially based, federal due process constraints on state-court jurisdiction: Field's invocation of the Fourteenth Amendment was *obiter dicta*, unnecessary to the decision of the case. Given the existing full faith and credit case law permitting nonrecognition of state-court judgments that were invalid according to common-law criteria of territoriality, Field's conclusion in paragraph 19 (his "Be that as it may" paragraph) that a federal court was just as free as a sister-state court to deny recognition to Mitchell's default judgment against Neff[134] was sufficient to affirm the ruling of the court below — a federal circuit court.

But since Borchers means to attack conventional wisdom, there is little leverage for him in discussing a long-recognized caveat that conventional wisdom has already incorporated into its judgment of the constitutional effect of *Pennoyer*. Thus he has tried to argue, at least in his original article, that acceptance of *Pennoyer*'s Fourteenth Amendment language as a dictum — an announcement simply of the Court's intention to construe the Due Process Clause as incorporating territorially based criteria for personal jurisdiction and an invitation to litigants to bring state-court rulings enforcing invalid judgments before it by writ of error — is a "charitabl[e]" gloss placed on *Pennoyer* by unduly forgiving commentators and judges.[135] Borchers thus casts Field's Fourteenth Amendment language not as a dictum but as "a central element of the case,"[136] and doubly condemns it, as a retroactive application of the Fourteenth Amendment to void a judgment rendered two years

---

[134] 95 U.S. at 732-33.

[135] Borchers, *supra* note 1, at 37-38.

[136] *Id.* at 38.

HeinOnline -- 28 U.C. Davis L. Rev. 632 1994-1995

prior to the amendment's ratification,[137] and as evidence of "sloppy" work by Justice Field.[138] It is "more likely," he claims, that the invocation of the Fourteenth Amendment was not meant as pregnant dicta, but rather indicates that "Field was lulled by the fact that the collateral proceeding was not initiated until 1874, six years *after* ratification, and simply overlooked the timing problem."[139]

Borchers does not substantiate his claim that Field's invocation of the Fourteenth Amendment was "a central element of the case."[140] He merely cites without elaboration to the relevant passage in *Pennoyer*, as if the error of conventional wisdom in treating this passage as dicta were self-evident in the text. Later in the same article, Borchers suggests that the reason he does not substantiate his "not dicta" claim is that he does not entirely believe it. He first invoked the supposed timing "conundrum" of Field's purportedly "central" reliance on the Fourteenth Amendment to support his claim that there was some "mystery" unresolved by *Pennoyer* about the relevance of due process to personal jurisdiction. He then went on to elaborate the limited view as a plausible answer to this "mystery." Yet this elaboration of the limited view contradicts his own "not dicta" claim. The only function of this claim, apparently, is as a device to hold Justice Field up to ridicule — deciding the case by retrospective application of the Fourteenth Amendment,[141] as if he were some rube unable to read a calendar instead of an exceptionally able, sophisticated, and worldly attorney, first in his class at Williams College and the restless protégé of one of the most famous lawyers in the land.[142] Just four pages after

---

[137] *Id.* at 37.

[138] *See supra* note 131.

[139] Borchers, *supra* note 1, at 38 (emphasis in original) (footnote omitted).

[140] *Id.*

[141] The Supreme Court later decided that *Pennoyer*'s due process dictum was indeed retrospectively applicable — in a different, indirect sense. *See infra* text accompanying notes 486-91.

[142] *See generally* CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (Archon Books 1963) (1930). At the age of 13 Field left the town of Stockbridge, Massachusetts, where his father was a minister, and traveled with a newly wedded sister and her missionary husband to Turkey and Greece, where he survived a plague epidemic, traveled widely, became fluent in Greek, and acquired some knowledge of Italian, French, and Turkish. After two and one-half years he returned to Stockbridge to prepare for college

HeinOnline -- 28 U.C. Davis L. Rev. 633 1994-1995

this cheap shot at the long dead, Borchers reverted to the conventional view that the Fourteenth Amendment was extraneous to the decision in the case at hand.[143]

Borchers begins the framing of his limited view reading of *Pennoyer* by arguing that Field construed the relevant provision of the Oregon Code to be consistent with, rather than in derogation of, generally accepted common-law principles of territorial jurisdiction.[144] Oregon's statutory incorporation of these principles required their elaboration to see whether, for lack of prejudgment attachment of Neff's property, Mitchell's judgment against Neff had been invalid as a matter of state law. "The long discussion of in personam and in rem jurisdiction that followed can be seen as an exposition of these 'general principles' in an effort to give content to the Court's construction of the Oregon statutes set forth early in the opinion."[145] Borchers concluded that Field was "far *less* concerned with the contents of Oregon's jurisdictional rules," which were deemed

---

entrance exams. He entered Williams College shortly before his seventeenth birthday with the intention of becoming a professor of oriental languages. *Id.* at 13-16. "The four years passed swiftly. Stephen distinguished himself throughout his college course. He delivered the Greek oration at the end of his junior year, and, as the student of highest rank in his class, delivered the valedictory speech at commencement in September, 1837." *Id.* at 20. He reconsidered his academic ambitions after graduation, and decided instead to become a lawyer. His tutor and early law partner in New York City was arguably the greatest lawyer in New York, and nationally one of the most prominent lawyers of the nineteenth century: his elder brother, David Dudley Field. He was admitted to the bar in 1841, but anxious to make a name for himself in his own right, he left New York in 1848. He first spent a year travelling in Europe with his father, experiencing first hand the "year of revolutions" there. A month after returning to New York in the fall of 1849, he set sail for California and the Gold Rush. In 1850 he was elected to the Assembly, the lower house of the state legislature, serving one term. After failing the following year in a bid to be elected to the state Senate, he developed an active law practice, appearing in 60 cases before the state supreme court and prevailing in 41 of them. He was elected to the state supreme court in 1857, and appointed by President Lincoln to the Supreme Court of the United States in 1863. *Id.* at 20-118. He remained on the Court for over 34 years, and was by all accounts neither saintly nor stupid.

[143] *Compare* Borchers, *supra* note 1, at 38 ("the due process clause [was treated as] a central element of the case" and "Field . . . simply overlooked the timing problem") *with id.* at 42 (treating due process as irrelevant in federal court where full faith and credit principles already permitted collateral attack on invalid state judgment).

[144] I discuss below why this is a possible, if implausible, construction of *Pennoyer*, and why it does not cure the dicta problem, but rather doubles it. *See infra* text accompanying notes 155-73.

[145] Borchers, *supra* note 1, at 41.

HeinOnline -- 28 U.C. Davis L. Rev. 634 1994-1995

to follow the common law, and "far *more* concerned with developing an enforcement mechanism for those rules."[146]

Borchers thus argues that the true significance of *Pennoyer* lies in its crafting of an "enforcement mechanism" — a federal right of collateral attack — by which any litigant could test the validity *as a matter of state law* of a prior state judgment upon which an opposing litigant relied to defeat a claim being litigated in federal court. By this reading of *Pennoyer*, its *holding* is that a *federal* court would permit litigants to attack collaterally a prior state judgment, on the ground of its invalidity under state law, even when the federal court sat in the same state that had rendered the invalid judgment.[147] The supposed novelty of this holding is that it permitted a federal court to treat an issue of "intrastate recognition" as if it were a more conventional instance of "interstate recognition."[148] Borchers then continues: "This cured the perceived problem of federal court enforcement, but left unaddressed the right of a collateral attack in the *same* state courts that rendered the judgment. For this matter, Field invoked the Due Process Clause."[149] Since no one doubts that Neff had sued to eject Pennoyer in a federal rather than a state court, so much of Field's discussion of a supposedly novel "enforcement mechanism" as was addressed to hypothetical state-court litigants — now said to be entitled to such an enforcement mechanism by operation of the new Due Process Clause — was extraneous to the decision of the case at hand. Thus by Borchers's own further reading of the case, Field's due process discussion could not have been "a central element of the case."

Perhaps sensitive to this inconsistency in his original paper, Borchers gives up altogether on the "not dicta" argument in his

---

[146] *Id.*

[147] As I have discussed above, see *supra* text accompanying notes 114-15, Borchers is wrong in supposing that such a right of collateral attack would be unique to federal court. In fact, such a right of collateral attack was a familiar feature of state practice, and so conceived the limited view of *Pennoyer* is vacuous. If, as Borchers contends, the limited view simply permitted a federal litigant to invoke the full faith and credit statute to attack the validity *under state law* of a prior state judgment, this reading of *Pennoyer* would give a federal litigant no right that litigant would not have had if proceeding in the courts of the judgment-rendering state.

[148] Borchers, *supra* note 1, at 41.

[149] *Id.* at 42.

HeinOnline -- 28 U.C. Davis L. Rev. 635 1994-1995

present paper. He now concedes that "[p]robably, . . . the principal holding of *Pennoyer* was that the Court could indirectly regulate jurisdiction [*i.e.*, as arbiter of the duties of judgment recognition imposed by the Full Faith and Credit Clause and statute] in cases of intrastate recognition, at least if F-1 was a state court and F-2 a federal court."[150] The Due Process Clause is no longer put forward as "a central element of the case," and Borchers now has "difficulty . . . discerning why the Court discussed the Due Process Clause at all."[151] Having earlier insisted that Field's "language did not treat the [due process] discussion as surplusage,"[152] he now invokes its "surplusage" status as a reason to question whether *Pennoyer* really did announce the Court's intention to constitutionalize the law of state-court personal jurisdiction.

> [T]he Court had no real need to hold that the Due Process Clause itself limits state court jurisdiction. All the parties in *Pennoyer* seemed to agree that Oregon followed the accepted "international" principles of jurisdiction. In fact, the *Pennoyer* majority's entire discussion of jurisdictional principles came in the context of construing Oregon Code section 55. Because the Oregon Code only restated traditional jurisdictional principles, the *Pennoyer* opinion would be a strange vehicle indeed for hypothesizing constitutional limits on state court jurisdiction.[153]

In my view, the debate over the constitutional principles of *Pennoyer* that Borchers proposes is not in any essential sense a debate over the holding of the case or the stare decisis effect of a dictum as opposed to a holding. The question is the content of the constitutional principles the Court announced in *Pennoyer*, not their decisional pedigree. Although Borchers now bows to conventional wisdom in accepting the characterization of the due process discussion in *Pennoyer* as a dictum, he nonetheless continues to deploy the dictum issue as an argument against the expansive view. The revised claim is not that Field was stupid, but rather that he wrote ambiguously, and that the lack of any clear purpose for the dictum counts in favor of

---

[150] *Jurisdictional Pragmatism*, *supra* note 3, at 568.

[151] *Id.* at 569.

[152] Borchers, *supra* note 1, at 38.

[153] *Jurisdictional Pragmatism*, *supra* note 3, at 570 (footnotes omitted).

HeinOnline -- 28 U.C. Davis L. Rev. 636 1994-1995

resolving the ambiguity in favor of the limited view. Borchers treats the gratuitous or "hypothetical" nature of the dictum as reinforcing his claim that something is mysterious about *Pennoyer*, and that the *Menefee* Court's later uncritical acceptance of the expansive view fumbled the chance to dispel that mystery, and may well have cemented in American law a misconceived notion of the constitutional principles that *Pennoyer*'s dictum meant to announce.

A coherent explanation of why Field would both include his dictum on due process and mean it to be understood according to the expansive view is thus relevant to a critique of Borchers's more general attack on this field of constitutional law.[154] I offer one here. I begin in partial agreement with Borchers on one point. It is possible to read "the *Pennoyer* majority's entire discussion of jurisdictional principles [as a matter of] construing [the] Oregon Code . . . ."[155] But this is

---

[154] Of course the pun is intended. By way of penance I have avoided any reference to whether the *Shoe* fits, when the other *Shoe* will drop, and the many other soleful comments with which oral repartee at the Symposium was laced.

[155] *Jurisdictional Pragmatism*, *supra* note 3, at 570. Borchers errs, however, in referring to the statute thus construed as "Oregon Code section 55." *Id.*; *cf.* Borchers, *supra* note 1, at 40 & n.135 (correctly citing to section 55 as source of *service of process* provisions which *Pennoyer* majority also construed to different effect than had Judge Deady below). Three sections of the Oregon Code of Civil Procedure were in issue, and the issue of construction confronted by the Supreme Court in *Pennoyer* as a matter of "jurisdictional principles" involved only the third of these sections, section 506. The relevant passage in *Pennoyer* is as follows:

> The Code of Oregon provides for [constructive] service [by publication] when an action is brought against a non-resident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing *this latter provision* to mean that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law.

95 U.S. at 720 (emphasis added). This summary of the relevant provisions of Oregon law was taken directly from the discussion of the same three provisions in Neff's brief in the Supreme Court. Brief for Defendant in Error at 8-9, Pennoyer v. Neff, 95 U.S. 714 (1878). The accompanying citations in that brief establish that the first provision (authorizing

HeinOnline -- 28 U.C. Davis L. Rev. 637 1994-1995

neither the obviously correct reading of *Pennoyer*,[156] nor one which reinforces any claim that it was mysterious for the Court to have appended its due process dictum. Borchers's construction of *Pennoyer*'s construction of Oregon law not only doubles the amount of dicta in *Pennoyer*, but also makes it even more essential for the Court to have addressed in dicta the constitutional interface between state law, common-law principles of territorial jurisdiction, and the jurisdiction of the Supreme Court to review state court judgments that might fail to construe state law criteria of validity as incorporating *Pennoyer*'s common-law principles.

As framed by Field in paragraph 3 of *Pennoyer*, the language requiring construction was a provision of the Oregon Code — section 506 — declaring "that no natural person is subject to the jurisdiction of a court of the State, 'unless he appear in the

---

constructive service of process) was section 55, paragraph 3, of the Code, *see also Pennoyer*, 95 U.S. at 718 (quoting section 55 in statement of facts preceding case); the second provision (authorizing a writ of attachment) was section 143, paragraph 2, of the Code; and the third provision — the "latter provision" limiting jurisdiction in certain instances to the value of property within the state — was section 506. This language is properly cited to section 506 in Judge Deady's opinion in the court below, Neff v. Pennoyer, 17 F. Cas. 1279, 1281 (C.C.D. Or. 1875) (No. 10,083).

[156] I accept only that it is a *possible* reading of *Pennoyer* that the Court construed the Oregon Code to have incorporated traditional common-law principles of territorial jurisdiction, and hence grounded its conclusion of the invalidity of Mitchell's judgment against Neff on state law as thus interpreted in light of the common law. Borchers allows of no doubt about the matter. "Field construed the Oregon Code to allow for personal jurisdiction, either in rem or in personam, only in accordance with territorial principles. Thus, Field took no great issue with the Oregon Code on the subject of personal jurisdiction." Borchers, *supra* note 1, at 40 (footnote omitted). Elsewhere Borchers refers to Field as having resolved "early in the opinion" that Oregon law should be construed as following the general law that Field proceeded to expound, such that "it appears that the Court was [not particularly] concerned with the contents of Oregon's jurisdictional rules, because these were settled as a result of the Court's interpretation of Oregon law." *Id.* at 41.

Justice Field's opinion does not support these exaggerated claims that the Court obviously and off-handedly resolved the issue of the construction of the Oregon Code at the outset of the opinion, treating it as so simple a matter as not to warrant discussion. As I discuss below, the construction that Borchers imputes to the Court is not only ill-suited to the language of the statute, but also in direct contradiction to the construction of the statute by the judge below, the federal district judge resident in Oregon. There is no clear evidence whatsoever that Field's ambiguous phrase, "[c]onstruing this latter provision to mean . . . ," was a declaratory statement rather than a conditional clause, and there is sound textual evidence that the Court, far from engaging in the "double dictum" that is the logical consequence of Borchers's reading of this phrase, properly perceived that it was a moot point.

HeinOnline -- 28 U.C. Davis L. Rev. 638 1994-1995

court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached.'"[157] There is evident ambiguity in the idea of a *person* being "subject to the jurisdiction" of a state in virtue of "having *property* therein," but "only to the extent of such property at the time *the* jurisdiction attached." To what sort of jurisdiction does "the jurisdiction" refer? The structure of the statute suggests — in my view quite strongly — that "the jurisdiction" refers to personal jurisdiction. The statute certainly begins in the voice of personal jurisdiction, declaring that no "natural person" is subject to Oregon's jurisdiction unless "he" falls within one of four denominated categories of natural persons — those who appear in a court of the state, are found (*i.e.*, personally served with process) within the state, are residents of the state, or own property in the state. So construed, the "only to the extent of such property" qualification limits the *execution* or *effect* of a judgment, rather than the *jurisdiction* to render a judgment or the *nature* of that jurisdiction as the subjection of a "person" to the power of an Oregon court.

But, with some circularity, the "only to the extent of such property" language can be read as limiting jurisdiction, in that single circumstance, to *jurisdiction over property* that was within the state "at the time the jurisdiction attached," rather than as limiting the effect within the state of a judgment predicated on *jurisdiction over the person* of a nonresident property owner. This is circular because the statute clearly refers to *two* classes of property — the class consisting of *all* "property therein" (property within Oregon at the time of enforcement of the judgment) and a (possibly lesser) included class consisting of only of so much of the "property therein" at the time of enforcement as was also "property therein" at the earlier time when "jurisdiction attached." This makes nontautological sense if the time at which "jurisdiction attached" is marked by some event independent of the property in question, such as the "attachment" of jurisdiction over the person of the owner of the property by such service of process as might be authorized by state

---

[157] *Pennoyer*, 95 U.S. at 720.

HeinOnline -- 28 U.C. Davis L. Rev. 639 1994-1995

law. But if the event that provides the relevant time line is the "attachment" of jurisdiction over the property itself, the definition of the included class of property becomes self-referential. In effect, the statute would be saying that we assert personal jurisdiction over three categories of persons, and we assert in rem jurisdiction over certain property owned by a fourth class of person, but in that case we only assert jurisdiction over the property we assert jurisdiction over.

Despite its semantic circularity, this latter construction of section 506 would have been powerfully attractive to the *Pennoyer* Court in light of the then prevalent canon of construction that statutes in derogation of the common law should be strictly construed.[158] Like the modern canon that statutes should be construed to avoid constitutional doubt,[159] this canon argued that even at the expense of a tortured construction of the words used by the legislature, a statute should if at all possible be construed in harmony with generally accepted principles of the common law. And as the *Pennoyer* Court stated, if section 506 were construed in this way, it "expresse[d] a principle of general, if not universal law." So construed, section 506 did not purport to grant in personam jurisdiction over nonresidents who neither appeared voluntarily nor were served with process within the state. Rather, section 506 meant only to authorize proceedings "substantially in rem" against nonresidents with property within the state, in order to protect state citizens who might have claims against nonresidents. Under the terminology that crystallized only in the wake of *Pennoyer*, such proceedings would come to be classified as an assertion of "quasi in rem" jurisdiction.[160]

Assuming then, *arguendo*, that the Supreme Court did indeed construe Oregon law to have incorporated "general, if not universal law" as the measure of the jurisdiction statutorily conferred on the Oregon courts, the question for decision became whether the jurisdictional principles of the general common law required prejudgment attachment of property as a condition of a valid quasi in rem judgment. For the reasons given in Field's

---

[158] *See, e.g.*, Shaw v. Railroad Co., 101 U.S. 557, 565 (1879).

[159] *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 500-01, 507 (1979).

[160] *See infra* text accompanying notes 275-78.

HeinOnline -- 28 U.C. Davis L. Rev. 640 1994-1995

elaboration of these general jurisdictional principles, prejudgment attachment was indeed required,[161] and Judge Deady had erred below in deciding otherwise.[162] Because Oregon law did in fact require such prejudgment attachment in a proceeding such as *Mitchell v. Neff*, and because it was conceded by all that no such prejudgment attachment had in fact occurred, the judgment in favor of Mitchell by which Pennoyer acquired title was, as Judge Deady had held, invalid as a matter of state law — not for the reasons stated by Judge Deady, relating to the authorization and proof of constructive service of process by publication, but for the alternative reason of the lack of the required prejudgment attachment of Neff's property.

This possible reading of *Pennoyer* transforms into dicta the discussion of *both* the nonrecognition principles of full faith and credit law *and* the Fourteenth Amendment's Due Process Clause. Once it is decided that the judgment against Neff was invalid under Oregon law, the case becomes a routine application of the Rules of Decision Act[163] as construed in *Swift v. Tyson*.[164] Oregon's jurisdictional statute was the governing rule of decision, since statutes were part of the "local" law obligatory

---

[161] *See infra*, text accompanying notes 297-310.

[162] There is no question that Deady construed the Oregon statute to the contrary. He thought that this created no conflict with generally accepted common-law principles, because he understood those principles to entail that "the power of the state over property within its limits, of non-residents, [is] supreme," and "in my judgment, the mode of exercising this power is a matter for the state to determine." Neff v. Pennoyer, 17 F. Cas. 1279, 1281 (C.C.D. Or. 1875) (No. 10,083). He continued:

> In the exercise of this power [the state] may require that the proceedings be strictly in rem and commenced by the seizure of the property, or it may, *as provided in this state*, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name — nominally — for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property so as to satisfy the same. In either case, the result is the same; while the latter mode of proceeding has this to commend it over the former, that it does not permit the seizure of interference with the property of the non-resident until the right or claim of the citizen in or to it is satisfactorily established.

Id. (emphasis added).

[163] Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1988)).

[164] 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

HeinOnline -- 28 U.C. Davis L. Rev. 641 1994-1995

on the federal courts under the Rules of Decision Act.[165] Applying Oregon's statutory local law, as construed to be consistent with general principles of law, the judgment in question was invalid for lack of the required prejudgment attachment. There remained for decision only the question of the effect on third parties of the subsequent invalidation of a judgment under which title had passed. Pennoyer argued strenuously in the Supreme Court that the Oregon Code protected the rights of innocent third parties.[166] But this argument was hardly convincing — the cited part of the statute dealt with the effects of redemption of the property by a nonresident defendant who was given one year in which to undo the effects of a *valid* judgment rendered by default upon constructive service of process.[167] In the absence of a governing state statute, the Supreme Court relied implicitly on general principles of law — as permitted by *Swift v. Tyson* — to determine the effects on third parties of an invalid judgment on their chain of title, and much to Justice Hunt's discomfit[168] ruled that an invalid judgment was wholly void, "an absolute nullity"[169] that was "without any validity,"[170] and could convey no title whatsoever.

By this "double dictum" view, the full faith and credit point — that a federal court would not have to recognize the validity of Mitchell's judgment *even if* Oregon did purport statutorily to assert extraterritorial personal jurisdiction in defiance of generally accepted common-law principles — was merely precautionary. If *other* states engaged in such an uncivilized practice, the federal courts to which almost any injured nonresident could have access, virtually by definition under the diversity jurisdic-

---

[165] *Id.* at 18-19.

[166] Brief and Argument for Plaintiff in Error 21-23, Pennoyer v. Neff, 95 U.S. 714 (1878).

[167] At the conclusion of this redemption provision, the statute declares: "But the title to property sold under execution issued on such judgment to a purchaser in good faith, shall not *thereby* be affected." *Pennoyer*, 95 U.S. at 719 (quoting redemption provision of § 57 of the Oregon Code of Civil Procedure) (emphasis added); *see also supra* note 113. In his brief to the Supreme Court, Pennoyer conceded that the statute was not applicable by its terms, but argued for its expansive construction. Brief and Argument of Plaintiff in Error at 22-23, *Pennoyer*, 95 U.S. 714.

[168] *Pennoyer*, 95 U.S. at 739-41 (Hunt, J., dissenting).

[169] *Id.* at 732.

[170] *Id.* at 734.

HeinOnline -- 28 U.C. Davis L. Rev. 642 1994-1995

tion, would stand ready to undo the damage. If states did not want to suffer the insecurity of title about which Justice Hunt complained, they had better conform their assertions of jurisdiction to generally accepted norms, and take responsibility for sorting out themselves the problems entailed by having issued in the past judgments that the federal courts would condemn as void — judgments that Field implied were fairly isolated, and that Hunt contended were commonplace under the jurisdictional provisions of many states. And as a further cautionary note that state courts should clean up their jurisdictional act if state practice had strayed from the generally accepted norms of the common law, Justice Field declared that the Fourteenth Amendment had fundamentally changed the rules of the jurisdictional game. State courts henceforth were under the yoke of review by writ of error in the United States Supreme Court. In "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction," conducted "[s]ince the adoption of the Fourteenth Amendment to the Federal Constitution," what had once been left to the common law (as altered by state statutes — ideally but not necessarily in compliance with the "general, if not universal" principle of territoriality), was now a matter of the federal constitutional right to due process of law.[171]

In my view, there is no conclusive way to determine whether this "double dictum" reading is correct, or the more traditional "single dictum" interpretation by which Judge Deady's construction of state law was accepted — so that under the Oregon statute this was deemed to be a valid judgment, since under state law (by Deady's construction) no prejudgment attachment was required[172] — and recognition was denied under full faith and credit principles because federal courts are "tribunals of a different sovereignty." The important point is that it makes no difference which reading is correct, since by either reading the judgment was worthless in federal court, and by its due process dictum the Court announced that any judicial proceeding conducted subsequent to the adoption of the Fourteenth Amendment was subject to constitutional invalidation by the Supreme

---

[171] *Id.* at 733-34.

[172] *See supra* note 162.

HeinOnline -- 28 U.C. Davis L. Rev. 643 1994-1995

Court on direct review of whatever appellate or collateral proceedings might yet be open to contest the validity of a state-court's assertion of personal jurisdiction. Indeed, the best reading would appear to be that the Court itself deemed this an issue of no practical significance, and was indifferent to whether Judge Deady had correctly construed the Oregon Code — making Field's transitional phrase from his discussion of generally accepted common-law principles of territorial jurisdiction to the nonrecognition and due process consequences of Oregon's arguable violation of those principles a precisely accurate statement of the Court's thinking: "Be that as it may . . . ."[173]

I conclude that the argument about dicta fails to cast doubt on the integrity or craftsmanship of Field's opinion in *Pennoyer*. Given the Court's view of the common-law principles of territorial jurisdiction as developed in its full faith and credit case law, wishful thinking that Judge Deady might be wrong, and that Oregon law might rather artificially be construed to conform fully with the common-law principles announced by the Court, would as a practical matter magnify the potential for state-federal conflicts when diversity jurisdiction was used by nonresidents to attack collaterally and to invalidate state judgments based on jurisdiction over property absent prejudgment attachment of that property. By making clear that the Court was prepared to enforce its view of common-law jurisdictional principles under the dual rubrics of full faith and credit law and Fourteenth Amendment due process, the *Pennoyer* Court sought to reduce potential insecurity of title caused by the overlapping jurisdiction of state and federal courts.

Of course, this is not to argue that the Court was *right* to limit state jurisdictional power by using federal jurisdiction to enforce common-law norms in the constitutional dress of either full faith and credit or due process of law. Neither the Court's reading of the common law nor its incorporation of the common law into the Constitution were necessarily correct. It may be desirable to revisit these constitutional questions, as Borchers contends. But there is nothing incoherent about *Pennoyer*'s approach to these questions, and the use of dicta in *Pennoyer* is

---

[173] *Pennoyer*, 95 U.S. at 732.

HeinOnline -- 28 U.C. Davis L. Rev. 644 1994-1995

ultimately immaterial to the merits of the constitutional law that Borchers wants to overrule.

2. *Galpin v. Page*: The Case of the Missing Case

The second major flaw that Borchers finds in *Pennoyer* is the failure of Justice Field to make any reference to *Galpin v. Page*.[174] *Galpin* featured prominently in the arguments of both parties, was discussed at length by the court below, and received prominent treatment from dissenting Justice Hunt. Yet Field does not cite *Galpin*, in which he wrote the Court's opinion. Borchers invests *Galpin* with great significance as a landmark case establishing that the Court viewed "intrastate" recognition cases tried in federal court as governed by different rules of judgment recognition than "interstate" cases. He views with dismay Field's "troubling, and probably intentional"[175] failure to discuss *Galpin* in *Pennoyer*, which he claims involved "facts almost precisely parallel."[176] His angst is increased by his perception of *Galpin* as the precursor of the limited view he attributes to *Pennoyer*.[177] This provokes one of his strongest attacks on the integrity of Field's opinion in *Pennoyer*, in which he suggests that Field was intellectually dishonest in failing to acknowledge, or even address, the tension between his views in *Galpin* and those announced in *Pennoyer*.

> Both *Pennoyer* and *Galpin* centered on the problem of recognition by a federal court of a state court judgment, based on service by publication, rendered in the federal court's home state. Moreover, both cases were decided after ratification of the fourteenth amendment. In *Galpin*, Field treated the problem of recognition as one of statutory construction, never invoking the Fourteenth Amendment, and specifically affirming the right of states to exercise jurisdiction beyond the confines of the territorial rules of jurisdiction. Field conspicuously ignored *Galpin* in *Pennoyer*, however, neither citing nor discussing it. Curiously, Justice Hunt's dissent in *Pennoyer* cited *Galpin*, stating that "[t]he case of *Galpin v.*

---

[174] 85 U.S. (18 Wall.) 350 (1873).

[175] Borchers, *supra* note 1, at 43.

[176] *Id.* at 38.

[177] *Id.* at 43. *See generally supra* note 122 (discussing tension between Borchers's claim that *Galpin* supports limited view and his claim that Field ignored *Galpin* because it was inconsistent with whatever Field meant to accomplish in *Pennoyer*).

HeinOnline -- 28 U.C. Davis L. Rev. 645 1994-1995

> *Page* . . . is cited in hostility to the views that I have expressed." The inescapable inference is that some earlier draft of the *Pennoyer* majority opinion *did* attempt to deal with *Galpin*, and that Field eventually abandoned the task, realizing that the rationales, if not the holdings, of the cases were inconsistent.[178]

A complete study of *Galpin v. Page* would require an article in its own right. It should suffice for present purposes merely to outline the complex facts and layered history of *Galpin* in order to establish its significance to Justice Field and its influence on his thinking. My conclusion is that Field was indeed reluctant to ground *Pennoyer* on his prior writings in *Galpin* and its associated cases, but for much different, and more honorable, reasons than Borchers assumes. The only "inescapable inference" that I draw from this material is that Borchers, for understandable reasons,[179] mistook the Supreme Court's opinion in *Galpin* as Field's, and the Court's, only encounter with this exceptionally complicated litigation. Most crucially, Borchers appears to be unaware that Field wrote a subsequent opinion in *Galpin* as Circuit Justice trying the case on remand, which not only makes clear Field's view of the relationship between *Galpin* and *Pennoyer*, but also accounts for his reluctance — or inability, given the views of the majority of the *Pennoyer* Court on the key issue in common between the two cases — to frame *Pennoyer* simply as *Galpin* revisited.

A brief history of *Galpin* begins with the death of Franklin Gray in New York City in July 1853.[180] In December 1853 his

---

[178] Borchers, *supra* note 1, at 38 (footnotes omitted).

[179] Borchers's history of *Pennoyer v. Neff* is only prologue to his larger task of reviewing the process by which the expansive view became constitutional dogma, which in turn is the predicate for a comprehensive canvas of the lack of coherence and pragmatic justification for current law. His historical arguments tie into his attack on current law, of course, because any structure is more easily toppled if its foundation is weak. But his primary focus is on the present, not the past. I empathize with the difficulty of fully examining the tangled history of nineteenth-century jurisdictional cases when the main object is to pass judgment on current law. I have had the luxury of looking only at Borchers's foundational arguments. Nonetheless, my focus on those arguments in their own right, detached from the rest of Borchers's work on the current jurisdictional "mess," *Jurisdictional Pragmatism*, *supra* note 3, at 564, has convinced me that Borchers's history is in key respects — his treatment of *Galpin v. Page* included — a tendentious rush to judgment that misconceives the content and meaning of the historical record.

[180] The facts set forth in this brief history are derived from the opinion of the Court in

HeinOnline -- 28 U.C. Davis L. Rev. 646 1994-1995

widow, Matilda, gave birth to Franklin's posthumous daughter, Franklina. It was undisputed that under California law Matilda and Franklina inherited in equal shares, as tenants in common, the entire estate of Franklin in California, consisting primarily of a substantial amount of real property in San Francisco. In January 1854 two trustees, Joseph Palmer and Cornelius Eaton, were appointed administrators of Franklin's estate by the probate court in San Francisco. In February 1854 Franklin's brother William brought a suit in equity against the administrators and Matilda in the California trial court of general jurisdiction in San Francisco, then called the district court. Invoking the equitable jurisdiction of the court, William sought to impose what amounted to a constructive trust on his brother's estate, alleging that he had been a partner in Franklin's business activities in California since 1848 and was entitled to a one-third share of Franklin's California holdings. By supplemental bill William later added Franklina as a party to the suit.[181] William asked for an accounting of the estate and distribution to him of his partnership share.

The district court convened an advisory jury on January 5, 1855, for the trial of the issues of fact in William Gray's suit. The jury found for the plaintiff, William Gray, on each issue. A motion for a new trial was denied, and on appeal was sustained on the ground that the verdict of an advisory jury in an equitable action was not binding on the court.[182] Shortly after the trial of William Gray's claim, one of the defendants therein, Eaton, resigned his position as administrator of Franklin Gray's

---

Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874); the opinion of Circuit Judge Sawyer in the decision reversed therein by the Supreme Court, Galpin v. Page, 9 F. Cas. 1113 (C.C.D. Cal. 1870) (No. 5205); the opinion of Circuit Justice Field on remand from the Supreme Court, Galpin v. Page, 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206); earlier opinions by the Supreme Court and Justice Field on circuit in other cases that arose out of the looting of the estate of Franklin Gray, Gray v. Brignardello, 68 U.S. (1 Wall.) 627 (1864) and Gray v. Larrimore, 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721) (Field, C.J.); and the opinions of the Supreme Court of California in Gray v. Eaton, 5 Cal. 448 (1856), and Gray v. Palmer, 9 Cal. 616 (1858).

[181] Also named as a defendant by William Gray was the father of Franklin and William Gray, James Gray. Galpin v. Page, 9 F. Cas. 1113, 1113 (C.C.D. Cal. 1870) (No. 5205), *rev'd*, 85 U.S (18 Wall.) 350 (1874). James Gray was neither served with process nor appeared, and played no apparent role in this or any of the ensuing litigation. *Id.* at 1128.

[182] Gray v. Eaton, 5 Cal. 448 (1856).

HeinOnline -- 28 U.C. Davis L. Rev. 647 1994-1995

estate and brought his own suit in equity against William Gray and the remaining administrator, Palmer, as well as the widow Matilda and the infant Franklina. Eaton's claim was strikingly similar to that of William Gray. Eaton alleged that since 1851 he too had been a general partner of the decedent Franklin in all of his California business activities, and claimed a one-fourth share of Franklin's California holdings. Like William Gray, Eaton sought an accounting and distribution of his share of the estate. Throughout the proceedings in the district court the widow Matilda appeared by counsel, one Henry Foote, who upon the uncontested petition of the plaintiffs was also appointed guardian ad litem of the infant Franklina. Although Eaton and William both denied that the other was part of the partnership each allegedly had had with Franklin, they consented to consolidation of their suits and to a decree entered on October 27, 1855, apparently with the consent of Foote as well, awarding Eaton one-fourth of the estate and William Gray one-third of the remaining three-quarters. The effect of this was to give Eaton and William Gray each a one-quarter share, leaving the widow and child with a one-quarter share each.

The decree in favor of Eaton and William Gray ordered an accounting of the assets and liabilities of Franklin Gray. By this accounting the decedent's property in California was found to be worth $237,000. But Eaton and William Gray had both alleged that while they had conserved intact all of their share in the assets of the partnership, withdrawing nothing in the way of current income, Franklin Gray had treated the partnership proceeds as his own, resulting in a large amount of personal debt to the partnership. Given the amount of this debt and the reduced value of the partnership assets when liquidated by judicial sale — only $70,000 was obtained in the sale of the $237,000 portfolio — Eaton and William Gray managed by their suits in equity to suck the estate of Franklin Gray entirely dry. The final accounting showed that Franklin's estate had a negative value, in the amount of an undischarged debt to William Gray for a further $3,533.17. The estate left to pass into probate thus being insolvent, it was unable to pay the $900 cost of Franklin's tombstone. Doubtless anxious to honor the dead, his posthumously putative partners graciously permitted this charge

HeinOnline -- 28 U.C. Davis L. Rev. 648 1994-1995

to be paid before the balance of the estate passed into their own pockets. Both widow and child were left without a penny.

As Justice Davis drolly remarked in his unanimous opinion for the Supreme Court of the United States in the first of the ensuing cases to come before it, "[t]he character of the suits brought in the State court by C.J. Eaton, by W.H. Gray, the parties to them, the kind of evidence upon which they were sustained, and their ultimate termination, provoke comments, but we forbear to make them."[183] The Supreme Court of California had had the jurisdiction to do more. It had reversed the judgment as to both plaintiffs in the consolidated cases of William Gray and Eaton when "[t]he widow[,] now conceiving that the proceedings had been collusive and irregular, took an appeal . . . ."[184]

The widow and child had been represented in that appeal by new counsel, Philip G. Galpin of New York, who would remain their attorney throughout the subsequent collateral proceedings and, by assignment of title from both clients, would conduct pro se the litigation of *Galpin v. Page*. As to Eaton the decree was reversed for lack of personal jurisdiction over Franklina, who with her mother was a resident of Brooklyn, New York.[185] As to William Gray the decree was reversed for lack of evidence.[186] Three years after remand to the district court the claims of both plaintiffs were dismissed for lack of further prosecution.[187]

The timeliness of the appeal to the Supreme Court of California was upheld on the ground that it was not until November 21, 1856, that the final judgment had been entered in the consolidated suits in equity. But by this time the property had already been sold, under an order to a commissioner of the district court dated April 7, 1856. The property had all been sold in a single day, on May 3, 1856, the sales had been con-

---

[183] Gray v. Brignardello, 68 U.S. (1 Wall.) 627, 633-34 (1864).

[184] 68 U.S. (1 Wall.) at 628 (referring to Gray v. Palmer, 9 Cal. 616 (1858)).

[185] Gray v. Palmer, 9 Cal. 616, 637-38 (1858). The reasoning of the Supreme Court of California on the jurisdictional issues raised by the appellants is discussed *infra* note 194.

[186] *Gray*, 9 Cal. at 640-41.

[187] *See* Gray v. Larrimore, 9 F. Cas. 1126, 1128 (C.C.D. Cal. 1874) (No. 5206) (Field, C.J.). An attempted appeal of the order of dismissal was itself dismissed as untimely. Gray v. Palmer, 28 Cal. 419, 420 (1865).

HeinOnline -- 28 U.C. Davis L. Rev. 649 1994-1995

firmed on May 14, 1856, and deeds had shortly thereafter been issued by the commissioner to the purchasers of the various parcels of property.[188] It appears that the disbursement to Eaton and William Gray of the proceeds of the judicial sale — the $70,000 realized upon the sale of property appraised at $237,000 — was withheld until the final judgment of November 21, 1856, was entered. The disbursement of the proceeds presumably occurred forthwith, there being no mention of the judgment having been stayed pending what the appellees attacked, unsuccessfully, as a long-belated appeal.[189]

Upon reversal the appellants apparently had the right to whatever restitution of the proceeds of the reversed judgment might be obtained retroactively from the appellees.[190] One doubts that there was anything left to disgorge. In any event, attorney Galpin now set forth upon a relentless campaign to regain the lost property by collaterally attacking the validity of the district court proceedings through a series of diversity-based ejectment actions in the federal circuit court in San Francisco against those who had purchased the property at the judicial sale of May 3, 1856. He proved to be the Terminator of his time.

The hapless purchaser in *Gray v. Brignardello*[191] had, the Supreme Court of the United States conceded in its statement of facts, bought his parcel in good faith and for a fair price of over $19,000.[192] But when he sought to introduce the record of *Gray and Eaton v. Palmer* to establish the validity of his title, it did not contain the decree of April 7, 1858, by which the commissioner had purportedly been authorized to proceed with the sale. The court below had upheld the legality of a *nunc pro tunc* order amending the missing decree at the time of the confirmation of the sale on May 14, 1858, but the Supreme Court reversed in a scathing opinion which made clear its view

---

[188] Galpin v. Page, 85 U.S. (18 Wall.) 350, 355 (1874); Galpin v. Page, 9 F. Cas. 1113, 1115 (C.C.D. Cal. 1870) (No. 5205) (Sawyer, J.).

[189] Gray v. Palmer, 9 Cal. 616, 634-35 (1858); *see also id.* at 621-23, 628 (arguments of counsel).

[190] *See* Galpin v. Page, 85 U.S. (18 Wall.) 350, 374 (1874) (discussing California law on consequences of reversing judgment on appeal).

[191] *Gray*, 68 U.S. (1 Wall.) 627 (1864).

[192] *Id.* at 629.

HeinOnline -- 28 U.C. Davis L. Rev. 650 1994-1995

that the purported decree of April 7th was factitious, and that the *nunc pro tunc* order was an attempt to validate retroactively an unauthorized judicial sale. The judicial sale was therefore void, and Brignardello held no title to the property in question.[193]

The first recorded litigation of the claim that title conferred by the judicial sale was invalid for lack of personal jurisdiction over the infant Franklina occurred in *Gray v. Larrimore*.[194] The trial was heard by Circuit Justice Field, who had participated in the decision of *Brignardello* in his first year on the Supreme Court. To Field's evident astonishment, the "missing" decree of April 7, 1856, had in the meantime come to light, having "lain unknown" for "nearly nine years . . . in the desk of the commissioner" to whom it was directed.[195] "It may well be doubted whether, under these circumstances, the decree should have been received in evidence," Field opined after permitting it to be introduced over Galpin's objection as attorney for Matilda and Franklina.[196] He determined that "the question of its admissibility" was rendered moot by "the conclusions reached on other grounds."[197] Thus began Justice Field's personal odyssey

---

[193] *Id.* at 635-36.

[194] 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721). The Supreme Court of California had reversed, as to Franklina only, the judgment of the district court in Eaton's suit in equity, holding that the court lacked personal jurisdiction over Franklina because Eaton, unlike William Gray, had failed to specify in his affidavit in support of service of process by publication where in New York the defendants Matilda and Franklina resided. Since William Gray's affidavit had stated that they resided in Brooklyn, New York, Eaton's omission was inexcusable and resulted in the crucial failure of the district court to direct that a copy of the summons and complaint be mailed to the defendants. Matilda's appearance by counsel had cured the defect as to her, but not as to Franklina. The Supreme Court of California sustained the sufficiency of the proof of service of process upon both Matilda and Franklina in William Gray's suit against them, over the objection that the affiant by whose declaration the service of process by publication was proved was described as "clerk in the office of the Placer Times and Transcript" rather than, as the statute required, "principal clerk." The court held that since the affidavit otherwise made clear that the affiant was the *only* clerk in the office, he could not properly describe himself as the "principal" clerk and the statute did not so require. The judgment in William Gray's suit in equity was reversed on the merits as to all parties, however, as against the weight of the evidence. The Supreme Court of California did not address in its opinion the effect of its rulings on the "sale . . . of the estate" that it acknowledged, in its statement of facts, had already occurred. Gray v. Palmer, 9 Cal. 616, 621, 637-38, 640-41 (1858).

[195] *Gray*, 10 F. Cas. at 1031.

[196] *Id.* at 1027, 1031.

[197] *Id.* at 1031.

HeinOnline -- 28 U.C. Davis L. Rev. 651 1994-1995

into the validity of state-court assertions of personal jurisdiction over nonresidents that culminated in his opinion in *Pennoyer v. Neff.*

In brief, he held that no personal jurisdiction had been obtained over Franklina, a nonresident served with constructive process by publication. The common-law doctrine, that the jurisdiction of a court is presumed upon a collateral attack of its judgment unless the record affirmatively shows the contrary, was inapplicable to courts of special rather than general jurisdiction. A court of general jurisdiction could "exercise only a limited and special jurisdiction" over persons beyond the territorial scope of their process as determined "in accordance with the common law."[198] No presumption of jurisdiction existed in the case at bar because on the face of the complaints Franklina was alleged to be a nonresident. The burden was on the defendants to show that by the means provided by statute, jurisdiction was nonetheless acquired over her. Because that statute was "in derogation of the common law," it was incumbent on the defendants to show that it was "strictly pursued."[199] On the grounds cited by the Supreme Court of California in reversing the final decree after the sale of the property, and on other grounds as well, the service of process by publication on Franklina was defective, and "the district court [n]ever acquired jurisdiction of the person of the infant, Franklina. As to her, the alleged record of that court is no record."[200] Her interests could not be represented by her mother, but only by a properly appointed guardian ad litem, and the district court lacked the power to appoint such a guardian "until service on the infant is effected."[201] The widow and child jointly held an undivided interest in common in the estate of Franklin Gray, and no adjudication could be made of the mother's interest standing alone absent the proper joinder of the infant to the litigation. "[T]he child, Franklina, was an indispensable party to any valid adjudication of the facts of partnership and debt, and consequently any binding decree for the sale of the alleged

---

[198] *Id.* at 1028.
[199] *Id.*
[200] *Id.* at 1029.
[201] *Id.*

HeinOnline -- 28 U.C. Davis L. Rev. 652 1994-1995

partnership property."[202] Therefore the proceedings in the district court were as void as to the mother as they were as to the child.[203]

This analysis was followed uneventfully in a subsequent decision in the federal circuit court, *Gray v. Murphy*.[204] But the final recorded case, *Galpin v. Page*,[205] developed into an epic rather than a footnote.

The defendant in possession was Lucy Page, presumably the wife or daughter of Gwym Page, the attorney for William Gray who had purchased the property at the judicial sale ordered in the course of the litigation he was conducting on William Gray's behalf.[206] Gwym Page had conveyed a half-interest to his law partner, J.B. Crockett. Lucy Page inherited Gwym Page's remaining half-interest, and received Crockett's half-interest by conveyance from Crockett.

The plaintiff seeking possession was Philip Galpin, the attorney who had represented Matilda and Franklina Gray since 1857 and who claimed title as their successor in interest.[207] In

---

[202] *Id.*

[203] *Id.* at 1029-30.

[204] *Id.* at 1034. The cited reference notes that this case is cited in Galpin v. Page, 9 F. Cas. 1126 (C.C.D. Cal. 1865) (No. 5206), but states that the decision is "[n]owhere reported." In *Galpin*, where Justice Field is writing the opinion of the circuit court on remand from the Supreme Court, he says that the "doctrines" of his *Larrimore* opinion "were followed in the subsequent case of Gray v. Murphy, and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the circuit court." *Id.* at 1130. The "present circuit judge" to whom Field refers is Circuit Judge Sawyer of the District of California, whose decision at the first trial of *Galpin v. Page* had been reversed by the Supreme Court in an opinion by Justice Field. *See* Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874), *rev'g* 9 F. Cas. 1113 (C.C.D. Cal. 1870) (No. 5205).

[205] 85 U.S. (18 Wall.) 350 (1874), *rev'g* 9 F. Cas. 1113 (C.C.D. Cal. 1870) (No. 5205) (Sawyer, J.), *on remand* 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206) (Field, C.J.).

[206] These facts are distilled from Justice Field's opinion for the Court in Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874); the opinion of Circuit Judge Sawyer in the decision reversed therein by the Supreme Court, Galpin v. Page, 9 F. Cas. 1113 (C.C.D. Cal. 1870) (No. 5205); and the opinion of Circuit Justice Field on remand from the Supreme Court, Galpin v. Page, 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206).

[207] This conveyance apparently occurred early on in their relationship, since Justice Field in his circuit court opinion refers to his claim of title as based on "proper mesne conveyances and proceedings in the probate court of the city and county of San Francisco." 9 F. Cas. at 1127. A "mesne" proceeding is interlocutory, so such a conveyance would have occurred while the probate of the estate of Franklin Gray was still pending. This makes it likely that the conveyance took place between the time of the final district court decree in favor of William Gray and Eaton against Matilda and Franklina Gray on

HeinOnline -- 28 U.C. Davis L. Rev. 653 1994-1995

keeping with the muddy circumstances of the case, the waterfront parcel on San Francisco Bay was submerged until mid-1867, when Lucy Page began filling it in with solid earth. This process of reclamation took six to eight months. Shortly after it was completed Galpin filed his suit to eject Page, on April 17, 1868. The value of the lot was $10,000. The value of the reclamation was $1,490, which Justice Field held to be offset in full by its rental value between the time Galpin sued and the time he was finally awarded. As he had previously done on behalf of his former clients and fellow New York citizens, Matilda and Franklina, Galpin was able to invoke diversity jurisdiction to bring his ejectment action in the federal circuit court for the District of California.

Galpin's first trial in the circuit court went badly. The trial judge was Lorenzo Sawyer, who prior to his appointment as a federal circuit judge in 1870 had served for six years, from 1863 to 1869, as a justice of the Supreme Court of California.[208] Without specifically citing Field's opinion in *Gray v. Larrimore*,[209] Sawyer noted that "[s]ince the trial of other cases in this court involving titles derived under the same sale," the case of *Hahn v. Kelly*,[210] had clarified and "settle[d] the law of California upon the subject," and the law was "binding upon this court, which, in the present action, is only administering the laws of the state of California."[211] Under *Hahn* and its "sound and well established legal principles, often recognized by adjudications of the supreme court of the United States," Sawyer had "no doubt that upon the face of the record in the consolidated actions of *Gray v. Palmer, Eaton, et al.*, and *Eaton v. Palmer et al.*, when presented in a collateral proceeding, the court must be held to have acquired jurisdiction of the person of Franklina C. Gray, for the purposes of determining her

---

November 21, 1856, and the filing of the notice of appeal by Galpin in the Supreme Court of California on behalf of Matilda and Franklina on October 7, 1857, *see* Gray v. Palmer, 9 Cal. 616, 617 (1858), and hence was part of the financial arrangement by which Galpin undertook his representation of Matilda and Franklina.

[208] JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 436 (2d ed. 1983).

[209] 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721).

[210] 34 Cal. 391 (1868).

[211] *Galpin*, 9 F. Cas. at 1117.

HeinOnline -- 28 U.C. Davis L. Rev. 654 1994-1995

rights in the subject matter of those actions."[212] Sawyer rejected entirely Field's theory that no presumption of jurisdiction was applicable where jurisdiction was based on service of process by publication on a nonresident. Instead he wrote an extended panegyric to and justification of the contrary reasoning of *Hahn* — perhaps not surprisingly, since in his former capacity as one of the three justices of the Supreme Court of Califor-

---

[212] *Id. Hahn* had fortified the judgments of California courts from collateral attack in four significant ways.

First, it held (overruling two then-recent cases) that the "record" placed in issue by a collateral attack on the validity of a default judgment consisted only of the "judgment roll," which as statutorily defined included neither the affidavit of the plaintiff upon which the court had relied in deciding that the statutory prerequisites for service by publication, were satisfied as to a given defendant in a given case, nor the order of the court detailing how the service of publication was to proceed. Thus, there would be no way to establish on the face of the record that the affidavit, even if truthful rather than fraudulent, did not in fact attest to the statutory prerequisites for service by publication, or that the nature of the published notice attested to in the return of service complied with the order of the court. Hahn v. Kelly, 34 Cal. 391, 402-05 (1868).

Second, it held that any jurisdictional fact absent from the record — conceived in this limited sense, and even if contradicted by other facts that might be considered "of record" but not recorded on documents included as part of the "judgment roll" — would be presumed to exist so as to support jurisdiction. *Id.* at 405.

Third, it held that if the judgment itself contradicted the facts set forth in the other documents of the record, *i.e.*, the "judgment roll," the statements of the court in its judgment would control insofar as they supported rather than contradicted the existence of jurisdiction. *Id.* at 407-08.

Fourth, it held that this virtually impregnable presumption of the requisite jurisdictional facts was applicable even when the record showed that the defendant was served by publication or that in any other respects the assertion of jurisdiction was not "'according to the course of the common law,'" *id.* at 409, a concept it mocked as one used

> mainly for ornamental purposes. It has a certain rotundity of sound which is quite pleasing to the ear, but leaves no definite impression upon the understanding. It is simply equivalent to a knowing look or a solemn shake of the head, and doubtless it was first used in that sense. When first employed its use was harmless, for there was then no mode of procedure except as the common law prescribed; but its continued use, where the modes of the common law have been superseded, is mischievous.

Id. at 411-12.

This fourth point, it should be noted, served implicitly but unmistakably to reject Justice Field's reasoning in Gray v. Larrimore, 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721), which had been expressly cited to the court by counsel for the defendants/respondents as the basis for a collateral attack on a default judgment and ensuing judicial sale by which the plaintiff/appellant claimed superior title as against the defendants/respondents. *Hahn*, 34 Cal. at 402. The judgment in issue had been rendered after service of process by publication on the defaulting defendant, who was absent from the state and apparently a resident of Washington, D.C. *Id.* at 395, 401.

HeinOnline -- 28 U.C. Davis L. Rev. 655 1994-1995

nia he had joined the court's opinion in *Hahn*.[213] Judge Sawyer also ruled alternatively that even if, as the California Supreme Court later determined, the decree of the district court was invalid on its face with respect to Eaton's suit for lack of personal jurisdiction over Franklina, this had no effect on the validity of the judicial sale of the decedent's property. Although the two suits had been consolidated, the claims of William Gray and Eaton were several, not joint. There was no facial jurisdictional defect as to William Gray's suit, and the judicial sale was independently necessary in the course of that litigation.[214] And just to make sure that the tail of the lion was well and truly pulled, Judge Sawyer added that he was dubious that Franklina was really such an indispensable party that a lack of jurisdiction over her would void the entire transaction. "I only allude to the point," he wrote, "for the purpose of calling attention of plaintiff's counsel and the appellate court more particularly to it, in case the cause should be taken to the supreme court for review, and my view upon the main proposition should be found erroneous."[215]

The lion roared in reply. Justice Field's opinion for the Court described the ruling of Judge Sawyer and the position taken by Page on appeal as embracing basically the same two points. First, that since the district court was a court of general jurisdiction, it was conclusively presumed to have acted within its jurisdiction except insofar as a lack of jurisdiction was apparent on the face of the record; and second, that a sale made under a presumptively valid decree was unaffected by the subsequent reversal of that decree.[216]

The Court expressed skepticism about Judge Sawyer's ruling on the second point, declaring that "[j]udgment without jurisdiction is unavailing for any purpose"[217] and noting that under the common law of many states, parties and their attorneys are not entitled to "[t]he protection which the law gives to a purchaser at judicial sales" who has no knowledge of jurisdic-

---

[213] *See Hahn*, 34 Cal. at 421 (Sawyer, J., concurring specially) ("I concur in the judgment, and the reasoning of my brother, Sanderson, upon which it is sustained.").

[214] Galpin v. Page, 9 F. Cas. 1126, 1124-25 (C.C.D. Cal. 1865) (No. 5206).

[215] *Id.* at 1126.

[216] Galpin v. Page, 85 U.S. (18 Wall.) 350, 364 (1874).

[217] *Id.* at 373.

HeinOnline -- 28 U.C. Davis L. Rev. 656 1994-1995

tional defects.[218] "As this case must go back for a new trial, this position can be more fully considered than it appears to have been by the court below."[219]

With respect to the first point, the Court ruled that Judge Sawyer had erred both in his conception and application of the governing law. Arguably one or the other half of the Court's double-barrelled reasoning was dicta, but which was the holding and which was not could be endlessly disputed.[220] Even by Judge Sawyer's test the decree in question was invalid, since the record of the prior judgment included the proceedings in the Supreme Court of California reversing the decree for lack of jurisdiction over Franklina. Justice Field added that, in virtue of the consolidation of the cases by the district court, the reversal of the decree necessarily extended to the whole decree, and not just that portion directed to the formerly separate suit brought by Eaton.[221] Thus by the terms of Judge Sawyer's own rule, the presumption of jurisdiction which he invoked was

---

[218] *Id.*

[219] *Id.* at 375.

[220] On remand Field referred to each of the alternative grounds as holdings. *See* Galpin v. Page, 9 F. Cas. 1126, 1130 (C.C.D. Cal. 1874) (No. 5206).

It should be noted that the reversal of the judgment below required remand of the case for a new trial. Where an appellate court affirms the judgment below and leaves nothing further for the court below to do, as in *Pennoyer v. Neff*, the statement of alternative grounds for decision clearly involves some degree of dicta — although it often becomes a nice question which of the alternatives should be treated as the "holding" and which as the "dictum." Where an appellate court is remanding the case for further proceedings consistent with its opinion, it is generally considered good practice for the court to "instruct" the court below on issues beyond the scope of the opinion at hand in order to minimize the chance of further error and successive appeals. Further license is commonly assumed by courts of last resort, in their "institutional" as opposed to "error correction" function, to address misperceptions of law in reported decisions of lower courts that may be mooted by reversal on other grounds, but may cause confusion, induce error, and propagate unnecessary appeals from other courts if allowed to stand uncorrected.

Judge Sawyer's decision in *Galpin v. Page* was widely circulated, having been reported by Judge Sawyer himself at 3 Sawy. 93. From 1870 (when he was appointed to the circuit court) until 1891 (when he died), Judge Sawyer was the unofficial reporter of opinions of the circuit and district courts within the Ninth Circuit. Commencing in 1873 they were published by the A.L. Bancroft Company of San Francisco, the precursor of the current Bancroft-Whitney publishing firm. *See generally* LORENZO SAWYER, REPORTS OF CASES DECIDED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE NINTH CIRCUIT. *Cf. also* JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 436 (2d ed. 1983) (biographical data on Judge Sawyer).

[221] 85 U.S. (18 Wall.) at 364.

HeinOnline -- 28 U.C. Davis L. Rev. 657 1994-1995

rebutted on the face of the record in question.[222] But Justice Field went on at length to declaim against the applicability of a "universally true" rule of presumptive jurisdiction when the judgment of a court of general jurisdiction was collaterally attacked.

"It is subject to many exceptions and qualifications," he declared, "and has no application to the case at bar."[223] For one thing, the presumption operated only to remedy the lack of "jurisdictional facts concerning which the record is silent,"[224] and did not permit a court to disregard facts inconsistent with jurisdiction that might appear on the face of the record. But this was merely an ancillary point. The crux of his opinion followed. "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law."[225] After supporting this proposition with citations to authority, he connected his primary and secondary arguments as follows. It is the beginning of the second paragraph of this passage that Borchers cites as irreconcilable with Field's subsequent opinion in *Pennoyer v. Neff.*

> Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. It is a rule as old as the law, and never more to be respected than now, that *no one shall be personally bound* until he has had his day in court, by

---

[222] *Id.* at 365.
[223] *Id.*
[224] *Id.* at 366.
[225] *Id.* at 367.

HeinOnline -- 28 U.C. Davis L. Rev. 658 1994-1995

> which is meant, *until he has been duly cited to appear,* and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.
>
> *When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions.* And such has been the ruling, we believe, of the courts of every State in the Union. It has been so held by the Supreme Court of California in repeated instances.[226]

Justice Field cited a number of California Supreme Court decisions in support of his "repeated instances" claim, but did not expressly address the contrary authority of *Hahn v. Kelly*[227] upon which Judge Sawyer had relied for his rebuke[228] of Field's decision in *Gray v. Larrimore.*[229] He did, however, refer to *Hahn* indirectly at the beginning of the final sentence of his summary of why the normal presumptions of jurisdiction evaporated on the facts of record in the consolidated action collaterally attacked by Galpin in his suit to eject Page.

> In the supplemental complaint filed in the action of *Gray v. Eaton* and others, and in the original complaint of *Eaton v. Palmer,* the absence of Franklina from the State and her residence in another State are alleged. The record in the two actions, and of course in the consolidated action, shows that she was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the District Court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which

---

[226] *Id.* at 368-69 (emphasis added).

[227] 34 Cal. 391 (1868). For a summary of the contrary principles announced in *Hahn, see supra* note 212.

[228] Galpin v. Page, 9 F. Cas. 1113, 1117, 1120 (C.C.D. Cal. 1870) (No. 5205).

[229] 10 F. Cas. 1025 (C.C.D. Cal. 1865) (No. 5721).

HeinOnline -- 28 U.C. Davis L. Rev. 659 1994-1995

> must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. *If there is any different course of decision in the State* it could hardly be expected that it would be followed by a Federal court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued.[230]

Borchers claims that in *Galpin*, "Field clearly stated that states were free to pass statutes extending their reach beyond the territorial principles; Field's analysis simply required a narrow reading of such statutes."[231] Borchers declares *Galpin* to be inconsistent with Field's later opinion in *Pennoyer* because Field reviewed in *Galpin* "the same principles of international law that the Court had consistently applied in cases of *interstate* recognition of judgments," and which were later invoked in *Pennoyer* to deny recognition to the underlying Oregon judgment in *Mitchell v. Neff*. He reasons that at the time of *Galpin*, Field must have been committed to an unannounced distinction between "interstate" and "intrastate" principles of judgment-recognition.

> Had these principles [of international law limiting extraterritorial assertion of personal jurisdiction over non-residents of the forum state] been fully applicable in an *intrastate* recognition case such as *Galpin*, . . . the case would have been decided swiftly because the underlying defendant [Franklina] was not personally served, and no appearance was made on her behalf. Noncompliance with the territorial principles of jurisdiction, however, was not a sufficient basis for Field to decide *Galpin*. After reviewing the record and

---

[230] 85 U.S. (18 Wall.) at 372-73 (emphasis added).

[231] Borchers, *supra* note 1, at 32. Borchers supports this statement with a footnote in which he quotes the single sentence of *Galpin* italicized above, beginning with "When, therefore, by legislation of a State" and ending with the phrase "every principle of justice exacts a *strict and literal compliance with the statutory provisions*." *Id.* at 32 n.76 (emphasis added by Borchers).

HeinOnline -- 28 U.C. Davis L. Rev. 660 1994-1995

> territorial principles, Field concluded that the state court lacked jurisdiction [only] because service did not comply with the state's "service by publication" statute.[232]

Borchers invokes this analysis of *Galpin* in support of his "inescapable inference" claim that Field omitted reference to *Galpin* in *Pennoyer* because "the rationales, if not the holdings, of the cases were inconsistent."[233]

> *Galpin* involved facts almost precisely parallel to Pennoyer. Both *Pennoyer* and *Galpin* centered on the problem of recognition by a federal court of a state court judgment, based on service by publication, rendered in the federal court's home state. Moreover, both cases were decided after ratification of the fourteenth amendment. In *Galpin*, Field treated the problem of recognition as one of statutory construction, never invoking the fourteenth amendment, and specifically affirming the right of states to exercise jurisdiction beyond the confines of the territorial rules of jurisdiction. Field conspicuously ignored *Galpin* in *Pennoyer*, however, neither citing nor discussing it.[234]

In his cursory account of *Galpin*, Borchers makes a false assumption. He treats Field's discussion of one criterion for the validity of a personal judgment by default against a nonresident — the requirement of strict compliance with local law — as if satisfaction of that one criterion alone were both a necessary and a sufficient condition for a valid judgment. *Galpin* established only that this criterion was a necessary condition of validity. Nothing in *Galpin* supports Borchers's assumption that this necessary condition was also a sufficient condition.

Judge Sawyer had held that all necessary jurisdictional facts were presumed to exist unless contradicted on the face of the record. The Supreme Court said that this was error even by Judge Sawyer's own terms, since the reversal of the underlying judgment (authorizing sale of the land) established the lack of personal jurisdiction over Franklina on the face of the record. Continuing on in a dictum or an alternate holding, the Supreme Court said in that part of *Galpin* here in issue that the fact of Franklina's nonresidency also appeared on the face of

---

[232] *Id.* at 31-32 (footnotes omitted).

[233] *Id.* at 38.

[234] *Id.*

HeinOnline -- 28 U.C. Davis L. Rev. 661 1994-1995

the record, and thus Judge Sawyer had erred in invoking a presumption of jurisdictional facts. The statutory authorization for constructive service of process, when strictly construed as a statute in derogation of the common law, required that the order of publication and the affidavit of compliance with it must appear in the record. Since this material was absent from the record, the underlying judgment was invalid. Judge Sawyer's ruling to the contrary was reversed and the case was remanded for a new trial in order to determine the effect of the invalidity of the judgment on the title that had passed under that judgment.

Having declared that "no one shall be personally bound . . . until he has been duly cited to appear,"[235] and having ruled that Franklina had not been "duly cited" in the manner prescribed by local law, the Supreme Court did not rule on whether service in strict conformity to local law was both a necessary *and sufficient* condition of being "duly cited," or whether some other necessary condition would also have to be satisfied before a nonresident could be "duly cited," such as service within the state in person or on a valid agent. Field's opinion for the Court nowhere "clearly stated" or "specifically affirm[ed]" that an extraterritorial personal judgment of a state court ought to be given effect if indeed there had been strict compliance with the letter of a state statute purporting to authorize such an overreaching judgment.

Certainly there is no basis for reading the opinion as implying what it does not say explicitly. The opinion drips with scorn for states' attempts to assert jurisdiction over persons beyond the territory over which they are sovereign; the denunciation of this practice is the nerve of the condemnation of Judge Sawyer's jurisdictional presumption after the initial observation that it was by its own erroneous terms inapplicable to the facts of the case at hand. Nothing in the Supreme Court's opinion supports Borchers's contention that it turned on the relevance in a federal court of his distinction between "interstate" and "intrastate" issues of judgment-recognition. But there are specif-

---

[235] Galpin v. Page, 85 U.S. (18 Wall.) 350, 368 (1874).

HeinOnline -- 28 U.C. Davis L. Rev. 662 1994-1995

ic passages in the Supreme Court's opinion which powerfully support a contrary inference.[236]

As the major part of the Justice Field's opinion for the Court in *Galpin* shows, and as Justice Field's opinion in the circuit court on remand irrefutably confirms, Field's target in *Galpin* was the invidious assault on common-law principles of jurisdiction and presumptions of jurisdictional facts that Judge Sawyer had carried over into the federal courts by his exuberant reliance on *Hahn v. Kelly*.[237] Assuming — as I have argued is the more plausible reading[238] — that the Court in *Pennoyer* did not simply construe the Oregon jurisdictional statute to have incorporated common-law limitations on extraterritorial personal jurisdiction over nonresidents, *Pennoyer* posed the question that *Galpin* did not, once Judge Sawyer's presumption of jurisdiction was countermanded: if a plaintiff fully complied[239] with a state statute in derogation of the common law authorizing extraterritorial personal jurisdiction over a nonresident, was the ensuing default judgment to be recognized as valid by a federal court?

---

[236] Field declared that "[t]he tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy." *Id.* at 367. This is hardly compatible with Borchers's claim that the Court assigned talismanic importance to state lines for purposes of determining whether a *federal* "forum" must indeed give effect to such "an act of usurpation." Field also made pointed reference to "the lesson" that might does not make right in discussing commentary on the necessity for strict compliance with jurisdictional statutes in derogation of the common law, declaring that the commentators "very justly observe that, 'the inconveniences which may occasionally result from this course of decision are more than compensated by the lesson which it teaches, that from whatever source power may come it will fail of effect when unaccompanied by right.'" *Id.* at 372 (citing 1 SMITH'S LEADING CASES 1012).

[237] 34 Cal. 391 (1868). Sawyer's reliance on *Hahn* is discussed *supra* at text accompanying notes 210-13.

[238] *See supra* note 156 and accompanying text.

[239] As discussed above, Judge Deady ruled at the circuit court level in Neff v. Pennoyer, 17 F. Cas. 1279, 1286-88 (C.C.D. Or. 1875) (No. 10,083), that Mitchell had not fully complied with the technical requirements of the state statute for service of process by publication on Neff. But in paragraph 4 of Field's opinion for the Supreme Court in Pennoyer v. Neff, 95 U.S. 714, 721 (1878), Field declared that despite "some difference of opinion" the majority view of the Supreme Court thought otherwise, and thus "[i]f . . . we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision." *See supra* text accompanying notes 55-56.

HeinOnline -- 28 U.C. Davis L. Rev. 663 1994-1995

The fact that *Pennoyer* was thus distinguishable from *Galpin* does not fully explain, however, why Field did not at least cite to *Galpin* in his *Pennoyer* opinion. An adequate assessment of the circumstances requires a look at what happened in *Galpin* after the Supreme Court's reversal of Judge Sawyer. Justice Field tried the case on remand, and wrote an opinion whose significance to this issue can hardly be overstated.[240]

Field began his substantive analysis by denying that Galpin's suit was, in the conventional sense, a collateral attack on the validity of the judgment in the underlying litigation involving the estate of Franklin Gray. The invalidity of that judgment had already been established by direct attack, given the judgment on appeal of the Supreme Court of California reversing the judgment below for, among other reasons, the lack of personal jurisdiction over Franklina.[241] At the end of his opinion, Field turned to examining the consequences of this binding adjudication of invalidity on the title which had purportedly passed at the judicial sale held prior to the reversal and invalidation of the underlying judgment by the Supreme Court of California.[242] But by far the major part of the opinion consisted of admitted dicta,[243] in which Justice Field excoriated the reasoning of *Hahn v. Kelly* and specifically declared it not to be binding on federal courts when considering the validity of California state-court judgments.

Field gave two reasons, both rooted in Acts of Congress, why *Hahn* was not controlling of proceedings in federal court. The first and narrower reason was based on the Rules of Decision Act[244] as construed in *Swift v. Tyson*.[245] Insofar as *Hahn* dealt

---

[240] Galpin v. Page, 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206).

[241] *Id.* at 1131.

[242] *Id.* at 1138-39.

[243] As Field put it, "We do not regard the case at bar as one where any collateral attack is made upon a judgment of a superior court of general jurisdiction." The relevant "grounds of invalidity" had already been established by direct attack on appeal to the Supreme Court of California, which had vacated the judgment upon which Page relied for superior title to Galpin. "We will nevertheless examine the positions advanced by the supreme court of the state in [*Hahn v. Kelly*]." *Id.* at 1131.

[244] Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1988)).

[245] 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938). Field did not cite *Swift*, but did quote two later cases in which the Supreme Court had restated the same principles. *See* 9 F. Cas. at 1131 (quoting Chicago City v. Robbins,

HeinOnline -- 28 U.C. Davis L. Rev. 664 1994-1995

with *presumptions of jurisdiction* that operated to immunize a judgment from a showing, on the face of the record, that the judgment was based on an assertion of jurisdiction that did not meet state statutory criteria for such jurisdiction, it addressed matters of general common law which the federal courts had independent authority to construe and apply.[246]

The second and more general reason was based on the Full Faith and Credit Act,[247] which while extending the constitutional obligation of full faith and credit to "mak[e] its provisions applicable to the national courts, as well as the courts of the states," gave that obligation "the same construction in its application to the national courts as to the state courts. It leaves untouched the general principle that the jurisdiction of every court is open to inquiry, when produced in the courts of another sovereignty."[248] In language that would be repeated virtually word for word three and one-half years later in paragraph 19 of *Pennoyer*, Field declared that "whilst the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of state courts only the same faith and credit which the courts of another state are bound to give them."[249] By way of illustration, Field noted that "[t]he circuit

---

67 U.S. (2 Black) 418, 429 (1862); Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 689 (1872)).

Swift was not regarded as particularly noteworthy until it was overruled by Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938). More familiar to lawyers in death than it ever was in life, it now stands as a leading symbol for the jurisprudence of an entire era — of which Field, *Pennoyer*, and *Galpin v. Page* were very much part.

[246] Field's discussion of the "Swift v. Tyson" issue on remand in *Galpin*, 9 F. Cas. at 1131-32, was foreshadowed by his previous statement for the Supreme Court in *Galpin* that the federal courts would not be bound by state court decisions construing the California statute authorizing extraterritorial service of process or limiting collateral attack on the validity of a judgment for lack of compliance with that statute.

> If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued.

Galpin v. Page, 85 U.S. (18 Wall.) 350, 373 (1874).

[247] Act of May 26, 1790, ch. 11, 1 Stat. 122.

[248] *Galpin*, 9 F. Cas. at 1132.

[249] *Id.* at 1131.

HeinOnline -- 28 U.C. Davis L. Rev. 665 1994-1995

court of the United States for the district of California has the same authority to examine into the jurisdiction of a state court of California, when its judgment is produced, as the circuit court of the United States for the district of New York has, when the same judgment is produced in that tribunal."[250]

So much for the idea that in writing for the Supreme Court in *Galpin*, Field had somehow committed himself to Borchers's imaginary "interstate" versus "intrastate" distinction, which he "struggled" to overcome in *Pennoyer* through a reinterpretation of the Full Faith and Credit Act that "contradicted *Galpin*." Field's opinion for the Supreme Court in *Galpin* was filed May 4, 1874; his opinion in the circuit court on the retrial of *Galpin* was filed August 31, 1874. Field may have decided on the train trip west to put *another* nail in the common-law coffin of *Hahn v. Kelly* by using the retrial as the forum to discuss in dicta why, even if California codified in statute the errant view of presumptions of jurisdiction with which *Hahn* and Judge Sawyer had infected the common law, state judgments could not thus be immunized from invalidation in federal court. But it is hopeless to claim that *Pennoyer*'s elevation of Field's views on the Full Faith and Credit Act to the law of the Supreme Court was either a "struggle" or a "contradiction." The "inescapable inference" is that Borchers erred so greatly only because he had not read Field's subsequent *Galpin* opinion.

Field went on in his circuit court opinion in *Galpin* to draft other portions of what became his opinion for the Court in *Pennoyer*. He rehearsed the main lines of his *Pennoyer* analysis as to the territorial limits of personal jurisdiction,[251] the exception of "personal status" cases from these limits,[252] and the residual authority of states to permit "'substantially a proceeding in rem'" to be adjudicated against a nonresident by attachment of property,[253] citing *Cooper v. Reynolds*[254] for the proposition that in such a case, "'if there is no appearance of the defendant, and no service of process on him, the case becomes, in

---

[250] *Id.* at 1132.
[251] *Id.* at 1133.
[252] *Id.*
[253] *Id.* at 1134.
[254] 77 U.S. (10 Wall.) 308 (1870).

HeinOnline -- 28 U.C. Davis L. Rev. 666 1994-1995

its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.'"[255] He even offered a preliminary sketch of his due process dictum in *Pennoyer*.

> But over property and persons with [the territorial] limits [of common-law jurisdictional principles] the authority of the state is supreme, *except as restrained by the federal constitution*. . . . In this state, the statute, in terms, allows a constructed or substituted service [on nonresidents] in all cases, . . . whether the action be directed against the property within the state, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident [except in attachment or other in rem cases, or in personal status cases], it cannot be sustained as a legitimate exercise of legislative power. . . . *The validity of the statute* can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court . . . or to cases where the action relates to the personal status of the plaintiff in the state.[256]

Field went on to note that the "attachment of the property of a non-resident is allowed by the law of this state," *i.e.*, California, and that this "affords sufficient protection to citizens of the state without the assumption of any territorial jurisdiction over non-residents."[257] In his first iteration of the famous phrase that he was to use in *Pennoyer* as prologue to denying recognition to Mitchell's judgment against Neff, he next declared: "Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law."[258] Lest there be any doubt about the impending merger of "natural justice" and "constitutional law," Field made the connection clear.

> A substituted service is usually made in the form of a notice published in the public journals, as in this state. "But such notice," says Cooley (page 404), in his treatise on Constitutional Limitations, "is restricted in its legal effect, and

---

[255] *Galpin*, 9 F. Cas. at 1134 (quoting *Cooper*, 77 U.S. (10 Wall.) at 318).

[256] *Id.* at 1133 (emphasis added).

[257] *Id.*

[258] *Id.*

HeinOnline -- 28 U.C. Davis L. Rev. 667 1994-1995

> cannot be made available for all purposes. . . . Where a party has property in a state, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, *due process of law* would require appearance or personal service before the defendant could be personally bound by any judgment rendered."[259]

Summarizing the relationship between the previously suggested "constitutional" limits on state jurisdictional statutes in derogation of common-law principles of territorial sovereignty and the rejection by federal courts of state-court jurisdictional presumptions beyond those permitted by the common law as generally conceived, Field questioned the "competency" of state legislatures to enact "valid" state laws that would serve the selfish interests of resident plaintiffs by playing fast and loose with the common-law rights of nonresident defendants.

> Such is the constant intercourse between citizens of different states at the present time that the greatest insecurity to property would exist, if purely personal judgments obtained ex parte, without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the state. That law would be intolerable, *if valid*, which would permit citizens of another state to come into this state and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different states who have never been within the state or possessed any property therein. If such judgments could be upheld they would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. *We do not think it within the competency* of the legislature to invest its tribunals with authority having any such reach and force; *certainly no presumption* in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the state, and did not appear to the action.[260]

---

[259] *Id.* at 1134 (emphasis added).

[260] *Id.* (emphasis added).

HeinOnline -- 28 U.C. Davis L. Rev. 668 1994-1995

There is much else of interest in Field's opinion on circuit in *Galpin*, such as his taxonomy of types of in rem jurisdiction,[261] his discussion of the notice value of requiring prejudgment attachment,[262] and his determination that Page's claim of title was invalid as to both Matilda and Franklina.[263] But for present purposes, the foregoing description of Field's reasoning in *Galpin* is sufficient to rebut Borchers's claim that Field simply ignored the *Galpin* litigation because the result he wanted to reach in *Pennoyer* contradicted his previous published views.

In support of this claim, Borchers points to the fact that Justice Hunt's dissent in *Pennoyer* responds to *Galpin* as having been "cited in hostility" to the views expressed by Justice Hunt. From this Borchers speculates that Field, convinced of the inconsistency of his present reasoning and that expressed in *Galpin*, must have elected to edit *Galpin* out of his *Pennoyer* opinion. This speculation is unfounded in fact.

First, it should be noted that Hunt refers to *both* of Field's opinions in *Galpin*, at the Supreme Court and in the circuit court.[264] Even if Borchers were to insist, implausibly, that

---

[261] *Id.* at 1138. Field's taxonomy retains present authority. Field treated "true" in rem jurisdiction and "quasi in rem" jurisdiction as each consisting of two subtypes, so that overall he recognized four types of in rem jurisdiction. Modern doctrine collapses his two subtypes of "true" in rem jurisdiction in the formulation set forth in Hanson v. Denkla, 357 U.S. 235, 246 n.12 (1958), and repeated in Shaffer v. Heitner, 433 U.S. 186, 199 n.17 (1977). *See also infra* note 278.

[262] *Galpin*, 9 F. Cas. at 1138-39.

[263] Under California's view of the common law, the status of Page's predecessors in interest as counsel for one of the parties imputed to them notice of any defects in the proceedings leading to the judicial sale at which they acquired title, and thus the title they received was invalidated by the subsequent reversal of the underlying judgment. *See* 9 F. Cas. at 1139 (citing Reynolds v. Harris, 14 Cal. 667 (1860); Reynolds v. Hosmer, 45 Cal. 616 (1873)). Since the reversal of the judgment by the Supreme Court of California extended to "all the issues as to all the parties," counsel had acquired no better claim of title at the judicial sale vis-à-vis Matilda than they had vis-à-vis Franklina. "[T]heir title fell with the reversal of the decree." 9 F. Cas. at 1139. But Field also appeared to hearken back, at least implicitly, to his earlier opinion on circuit in Gray v. Larrimore, 10 F. Cas. 1025, 1029-31 (C.C.D. Cal. 1865) (No. 5721), in which he had concluded that Franklina was an "indispensable party" to the underlying litigation and that the determination by the Supreme Court of California that she had not properly been joined for lack of personal jurisdiction invalidated the entire proceedings, with respect to Matilda as well as Franklina, even as to third party purchasers at the judicial sale. "The decree as to the infant Franklina being void for want of jurisdiction in the district court over her; all proceedings founded upon such decree, so far as her rights are concerned, necessarily partake of the same infirmity." 9 F. Cas. at 1139.

[264] Pennoyer v. Neff, 95 U.S. 714, 743 (1878) (Hunt, J., dissenting) ("The case of

HeinOnline -- 28 U.C. Davis L. Rev. 669 1994-1995

these two opinions should be construed as contradictory rather than in harmony with each other, there is no possible basis to argue that Field's circuit court opinion in *Galpin* was somehow inconsistent with *Pennoyer*, of which the former opinion is virtually a first draft.

Second, both of Field's *Galpin* opinions had been cited to the *Pennoyer* Court in the arguments of counsel for both parties.[265] Thus Hunt's reference to these opinions having been "cited in hostility" to his views is explicable as a reference to the arguments of counsel for Neff as defendant in error.

Third, the very fact that Field's reasoning in *Pennoyer* was so clearly derivative of his reasoning in *Galpin* provided a good reason for Field to avoid self-reference, and to ask the majority in *Pennoyer* to adopt that reasoning on its merits and in its own right, free of any suggestion that the Court was simply deferring to the views that Field had set forth in *Galpin* in his capacity as a single Justice sitting on circuit.

Finally, the general texture of the *Galpin* case — which involved litigation in Field's home state, concerned local practices that Field had denounced in anything but dispassionate terms, and had drawn Justice Field into a public feud with Judge Sawyer and the other California Supreme Court justices who had decided *Hahn v. Kelly* — argued strongly for Field to set *Galpin* and California civil practice aside in writing for the Court why an Oregon judgment was invalid.

3. Jumping to Jurisdictional Conclusions

Besides faulting Field for the extraneous aspects of his *Pennoyer* opinion and his failure to discuss *Galpin*, Borchers identifies two more alleged infirmities in Field's treatment of the jurisdictional issues in *Pennoyer*. He asserts that Field's "now-famous dissertation on in rem and in personam jurisdiction" was both unnecessary (as to in personam jurisdiction) and un-

---

Galpin v. Page, reported in 18 Wall. 350, and again in 3 Sawyer, 93, is cited in hostility to the views I have expressed.")

[265] Brief and Argument of Plaintiff in Error at 5, 17, 19, 20, *Pennoyer*, 95 U.S. 714; Brief for Defendant in Error at 3, 5, 7, *Pennoyer*, 95 U.S. 714.

HeinOnline -- 28 U.C. Davis L. Rev. 670 1994-1995

substantiated (as to in rem jurisdiction).[266] These assertions echo those of Professor Perdue.[267]

Field's opinion was deficient in neither respect. The first allegation confuses the issues decided by the trial court with those presented on appeal. This confusion is compounded by the critics' references to a jurisdictional vocabulary that was not then in common use. I cannot identify what confusion may have produced the second allegation. There is some irony in encountering an unsubstantiated claim of a lack of substantiation, and especially where the ironic charge is flatly wrong. It is suggestive of a certain blindness to the facts that appears to characterize much of Borchers's argument from history.

1. *Was Field's discussion of in personam jurisdiction unnecessary?* Referring to Field's conclusion that Mitchell's judgment against Neff could not be upheld as a personal judgment because "the

---

[266] Borchers, *supra* note 1, at 35 & n.108. "As for in rem jurisdiction, Field concluded that the failure to attach the property at the *commencement* of the litigation foreclosed the possibility of in rem jurisdiction. Field cited no authority for this proposition . . . ." *Id.* (footnote omitted).

[267] Perdue makes these two points in the reverse of the order in which they are discussed here.

> Field's opinion is somewhat disorganized, but the essential elements can be easily summarized. First, although the opinion held that the defects in the affidavits were not a basis for a collateral attack, the Court nonetheless found a jurisdictional defect which invalidated the sale. Specifically, the Court held that quasi-in-rem jurisdiction was never acquired because Neff's property in Oregon had not been attached at the beginning of the litigation. Field thought it self-evident that the property must be attached at the beginning of the suit in order to secure quasi-in-rem jurisdiction. Field did not cite any authority for this proposition and in fact a number of states permitted quasi-in-rem jurisdiction without prior seizure. Undaunted by a lack of authority, Field reasoned that attachment at the beginning of the suit was necessary in order to prevent an unacceptable uncertainty about the validity of the judgment prior to the actual attachment of the property.
>
> The second aspect of the opinion is a discussion of why there was not in personam jurisdiction — a completely unnecessary element of the opinion. Having concluded that there was no quasi-in-rem jurisdiction the opinion could have stopped there. As Deady noted, the Oregon Code did not permit in personam jurisdiction over a nonresident, and both parties conceded that the judgment was not binding in personam. Field nonetheless proceeded to discuss at length the circumstances under which in personam jurisdiction could be exercised.

Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 497-98 (1987) (footnotes omitted).

HeinOnline -- 28 U.C. Davis L. Rev. 671 1994-1995

lack of in-state service or an appearance was fatal,"[268] Borchers adds in a footnote: "In fact, the parties did not even argue that in personam jurisdiction existed, but focused instead upon the possibility of in rem jurisdiction."[269] He relies entirely on Perdue's article to support this claim, noting that Perdue relied in turn on the opinion of Judge Deady, the federal trial judge whose ruling was affirmed in Pennoyer.[270]

Perdue relied on Judge Deady's statements that "[it] is admitted on all hands that such a judgment is not binding in personam" and that "this rule is expressly declared in the Oregon Code of Civil Procedure (section 506). . . . Neither is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt owed him by Neff."[271] Perdue appears to accept Deady's analysis as conclusive, perhaps because his perception of the issues was informed by his role as the drafter of the Oregon Code.[272]

There was no reason, however, for the Supreme Court to deem itself bound by Judge Deady's construction of the Oregon statute or his conception of the issues presented in light of that construction. For Field as well as Deady the statute could be viewed through the lens of personal history,[273] but the con-

---

[268] Borchers, *supra* note 1, at 35.

[269] *Id.* at 35 n.108.

[270] *Id.* (citing Perdue, *supra* note 267, at 498 & n.134 (citing Neff v. Pennoyer, 17 F. Cas. 1279, 1280-81 (C.C.D. Or. 1875) (No. 10,083))).

[271] *Neff*, 17 F. Cas. at 1280-81.

[272] Perdue characterizes Judge Deady's opinion as follows:

> Deady's opinion is long, careful, and quite conservative in approach. His analysis was limited to the question whether there was quasi-in-rem jurisdiction. He did not discuss whether there could have been in personam jurisdiction because, as he noted, all the parties agreed that there was no in personam jurisdiction. His approach is based solely on state statutory construction, *an area in which Deady was particularly knowledgeable since it was he who drafted the Oregon Code.* Although he acknowledged that "it is the duty of the state to deal justly and considerately with nonresidents who have property within her jurisdiction," he concluded that matters pertaining to the "mode of proceeding" are within the "absolute control" of the state.

Perdue, *supra* note 267, at 491 (emphasis added, footnotes omitted).

[273] As Justice Hunt pointed out in dissent in *Pennoyer*, 95 U.S. at 738, sections 55-57 of the Oregon Code were "nearly identical" to New York's 1848 Code of Civil Procedure. The New York Code had been drafted by Justice Field's brother David Dudley Field, Jr.,

HeinOnline -- 28 U.C. Davis L. Rev. 672 1994-1995

struction of legislation is not to be decided solely or even substantially by appeal to the diaries of its drafters. Legislation is an institutional act, not a personal epistle. The institutional meaning of the Oregon Code was facially ambiguous, however "express" it may have appeared to Judge Deady. As previously discussed, the Supreme Court decided *Pennoyer* on the basis of traditional common-law principles of territorial jurisdiction, and it is a lively but inconsequential issue whether Mitchell's judgment against Neff was invalid as a matter of local law (the Court construing the statute to have incorporated the traditional common-law principles) or as a matter of full faith and credit law (the Court refusing to recognize the judgment notwithstanding its validity as a matter of local law).[274] By either reading it was imperative to elaborate these dispositive jurisdictional principles, and that required reference to the entire spectrum of jurisdictional categories from the classically in personam to the classically in rem.

The *Pennoyer* Court's restatement of these jurisdictional principles was complicated by the as-yet inchoate status of "quasi in rem" jurisdiction as an intermediate form of jurisdiction, partaking of characteristics of both in personam and in rem jurisdiction. Pending the Court's adoption in *Pennoyer* of Field's taxonomy of in rem jurisdiction,[275] which he carried forward in less detailed form from his opinion on circuit in *Galpin*,[276] the proper jurisdictional classification of proceedings to enforce a personal obligation by proceedings "substantially . . . in rem"[277] was by no means settled. Only after *Pennoyer* did the Court's rejection of a dichotomy between in personam jurisdiction and "true" or "direct" in rem jurisdiction result in broad and standardized usage of the term "quasi in rem" jurisdiction.[278]

---

while Justice Field was his law partner. *See supra* note 118; SWISHER, *supra* note 142, at 22. Justice Field had in turn drafted the California Code of Civil Procedure. *See supra* note 118; SWISHER, *supra* note 142, at 54. "In its general character," according to Justice Hunt, the California Code of Civil Procedure was "like the Statutes of Oregon and New York." 95 U.S. at 739.

[274] *See supra* text accompanying notes 155-73 (discussing interpretive problem posed by § 506 of Oregon Code of Civil Procedure).

[275] *Pennoyer*, 95 U.S. at 734.

[276] *Galpin*, 9 F. Cas. at 1138.

[277] *Pennoyer*, 95 U.S. at 734.

[278] In the portion of *Cooper v. Reynolds* that Field quoted in developing his taxonomy,

HeinOnline -- 28 U.C. Davis L. Rev. 673 1994-1995

Thus I find it unconvincing for Perdue (and following her, Borchers) to condemn Field's "discussion of why there was not

---

the Court referred to what we would now call quasi in rem jurisdiction in mixed terms, as a situation where "the case becomes in its essential nature a proceeding in rem" because "the judgment of the court, *though in form a personal judgment* against the defendant, has no effect beyond the property attached in that suit." 95 U.S. at 725-26 (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318 (1871)).

A search for the term "quasi in rem" in Westlaw's ALLFEDS-OLD database produces a list of 136 federal cases decided prior to 1945. The database includes all reported Supreme Court cases, and the search produces 20 Supreme Court opinions. Of these, only one, an admiralty case decided in 1827, refers to "quasi in rem" jurisdiction prior to *Pennoyer*. Ramsay v. Allegre, 25 U.S. (12 Wheat.) 611 (1827). The next Supreme Court case to use the term is Freeman v. Alderson, 119 U.S. 185 (1886). Writing for the Court, Justice Field referred to "a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted." *Id.* at 187. Field's opinion in *Freeman* appears to have standardized the usage of "quasi in rem" as a form of jurisdiction exercised in actions at law. Westlaw's compilation of early reported cases of lower federal courts is the most complete available, and reveals "quasi in rem" to have been used in just four cases decided prior to *Pennoyer*. The Harrison, 9 F. Cas. 678 (D. Cal. 1870) (No. 5038) (admiralty jurisdiction); Galpin v. Page, 9 F. Cas. 1113 (C.C.D. Cal. 1870) (No. 5205) (Sawyer, J.), *rev'd*, Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874); Stillman v. White Rock Mfg. Co., 23 F. Cas. 83 (C.C.D.R.I. 1847) (No. 13,446) (equitable jurisdiction; scope of power to join interstate nuisance in state where nuisance is created); Carson v. Jennings, 5 F.Cas. 175 (C.C.D. Pa. 1804) (No. 2464) (Washington, J., on circuit) (admiralty jurisdiction).

Of these cases, *Galpin v. Page* is by far the most significant, both because it is an action at law and because the term is used in an opinion reviewed and reversed by Justice Field. But despite extensive reference to Justice Field's decisions in *Galpin* for the Supreme Court and on circuit by Judge Deady, *Neff*, 17 F. Cas. at 1281, 1283-84, 1288-89, and counsel for both parties on appeal, *see supra* text accompanying note 265, there is no reference by Judge Deady or counsel to Judge Sawyer's reversed decision at the first trial of *Galpin v. Page*, and Justice Field himself did not use the term "quasi in rem" in *Galpin*, *Pennoyer*, or any other case until *Freeman*.

It thus appears that at the time of *Pennoyer* "quasi in rem" was on the cusp of becoming a recognized term of art, but did not achieve that status until *Freeman*, a case in which the concept of quasi in rem jurisdiction was discussed in light of *Pennoyer*'s taxonomy of jurisdictional categories. In *Freeman* that taxonomy began to assume its fully modern form, as Justice Field distinguished between actions to try title to property as against a particular defendant and actions to try personal claims unrelated to the property that has been attached as the basis for the court's jurisdiction. *Compare Freeman*, 119 U.S. at 187-90 (holding that judgment for costs incidental to a (Type I) quasi in rem action upon constructive service of process against a nonresident to establish an undivided half-interest in land and to partition it accordingly, could not validly be enforced by execution against the nonresident's remaining interest in the other half of the partitioned property absent attachment of it (conferring Type II quasi in rem jurisdiction) or personal service of process on the nonresident (conferring personal jurisdiction)) *with* Hanson v. Denkla, 357 U.S. 235, 246 n.12 (1958) (framing modern distinction between Type I and Type II quasi in rem jurisdiction).

HeinOnline -- 28 U.C. Davis L. Rev. 674 1994-1995

in personam jurisdiction" as "a completely unnecessary element of the [*Pennoyer*] opinion."[279] She states that "[h]aving concluded that there was no quasi in rem jurisdiction," Field "could have stopped there" without discussing "at length the circumstances under which in personam jurisdiction could be exercised."[280] Such an appeal to hard-and-fast categories of quasi in rem as opposed to in personam jurisdiction is anachronistic and misleading given the state of the law at the time the opinion was written. Whatever Judge Deady's personal view, the text of section 506 did not identify "expressly"[281] or otherwise whether Oregon's jurisdiction over nonresidents owning property was quasi in rem jurisdiction or some limited form of personal jurisdiction "binding" on the person but enforceable "only to the extent of the property at the time the jurisdiction attached."[282]

Judge Deady framed the issues presented not only on the basis of his reading of section 506 as "expressly" abjuring in personam jurisdiction over nonresidents absent appearance or personal service of process, but also on the basis of the arguments of the parties. Yet whatever was argued before Judge Deady, and however he chose to construe those arguments, Perdue's (and Borchers's) claim that "both parties conceded that the judgment was not binding in personam"[283] must be tested against the arguments of the parties *in the Supreme Court* — the arguments that Field purportedly ignored in discussing the criteria for a valid assertion of in personam jurisdiction over a nonresident.

Pennoyer, of course, argued principally against the holdings of Judge Deady that in two respects the affidavits supporting service of process by publication were defective. But in concluding that Mitchell's judgment and Pennoyer's title should be recognized as valid once Deady's errors were corrected, Pennoyer's brief on appeal characterized the record of *Mitchell v. Neff* as showing "jurisdiction, to render the judgment therein

---

[279] Perdue, *supra* note 267, at 498.

[280] *Id.* at 498-99.

[281] Neff v. Pennoyer, 17 F. Cas. 1279, 1281 (C.C.D. Or. 1875) (No. 10,083).

[282] *Id.* (quoting § 506 of Oregon Code of Civil Procedure). *See generally supra* text accompanying notes 155-60 (discussing construction of § 506).

[283] Perdue, *supra* note 267, at 498.

HeinOnline -- 28 U.C. Davis L. Rev. 675 1994-1995

against Marcus Neff the non-resident defendant, as a means of subjecting his property in the State of Oregon and within the jurisdiction of the court to the satisfaction of the claim of one of its citizens . . . ."[284] Pennoyer asserted that he "claimed title to the property in controversy by virtue of a judgment against said Neff . . . and by virtue of an execution sale and Sheriff's deed for said premises, under said judgment."[285] In stating the "facts showing jurisdiction of the court," Pennoyer quoted and relied upon Mitchell's affidavit that asserted: "'The plaintiff has a just cause of action against defendant for a money demand on account. That this court has jurisdiction of said action. That the defendant has property in this county and State.'"[286] This does not read to me as a concession that there was no in personam jurisdiction over Neff, if that were to be deemed by the Court the best way to characterize an assertion of the power to adjudicate a concededly personal claim that had nothing whatsoever to do, on the facts of record, with the property against which that personal judgment was executed. Nowhere in Pennoyer's brief does he articulate a divide between in rem and in personam jurisdiction, much less claim the former ground and renounce the latter. Indeed, Pennoyer fastidiously avoided using either term.[287]

---

[284] Brief and Argument for Plaintiff in Error at 24, Pennoyer v. Neff, 95 U.S. 714 (1878).

[285] *Id.* at 1.

[286] *Id.* at 2.

[287] I therefore dispute Perdue's claim, based on the same brief, that "Pennoyer's argument was based solely on the *theory* that the court had *in rem* jurisdiction." Perdue, *supra* note 267, at 499 n.135 (emphasis added).

Perdue here continues her anachronistic practice of reading the issues in *Pennoyer* through the lens of modern jurisdictional theory, without noting that neither the judges nor the parties involved had used the terms by which she characterizes their arguments. "In rem" was an established and available jurisdictional term at the time of *Pennoyer*, yet Pennoyer's brief on appeal contains *not a single reference to "in rem" jurisdiction of any form* — standard, quasi-, or otherwise. It thus strikes me as rather amazing that a brief "based solely on the theory that the court had in rem jurisdiction" does not once mention the term defined by that theory. Of course, the brief speaks frequently of "jurisdiction," but it never paints Pennoyer into the corner of relying solely on "in rem" as opposed to "in personam" jurisdiction in its peculiarly limited local form. Indeed the words "in rem" and "in personam" appear nowhere in the brief.

Pennoyer speaks of the Oregon court having obtained "*jurisdiction of the defendant*, Neff," Brief and Argument for Plaintiff in Error at 1, *Pennoyer* (emphasis added), states the issue in the court below as whether the Oregon court "had *jurisdiction to render the judgment*

HeinOnline -- 28 U.C. Davis L. Rev. 676 1994-1995

Neff suffered no such jurisdictional aphasia. After coyly noting that Judge Deady's opinion below "appears to us so conclusive upon the points which induced his decision in our favor" that those points needed no further argument in the Supreme Court,[288] Neff devoted his entire brief to the proposition that "jurisdiction . . . must be exercised in one of two modes, either *in rem* or *in personam*."[289] Neff argued that this dichotomy was fatal to Mitchell's judgment against Neff because it was not an in rem judgment, and as an in personam judgment it was inval-

---

in the case of Mitchell v. Neff," *id.* at 2 (emphasis added), recites at length "the facts showing the *jurisdiction of the court*," *id.* at 2-3 (emphasis added), assigns as the fourth error below that "[t]he Court erred in holding and deciding that the State Circuit Court had no *jurisdiction in the said action* of Mitchell v. Neff," *id.* at 4 (emphasis added), argues that "the State has the power to subject the property of non-residents within its territorial limits to the satisfaction of the claims of its citizens against such non-residents by any mode of procedure it may deem proper and convenient under the circumstances" and that "under the laws of the State of Oregon it is not required that such property be attached in the first instance in order to give the Court *jurisdiction . . . as a means of reaching property*," *id.* at 5 (emphasis added), argues further that "in the case of Mitchell v. Neff, in the State Circuit Court, *every step to acquire jurisdiction* therein was taken in the cause as required by statute," *id.* at 6 (emphasis added), insists that on collateral attack the court below was bound by the record and that "there is *no want of jurisdiction* appearing on the record of the proceedings of the court rendering the judgment," *id.* at 21 (emphasis added), and concludes by repeating three times that "the judgment of the said State Circuit Court was valid — not void — [because] said court *had jurisdiction* to render the same," that "the record . . . *showed jurisdiction*, to render the judgment therein against Marcus Neff the non-resident defendant, as a means of subjecting his property in the State of Oregon and within the jurisdiction of the court to the satisfaction of the claim of one of its citizens" and that the record "conclusively showed *jurisdiction to render the judgment*," *id.* at 24 (emphasis added).

In my view, there was good reason for Pennoyer not to commit to using either "in rem" or "in personam" — embracing the one and renouncing the other, in the manner of Judge Deady below — and instead to seek (or retain) the promised land by arguing only that the state court had acted "with jurisdiction" in some unrefined but effective sense. There was genuine uncertainty in the law about the intermediate case since defined as "quasi in rem" jurisdiction and the necessity of prejudgment attachment if what had occurred in *Mitchell v. Neff* turned out to be more "in rem" than "in personam," *i.e.*, "quasi in rem." There was also genuine uncertainty whether "in personam" jurisdiction, even when subject to a limitation on the power of execution of the resulting judgment as against a nonresident that might be deemed to make it "quasi in personam," could in light of *Galpin v. Page* be valid when predicated only on constructive service of process. The prism of jurisdictional categories with which Perdue views the case in hindsight was quite foggy at the time of argument and decision. The case was argued in foggy terms, which Field sought to clarify with his discussion of the entire spectrum of available jurisdictional categories.

[288] Brief on Appeal of Defendant in Error at 1, *Pennoyer*.

[289] *Id.* at 2 (emphasis in original).

HeinOnline -- 28 U.C. Davis L. Rev. 677 1994-1995

id.[290] Neff had no trouble seeing that section 506 was problematic under the law announced by Field on circuit in *Galpin v. Page*.[291]

> His Honor, Field J., in Galpin v. Page . . . speaking on this point says:
>
> "The validity of the statute can only be sustained by restricting its application to cases where *in connection* with the process against the person, property in the state is brought under the control of the Court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the State."
>
> It certainly cannot be claimed in this case that "*in connection with the process against the person*" there was any proceeding against the property. The process being *in personam*, all subsequent proceedings in the case, up to the termination of it in the judgment, were of the same character, and gave the Court no jurisdiction over the *res*. The property was not subjected to the control of the Court previous to the judgment, and was never seized until after its rendition, and then only upon execution based thereon. If the Court, then, had no jurisdiction to render a valid judgment *in personam*, the execution resting for its validity on the judgment, partakes of its defects and falls with it.[292]

Obviously, Neff was arguing *against* the existence of in personam jurisdiction. But he nonetheless framed the issue as very much at play, and the characterization of Mitchell's judgment as in personam, *ergo* invalid, went to the heart of his case if — as happened — Judge Deady's rationale for ruling in Neff's favor did not survive appellate review.

To summarize, Borchers argues on Perdue's authority that "the parties [in *Pennoyer*] did not even argue that in personam jurisdiction existed, but focused instead on the possibility of in rem jurisdiction."[293] Thus, in Perdue's words, Field's discussion of the issue of in personam jurisdiction was "completely

---

[290] *Id.* at 2-11.

[291] 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206).

[292] Brief on Appeal of Defendant in Error at 3-4, *Pennoyer*, quoting Galpin v. Page, 9 F. Cas. 1126, 1133 (C.C.D. Cal. 1874) (No. 5206).

[293] Borchers, *supra* note 1, at 35 n.108 (citing Perdue, *supra* note 267, at 498).

HeinOnline -- 28 U.C. Davis L. Rev. 678 1994-1995

unnecessary."[294] Yet, when we look at the statute involved and the arguments made in *Pennoyer*, we find a much different picture than that described by Borchers and Perdue. True, Neff did not "argue that in personam jurisdiction existed," but that was dictated by his position in court, not his analysis of the issues. His whole argument (aside from his reliance on the judgment below) consisted of showing *why* "in personam jurisdiction" *did not* "exist[]," and hence why the personal judgment rendered in favor of Mitchell had been void. Pennoyer argued neither that "in personam jurisdiction existed" nor that it did not; far from "focus[ing] instead on the possibility of in rem jurisdiction," Pennoyer sought to rely on general arguments of jurisdictional *power* without ever mentioning "in rem" jurisdiction as the best jurisdictional "*possibility*" or pigeonhole for justifying Oregon's assertion of power over the property of nonresidents "by any mode of procedure it may deem proper and convenient."[295] Thus, Field's discussion of the categories of in personam and in rem jurisdiction upon which Neff relied, as applied to the general claim of state jurisdictional power upon which Pennoyer relied, can by no fair reading of the historical record be deemed unnecessary to decision of the issues presented.

2. *Was Field's discussion of in rem jurisdiction unsubstantiated?* Borchers and Perdue both claim that Field failed to substantiate the key point leading to invalidation of Mitchell's judgment — the necessity for property to be attached or otherwise formally brought under the control of the court prior to rendition of a valid in rem judgment against that property.

> As for in rem jurisdiction, Field concluded that the failure to attach the property at the *commencement* of the litigation foreclosed the possibility of in rem jurisdiction. Field cited no authority for this proposition, but reasoned that "jurisdiction . . . cannot be made to depend upon facts to be ascertained after [the court] has tried the cause and rendered the judgment."[296]

---

[294] Perdue, *supra* note 267, at 498.

[295] Brief and Argument for Plaintiff in Error at 5, *Pennoyer*. *See generally supra* note 287 (discussing Pennoyer's contentions on appeal).

[296] Borchers, *supra* note 1, at 35. Although Borchers does not rely on Perdue for this point, she makes the same assertion in virtually identical language. Perdue continues on

HeinOnline -- 28 U.C. Davis L. Rev. 679 1994-1995

I am troubled by this trip into the twilight zone where what you see is, apparently, not what you get. Of course, the proof of a negative proposition is no simple matter, so the lack of substantiation for this charge of a lack of substantiation would not be surprising, if indeed Field had "cited no authority" for the proposition in question. But since he cited four cases, quoting the relevant language from each, it is surprising that neither scholar sought to explain why these four cited cases constituted "no authority." Perhaps Field misread the cases, perhaps they were not good cases, perhaps they were not representative cases — but it is one thing to claim that the point was not a good one, or not supported by the authorities cited, and quite another to claim in the face of the clear text of the reported opinion that Field "cited no authority" at all.

Field states in paragraph 8 of *Pennoyer* that

> [i]t is *in virtue of* the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can *then* be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate.[297]

He begins paragraph 9 by declaring that "[t]hese views are not new,"[298] and goes on in paragraphs 9 and 10 to cite and quote *Picquet v. Swan*[299] ("'*process* by local laws may, *by attachment*, go to compel his appearance'")[300] and *Boswell's Lessee v. Otis*[301] ("'Jurisdiction is acquired . . . by *a procedure against the property* of the defendant within the jurisdiction of the court. . . . And it is immaterial whether the proceeding against the property be by an attachment or bill [of sequestration] in chancery. It must be substantially a proceeding *in rem*.'").[302]

---

to suggest that Field's requirement of prejudgment attachment for a valid in rem judgment was not only unsubstantiated but inconsistent with existing law. *See* Perdue, *supra* note 267, at 498.

[297] *Pennoyer*, 95 U.S. at 723-24.

[298] *Id.* at 724.

[299] 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.).

[300] *Pennoyer*, 95 U.S. at 724 (emphasis added).

[301] 50 U.S. (9 How.) 336, 336 (1850).

[302] 95 U.S. at 724 (emphasis added).

HeinOnline -- 28 U.C. Davis L. Rev. 680 1994-1995

In paragraph 11 Field states that, perhaps, these authorities dealt with the necessity of actual attachment only in dicta. He then cites and quotes at length from *Cooper v. Reynolds*,[303] which he offers as definitive on the point. The quoted portion of *Cooper* upholds a state statute that "'says that, upon affidavit . . . [of the defendant's absence or non-residence], *a writ of attachment may be issued* and levied on any of the defendant's property, and publication may be made *warning him to appear*, and that *thereafter* the court may proceed in the case, whether he appears or not.'"[304] After discussing the subsequent nature of the action, as in personam if the defendant appears and as essentially a proceeding in rem if there is no appearance by the defendant, Field's quotation from *Cooper* concludes: "*[T]he court*, in such a suit, *cannot proceed, unless* the officer finds some property of defendant on which to levy the *writ of attachment.* A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."[305]

After discussing some collateral matters,[306] in paragraph 15 Field ends his discussion of the prejudgment attachment requirement by noting the uncertainties that would arise under Judge Deady's paradoxical view that "jurisdiction . . . can[] be made to depend upon facts to be ascertained after [the court] has tried the cause and rendered the judgment,"[307] and concluding that "the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what

---

[303] 77 U.S. (10 Wall.) 308 (1870).

[304] *Pennoyer*, 95 U.S. at 725 (emphasis added) (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318 (1870)).

[305] *Id.* at 726 (emphasis added) (quoting *Cooper*, 77 U.S. at 318-19).

[306] In paragraph 12, Field argues that nothing in *Cooper v. Reynolds* turned on the possibility that the absentees there involved may have been citizens of the forum state rather than nonresidents. In paragraph 13, Field explains why he agrees with the doctrine of *Cooper* despite his dissent in that case on other grounds. In paragraph 14, Field expands his approval of the doctrine of *Cooper* to a general defense of dispensing with personal service of process in cases where the prejudgment attachment of property provides an additional probability that the defendant will receive actual notice of the suit, but insists that nothing but personal service of process in the forum state will suffice to compel a nonresident to defend an in personam suit. *Id.* at 726-27. *See generally supra* text accompanying notes 44-95 (presenting a paragraph-by-paragraph overview of *Pennoyer*).

[307] *Pennoyer*, 95 U.S. at 728.

HeinOnline -- 28 U.C. Davis L. Rev. 681 1994-1995

may occur subsequently."[308] He then cites and quotes from *Webster v. Reid*,[309] in which the judgment of a territorial court was held void, and ineffective to pass title, because "'*there was no* personal notice to individuals, nor an *attachment* or other proceeding against the land, *until after the judgments.* The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold.'"[310]

I fail to comprehend how this detailed discussion of the necessity for prejudgment attachment in light of four precedent cases can be viewed as an ipse dixit. Borchers appears not to have read with care the case he attacks for its "many conundrums."[311] Perdue, who criticizes Field not only for failing to "cite any authority" but also for ignoring cases pointing the other way,[312] proceeds to cite Field's leading case, *Cooper v. Reynolds*,[313] as if it were contrary authority, relying on a misleadingly selective quotation from it without reference to the

---

[308] *Id.*

[309] 52 U.S. (11 How.) 437 (1850).

[310] *Pennoyer*, 95 U.S. at 728 (footnote omitted) (emphasis added) (quoting Webster v. Reid, 52 U.S. (11 How.) at 437).

[311] Borchers, *supra* note 1, at 37.

[312] *See* Perdue, *supra* note 267, at 498.

[313] 77 U.S. 308 (1870).

HeinOnline -- 28 U.C. Davis L. Rev. 682 1994-1995

far more extensive and representative passage quoted by Field in *Pennoyer*.[314]

---

[314] Perdue, *supra* note 267, at 498 n.132. In text Perdue asserts that "in fact a number of states permitted quasi in rem jurisdiction without prior seizure." *Id.* at 498. In the accompanying footnote she cites three state cases and several articles, ending with a "*see also*" cite to Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 320 (1870), which she quotes as follows: "'whether the writ [of attachment] should have been issued simultaneously with the institution of the suit, or at some stage of its progress, cannot be a question of jurisdiction . . . .'"

To gauge how misleading this fragment is, consider first that the concern in *Cooper* was that the writ of attachment may have been issued *too early*, not too late. Tennessee law authorized attachments in personal actions in broad terms as security for execution of the judgment as well as the basis for jurisdiction to render the judgment. The attachment could issue at the commencement of suit or any time thereafter upon proof that the defendant could not be found. When the attachment was the basis for jurisdiction, provision was made for publication of the time and place at which the defendant was to appear and defend against the suit in question. In *Cooper*, the process of proving the absence of the defendant appeared to have been "greased," since the plaintiff filed suit, process was issued, the sheriff returned the process claiming to have searched the county and found none of the defendants therein, the plaintiff then swore out an affidavit attesting to the absence of the defendants, and the attachment was issued on that basis — all on the same day. 77 U.S. (10 Wall.) at 308, 310. This fact, and the general insufficiency of the affidavit in support of attachment and notice by publication as argued by counsel for the defendant in error, *id.* at 314-15, appears to have been the basis for Justice Field's terse dissent from the majority opinion. *Id.* at 321.

A default judgment was rendered against Reynolds, who later sued in diversity to eject Cooper from the land which Cooper had acquired at the sale of Reynolds' land under color of the default judgment. *Id.* at 311-12. The Supreme Court reversed the circuit court's judgment in favor of Reynolds, holding that the attachment proceedings had conferred jurisdiction on the Tennessee state court that had issued the underlying default judgment against Reynolds. Immediately after the portion of *Cooper* quoted by Justice Field in *Pennoyer*, in which the Court emphasized that the attachment was crucial to the state court's jurisdiction over the suit, which could not proceed unless the writ of attachment led to property of the defendant being found and brought under the control of the court, the Supreme Court continued its discussion of the nature of and prerequisites for attachment jurisdiction, with the only conceivable relevance of its reference to the timing of the attachment being to rebut the argument that the writ of attachment had been issued too precipitously. The last emphasized sentence is the fragment at the end of the Court's discussion to which Perdue refers, totally out of context, as if it reflected indifference to whether the writ of attachment had not been issued until *after* the default judgment had been rendered.

> Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that *the seizure of the property*, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, *is the one essential requisite to jurisdiction*, as it unquestionably is in proceedings purely *in rem*. *Without this the court can proceed no further; with it the court can proceed* to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when

HeinOnline -- 28 U.C. Davis L. Rev. 683 1994-1995

4. Summary and Appraisal

I find Borchers's arguments against the expansive view based on alleged deficiencies and irregularities in Field's opinion to be unconvincing and for the most part unsupported. There is thus no reason to adopt Borchers's ill-defined and textually implausible limited view of *Pennoyer* as a desperate measure required in order to salvage the coherence of the Court's opinion.

Pennoyer's expansive view of due process, however problematic in hindsight, was not incoherent. Its intellectual history deserves to be taken seriously. Although a legal innovation announced in a dictum, it was a logical and evolutionary means of resolving Field's evident concerns, expressed in a series of prior opinions, about abuse of state legislative and judicial power through assertions of personal jurisdiction over nonresidents in derogation of traditional common-law limitations on territorial jurisdiction. Field had first-hand experience of the hurly-burly conditions of life and law on the frontier.[315] In his view, admission to statehood entailed responsibilities for fair play and civilized behavior within the communities of states. When the Supreme

---

> such a writ is returned into court, the power of the court over the *res* is established. *The affidavit is the preliminary to issuing the writ. It may be a defective affidavit,* or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of *the jurisdiction acquired by the writ levied upon defendant's property.*
>
> . . . .
>
> It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the State, and that such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. *Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction.* If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction.

Id. at 319-20 (emphasis added).

[315] *See generally* SWISHER, *supra* note 142, at 25-129 (chs. 2-5, entitled "Early Days in California," "Problems of Frontier Life," "From the Bar to the Bench," and "Judicial Environments").

HeinOnline -- 28 U.C. Davis L. Rev. 684 1994-1995

Court of California in *Hahn v. Kelly*[316] mocked the principles of natural justice implicit in the common law, Field responded on circuit in *Galpin*[317] by invoking the Rules of Decision Act and the Full Faith and Credit Act as authority for federal courts to follow the general common law notwithstanding its corruption by local tribunals. And in *Pennoyer*, Field marshalled a majority willing to protect the values of the common law for the future by making traditional common-law principles of territorial jurisdiction part of the constitutional mandate of due process of law.

IV. FROM *PENNOYER* TO *MENEFEE*

A. The Cases That Borchers Cites

1. Overview

The final part of Borchers's historical justification for the limited view relies on several post-*Pennoyer* cases in which the Supreme Court treated the validity of state-court judgments as a judgment-recognition issue under the Full Faith and Credit Clause and Act, rather than as a due process issue. Some of these cases note offhandedly that state courts might construe differently the validity of the judgments in question. Borchers concludes from these cases that the effect of *Pennoyer*'s due process dictum on the internal administration of state courts remained unresolved for decades after *Pennoyer*. He does not argue — although he might equally as well — that these cases repudiated the dictum totally, and assumed that state courts were free to recognize and enforce their own judgments free of any due process constraint whatsoever. He argues more modestly that these delphic statements — he calls them "clear dicta"[318] — suggest a period of co-existence of the limited and expansive views of *Pennoyer*'s due process dictum. By his reading of these cases, there was a continuing tension in the Supreme Court's case law between the limited and expansive view, and it

---

[316] 34 Cal. 391 (1868).

[317] Galpin v. Page, 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206). *See generally supra* text accompanying notes 243-60 (discussing relationship between *Hahn* and *Galpin*).

[318] Borchers, *supra* note 1, at 46.

HeinOnline -- 28 U.C. Davis L. Rev. 685 1994-1995

was therefore "inexplicable" that the Supreme Court resolved this tension in favor of the expansive view without acknowledging this tension or giving reasons for rejecting the limited view alternative. He thus submits that a return to the limited view by adoption of his program of reform of current law would not entirely break faith with precedent. He asks only that the Supreme Court revisit an issue that precedent has never coherently resolved.

In his original article, Borchers identified ten such cases as supporting his limited view.[319] He characterizes the first eight of these cases — those decided prior to 1899 — as "represent[ing] two decades of clear dicta that *Pennoyer* did not effect a general limitation on the reach of state courts."[320] He acknowledges that the Court decided two cases in 1899 that do not support his thesis, but argues that these cases failed to address the choice left open by *Pennoyer* between the limited and the expansive view. Of the first, *Connecticut Mutual Life Insurance Co. v. Spratley*,[321] he says: "Inexplicably, . . . the first time the Court faced a case squarely posing the issue, the Court appeared to assume the correctness of the *expansive* view of *Pennoyer*."[322] And of the second, *Dewey v. Des Moines*:[323] "The Court elevated the expansive view from dicta to holding

---

[319] Borchers discusses six of these cases in his main text. *See* Borchers, *supra* note 1, at 44-49. In the order discussed, these six cases are: Insurance Co. v. Bangs, 103 U.S. 435 (1880); Hart v. Sansom, 110 U.S. 151 (1884); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287 (1890); Goldey v. Morning News, 156 U.S. 518 (1895); Cooper v. Newell, 173 U.S. 555 (1899); Haddock v. Haddock, 201 U.S. 562 (1906), *overruled by* Williams v. North Carolina, 317 U.S. 287, 304 (1942). One case is discussed in a discursive footnote. *See* Borchers, *supra* note 1, at 44 n.159 (discussing St. Clair v. Cox, 106 U.S. 350 (1882)). The remaining three cases are cited in a "*see, e.g.*" footnote as additional cases containing "clear dicta that *Pennoyer* did not effect a general limitation on the reach of state courts." *See* Borchers, *supra* note 1, at 46 & n.169, citing Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); Laing v. Rigney, 160 U.S. 531 (1896); Wilson v. Seligman, 144 U.S. 41 (1892). Among the many remarkable features of Borchers's treatment of these ten cases is the fact that three of them, *St. Clair*, *Wilson*, and *Haddock*, are among the "leading cases" cited in *Menefee* as establishing the Court's unswerving commitment to the expansive view of *Pennoyer*. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193-94, 194 n.1 (1915).

[320] Borchers, *supra* note 1, at 46.

[321] 172 U.S. 602 (1899).

[322] Borchers, *supra* note 1, at 46-47 (citing *Connecticut Mut. Life Ins. Co.*).

[323] 173 U.S. 193 (1899).

HeinOnline -- 28 U.C. Davis L. Rev. 686 1994-1995

less than a year later, although again without analysis."[324] He invokes the last two of his supportive cases, decided in 1899 and in 1906, to show that "the limited view died slowly," and concludes that it was not until the *Menefee* decision in 1915 that the Supreme Court "clearly decided the issue," yet still without ever "explaining why due process limits the reach of state courts." Borchers concludes that the expansive view thus "germinated" in American constitutional law from "the ambiguous seed planted in *Pennoyer*" after nearly forty years of "non-analysis."

It is not part of my present project to dispute Borchers's treatment of *Spratley* and *Dewey* as bolts from the expansive-view blue, and of *Menefee* as the triumph of "non-analysis." My concern is only to dispute Borchers's compound claim that *Pennoyer* plausibly left open the limited view, and that subsequent courts flirted with the limited-view alternative for decades thereafter. The "non-analysis" argument bears on that disputed claim, however, in the following way. Borchers suggests that the failure of the Court to offer any further justification for the expansive view when reaffirming and applying it in subsequent cases argues against the expansive view as the proper reading of *Pennoyer*.

I am prepared, *arguendo*, to accept one factual premise for this argument. There is no neglected case of which I am aware, other than Field's opinion on circuit in *Galpin*[325] (much of which was reiterated in *Pennoyer*) and perhaps Holmes' opinion in *McDonald v. Mabee*[326] (which was virtually contemporaneous with *Menefee*), that adds to what *Pennoyer* itself said about the reasons for placing state-court personal jurisdiction under the yoke of the federal constitutional right to due process of law. But Borchers offers no reasons of jurisprudence or conventional judicial practice why this ostensible "non-analysis" is a reason for skepticism that successor courts in fact read *Pennoyer* according to the expansive view.[327]

---

[324] Borchers, *supra* note 1, at 47 (citing *Dewey*).

[325] Galpin v. Page, 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206). *See supra* text accompanying notes 240-63 (discussing relationship of Justice Field's opinion on circuit in *Galpin* and his subsequent opinion for Supreme Court in *Pennoyer*).

[326] 243 U.S. 90 (1917). *See supra* note 70 (discussing status of *McDonald* as sequel to *Pennoyer* and precursor to *International Shoe*).

[327] Whether they should have, as opposed to overruling *Pennoyer* in this respect and

HeinOnline -- 28 U.C. Davis L. Rev. 687 1994-1995

I can think of no reason why the lack of any retrospective exegesis of *Pennoyer*'s due process dictum supports the supposition that *Pennoyer* was not understood to mean what it said. It could just as well suggest, as the later "inexplicable" affirmations of the expansive view would seem to confirm, that the logic of *Pennoyer* was self-evident. I am reminded of the modern, if qualified, analogies of *Shelley v. Kraemer*[328] and *Brown v. Board of Education*.[329] *Shelley*'s crucial due process reasoning was not a dictum, to be sure, but my point is that one does not find subsequent courts impelled to debate its controversial premises and explain why the decision was sound.[330] It was followed, without question. And *Brown*'s due process reasoning took the form of a holding, but a decade or more of "all deliberate speed"[331] gave it the pale force of a dictum. Its reasoning was forcefully criticized off the bench as a legal ipse dixit.[332] Yet it was followed and ultimately enforced, albeit in fits and starts, without any felt need for retrospective judicial analysis or justification of the underlying constitutional doctrine.[333]

---

adopting the limited view as a better view of what due process entails with respect to state-court personal jurisdiction, is a much different question that Borchers addresses in the prescriptive parts of his original article, Borchers, *supra* note 1, at 87-105, and of his present paper, *Jurisdictional Pragmatism* at 582-90. Borchers wants to free debate over the merits of his proposed reinterpretation of the constitutional law of state-court personal jurisdiction from the deference due to precedent by denying the content and hence the force of that precedent. The question I am addressing is whether he has succeeded in the reinterpretation of history by which he seeks to facilitate his reinterpretation of the Constitution.

[328] 334 U.S. 1 (1948).

[329] 347 U.S. 483 (1954) [hereafter *Brown I*].

[330] *See generally* Francis A. Allen, *Remembering* Shelley v. Kraemer, 67 WASH. U. L.Q. 709 (1989) (reviewing case law under *Shelley* and criticism of how *Shelley* defined "state action").

[331] 349 U.S. 294, 301 (1955) [hereafter *Brown II*].

[332] *Compare* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (attacking legal basis of *Brown I*) *with* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (supporting legality of *Brown I*).

[333] *Brown I*, 347 U.S. 483 (1954), decided only the merits of the constitutional claim. *Brown II*, 349 U.S. 294 (1955), decided the question of relief and adopted the standard of "all deliberate speed" that allowed desegregation to drag on for years thereafter. For a brief discussion of the lack of a "precise doctrinal foundation" for *Brown I* and the "controversial" and "reasonless" per curiam opinions that followed, in which it is argued that Cooper v. Aaron, 358 U.S. 1 (1958), merely reaffirmed *Brown II* by appeal to the Court's authority, and that the Court did not "turn[] a doctrinal and substantive corner" until Green v. County Sch. Bd., 391 U.S. 430 (1968), see THE OXFORD COMPANION TO THE SU-

HeinOnline -- 28 U.C. Davis L. Rev. 688 1994-1995

Borchers's argument turns, then, on the different question of whether, in fact, subsequent courts indeed followed *Pennoyer* without quibble or question. Borchers concedes, indeed complains, that this was the character of *Spratley*, *Dewey*, and *Menefee*. But he relies on the other ten cases he cites to raise doubts about the Court's unswerving commitment to *Pennoyer*, and hence about the nature and terms of what *Pennoyer* actually decided with respect to due process and state-court personal jurisdiction. As I demonstrate below, Borchers's claim that these cases declare "clear dicta" bespeaking the limited view of the extent of *Pennoyer*'s due process constraints is not only unsupported by the historical record, but affirmatively contradicted by it.

It is worth noting preliminarily that these cases, if indeed they were to bear the construction Borchers recommends, would reflect not some "limited" view but a null view of due process. Borchers treats the issue dichotomously, as if the failure to affirm expressly the expansive view necessarily implies the limited view. But nothing in the cases he cites supports this dichotomy. They rely on full faith and credit principles to determine whether a judgment should be recognized in federal court, and sometimes note that these principles are inapplicable to courts of the judgment-rendering state. His claim that these cases support the limited view, construed as he suggests, is a charade. To rely on full faith and credit principles rather than due process to invalidate state-court judgments for federal judgment-recognition purposes, and to observe that "perhaps" state courts would "feel bound" to give effect to provisions for constructive service of process on nonresident defendants sued in personam, does not support the limited view vis-à-vis the expansive view. It supports neither. But Borchers is not willing to

---

PREME COURT OF THE UNITED STATES, *supra* note 118, at 93-95. But the corner turned by *Green* related only to the far-reaching nature of the remedy mandated by the substantive constitutional law of *Brown I*. Buttressed by the intervening passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the *Green* Court re-examined only *Brown II*. Without reconsidering the premises of *Brown I*, the Court held that more was required than the lackluster pace and scope of *Brown II*'s purely prospective remedy of disestablishment of dual school systems, and concluded that adequate relief from a constitutional violation under *Brown I* — a state-segregated dual school system — required remediation of the continuing effects of such past racial discrimination.

HeinOnline -- 28 U.C. Davis L. Rev. 689 1994-1995

claim that these cases repudiated due process regulation of state-court personal jurisdiction altogether, and so defaults, by the same "non-analysis" that he complains of with respect to the Supreme Court, to the assumption that if the expansive view was not expressly confirmed, the limited view must have been the fallback position adopted by inference.

I will review the cited cases in the order in which he presents them, with particular attention to the first three and the last. The first two were decided by Justice Field. Given the grave concern he expressed in *Galpin* about the current of the law in California as posing a serious threat of injustice perpetrated by constructive service of process on nonresidents, it is reasonable to assume that he paid close attention to the treatment of *Pennoyer* in opinions he wrote for the Court.[334]

Borchers's treatment of the third case, like his treatment of those decided by Justice Field, raises troubling questions about how seriously Borchers takes the process of historical inquiry. I look closely at these first three cases, and then deal more summarily with the next six cases. But the final case, which Borchers presents as "another striking case" in support of the limited view,[335] is such a striking example of Borchers's problematic historiography that I give it, too, detailed consideration.

2. Borchers's First Three Ostensible Counter-Examples to the Expansive View

Case 1. In *Insurance Co. v. Bangs*,[336] Justice Field wrote for the Court: "Substituted service, by publication, against non-resident or absent parties, allowed in some States in purely personal actions, is not permitted in the Federal Courts." Borchers offers this statement as evidence that Field was prepared to

---

[334] It is more questionable how much attention other Justices might pay to the implications of reciting the familiar slogans of full faith and credit case law in judgment-recognition cases without revising the old dogma to take note of the universalization of these principles under *Pennoyer*'s due process dictum. However noteworthy it appears today, *Pennoyer* was not on every lawyer's lips in the nineteenth century. Field's biographer does not make a single mention of *Pennoyer*, *Galpin*, or any related case in his 449-page account of Field's life. *See* SWISHER, *supra* note 142, *passim*.

[335] *See* Borchers, *supra* note 1, at 48 & n.182 (referring to Haddock v. Haddock, 201 U.S. 562 (1906)).

[336] 103 U.S. 435, 439 (1881).

HeinOnline -- 28 U.C. Davis L. Rev. 690 1994-1995

permit states, even after *Pennoyer*, to enforce the kinds of judgments condemned in *Pennoyer* as invalid under traditional common-law principles of territorial jurisdiction and, according to the expansive view, henceforth invalid for any purpose as violations of due process of law.

Borchers is doubly wrong in conceiving of *Bangs* as supportive of his limited view. First, in the cited sentence Justice Field is dealing strictly with a procedural matter — the rules of practice in federal court under the Conformity Act of 1872 and other federal statutes. Although defective service of process may deprive a court of jurisdiction to render a binding judgment against the unserved or improperly served defendant, depending on the importance placed by a particular court system on rigid compliance with the mechanics of service of process and on whether the defendant nonetheless entered an appearance, the jurisdictional issue is in this context secondary to the procedural issue. While the procedural violation in *Bangs* resulted in the invalidation of the judgment in question, the Court did not need to look further than that procedural violation to establish the invalidity of the judgment in question. The prior judgment was a federal judgment in a diversity case. It was invalid as a matter of the "local law" of the federal courts because the general incorporation of local state practice under the Conformity Act of 1872[337] — which in general governed procedure in actions at law in federal court prior to the inauguration of the uniform Federal Rules of Civil Procedure in 1938 — was subject to an express qualification: federal practice was to follow the rules of local state practice "as near as may be." *Bangs* was strictly a matter of the Supreme Court exercising its supervisory jurisdiction to police the rules of practice in the federal trial court system.

All this becomes eminently clear when Borchers's selective quotation is read in conjunction with the rest of the relevant passage. It should be noted by way of introduction that there was a special feature in *Bangs* which made it reminiscent of

---

[337] Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 61, at 425 (5th ed. 1994) (discussing practice in federal courts under Conformity Act and noting that "state practice did not control on questions of jurisdiction or validity of service of process").

HeinOnline -- 28 U.C. Davis L. Rev. 691 1994-1995

Galpin v. Page. The unserved defendant was an infant, process had been served on the "general guardian" of the infant after the general guardian had left the state, and the general guardian had refused to appear on behalf of the infant; whereupon a guardian ad litem had been appointed by the federal court whose judgment against the infant was in question.[338]

> The statute of Michigan requiring the general guardian of an infant to "appear for and represent his ward in all legal suits and proceedings unless when another person is appointed for the purpose as guardian or next friend" does

---

[338] A reader who has gotten this far deserves some entertainment. Hence I will also note that *Bangs* is perhaps the most classic "widow and orphan" case in the history of American law — more so even than *Galpin*, where the purity of the conflict is blurred by the size of the cast. By a three-cushion shot on one day in the Supreme Court, the infant Bangs pocketed $10,000. The facts and legal resolution are worthy of a digression.

The husband and father had taken out two policies of insurance payable to the child, in the amount of $5,000 each, shortly before dying in suspicious circumstances that the insurance company alleged resulted from suicide by strychnine. The widow refused to permit a post-mortem examination and left the state with her child, moving from Michigan to Minnesota. Three litigations ensued. In suit number 1, the insurance company sued both the widow and the child in federal court in Michigan to cancel the policies, alleging that they were not only the third-party beneficiaries of fraud, but were active co-conspirators in the plot. In suit number 2, filed while suit number 1 was pending, the child sued in Minnesota state court to enforce payment of the insurance. The insurance company removed suit number 2 to federal court in Minnesota. Originally the insurance company asserted its fraud claim as an affirmative defense to suit number 2, but after winning its fraud suit in Michigan, it withdrew all other defenses in the Minnesota action and elected to stand on the preclusive effect of the Michigan judgment. When the Minnesota federal court in suit number 2 refused to recognize the Michigan federal court's judgment in suit number 1, the insurance company brought the case to the Supreme Court on writ of error. This was Insurance Co. v. Bangs, 103 U.S. 435 (1881) (No. 227), in which Justice Field affirmed the decision of the federal court in Minnesota that the judgment in suit number 1 was invalid for lack of proper service of process. Meanwhile the insurance company had filed suit number 3, which was essentially the refiling of suit number 1 but in federal court in Minnesota rather than Michigan. It lost that suit too, and again appealed to the Supreme Court. This was Insurance Co. v. Bangs, 103 U.S. 780 (1881) (No. 693), a companion case decided by Justice Field separately but on the same day and under the same name as No. 227.

There was no problem with service of process in No. 693, but Field took evident glee in vilifying the insurance company for its ungallant accusations. After a colorful recitation of the facts in which the insurance company all but ties the widow and child to the railroad tracks between Michigan and Minnesota, Field announced that the claim in No. 693 was collaterally estopped by the judgment affirmed in No. 227, since No. 693 involved allegations of fraud that had been pleaded and withdrawn in No. 227. And even if there were no such bar by prior adjudication, the opportunity to plead the defense in No. 227 provided an independent basis for denying equitable relief in No. 693, since the insurance company had had at hand, but had fumbled, an adequate remedy at law.

HeinOnline -- 28 U.C. Davis L. Rev. 692 1994-1995

> not change the necessity of service of process upon the defendants in a case before a court of the United States where a personal contract alone is involved. It may be otherwise in the State courts; it may be that, by their practice, the service of process upon the general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. We believe that in some States such is the fact; but the State law cannot determine for the Federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against non-resident or absent parties, allowed in some States in purely personal actions, is not permitted in the Federal courts. Such service can only be resorted to where some claim or lien upon real or personal property is sought to be enforced, and the decision of the court will then only affect property of the party within the district. Rev. Stat., sect. 738.[339]

Second, Borchers's distortion of *Bangs* does not end with his selective editing of this passage. The Court did not have before it a *state* judgment predicated on the service of process by publication, and it was not necessary to its decision for the Court to consider whether judgments obtained in state court by such means were now constitutionally suspect even if, with respect to the mechanics of service of process, everything had been done exactly as authorized, or "allowed," by the local law of the state court involved. But having concluded that the underlying *federal* judgment was void for lack of proper service of process, Field next considered the argument that, in the special circumstances of a judgment not rendered by default, but rather after a full contested trial upon the appearance and active contest of the claim against the infant by a guardian ad litem, the validity of the contested judgment should not be open to collateral attack. Field expressly considered, in this context, a number of state court cases cited by counsel in which the representation of an infant by a guardian ad litem had been held to bar collateral attack on the judgment on the ground that the infant had not properly been served with process. He distinguished these cases on various grounds, and concluded his opinion as follows.

> But in none of the cases to which our attention has been called has a judgment been upheld where a guardian ad

---

[339] Insurance Co. v. Bangs, 103 U.S. 435, 439 (1881).

HeinOnline -- 28 U.C. Davis L. Rev. 693 1994-1995

> litem had been appointed for a non-resident infant against whom a purely personal demand was prosecuted. If such a case exists, the judgment in it can have no greater force than one rendered for a personal demand against a non-resident upon any other form of constructive service; and that constructive service will not give jurisdiction in such cases is the established doctrine of this court. Pennoyer v. Neff, 95 U.S. 714.[340]

Thus, the very case cited as evidence that Field subscribed to the limited view in fact ends, to the contrary, with a ringing endorsement of the expansive view. Field says that "if" a state court has indeed "upheld" a personal judgment upon some locally authorized form of constructive service of process, such as service on "a guardian ad litem . . . appointed for a non-resident infant," such a judgment has "no greater force" than any other "rendered for a personal demand against a non-resident upon . . . constructive service of process," which under the "established doctrine of this court" is invalid for lack of "jurisdiction" — citing *Pennoyer*. On the limited view, a judgment invalid under *Pennoyer* would have "greater force" in the state courts of the judgment-rendering state than in the federal courts. But here Field asserts just the opposite.

Case 2. In *St. Clair v. Cox*,[341] Justice Field wrote for the Court that "[i]n *Pennoyer v. Neff* we had occasion to consider at length the manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the Federal courts." Here, in full, is what Borchers has to say about *St. Clair*:

> Field dropped at least one other hint that he held the limited view of *Pennoyer*. In St. Clair v. Cox, 106 U.S. 350 (1882) (Field, J.), the Court considered recognition of a Michigan state court judgment. The Court concluded that the Michigan state court had jurisdiction, therefore entitling its judgment to recognition. *Id.* at 356. The Court found that the judgment debtor, a corporation, had transacted enough business in Michigan to indicate its "consent" to service of process. *Id.* In the course of reaching this conclusion, Field, describing *Pennoyer* in circumscribed terms, stated that "[i]n *Pennoyer v. Neff* we had occasion to consider at length the

---

[340] *Insurance Co.*, 103 U.S. at 441.

[341] 106 U.S. 350, 353 (1882).

HeinOnline -- 28 U.C. Davis L. Rev. 694 1994-1995

> manner in which state courts can acquire jurisdiction to render a personal judgment against non-residents *which would be received as evidence in the federal courts.*" *Id.* at 353 (emphasis added). Again, Field would have no occasion to describe *Pennoyer* in these narrow terms if he held the expansive view to the effect that a state court judgment entered on a nonterritorial jurisdictional basis was void even within the judgment-rendering state.[342]

I have quoted Borchers's statement of the case in full, because it is wrong. Palpably and objectively wrong. He says that the Supreme Court upheld the jurisdiction of the Michigan court, and recognized its judgment. It did neither. It held the judgment in question *invalid* as an assertion of personal jurisdiction because there was *no* evidence in the record that the corporate defendant was transacting *any* business in Michigan at the time its putative agent was served with process in Michigan. It *refused* to recognize the Michigan judgment, upholding the lower court's refusal to admit it into evidence. That being the only error assigned, it affirmed the judgment below.

Well, so what? Field still referred to the consequence of a state rendering a personal judgment in a "manner" condemned by *Pennoyer* as resulting in the judgment not being "received in evidence in federal court," and isn't that a "narrow" and "circumscribed" way of putting it? If he held the expansive view, why did Field not express himself more forcefully, substituting for his more complex formulation the words italicized below, and thus declaring that "[i]n *Pennoyer v. Neff* we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a *valid personal judgment*?"

These are interesting historical questions, and as I will show, sound answers can be offered which drain significance from *St. Clair* as a "hint" that Field himself took the limited view of *Pennoyer*. Of critical importance in accounting for Field's "circumscribed" language are the dual nature of the underlying judgment whose recognition was in issue, the unusual way in which the judgment-recognition issue was posed, and a cluster of reasons why the case was an egregiously unsuitable vehicle in

---

[342] Borchers, *supra* note 1, at 44-45 n.159.

HeinOnline -- 28 U.C. Davis L. Rev. 695 1994-1995

which to reiterate, entirely gratuitously, *Pennoyer*'s due process dictum.

The case brought to the Supreme Court by writ of error was an action in federal court in Michigan by Cox, the plaintiff below and defendant in error. Cox sought to recover on two $2,500 promissory notes by which the defendants below and plaintiffs in error — the St. Clair group (St. Clair) — were indebted to the Winthrop Mining Company, which had assigned the notes to Cox. St. Clair defended the action by contending that the notes had been drawn as part payment for a shipment of ore and other property that had never been delivered in the quantity agreed. St. Clair's position was that the notes upon which it was being sued in the federal action had been assigned to Cox by Winthrop in order to avoid St. Clair's defenses as to Winthrop — in short, that Cox was not a holder in due course. St. Clair alleged that Cox took the notes with knowledge at the time of the assignment that Winthrop was indebted to St. Clair in the sum of $10,000 — twice the sum of St. Clair's offsetting debt to Winthrop. By the assignment and the present suit against St. Clair in federal court, Cox and Winthrop were collusively trying to get St. Clair to pay the $5,000 while Winthrop remained indebted to St. Clair for $10,000.

St. Clair sought to establish the fact of this $10,000 debt and Cox's knowledge of it by introducing into evidence the record of a Michigan state-court default judgment obtained by St. Clair against Winthrop prior to the assignment transaction between Winthrop and Cox. This judgment did not establish the full amount of the $10,000 debt — the judgment was for only $6,450 — but in St. Clair's view it did establish the fact of Winthrop's indebtedness to St. Clair, and the fact that Cox had notice of this indebtedness. The jurisdictional problem presented by the case arose from the fact that this $6,450 default judgment

> was rendered in an action commenced by attachment. . . . [T]he jurisdiction of the [Michigan state] court, under the writ, to dispose of the property attached cannot be doubted . . . . No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence

HeinOnline -- 28 U.C. Davis L. Rev. 696 1994-1995

> that the amount rendered was an existing obligation or debt against the company.[343]

In other words, was the judgment merely quasi in rem, entitling St. Clair to the property seized by attachment and nothing more, or was it in personam, in which case it established the fact of the entire $6,450 debt and could be enforced in collateral proceedings to recover so much of that amount as remained unpaid after execution upon the attached property?

The answer to this question was not self-evident, because under Michigan law the sheriff was required, if possible, to serve a copy of the writ of attachment on the person of the defendant, and if such service were made, "the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons."[344] The return filed by the sheriff in St. Clair's attachment suit against Winthrop declared that he had served a copy of the writ "on the defendant, 'by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally,'" in the Michigan county where the attachment suit was pending. If Colwell was indeed Winthrop's agent for service of process, the judgment rendered was in personam, and should be recognized in St. Clair's defense of Cox's federal court action as evidence of a pre-existing debt owed by Winthrop to St. Clair at the time of Winthrop's assignment of St. Clair's notes to Cox. Colwell's agency depended upon whether, at the time of the attachment suit, Winthrop was "engaged in business in the State."[345] There being no evidence of this in the record of the attachment suit, it was deemed by the Supreme Court to have resulted only in a quasi in rem judgment which accordingly lacked "any probative force" to establish the fact of the allegedly pre-existing indebtedness of Winthrop to St. Clair.[346] Thus Field's words fit exactly the situation at hand. *Pennoyer* had indeed turned on whether Mitchell's judgment should have been "received in evidence" to establish Pennoyer's defense to Neff's

---

[343] *St. Clair*, 106 U.S. at 351-52.

[344] *Id.* at 352.

[345] *Id.* at 360.

[346] *Id.* at 359.

HeinOnline -- 28 U.C. Davis L. Rev. 697 1994-1995

action in ejectment. And St. Clair presented the very same issue, whether a prior default judgment should be "received in evidence" to establish St. Clair's defense to Cox's suit in the present action.

I do not take Borchers point to be directed to the "received in evidence" part of Field's phrase, however. To the extent that the phrase has a disjunctive connotation — implying that there is one set of standards for "acquiring jurisdiction" as to which state and federal law may vary, and a separate set of distinctively federal standards, set forth in *Pennoyer*, for determining whether state judgments will be recognized or "received in evidence" in federal court — it is an accurate summary of *Pennoyer*'s holding, provided *Pennoyer* is read as based on full faith and credit principles rather than on a construction of Oregon law as incorporating traditional common-law principles of territorial jurisdiction.[347] Borchers's focus must be on the final four words: "in the federal courts." By the expansive view of *Pennoyer*'s due process dictum, this limitation is unnecessary. Not irrelevant, perhaps — after all, the judgment under review was a federal judgment, and the only issue at hand was the admissibility of evidence in a federal court. But Field chose to insert them, the argument goes, *ergo* he at least "hinted" that he held the limited view.

The structure of this argument is interesting, and strange. It draws an inference from the *failure* to add a dictum.[348] Field had "no occasion" to address any proceedings other than the federal proceedings under review, yet he is said to have had

---

[347] As discussed above, *supra* text accompanying notes 155-73, the holding of *Pennoyer* can be said to be either that Mitchell's judgment was invalid by Oregon's state law criteria (construed as having incorporated general common-law principles of territorial jurisdiction) or, more plausibly, that the judgment was "valid" in the sense that Oregon's statutory criteria for extraterritorial personal jurisdiction had been fully satisfied (thus construing the limited effectiveness of the judgment under Oregon law as a nonjurisdictional limitation on Oregon courts' powers to issue writs of execution), but was "invalid" under the general common-law principles of territorial jurisdiction and judgment-recognition implicit in the Full Faith and Credit Act. Field's arguably disjunctive phrasing in *St. Clair* supports the latter reading of *Pennoyer*.

[348] This inference is particularly strained on Borchers's mistaken reading of the case, since by that account there was significance in Field's avoidance of discussing in a dictum the effect in state court of the judgment in question if it had been invalid, which (according to Borchers) it was not.

HeinOnline -- 28 U.C. Davis L. Rev. 698 1994-1995

"no occasion" not to do so. Discussion of the effect that the underlying judgment might have in state court proceedings was not necessary to the decision of the case, but apparently, having addressed the point in dicta in *Pennoyer*, any failure by Field to repeat the dictum at every successive opportunity becomes a reason to "narrow" or "circumscribe" the force of what he said in *Pennoyer*.

There is one good theoretical reason for Field to have been averse to repeating ad nauseam the dictum in *Pennoyer*, but it is probably anachronistic. From a modern perspective his dictum left lingering a difficult problem of retrospectivity regarding title to property that had passed under state judgments that were suspect under *Pennoyer* because rendered after the effective date of the Fourteenth Amendment, but had been enforced without collateral attack in the federal courts or the courts of sister states. The evident willingness of federal courts to deny recognition to hoary judgments in cases such as *Galpin* and *Pennoyer* based simply on full faith and credit principles, unbolstered (except in dicta) by reference to due process, cuts against this argument, however. And while modern judges anguish perennially over the retrospectivity of landmark constitutional cases that "change" the law, or at least the received understanding of its meaning,[349] to judges of Field's era it may well have seemed a given that novel judicial decisions were fully and unquestionably retrospective[350] — and for that reason were rarely appropriate.

Nonetheless, caution bred of concern for limiting the collateral effect of *Pennoyer* on previously concluded judicial proceedings cannot be dismissed out of hand as a reason for Field

---

[349] *See generally* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2516-18 (1993) (repudiating in dicta reasoning of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)) (civil retroactivity); Griffith v. Kentucky, 479 U.S. 314 (1987) (overruling Linkletter v. Walker, 381 U.S. 618 (1965)) (criminal retroactivity). *Cf. also Harper*, 113 S. Ct. at 2526 (O'Connor, J., dissenting) (referring to recent retroactivity jurisprudence as "chaotic" and "hopelessly muddled").

[350] *See generally Harper*, 113 U.S. at 2522-23 (Scalia, J., concurring) (reviewing traditional American practice of deeming all judicial decisions to be fully retroactive). *See also* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 363-66 (1932) (Cardozo, J.) (discussing variations in retrospectivity policies of state courts and declaring state retrospectivity practice to be immune from federal constitutional regulation when only state law is in issue).

HeinOnline -- 28 U.C. Davis L. Rev. 699 1994-1995

confining his reference in *St. Clair* to the holding in *Pennoyer*.[351] Certainly Justice Hunt in dissent in *Pennoyer* had sounded an alarm about ensuing uncertainty of title,[352] and Justice Field had acknowledged in his survey of state guardian ad litem cases in *Bangs* that in some "exceptional" cases state courts had "sustained against collateral attack" judgments "rendered in an action where a guardian ad litem had been appointed without previous service of process upon the infant; but . . . there has generally been in them some circumstance which rendered any disturbance of the judgment likely to lead to great hardship and injustice," as where "an ejectment was brought for land more than twenty years after it had been sold, and which during the interval had increased greatly in value."[353] The *Pennoyer* dictum itself could be justified for its prospective effect in guiding the *future* conduct of state courts.[354] Justice Field's evident sensitivity to the potentially inequitable effect of disturbing past judgments might well have counseled against fervent repetition of that dictum. Sometimes the exception proves the rule, and Field may well have thought that *Pennoyer*'s dictum was justified by the exceptional threat to common-law values posed by *Hahn v. Kelly* and the general course of proceedings at issue in *Galpin*, without committing himself to a habit of speaking beyond the case at hand.

In addition to these theoretical and prudential reasons for Field to refer in *St. Clair* to *Pennoyer*'s holding but not its dictum, there was a more practical reason for Field to be careful in his phrasing. The underlying judgment was not void for any purpose, as was the underlying judgment in *Pennoyer*. There *had* been a proper prejudgment attachment in *St. Clair*, and the

---

[351] For additional discussion of the relationship between the retrospective effect of *Pennoyer*'s due process dictum and the res judicata problems presented by previously concluded litigation in which federal due process objections could have been raised and brought to the Supreme Court by writ of error, but were not, *see infra* text accompanying notes 485-503.

[352] *See* Pennoyer v. Neff, 95 U.S. 714, 739-41 (1878) (Hunt, J., dissenting) ("I doubt not that many valuable titles are now held by virtue of the provisions of these statutes. . . . All these statutes are now adjudged to be unconstitutional and void. The titles obtained under them are not of the value of the paper on which they are recorded, except where a preliminary attachment was issued.").

[353] Insurance Co. v. Bangs, 103 U.S. 435, 441 (1881).

[354] *See supra* text accompanying notes 154-73.

HeinOnline -- 28 U.C. Davis L. Rev. 700 1994-1995

judgment was valid as a quasi in rem judgment. No state court had purported to give the judgment effect as a personal judgment, and the issue of its character as such arose only because of its unusual role in the present litigation — not to determine title to property, but merely to determine the existence of a pre-existing debt that would be relevant to the jury's determination of Cox's status as "a *bona fide* holder of the notes for value."[355] The issue confronting Field was, literally, the evidentiary effect of the judgment. That required consideration of its alternate character as an in personam judgment, which turned on the effectiveness of the personal service of process on a putative corporate agent. Having referenced *Pennoyer* as the applicable authority on this issue, Field elaborated the jurisdictional doctrine of *Pennoyer* as applied to the activities of nonresident corporations, concluded that the service on the agent was ineffective as to the corporation, and affirmed the exclusion of the judgment from evidence. Of course he could have continued on, and stated that the judgment would on the contrary indeed be "received in evidence" in the federal courts if Winthrop were to sue in diversity to recover title to the property that had passed to St. Clair in execution of the judgment as a quasi in rem judgment, and he might also have addressed the nature of the proceedings in which the Michigan state courts could and could not give effect to the judgment without violating due process. But he had a case at hand to decide, and he decided it in a way that did not distract attention from the principal issue presented — whether the personal presence in a state of a corporate agent is sufficient, standing alone, to make a nonresident corporation "present" in that state for purposes of personal service of process.

Case 3. In *Hart v. Sansom*,[356] the Court declared that a personal judgment

> can only be supported, against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the State might perhaps feel bound to give effect

---

[355] St. Clair v. Cox, 106 U.S. 350, 351 (1882).

[356] 110 U.S. 151, 155 (1884).

HeinOnline -- 28 U.C. Davis L. Rev. 701 1994-1995

> to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court.

Although quoting this passage in full in a footnote,[357] Borchers omits, without ellipsis, the hardly insignificant "perhaps" in his textual discussion,[358] and claims that "[i]t is hard to imagine a clearer statement of the limited reading of *Pennoyer*."[359] I personally have no difficulty imagining that "the courts of the State *are free to give* effect to the service made as directed by its statutes" would be a much clearer statement that due process does not limit state-court personal jurisdiction than "the courts of the State might perhaps feel bound," but my principal concern is to correct Borchers's history, not his hyperbole.

Hart is a quizzical case for reasons quite apart from the "might perhaps feel bound" language. It involved a Louisiana citizen who claimed title to land in Texas under an 1846 deed from the original owner, who had died in 1865, that Hart did not record until 1879. The decedent's heirs had filed an action in a Texas state court in 1873 against a cluster of defendants with overlapping and interrelated claims, including Hart and another nonresident from New York. Both Hart and the New Yorker were served constructively, by publication. All the defendants defaulted. The state court's ensuing judgment, rendered in 1875, nullified the claims of title of all the defendants. As to all but Hart, that involved removing the "cloud upon the plaintiffs' title . . . created by the deeds mentioned in the petition."[360] The record showed that a jury "upon a writ of inquiry" had assessed damages against Hart and the New Yorker, but the only execution that issued was confined to costs.[361]

After recording his musty deed in 1879, Hart brought suit in federal court in Texas to eject the heirs from the land in question. Over Hart's objection, the trial court admitted the 1875

---

[357] Borchers, *supra* note 1, at 45 n.163.

[358] "The Court stated, however, that courts of the judgment-rendering state 'might feel bound' to give effect to extra-territorial service statutes." *Id.* at 45.

[359] *Id.*

[360] *Hart*, 110 U.S. at 154.

[361] *Id.* at 153-54.

HeinOnline -- 28 U.C. Davis L. Rev. 702 1994-1995

judgment into evidence and directed a verdict for the defendants on the ground that the judgment "divested the plaintiff of his title to the land."[362] The Supreme Court reversed, resolving after some debate that the 1875 judgment was in personam rather than in rem, and thus that constructive service of process was ineffective. This was certainly a surprising conclusion, insofar as it dealt with a judgment pertaining to property within the state, and the reasoning of the Court was both torturous and qualified. The Court took pains to indicate that it did not mean to leave states hostage to the whim of outsiders who, by remaining beyond the reach of personal service of process, could undermine the security of title within the state.[363] Had Texas "expressly provided by statute" for "a trustee appointed by the court" to represent Hart's interest in the

---

[362] *Id.* at 153.

[363] The Court reasoned as follows:

> It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession, and that part which removes the cloud upon the plaintiff's title appears to be limited to the cloud created by the deeds mentioned in the petition; and the petition does not allege, the verdict negatives, that Hart held any deed.
>
> But if there is any judgment (except for costs) against Hart, it is, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and is no bar to the present action.
>
> Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a relief to the plaintiff. . . .
>
> It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.

Id. at 154-55 (citations omitted).

HeinOnline -- 28 U.C. Davis L. Rev. 703 1994-1995

land in the 1873 proceeding, the judgment would have been in rem, rather than in personam, and thus valid.[364] "In the judgment in question," however, "no trustee to act in behalf of the defendant was appointed by the court," nor was the Court "referred to any statute authorizing such an appointment to be made."[365]

> The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title.
>
> Such a decree, being *in personam* merely, can only be supported, against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other State; and it is of no greater force, as against a citizen of another State, in a court of the United States, though held within the State in which the judgment was rendered.[366]

Now this is probably confused, and surely confusing. The Court deems an action to determine title to land to be in personam, but only "unless otherwise expressly provided by statute," because it took the form (more or less) of restraining Hart from asserting title rather than adjudicating, in rem, whether he had title. This appears to be a matter of the form of action in question, as determined by a distinction between the nature of a cloud cast by a mere "pretended claim" of title as opposed to one founded on "possession" or a "recorded deed[] . . . [or] any deed."[367] Absent express alteration of the common law, the form of action was deemed to be a claim against the person rather than a determination of title to the property in issue. Even construing the action to be in perso-

---

[364] *Id.*

[365] *Id.* at 155.

[366] *Id.* at 155-56.

[367] *Id.* at 154.

HeinOnline -- 28 U.C. Davis L. Rev. 704 1994-1995

nam, a state can "provide by statute" for the appointment of a local trustee, presumably founded upon mere constructive service of process, to represent the nonresident, thus treating him (fictitiously) as if present in the state and thus subject to a personal decree. But absent such an assertion of legislative power, the court that rendered the 1875 judgment had "no inherent power, by the mere force of its [statutorily unauthorized] decree, to annul a deed or to establish a title" vis-à-vis a nonresident brought into court only by constructive service of process. Having begun with doubt whether there was any adjudication at all as to Hart, or if there was, whether it was conclusive of the different issue set forth in the present case (the validity of the previously unrecorded deed of which the plaintiffs in the 1875 judgment had been unaware) — both questions that, if answered in the negative, would make the jurisdictional issue moot — the Court ended by treating the judgment as if it dealt with ownership of a document rather than ownership of land.[368]

Small wonder that the courts of Texas "might perhaps feel bound to give effect to the service made by its statutes," since everything turned on matters of statutory content and construction, and the pre-*Pennoyer* judgment in issue, establishing title to Texas land, was not beyond even the post-*Pennoyer* power of the state if based upon legislative acts rather than the "inherent power" of a Texas court to exercise equitable jurisdiction over the person of a nonresident. The important question is what "feeling bound" entailed. As to the other defendant, the New Yorker, whose recorded title was cancelled by the 1875 judgment, that judgment was, by the reasoning of the Court, a valid assertion of in rem jurisdiction. A Texas court might well "feel bound" to give effect to the 1875 judgment if contested in its courts by the New Yorker or his successor in interest. As to the rest of the defendants generally, were they too to contest the effect of the 1875 judgment on the ground that Hart was an indispensable party in whose absence the entire judgment fell, a

---

[368] Obviously Hart could not sue in ejectment in some other state, whose courts might then be asked to recognize the 1875 judgment. The issue could only come before the courts of some other state in some sort of nonlocal action, such as a suit in Louisiana to compel Hart to surrender the deed or to execute a conveyance to the heirs.

HeinOnline -- 28 U.C. Davis L. Rev. 705 1994-1995

Texas court might "feel bound" to "give effect" to the constructive service on the nonresidents to the extent of sustaining the effectiveness of the judgment as to the other parties. And as to other nonresident defendants, in other lawsuits involving more conventionally in rem claims, constructive service under Texas statutes might be sustained as a matter of construction of just what those statutes indeed had "expressly provided."

It is hardly clear that an acknowledgment that Texas judges "might perhaps feel bound" to give effect to constructive service solely by reference to whether it had been authorized by their legislature was meant to tell them that they were free to do so, due process be damned, even when the statute so applied resulted in "bringing the person" of the defendant before the court based on "merely constructive service." The far more obvious reading of *Hart v. Sansom* is as an explication in a marginal case of what was, and was not, an in rem as opposed to an in personam judgment, and a caution that state judges should not be blinded by legislative deference to the standing possibility that — as viewed with the skepticism of a court of another government — the judgment should be "allowed no force" because *Pennoyer*'s line between in rem and in personam jurisdiction had been crossed. Thus read, of course, the case elaborates the expansive view rather than qualifies it.

Borchers reads the case differently, with some (though scant) support in its delphic language. But the historical issue is how the case was understood at the time, and the best evidence of that is how *Texas* judges read it — the judges whom Borchers claims were left free by *Hart* to "feel bound" by Texas law free of the constraints of federal due process, expansively construed. Did they take it to be their emancipation proclamation, allowing them to give whatever force they wished to Texas judgments in personam based on constructive service of process on nonresidents? This is not a moot point. History offers a clear and indisputably authoritative answer. Just five years after *Hart*, in a case of some fame for its discussion of a different jurisdictional issue,[369] the Texas Supreme Court used the very same

---

[369] York v. State, 11 S.W. 869 (Tex. 1889), *aff'd sub nom.* York v. Texas, 137 U.S. 15 (1890). The Supreme Court of Texas ruled that despite the lack of effective service of process on the nonresident defendant, the defendant's due process claim was mooted by

HeinOnline -- 28 U.C. Davis L. Rev. 706 1994-1995

the defendant's attempt to enter a special appearance to contest this lack of jurisdiction. The state supreme court held that under the state statutes governing appearances in court, no provision was made for a special appearance and any appearance whatsoever was sufficient to bring the defendant within the power of the court as if personally served with process within the state. Acknowledging that "[a] judgment entered against him as the case stood before he appeared would have been a nullity," *id.* at 870, the court held that the defendant's voluntary act of appearance gave Texas the constitutional power over his person that it would otherwise have lacked, *id.* at 869-70. Although it deemed the Texas statutory scheme "peculiar," the United States Supreme Court affirmed, holding that the privilege of special appearance routinely afforded by other states was a matter of convenience which did not rise to the level of a due process right. *York*, 137 U.S. at 19-21.

It is interesting that the Supreme Court of the United States decided whether there was a right to a special appearance on the assumption that it was essential to the outcome of the case, because without treating the defendant's appearance as a submission to the jurisdiction of the court, the judgment would have been invalid. "It was conceded by the District and the Supreme Courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction," the Court declared, noting that under the practice of other states a special appearance would not "waive the illegality of the service or submit the party to the jurisdiction of the court." *Id.* at 19, 20. The Court expressly added that, had the Texas judgment been entered by default, it would have been invalid and could have been collaterally attacked. *Id.* at 21. All of this is powerful evidence of the expansive view.

Borchers is clearly aware of *York v. Texas*, for he cites the case. Borchers, *supra* note 1, at 50 n.196. Incident to its unequivocal adoption of the expansive view, the *Menefee* Court rejected the contention below of the North Carolina Supreme Court that overruling a motion upon special appearance to quash constructive service on a nonresident could not constitute a due process violation, if at all, until enforcement of the judgment. Borchers says that *Menefee* "probably overruled" *York*, which Borchers describes as having "held that due process could not conceivably be implicated until the time of the enforcement of a judgment." *Id.* In *York*, the Supreme Court declared: "If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process, and protected the possession of his property." 137 U.S. at 21. Borchers thus argues that, in the view of the *York* Court, the only due process violation that would have resulted had the judgment there had been rendered by default would arise from the actual or threatened enforcement of the judgment, rather than the mere rendering of the judgment in the first place — apparently because, until then, the "deprivation of property" to which the Due Process Clause refers would not have occurred.

This seems far-fetched by its own terms — certainly due process was "conceivably implicated" by an invalid judgment upon which execution could issue at any time, and it is hard to believe in the ordinary case that a judgment debtor seeking in equity to restrain the enforcement of an as yet untested but allegedly invalid judgment which cast a cloud over the judgment debtor's financial future, would be forced by the chancellor to stand by in torment, assets encumbered, while the adversary toyed with the timing of enforcement — all the while offering, no doubt, to sell peace at a price. But even by Borchers's reading, *York* does not support the limited view. The issue as between the limited view and the expansive is, as Borchers says, "not a problem of timing" but rather "a problem of the fundamental role of due process in personal jurisdiction" concerning whether "the due process clause is the source of jurisdictional limitations that operate directly on the states."

HeinOnline -- 28 U.C. Davis L. Rev. 707 1994-1995

words to utterly reject Borchers's strained reading of what law, state or federal, state judges should "feel bound" to enforce — citing in the process both *Hart* and *Pennoyer*.

> Since the decision made in the case of Pennoyer v. Neff, 95 U.S. 723, it must be held that service made without this state, as it was upon appellant, is insufficient to confer jurisdiction on a court of this state to render a mere personal judgment against one a citizen of and resident in another state. Freeman v. Alderson, 119 U.S. 185; Hart v. Sansom, 110 U.S. 151; Harkness v. Hyde, 98 U.S. 476; Cooper v. Reynolds, 10 Wall. 309. One of the grounds on which the decision in Pennoyer v. Neff is based makes it authoritative throughout the Union in all cases to which it is applicable; and, although there may have been some decisions made in this state asserting a contrary rule, we *feel bound* to follow it. In this case there was no judgment sought or rendered other than one strictly personal in its character.[370]

3. Borchers's Next Six Cases

Case 4. In *Grover & Baker Sewing Machine Co. v. Radcliffe*,[371] the Court referred approvingly to state court decisions that had appreciated "the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State." While the Court cites a number of full faith and credit cases, some quite dated, quoting without reference to *Pennoyer*'s dictum their discussions of the right of the courts of another state to deny effect to a sister-state judgment without respect to its validity in the judgment-rendering state, that is not the gravamen of the case. The issue of jurisdictional power is secondary to the construction of a contract by which the defendant purportedly waived his right to

---

Borchers, *supra* note 1, at 50-51. But aside from "the problem of timing" about *when* a defendant is denied due process by an invalid judgment, *York* is unequivocal, at both the state and federal levels, that due process does impose "jurisdictional limitations that operate directly on the states." It is, through and through, an expansive view case, and one of the most famous ones on the books. Yet Borchers highlights *Hart*, seizes on four words therein, and claims that "might [perhaps] feel bound" is a "ringing endorsement" of the limited view, *id.* at 45 — without ever discussing, or perhaps even noticing, the irreconcilability of *York* with this entire line of argument.

[370] *York*, 11 S.W. at 869-70 (emphasis added).

[371] 137 U.S. 287, 295 (1890).

HeinOnline -- 28 U.C. Davis L. Rev. 708 1994-1995

object to a lack of jurisdictional power. The case is thus essentially a choice of law case, with the choice of law consequential to the jurisdictional point.

At issue was a judgment rendered in Pennsylvania without appearance or service of process on a confession of judgment executed in Maryland by John Benge, then a citizen of Maryland and at the time of the proceedings under review a citizen of Delaware. John Benge had executed a cognovit note as security for a line of credit extended to James Benge (presumably a relative) by the default judgment plaintiff, a sewing machine company. It appears that James Benge was a retailer of the company's products. James Benge defaulted in his obligations, and the company sought recourse against John Benge in the full $3,000 amount of the cognovit note. By its terms, the note authorized "any attorney of record in the state of New York or any other state to confess judgment against" John Benge. But under an 1806 Pennsylvania statute, the "prothonotary of any court of record" in Pennsylvania was required to enter a confession of a judgment "without the agency of an attorney . . . which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney."[372] After obtaining the confessed judgment by this means, the company brought a quasi in rem action on the judgment in Maryland by attaching property held there by Radcliffe but allegedly owned by John Benge. Radcliffe challenged both the ownership of John Benge and the validity of the underlying judgment. At trial and on appeal, the Maryland courts ruled that the confessed judgment was invalid for lack of jurisdiction because the method of confession was not that specified in the cognovit note.

On writ of error to the Maryland Court of Appeals, the Supreme Court affirmed. The Court stated unexceptionably the doctrine of *Pennoyer* and its predecessor full faith and credit cases "that a personal judgment is without validity if rendered

---

[372] It appears that the Pennsylvania statute was intended to protect debtors from exorbitant fees associated with simple debt collections. The statute provided for a fee of one dollar to be paid by the defendant whose judgment was confessed, "and the defendant shall not be compelled to pay any costs or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid." *Id.* at 291.

HeinOnline -- 28 U.C. Davis L. Rev. 709 1994-1995

by a state court in an action upon a money demand against a nonresident of the state, upon whom no personal service of process within the state was made, and who did not appear."[373] The problematic language in the Court's opinion appears in the course of its discussion of "the distinction between the validity of a judgment rendered in one state, under its local laws upon the subject, and its validity in another state . . . ."[374]

This was clarified somewhat by the Court's several references to the importance to the validity of a judgment, if rendered without personal service on or appearance by the defendant, whether the defendant were a nonresident or not.[375] But it was undisputed that John Benge was not a resident of Pennsylvania, and therefore, the Court said, "it was necessary to the validity of the judgment, *at least elsewhere*, that it should appear from the record that he had been brought within the jurisdiction of the Pennsylvania court by service of process, or his voluntary appearance, *or that he had in some manner authorized the proceeding*."[376] The "at least elsewhere" language suggests, or at least does not foreclose, that a judgment rendered without personal jurisdiction according to federal full faith and credit principles could nonetheless be enforced in the judgment-rendering state without violating the Due Process Clause. But the dispositive language turns out, on further examination of the Court's reasoning, to be the "in some manner authorized" language.

---

[373] *Id.* at 294-95.

[374] *Id.* at 295.

[375]

> Publicists concur that domicil[e] generally determines the particular territorial jurisprudence to which every individual is subjected. . . . A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant . . . in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment of a sister State . . . to set up, as a defence, want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment, and had not been served with process, and did not enter his appearance.

Id. at 297-98.

[376] *Id.* at 298 (emphasis added).

HeinOnline -- 28 U.C. Davis L. Rev. 710 1994-1995

The "validity of the judgment" turned on the terms of the contract, or note, by which John Benge had confessed to judgment. If he had, in effect, waived his right to object to the lack of jurisdiction over his person, the judgment was valid. But if he had, in effect, appointed "any attorney" to be his agent for service of process, the judgment was not valid, because no attorney had duly confessed judgment on his behalf. Pennsylvania, of course, would not view the judgment with the squinting eye that full faith and credit principles permit courts to adopt when a state is asked to enforce a foreign judgment against its own citizen. Moreover, Pennsylvania might differ from Maryland law with regard to the meaning and construction of the fine print in the cognovit note authorizing confession of judgment by "any attorney" in relation to Pennsylvania's 1806 statute authorizing any prothonotary to act in lieu of an attorney. Were John Benge a Pennsylvania resident, there could be no doubt that Pennsylvania could apply its own law so as to hold the proceedings to be substantially in compliance with the cognovit note, and hence enforce the confessed judgment as a valid judgment. The Court did not resolve the choice of law issue that was posed by the fact that John Benge was not a Pennsylvania resident, however. It was sufficient to hold that, whatever law might be applied were the validity of the judgment contested in Pennsylvania to determine whether the confession-of-judgment defendant had "in some manner authorized the proceeding," "at least elsewhere" the forum state could choose to apply the law of the place where the note was executed, and where John Benge resided at the time the note was executed. This was Maryland, and so the Maryland courts' determination under Maryland law that the method of confessing judgment was not the method authorized by the note was a permissible choice of law. The result was a judgment rendered without service of process, without appearance, and without confession, and so the application of Maryland law, rather than Pennsylvania law, to the construction of the note was necessarily dispositive, and destructive, of the validity of the judgment.[377]

377

By the bond in question he authorized "any attorney of any court of record in the State of New York, or any other State, to confess judgment against him

HeinOnline -- 28 U.C. Davis L. Rev. 711 1994-1995

Case 5. In *Goldey v. Morning News*,[378] the Court declared:

> Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. . . . For the same reason, service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States . . . .[379]

Goldey is a fascinating case in its own right, but as an exemplar of the supposed vitality of the limited view, it is only slight-

---

(us) for the said sum, with release of errors, etc." *But the record did not show,* nor is it contended, that he was served with process, or voluntarily appeared, or *that judgment was confessed by an attorney* of any court of record of Pennsylvania. *Upon its face, then, the judgment was invalid,* and to be treated as such when offered in evidence in the Maryland court.

It is said, however, that the judgment was entered against Benge by a prothonotary, and *that the prothonotary had power to do this under the statute of Pennsylvania* of February 24, 1806. Laws of Penn. 1805-6, p. 347. This statute was proved as a fact upon the trial in Maryland, and may be assumed to have authorized the action taken, though under *Connay v. Halstead,* 73 Penn. St. 354, that may, perhaps, be doubtful. And *it is argued that the statute, being in force at the time this instrument was executed, should be read into it* and considered as forming a part of it, and therefore that John Benge had consented that judgment might be thus entered up against him without service of process or appearance in person or by attorney.

But we do not think that *a citizen of another State than Pennsylvania* can be thus presumptively held to knowledge and acceptance of particular statutes of the latter State. What Benge authorized was a confession of judgment by any attorney of any court of record in the state of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms *he did not consent to be bound by the local laws of every State in the Union* relating to the rendition of judgment *against their own citizens* without service or appearance, but on the contrary made such appearance a condition of judgment. *And even if judgment could have been entered against him,* not being served and not appearing in each of the States of the Union, *in accordance with the laws therein* existing upon the subject, *he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State.*

The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, *thereby permitting the law of another State to override their own.*

Id. at 298-99 (emphasis added).

[378] 156 U.S. 518 (1895).

[379] *Id.* at 521-22.

HeinOnline -- 28 U.C. Davis L. Rev. 712 1994-1995

ly more persuasive than *St. Clair v. Cox*,[380] which it both cites and resembles.[381] Like *St. Clair*, it held that service of process on an agent of a nonresident corporation, not otherwise transacting business in the state, was ineffective if the agent's presence in the state was unrelated to corporate conduct.[382] In this respect it broke no new ground. Also like *St. Clair*, it was a full faith and credit case that relied on full faith and credit principles without pronouncing, in dicta, the parallel role of the Due Process Clause in determining the validity of such a judgment even within the judgment-rendering state. But unlike *St. Clair*, the service in question was quashed upon special appearance following removal of the case to federal court,[383] so the issue arose in the context of the validity of service of pro-

---

[380] 106 U.S. 350 (1882). *St. Clair* is the second of the line of cases here discussed. *See supra* text accompanying notes 341-55.

[381] 156 U.S. at 522.

[382] *Id.* at 526.

[383] This presented nice issues of the relationship of removal and appearance, the plaintiff having argued that by appearing in state court to seek removal, the defendant entered a general appearance that waived any defect of process. (It was not until 1948 that the present system, whereby removal is effected by notice of removal filed directly in federal court, was substituted for the former procedure of petitioning the state court to remove the case to federal court.) Alert counsel for the defendant had carefully couched the removal petition as a special appearance in state court solely for that purpose, and immediately after the removal again appeared specially to ask the federal court to quash the service of process. Thus, the Court was able to hold that the jurisdictional objection had been properly preserved and presented without ruling on the more general issue of the status of a removal petition as a general appearance when less cautiously presented to the state court. *Goldey*, 156 U.S. at 525-26. In so doing, however, it reasoned that appearance rules in state court were not binding on federal courts of the same state, relying on the same exception to the Conformity Act that was at play in Insurance Co. v. Bangs, 103 U.S. 435 (1880), as discussed *supra* text accompanying note 337. *See Goldey*, 156 U.S. at 523-24.

This left dangling a question of the crack between York v. Texas, 137 U.S. 15 (1890), *see supra* note 369, and Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287 (1890), *see supra* text accompanying notes 371-77, concerning the law applicable to a constructive *appearance*, as opposed to constructive service of process, by which a nonresident was deemed subject to the jurisdiction of a state court as a matter of state law. Thus the concededly inconclusive resolution in *Goldey* of the status of an appearance to seek removal as a jurisdiction-conferring event under state versus federal law may have been responsible for some of the waffle in *Goldey* about the outcome of a jurisdictional objection depending upon the court system in which the objection was lodged. This point is weakened, however, by the fact that the various distinctions drawn in *Goldey* between "the court the service of whose process is in question, and the court in which the effect of that service is to be determined," 156 U.S. at 522, all dealt with constructive *service* issues rather than constructive *appearance* issues.

HeinOnline -- 28 U.C. Davis L. Rev. 713 1994-1995

cess challenged prior to judgment rather than the validity of a default judgment challenged collaterally. The limited-view-resonant caveats were also more pointed, with the Court noting that "[u]pon the question of the validity of such a service as was made in this case, there has been a difference of opinion between the courts of the State of New York and the Circuit Courts of the United States,"[384] yet continuing on to use the supposedly diffident language that Borchers quotes: "although" the service at issue may be "recognized as valid by [New York's] legislative acts and judicial decisions," it "can be allowed no validity" in federal court "[w]hatever effect a constructive service [might] be allowed" in state court.[385]

Since the *Goldey* Court did not squarely hold that the service in question was in fact valid under New York law, and merely assumed that *this* service was in accordance with New York's statutory requirements because "[s]uch a service" had been held valid in other cases decided by the New York Court of Appeals, *Goldey*'s language may not be diffident at all. "Whatever" and "although" and "may be allowed" are appropriately conditional phrases to note that the adequacy of this service under state law was assumed but not decided.

As with *Hart v. Sansom*,[386] however, we do not have to debate dictionary meanings or resort to a Ouija board in order to gain a better understanding of *Goldey*'s significance. Given New York's divergence from federal authority on the point, contemporary New York judges could be expected to exploit their freedom from the Due Process Clause if that were what *Goldey* meant to permit. In 1902 the New York Court of Appeals unambiguously indicated that it deemed itself bound by due process constraints on state-court personal jurisdiction, holding that the Supreme Court's elaboration of due process in *Scott v. McNeal*[387] had "expressly overruled" New York precedent on the binding effect of a probate court's judgment on an un-

---

[384] *Goldey*, 156 U.S. at 520.

[385] *Id.* at 521-22.

[386] 110 U.S. 151 (1884). *Hart* is the third of the line of cases here discussed. *See supra* text accompanying notes 356-70.

[387] 154 U.S. 34 (1894).

HeinOnline -- 28 U.C. Davis L. Rev. 714 1994-1995

served party.[388] In 1907 the same court responded to a federal due process attack on the validity of service of process in New York on the president of a foreign corporation, which "strictly conform[ed]" to state statutory law, by acknowledging that federal standards for the validity of service of process under *Goldey* were "not in entire accord" with its own prior decisions under the New York statutes.[389] The court of appeals defended the New York statute as "furnish[ing] the safer and wiser rule to follow" in protecting the interests of New York residents, but proceeded through clenched teeth to "recognize and attempt to follow the rule laid down by the federal court" in *Goldey*.[390] Only after analyzing the "peculiar" and unprecedented facts of the case, which posed corporate "alter ego" issues because the defendant foreign corporation was owned and controlled by a New York holding company, did the court of appeals sustain the service as "valid, not only under the decisions of our court, but under those of the federal court as well."[391]

Case 6. *Conley v. Mathieson Alkali Works*,[392] cited without elaboration by Borchers as the first of three "*see, e.g.*" cases supporting his claim that "*Pennoyer* did not effect a general limitation on the [jurisdictional] reach of state courts,"[393] literally echoed the *Goldey* case. Like *Goldey*, *Conley* involved the validity of service of process on a corporate agent, arguably authorized by state statute, in a case removed to the federal circuit court from a New York state court. Among the passages quoted from *Goldey* was the one flagged as significant by Borchers: "'Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government.'"[394] But this particular passage, which was as extraneous to the result in *Conley* as in *Goldey*, received no special attention or explication. The *Conley* Court dressed its decision in language

---

[388] In re Killian's Estate, 65 N.E. 561, 563-64 (N.Y. 1902).

[389] Grant v. Cananea Consol. Copper Co., 82 N.E. 191, 192-93 (N.Y. 1907).

[390] *Id.* at 193.

[391] *Id.* at 192, 194.

[392] 190 U.S. 406, 411-12 (1903).

[393] Borchers, *supra* note 1, at 46 & n.169.

[394] *Conley*, 190 U.S. at 411 (quoting Goldey v. Morning News, 156 U.S. 518, 521 (1895)).

HeinOnline -- 28 U.C. Davis L. Rev. 715 1994-1995

borrowed from another suit, and *Goldey*'s "clear dicta"[395] was carried forward like lint in a trouser cuff, and with no more significance.

If one squints to find language of independent significance in *Conley*, it perhaps lies in the Court's statement of the holding of *Goldey*: "[I]t is not every service upon an officer of a corporation which will give *the state court* jurisdiction of a foreign corporation."[396] The issue in *Goldey* and *Conley* was not the validity of a prior state judgment and whether it should be recognized in federal court — an issue that would necessarily turn on whether the state court had jurisdiction in the underlying case — but rather the issue whether a federal court had the jurisdiction itself to proceed to adjudicate a case, and thus erred in dismissing that case for lack of jurisdiction. Given this posture, it was sufficient to affirm the federal circuit court's ruling that it lacked jurisdiction, and the reference to a lack of jurisdiction in state court as well could be construed as a "counter-dictum" grounding *Goldey*, and hence *Conley*, not only in full faith and credit principles (which permitted the federal court to disregard state statutory law predicated on jurisdictional principles inapplicable in federal court), but also in due process principles (which negated the jurisdiction the state courts would otherwise have had under state law *ex proprio vigore*). While I am skeptical that this would be a proper reading of *Conley*,[397] the point is that *Conley* provides no more support for the limited view than did *Goldey*, and perhaps less. Moreover, when the New York Court of Appeals construed *Goldey* in 1907 as requiring application of federal case law to determine whether service of process under New York law violated the Due Process Clause

---

[395] Borchers, *supra* note 1, at 46.

[396] *Conley*, 190 U.S. at 410 (emphasis added).

[397] My skepticism arises from the fact that in both *Goldey* and *Conley*, the complaint had been filed in state court, and the federal circuit court was exercising removal jurisdiction. Removal jurisdiction was then conceived as "derivative" of the jurisdiction of the state courts, and absent an unstated (but possible) distinction by *Goldey* and *Conley* between the subject-matter jurisdiction of the state court and its jurisdiction over the person of the defendant, the existence of "jurisdiction" in the federal court was not independent of the existence of "jurisdiction" in the state court at the time of removal to the federal court. *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 38, at 226 (5th ed. 1994) (discussing cases in which it "was frequently said that jurisdiction on removal is derivative, and that if the state court had no jurisdiction, the federal court acquires none").

HeinOnline -- 28 U.C. Davis L. Rev. 716 1994-1995

of the Fourteenth Amendment, it cited *Conley* as one of the relevant federal cases.[398]

Case 7. *Laing v. Rigney*[399] involved the validity of a New Jersey divorce decree awarding alimony that New York had refused to enforce. Far from supporting the limited view, it expressly contradicts it.[400]

On writ of error to the New York Court of Appeals, the Supreme Court succinctly summarized the constitutional issue: "The Federal question presented by this record is whether the judgment of the New York courts, in dismissing plaintiff's complaint, which sought to enforce a final decree of the Court of Chancery of New Jersey, gave due effect to the provisions of article IV of the Constitution of the United States, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State."[401] Because the issue arose from New York's refusal to enforce the New Jersey judgment, this was indeed a full faith and credit case, but the Supreme Court expressly recognized that the converse of the

---

[398] Grant v. Cananea Consol. Copper Co., 82 N.E. 191, 193 (N.Y. 1907). *Grant* distinguished *Conley* from *Goldey*, however, in the following respect. In *Conley*, as in *Goldey*, the Supreme Court had assumed, as the plaintiff contended, that process had been served in a manner authorized by state law. Reviewing the facts in *Conley*, the New York Court of Appeals decided that there, unlike in *Goldey*, state and federal law were not in conflict because the service was insufficient as a matter of state law, mooting the federal due process point.

[399] 160 U.S. 531 (1896).

[400] I am mystified as to what contrary conclusion Borchers draws from the case. The cited portion of the Court's opinion discusses the contention of the defendant in the New Jersey case that enforcement of the judgment against him would violate his right to due process of law. The Court goes on to reject that argument, but only because "the evidence of the defendant did not avail to show want of jurisdiction on the part of the Chancery Court of New Jersey to render the decree in question." *Id.* at 545.

> [I]t may fairly be said that he both had an opportunity to be heard and was heard. His appearance by counsel under the supplementary proceedings was not to object to the jurisdiction of the court, but to effect a change in the recitals of the decree on non-jurisdictional grounds. As before stated, we do not deem it necessary to consider the contention on behalf of the plaintiff in error that by such appearance the defendant estopped himself from alleging error in the decree when thus amended, but we think he certainly precluded himself from now contending that he has been deprived of his property within the meaning of the Federal Constitution.

Id.

[401] *Id.* at 539.

HeinOnline -- 28 U.C. Davis L. Rev. 717 1994-1995

full faith and credit argument of the plaintiff-in-error seeking to enforce the New Jersey judgment was a due process argument by the defendant-in-error seeking to void that judgment for lack of territorial jurisdiction. "It is claimed by the defendant in error that to hold him personally bound by the decree for the payment of money would, in the circumstances of the present case, deprive him of his property without due process of law."[402] The Supreme Court reversed the New York judgment, holding that the defendant husband's appearance by counsel to move, successfully, for an amendment of the terms of the default judgment, constituted a submission to the jurisdiction of the New Jersey court. While the defendant husband could have appealed the New Jersey judgment to argue error in the entry of judgment upon his default, "we think he certainly precluded himself from now contending that he has been deprived of his property within the meaning of the Federal Constitution."[403] And leaving no doubt that it was cognizant of the distinction between the *affirmative* full faith and credit obligation of New York to enforce a valid sister-state judgment and the *negative* due process obligation of New York to deny enforcement of a sister-state judgment that was invalid for lack of territorial jurisdiction, the Court declared: "It is undoubtedly true, as claimed by the defendant in error, that if the judgment of the Court of Chancery of New Jersey was not binding upon the defendant therein personally in that State, *no such force* could be given to it in the state of New York."[404] "No such force could be given" is not the language of full faith and credit law.[405] It is the due process language of *Pennoyer* in the fullest flower of the expansive view.

Case 8. In *Wilson v. Seligman*,[406] the Court referred to a "former statute of Missouri" dating from 1855 permitting an unsatisfied judgment against a corporation to be executed without any further process by levy upon "the property of stockholders

---

[402] *Id.* at 545.

[403] *Id.*

[404] *Id.* at 539-40 (emphasis added).

[405] *Id.* at 540. "[T]he Supreme Court cases of this era did not hold that the Full Faith and Credit Clause placed any affirmative limitations on jurisdiction." *Jurisdictional Pragmatism*, *supra* note 3, at 566.

[406] 144 U.S. 41, 45 (1892).

HeinOnline -- 28 U.C. Davis L. Rev. 718 1994-1995

within the State" of a stockholder of the corporation, and observed "[i]n that condition of the law, the judgment and execution bound only the property of stockholders on which it was levied within the State, and created no personal liability on their part which could be enforced by suit in another State . . . ."[407] Presumably Borchers reads this to mean that, in the Court's view, this statutory liability *was* indeed a "personal liability" but one which could *not* "be enforced by suit in another state," rather than that this *was not* a "personal liability" and therefore (like any other liability based on state power over property within the state rather than the person of a nonresident) could not be "enforced by suit in another state."

Borchers's reading is strained at best,[408] but in any event describes the Court's putative view of a superseded statute that had been repealed before either the Fourteenth Amendment was adopted or *Pennoyer* was decided. The Court made clear that the different statute at issue in the case before it had originally been enacted in 1865 and reenacted in the Revised Statutes of 1879.[409] This new statute superseded the 1855 statute, and provided a different process for executing against a shareholder a judgment against a corporation.[410] The new statute required service of process on the shareholder prior to any execution against the shareholder of the judgment against the corporation.[411] In the case at hand, however, that service had occurred extraterritorially — the process of the Missouri court had been served on the defendant shareholder at his home in New York.[412] For that reason it had been found invalid by a federal circuit court sitting in Missouri. Quoting liberally from

---

[407] *Id.*

[408] Referring to the 1855 statute, the Court declared: "In that condition of the law the judgment and execution bound only the property of stockholders on which it was levied within the State, and created no personal liability on their part which could be enforced by suit in another State . . . ." 144 U.S. at 45-46. This seems clearly enough to construe the statute as encumbering only in-state property, not the person of the defendant. As such it is perfectly consistent with *Pennoyer*'s principles of territoriality, and does not suggest that a judgment based on extraterritorial personal jurisdiction could be enforced in Missouri but not elsewhere.

[409] *Wilson*, 144 U.S. at 42 n.1.

[410] *Id.* at 45-46.

[411] *Id.* at 43-44.

[412] *Id.* at 42-43.

HeinOnline -- 28 U.C. Davis L. Rev. 719 1994-1995

Pennoyer's most expansive language — "no State can exercise direct jurisdiction and authority over persons or property without its territory" — "ineffectual for any purpose" — "[p]rocess sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability" — "an absolute nullity . . . not entitled to any respect in the State where rendered" — "[lacking] any validity" — the Court vehemently affirmed that determination of invalidity.[413] One searches in vain for the promised "clear dicta" supporting Borchers's limited view.

Case 9. *Cooper v. Newell*[414] is the first of two cases cited by Borchers to show that "the limited view died slowly"[415] even after it was "[i]nexplicably"[416] rejected by the Supreme Court in a pair of 1899 cases, *Connecticut Mutual Life Insurance Co. v. Spratley*[417] and *Dewey v. Des Moines.*[418] "Decided only five weeks after *Dewey*," *Newell* is seen by Borchers as a limited view case because it "repeated the *Goldey* language giving states free reign to recognize their own judgments as they saw fit."[419]

I have already discussed how *Goldey*'s language gave no such "free reign," even in the eyes of supposedly freed state judges.[420] But *Newell* is even more profoundly inapposite than *Goldey* and *Goldey*'s other echo, *Conley.*[421] Unlike those cases, in which constructive service of process of uncertain ("whatever") effect under state law was deemed ineffective to permit the federal courts to adjudicate personal claims against foreign

---

[413] *Id.* at 44-45.

[414] 173 U.S. 555 (1899).

[415] Borchers, *supra* note 1, at 48.

[416] *Id.* at 46.

[417] 172 U.S. 602 (1899).

[418] 173 U.S. 193 (1899).

[419] Borchers, *supra* note 1, at 48. Borchers relies on that part of *Newell* where *Goldey*'s full faith and credit language is quoted and the law of the judgment-rendering state is distinguished because, inter alia, "[w]hat ever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." Borchers, *supra* note 1, at 48 n.181 (citing *Cooper*, 173 U.S. at 568).

[420] Goldey v. Morning News, 156 U.S. 518 (1895), is discussed *supra* text accompanying notes 378-91, as the fifth of Borchers's ten post-*Pennoyer* cases supposedly supportive of the limited view.

[421] *See supra* text accompanying notes 392-98 (discussing the sixth of Borchers's ten cited cases, Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903)).

HeinOnline -- 28 U.C. Davis L. Rev. 720 1994-1995

corporations, *Newell* involved the validity and hence preclusive effect of a judgment actually rendered in state court — an 1850 Texas judgment rendered years before the ratification of the Fourteenth Amendment in 1868 limited "whatever" power the state theretofore had to render binding personal judgments. Moreover, that judgment did not even purport to bind a nonresident upon constructive service of process. It was a contested judgment rendered by a jury after the purported appearance of the defendant by counsel. It was collaterally attacked by an ejectment suit in federal court filed forty years later in Texas by the New Yorker whose title to the land in question had been divested by the 1850 judgment. The federal jury found that the 1850 judgment was a fraud and a nullity. The defendant there, now the federal plaintiff, had left Texas in 1848, had never known of the suit, and had not retained the attorney who purported to appear on his behalf in the Texas suit in 1850. The 1891 federal judgment returning the land to the plaintiff was appealed to the Fifth Circuit on the ground, inter alia, that the trial judge should have directed a verdict for the defendant on the basis of the conclusive effect of the prior contested state judgment entered upon the appearance through counsel of the defendant therein, the present federal plaintiff.[422]

The newly constituted court of appeals[423] certified to the United States Supreme Court the question whether a federal court sitting in Texas was bound by the record of the Texas judgment, and hence whether the federal trial court had erred in permitting the judgment to be collaterally attacked by the evidence of fraud considered and accepted by the jury below. As such, the case posed a pure full faith and credit question — the law governing the means of challenging the validity of a pre-1868 (*ergo* pre-Fourteenth Amendment) state judgment and hence denying it recognition in a federal court. Thus it was hardly surprising that the Supreme Court upheld the proceedings in the federal trial court by discussing its full faith and credit precedents, relying on the "leading case" of *Thompson v.*

---

[422] Cooper v. Newell, 173 U.S. 555, 556-64 (1899).

[423] The Circuit Courts of Appeals were created by the Evarts Act, Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 1, at 6 (1977) (describing structure of lower federal courts under the Evarts Act).

HeinOnline -- 28 U.C. Davis L. Rev. 721 1994-1995

Whitman to establish that the jurisdiction of a state court to render a judgment submitted for recognition in federal court is always open to inquiry by evidence beyond the record, whatever presumptions of jurisdiction might obtain in state court, and relying principally on *Pennoyer* and *Goldey* to establish that "[t]he same rule applies . . . even when the judgment of the court of a State comes under consideration in a court of the United States, sitting in the same State."[424]

But there is far more damning evidence that *Newell* is not predicated on the limited view than the fact that it applied full faith and credit law to a full faith and credit case involving a state court judgment that could not have violated the Due Process Clause of the Fourteenth Amendment because it was rendered eighteen years before the amendment went into effect. After establishing as a matter of federal full faith and credit law that the federal trial court had the *prerogative* to admit evidence collaterally attacking the 1850 state judgment, the Supreme Court continued on to consider whether it *should* have done so by admitting the evidence at issue in this case. The Court discussed state-court case law from Massachusetts and New York establishing that in those states such evidence was admissible even in non-full faith and credit cases, for the purpose of collaterally attacking one of the state's own prior judgments.[425] And then the kicker. The *Newell* Court declared: "We do not understand any different view to obtain in Texas."[426] The Court cited three pertinent Texas cases, quoting at length from one "which is much in point," wherein the chief justice of Texas had declared that the plaintiff there, just like the federal plaintiff in *Newell*, had "'alleged facts'" concerning nonresidence, lack of service, and lack of appearance "'which, if true, would render the [prior Texas state-court] judgment void . . . and no one could acquire rights under it.'"[427] The *Newell* Court concluded that "the Circuit Court was clearly right in admitting evidence to contradict the recital that Newell was a

---

[424] *Cooper*, 173 U.S. at 567 (citing Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873)); *see supra* note 114 and text accompanying notes 120-22 (discussing *Thompson*).

[425] *Id.* at 569.

[426] *Id.* at 570.

[427] *Id.* at 570-71 (quoting Bender v. Damon, 9 S.W. 747, 748 (Tex. 1888)).

HeinOnline -- 28 U.C. Davis L. Rev. 722 1994-1995

citizen and resident of Texas, and to show that the attorney had no authority to represent him."[428]

If this case is supportive of the limited view, it can only be because the Court *did not* say that due process compelled the same result as full faith and credit law. But it could not say that about the 1850 judgment, which was rendered before the Fourteenth Amendment came into play. And it could not say that about the recognition of the judgment by Texas courts after the Due Process Clause became applicable to them,[429] because the Texas courts had not been asked to enforce the judgment. And any "woulda, coulda, shoulda" due process dictum about what the Texas state courts would have had to do if they had been asked to enforce the judgment would have been patently obnoxious, since the Court's own review of Texas precedent showed conclusively that the Texas courts *would not* have enforced the 1850 judgment in question without first permitting the judgment to be collaterally attacked by the submission to the trier of fact of evidence of its fraudulent nature.

---

[428] *Id.* at 571. The Supreme Court went on to reject the alternative contention that the 1850 judgment was binding as an in rem judgment against a nonresident based on state power to settle title to property within its jurisdiction. The 1850 action had not been framed or prosecuted in this fashion, and manifestly did not satisfy the prerequisites of the state statutes that "taken together" arguably might have authorized such an assertion of in rem jurisdiction. *Id.* at 571-72. The Court noted in passing, however, that under the statute in force at the time of 1850 action, Texas "provid[ed] generally that, in suits against non-residents, service could be had by publication." *Id.* at 571. The Court took pains to declare that, as such, the statute was overbroad. "This statute was applicable to all suits, and, so far as actions against non-residents were personal, judgment on citation by publication would not be conclusive." *Id.* Most probably the Court was still speaking in the voice of full faith and credit regarding the conclusiveness of a Texas judgment in a later federal proceeding. But to the extent that this speaks not to the *recognition* of a state judgment in other courts, and rather to the *power* to render in the first place a binding in personam judgment upon a non-resident based only on constructive service of process — and the Court does go on immediately thereafter to characterize a more narrowly drawn statute limited to in rem proceedings upon constructive service of process as "within the power of the legislature of Texas," *id.* — the dictum is grounded in due process, and the limited view is nowhere to be found.

[429] *See generally infra* text accompanying notes 466-87 (discussing the expansive-view holding in Scott v. McNeal, 154 U.S. 34 (1894). In *Scott v. McNeal*, not cited by Borchers, the Supreme Court reversed the enforcement by a state court of a judgment not *itself* violative of the Fourteenth Amendment because state-court enforcement of a judgment invalid under federal territoriality principles constituted an independent denial of due process at the time of enforcement.

HeinOnline -- 28 U.C. Davis L. Rev. 723 1994-1995

4. Borchers's Last Strike

Case 10. *Haddock v. Haddock*[430] is the last of the cases between *Pennoyer* and *Menefee* cited by Borchers as supportive of the limited view, and the second such case to be decided after *Spratley* and *Dewey* had expressly endorsed the expansive view. Borchers calls it a "striking case" because it initially "intimated the correctness of the expansive view" but concluded by adopting a double standard for the effectiveness of divorce decrees which was "consistent only with the *limited* view of *Pennoyer*."[431] What is striking is the errant audacity of this claim, given the content of the expansive and limited views as originally juxtaposed.

At this point in his article, apparently, Borchers has decided that the expansive view means not (1) that federal due process principles of personal jurisdiction prohibit a state from enforcing a personal judgment rendered in violation of those principles, even within the territory of the judgment-rendering state; but (2) that federal due process principles of personal jurisdiction are (a) immutably fixed by their elaboration in *Pennoyer*, and (b) co-extensive with federal full faith and credit principles of personal jurisdiction, so that a personal judgment is either invalid everywhere as a matter of due process (as defined in *Pennoyer*), or every other state and federal court is bound to give that judgment the same effect as it would have in the judgment-rendering state. Since *Haddock* is inconsistent at least with (2)(b), Borchers concludes that it is "consistent only with the *limited* view of *Pennoyer*." There is now no pretense that the limited view has any content of its own. It only means some departure from the expansive view as thus redefined.

Originally the expansive view affirmed that due process limits state jurisdictional power and the limited view denied this, requiring instead only that a state provide an opportunity to contest the validity of a judgment under state law. All the expansive view entailed, by this definition, was *some* due process constraint of the validity and enforceability of state judgments

---

[430] 201 U.S. 562 (1906), *overruled by* Williams v. North Carolina, 317 U.S. 287, 304 (1942).

[431] Borchers, *supra* note 1, at 48-49.

HeinOnline -- 28 U.C. Davis L. Rev. 724 1994-1995

according to federal standards independent of and superior to local-law criteria of validity. By the time Borchers gets to *Haddock*, any departure from or redefinition of what *Pennoyer* had to say about the *content* of those federal standards, or any lack of *co-extensiveness* between due process constraints and full faith and credit obligations, is reason enough to claim life for the limited view.[432] Nowhere does Borchers demonstrate as vividly as here the fluidity of his own definition of the limited view.

---

[432] This process of dilution of the limited view can be illustrated by analogy to a similarly structured but different and imaginary claim that I impute to Borchers only by hypothesis.

Suppose Borchers had proposed that the principles of free speech applicable to the states through the Fourteenth Amendment's Due Process Clause had taken a wrong turn decades ago. All that the original cases meant to establish was, say, that states could not restrain or penalize speech through ad hoc judgments by courts. Calling this the "limited" view of federal constitutional regulation of state suppression of free speech, Borchers reinterpreted the early cases as limiting the right to challenge state action on due process/free speech grounds to the right to show that the type of speech in question did not fall within a category of speech banned by an express state statute, strictly construed.

Continuing the hypothesis, let us suppose that Borchers attempted to show that the early cases were in fact deferential to express legislative prohibitions of disfavored speech in just this way. His story began with cases in which federal courts exercising diversity jurisdiction had refused to follow pre-Fourteenth Amendment precedents in certain states that had imposed judicial sanctions for disfavored speech. These precedents involved shutting down radical newspapers as nuisances, and awarding damages to politicians accused of corruption by opponents. The federal courts declared these precedents to be contrary to general principles of common law, and not binding on the federal courts. Reviewing one of these cases, the Supreme Court held that on matters of general common law the lower courts were not bound by state law, and went on in dicta to declare that these precedents would, since the ratification of the Fourteenth Amendment, deny the defendants due process of law. But in later cases the Supreme Court continued to refer to the disfavored state precedents as violative of traditional principles of common law rather than as unconstitutional, and sometimes declared that "perhaps" states remained free to suppress or penalize such speech in their own courts provided that they strictly complied with express and narrowly tailored statutes by which the local legislature prohibited certain kinds of obnoxious speech. Eventually, but "inexplicably," the Supreme Court disavowed this "limited" view of due process, and in reversing the judgment of a state court that had upheld an injunction in strict compliance with an express state statute banning singing in public on Sundays, declared that any state action to suppress the sort of speech that was not actionable under traditional principles of common law was unconstitutional, whether or not the cause of action had been statutorily conferred.

HeinOnline -- 28 U.C. Davis L. Rev. 725 1994-1995

Haddock[433] involved a couple married in 1868 in New York.[434] The circumstances were unusual. The marriage was unconsummated, and the couple separated on the day of the wedding.[435] The husband moved to Connecticut, and sued there for divorce in 1881. Process was served on the wife by publication, and by mail to her last known address in New York. The divorce was granted by default, and the husband remarried the following year. In 1891 the husband "inherited a considerable property from his father." The wife first sought alimony and a legal separation in New York in 1894, obtaining judgment by default after service of process by publication. That judgment was ineffective for lack of personal service of process on the husband. The wife sued again for a legal separation and alimony in 1899, this time personally serving the husband with process while he was present within New York.[436] The husband asserted that the Connecticut divorce of 1881 was

---

A few years later, the Supreme Court upheld a state court injunction against singing a particularly bawdy ballad at football games in violation of a narrowly tailored state obscenity statute. After "intimating" early in its opinion that states were prohibited by the Due Process Clause from suppressing protected speech, the Supreme Court reviewed its free speech precedents and their common-law antecedents, ultimately ruling that obscenity was not protected speech within the meaning of the Due Process Clause. Borchers would, according to my hypothesis, cite this as showing the lingering force of his "limited" view of the true scope of due process constraints on state-court judgments burdening free speech.

But that would entail a substantial redefinition of his "limited" view as originally proposed. What started out as a limitation in terms of *how* the state could prohibit *any* speech it wished, would have become a limitation on the *sort* of speech the state could regulate — not how it could regulate it. This is the sort of redefinition of the limited view of due process that is manifested by Borchers's claim that *Haddock* is a limited view case. It does not qualify the general force of due process as an independent, distinctly federal limitation on state jurisdictional power. It treats divorce decrees as especially problematic judgments in terms of how federal due process allocates jurisdictional power among states, just as free speech law has treated obscenity — and defamation, and commercial speech, and speech broadcast by licensed users of public airwaves — as especially problematic forms of speech in terms of how due process limits state power to regulate speech.

Having begun as the *antithesis* of the expanded view, Borchers's limited view of due process regulation of state-court jurisdictional power has by this stage of his analysis become only a *qualification* of it. *Haddock* is at best a "limited expansive view" case, but that is limited enough for Borchers.

[433] 201 U.S. at 564.

[434] The colorful facts are succinctly summarized in Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 119 (1990).

[435] *Haddock*, 201 U.S. at 606 (Brown, J., dissenting).

[436] *Id.*

HeinOnline -- 28 U.C. Davis L. Rev. 726 1994-1995

entitled to full faith and credit in New York, which apparently would have been determinative of the wife's alimony claim because the Connecticut decree was predicated on the wife's desertion of the husband and fraud in procuring the marriage.[437] The New York courts denied recognition to the Connecticut divorce and awarded alimony to the wife.[438] On writ of error the Supreme Court affirmed in a five-four decision, with Justices Harlan and Holmes among the dissenters.[439]

The Court wrestled heroically, if ineptly, with what would become known as the problem of "divisible divorce."[440] The majority opinion and two dissenting opinions together exceeded 25,000 words in length, and extended for seventy-two pages of the *United States Reports*. The majority reduced the governing law to seven "legal propositions irrevocably concluded by previous decisions of this court."[441]

(1) Full faith and credit principles operate in what we would call today a digital rather than analog fashion. Either a state is obligated to give a foreign judgment "full" faith and credit, or none.[442]

(2) Personal judgments against nonresidents based only on constructive service of process are void. Full faith and credit principles are moot, since due process forbids enforcement of such a judgment "even in the state where rendered."[443]

(3) In rem judgments may be enforced by the judgment-

---

[437] *Id.* at 564-66.

[438] *Id.* at 565.

[439] *See id.* at 606 (Brown, J., dissenting, joined by Harlan, Brewer, & Holmes, JJ.); *id.* at 628 (Holmes, J., dissenting, joined by Harlan, Brewer, & Brown, JJ.).

[440] In Williams v. North Carolina, 317 U.S. 287 (1942) the Supreme Court had overruled *Haddock* to declare that a divorce decree rendered by the state of domicile of just one spouse, without personal jurisdiction over the other spouse, was entitled to full faith and credit. *See* Feigenson, *supra* note 434, at 121 n.12. In Estin v. Estin, 334 U.S. 541 (1948), however, the Supreme Court ruled that jurisdiction over the person of the defendant was required for a valid judgment imposing a financial liability for spousal support. The *Estin* Court noted that "[t]he result in this situation is to make the divorce divisible." *Id.* at 549. *See generally* Feigenson, *supra* note 434 (discussing rubric of "divisible divorce").

[441] *Haddock*, 201 U.S. at 566. The first three propositions were indeed uncontroversial; in certain respects the latter four were disputed by the dissenting Justices. *See id.* at 606 (Brown, J., dissenting); *id.* at 628 (Holmes, J., dissenting). Justices Brown and Holmes concurred in each other's dissenting opinions; both dissenting opinions were also joined by Justices Harlan and Brewer.

[442] *Id.* at 567.

[443] *Id.* at 567-68.

HeinOnline -- 28 U.C. Davis L. Rev. 727 1994-1995

rendering state "in consequence of the authority which government possesses over things within its borders . . . after the giving of reasonable opportunity to the owner to defend . . . even though jurisdiction is not directly acquired over the person of the owner of the thing."[444]

(4) Divorce decrees are an "exception" to the second proposition in virtue of "the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens . . . and the validity of the judgment may not therein be questioned . . . as repugnant to the due process clause of the Constitution."[445]

(5) Where both husband and wife are domiciled in the same state, or where one spouse sues where domiciled and acquires personal jurisdiction therein over the other spouse (*i.e.*, by personal service of process or appearance), that state has jurisdiction to render an extraterritorially effective decree of divorce.[446]

(6) The domicile of the husband is normally controlling of the domicile of the wife, but not when the husband has wrongfully abandoned the wife and fled the state of marital domicile to avoid his obligations.[447]

(7) When, however, the husband remains in the marital domicile and the wife wrongfully leaves, she remains constructively domiciled in the same state as the husband, and that state can render an extraterritorially effective divorce decree under the fifth proposition.[448]

The Court invoked its fourth and sixth propositions to hold that the Connecticut decree was not invalid for lack of due process, but that New York was not obligated to give it full faith and credit.[449] The validity of the judgment under due process standards was established in two ways. First, the Court expressly declared in stating its fourth proposition that "the validity of the judgment [granting an ex parte divorce] may not therein [*i.e.*, within the judgment-rendering state] be questioned on the

---

[444] *Id.* at 569.
[445] *Id.* at 569-70.
[446] *Id.* at 570.
[447] *Id.* at 570-71.
[448] *Id.* at 571-72.
[449] *Id.* at 572.

HeinOnline -- 28 U.C. Davis L. Rev. 728 1994-1995

ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the Due Process Clause of the Constitution."[450] This affirmation of the power of the judgment-rendering state to enforce its own divorce decree was repeated three more times in the course of the majority opinion.[451] Second, the *Haddock* Court also declared four times that a state was *free to give effect* to a sister state's ex parte judgment granting its citizen a divorce if the sister state wished to do so as a matter of comity;[452] the permissibility of extraterritorial enforcement of an ex parte divorce decree would obviously be precluded if such a decree were invalid for lack of due process of law. The holding of *Haddock* was only that New York was *not obligated* to give effect to the Connecticut judgment under federal full faith and credit principles.[453]

Beyond any possible doubt, *Haddock* was thus a full faith and credit case — not a due process case. Its major innovation, consistent with if not compelled by *Pennoyer*,[454] was to decou-

---

[450] *Id.* at 569.

[451] *Id.* at 572, 581, 605.

[452] *Id.* at 570, 581, 604-06.

[453] The Court framed the issue before it as: "Did the court below violate the Constitution of the United States by refusing to give to the decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?" *Id.* at 565-66. After stating and applying its seven governing propositions, the Court declared that

> [t]he case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil[e] of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution.

Id. at 572. The Court concluded its opinion as follows:

> Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, *we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause.* It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, affirmed.

Id. at 605-06 (emphasis added).

[454] Pennoyer v. Neff, 95 U.S. 714, 734 (1878). Justice Field had written in paragraph

HeinOnline -- 28 U.C. Davis L. Rev. 729 1994-1995

ple due process from full faith and credit in the divorce context. The Court boasted of the virtue of the double standard it adopted as a grand compromise:

> [T]he denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity.[455]

The Court's opinion was not a sound one. It was faulted in one dissenting opinion for too quickly assimilating divorce decrees to in personam rather than in rem judgments,[456] thereby forcing on itself the hitherto unprecedented decoupling of due process analysis from full faith and credit analysis.[457] In the other dissenting opinion, Justice Holmes protested the Court's substitution of fiction for fact in its seventh proposition,[458]

25:

> To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding *within the State*, though made without service of process or personal notice to the non-resident.

Id. (emphasis added).

[455] *Haddock*, 201 U.S. at 581.

[456] *Id.* at 606, 614-15, 624-25 (Brown, J., dissenting).

[457]

> As no question is made as to the validity of the Connecticut decree and its legal effect in that State, and as this court has repeatedly decided that, under the full faith and credit clause of the Constitution, a judgment conclusive in the State where it is rendered is equally conclusive everywhere in the courts of the United States, I do not understand how this decree can be denied the same effect in New York that it has in Connecticut without disregarding the constitutional provision in question.

Id. at 626 (citations omitted).

[458] *Id.* at 628-32 (Holmes, J., dissenting). This part of Holmes' dissenting opinion

HeinOnline -- 28 U.C. Davis L. Rev. 730 1994-1995

which sought to explain an earlier case[459] giving extraterritorial effect to an ex parte divorce as predicated on the constructive domicile of a nonresident wife in the state in which her husband divorced her.[460]

Haddock did not stand the test of time or critical analysis.[461] But it did not support a recognizable version of the limited view. Its ill-fated disjuncture between due process and full faith and credit qualified the full faith and credit standards of the day, not the due process standards. After *Haddock*, as before, judgments rendered in violation of federal due process limitations on state-court jurisdiction were as unenforceable within the judgment-rendering state as without.

---

ended with a famous discussion of line-drawing and the law:

> I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts, the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicil[e] when the married pair happens to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

Id. at 631-32 (citation omitted). Holmes also expressed his dismay at the decoupling of due process and full faith and credit law:

> I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, article 4, § 1, the notion of a judgment being valid and binding in the state where it is rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of those states.

Id. at 632.

[459] Atherton v. Atherton, 181 U.S. 155 (1901).

[460] *Haddock*, 201 U.S. at 571-72.

[461] *Haddock* was overruled in Williams v. North Carolina, 317 U.S. 287 (1942). *See supra* note 440. For a sample of the criticism of *Haddock* preceding *Williams*, see Joseph H. Beale, *Haddock Revisited*, 39 HARV. L. REV. 417 (1926); Joseph W. Bingham, *The American Law Institute vs. The Supreme Court: In the Matter of* Haddock v. Haddock, 21 CORNELL L.Q. 393 (1936).

HeinOnline -- 28 U.C. Davis L. Rev. 731 1994-1995

B. The Cases That Borchers Does Not Cite

1. *York v. Texas*

Borchers errs in identifying the Court's 1899 decision in *Spratley*[462] as "the first time the Court faced a case squarely posing the issue [of the] correctness of the *expansive* view of *Pennoyer*."[463] As discussed above, the Court's 1890 decision in *York v. Texas*[464] was an expansive view case, and was understood as such by the Texas state courts.[465]

Although the *York* Court determined that due process did not entail a right to appear specially to contest an invalid assertion of personal jurisdiction prior to enforcement of the ensuing judgment, its reasoning was "squarely" predicated on the obligatory force upon state courts of due process constraints on personal jurisdiction. *York* assumed that state-court territorial jurisdiction was limited by the Due Process Clause, and that enforcement of a constitutionally invalid judgment was beyond the power even of the state that had rendered the judgment. The case turned only on *when* a state was required to pass upon the constitutionality of its assertion of personal jurisdiction over a nonresident, not on *whether* federal due process standards were controlling over local law for purposes of determining the validity of a judgment when enforcement was sought within the judgment-rendering state.

2. *Scott v. McNeal*

If *York* was not "squarely" enough on point to count as an expansive view case, it can only be because the state judgment there in issue *survived* due process scrutiny based on the defendant's submission to state jurisdiction by an unauthorized attempt to enter a special appearance. But this was not the case with the Supreme Court's 1894 decision in *Scott v. McNeal*.[466] There a state judgment was *reversed* as a denial of due process

---

[462] Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[463] Borchers, *supra* note 1, at 47.

[464] 137 U.S. 15 (1890).

[465] *See supra* text accompanying notes 369-70.

[466] 154 U.S. 34 (1894).

HeinOnline -- 28 U.C. Davis L. Rev. 732 1994-1995

because of the invalidity of the underlying judgment given effect by the state court.

I do not think that *Scott* was ignored by Borchers in the hope that no one would notice its absence and discover its inconvenient inconsistency with his argument — any more than I think that Field pulled such a shenanigan with respect to *Galpin v. Page*.[467] The reason for Borchers's oversight — at least the only sound reason I can think of — is that the underlying judgment in *Scott* was the judgment of a territorial court, which might seem to disqualify it as a testing case for the expansive view. But as we shall see, that supposition is insupportable.

Scott's significance goes beyond the issue of whether it — or *York*, or *Spratley* — was the first case in which the Supreme Court "squarely" expounded the expansive view. It is informative of the conception of due process announced in *Pennoyer* for reasons quite apart from the plausibility of the limited view that Borchers seeks to wring from *Pennoyer*. A better understanding of this conception — of the relationship between jurisdictional invalidity and the Due Process Clause — helps to explain why the Court was reluctant to repeat *Pennoyer*'s due process dictum in subsequent jurisdictional cases — such as the ten cited by Borchers that I have just discussed[468] — in which full faith and credit principles or the Conformity Act made due process issues moot.

Moses Scott disappeared from Thurston County, in the Territory of Washington, in March 1881.[469] In April 1888 Mary Scott petitioned the probate court for Thurston County to have Moses declared dead, and to pass his estate through probate. Mary Scott's relationship to Moses is unclear. Moses was alleged to have never married, and to have left as heirs the three children of a deceased brother.[470] Her standing to petition for the administration of the estate of Moses Scott was based on

---

[467] See *supra* text accompanying notes 174-265 (discussing relationship between Justice Field, the *Galpin* litigation, and *Pennoyer*).

[468] See *supra* text accompanying notes 318-461.

[469] This summary of the facts is taken from the statement of facts preceding Justice Gray's opinion for the Supreme Court. *See Scott*, 154 U.S. at 34-37.

[470] It is possible that Mary Scott was the mother of these children, and hence the sister-in-law of Moses, but there is no evidence of this other than the sharing of a common surname.

HeinOnline -- 28 U.C. Davis L. Rev. 733 1994-1995

her status as a creditor of Moses, whose estate consisted of at least one parcel of mortgaged land.[471] The probate court granted the requested judgment, declaring Moses dead and ordering the sale of his land. The parcel in question was sold at auction to Ward for $301.50; the probate court confirmed the sale and issued title to Ward on November 26, 1888. Exactly one year later,[472] on November 26, 1889, Ward sold the land to John and Augustine McNeal for $800. "[T]he defendants forthwith took and since retained possession of the land, and made valuable improvements thereon."[473]

Something else significant happened in November 1889. On November 11th, Washington ceased being a territory and became a state.[474] Thus, when Moses Scott reappeared, alive and well enough to sue the McNeals for ejectment on January 14, 1892, his action was filed in the superior court of Thurston County in what was now the state of Washington. The superior court regarded the premature determination of the demise of Moses Scott to be mere error in the exercise of jurisdiction which did not void the resulting judgment. The McNeals were allowed to introduce the probate court judgment in defense of the action of ejectment, and the jury was directed to return a verdict in their favor. On appeal to the Supreme Court of Washington, Scott argued "'that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law.' But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment."[475] Scott brought the case to the Supreme Court of the United States on the ground that "the

---

[471] It is not clear who held the mortgage on the land. Presumably it was not Mary, since otherwise she could have foreclosed on the mortgage in the conventional way, by an in rem action upon constructive service of process, without need of the probate proceeding. Such a foreclosure action, if done in the way prescribed by local statutes, would unquestionably have resulted in a valid default judgment — a quasi in rem Type I judgment in modern parlance. *See supra* note 278.

[472] It is likely that there was a one-year redemption period, similar to that provided by section 57 of the Oregon Code of Civil Procedure, when land was sold under a default judgment upon constructive service of process. *See* Pennoyer v. Neff, 95 U.S. 714, 719 (1878) (quoting § 57 of Oregon Code of Civil Procedure in statement of facts preceding case).

[473] *Scott*, 154 U.S. at 37.

[474] Proclamation No. 8, 26 Stat. 1552 (1889).

[475] *Scott*, 154 U.S. at 37.

HeinOnline -- 28 U.C. Davis L. Rev. 734 1994-1995

probate proceedings . . . were without jurisdiction over the subject-matter, and absolutely void; and that the judgment of the superior court, and the judgment of the Supreme Court of the State affirming that judgment, deprived him of his property without due process of law, and were contrary to the Fourteenth Amendment of the Constitution of the United States."[476]

The Supreme Court of the United States reversed the judgment of the Supreme Court of Washington. Scott's argument of a lack of "jurisdiction over the subject-matter," and some of the references in the Supreme Court's opinion to the fact of the death of the absentee as a jurisdictional fact under state law, may appear to make the decision sui generis, and predicated on the invalidity of the judgment as a matter of state law. Not only would this be a strange construction, given the contrary view of state law by the supreme court of the state — it would also be the wrong construction. The issue of "construction" of state law upon which the United States Supreme Court differed with the Supreme Court of Washington was whether state law denied "due process of law."[477] The Supreme Court of the United States held that it did — for lack of proper notice to the supposed decedent that his property was about to be redistributed upon the presumption of his death. Scott, the Supreme Court held, "is not bound, either by the order appointing the administrator, or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either."[478] And fortunately for later scholars concerned with whether this was really a subject-matter or personal jurisdiction case, the Court expressly relied upon and adopted the reasoning of the "learned and able opinion"[479] of Circuit Judge William Gardner Choate in *Lavin v. Emigrant Industrial Savings Bank*.[480] Judge Choate left no doubt

---

[476] *Id.*

[477] *Id.* at 45.

[478] *Id.* at 50.

[479] *Id.*

[480] 1 F. 641 (C.C.S.D.N.Y. 1880). Judge Choate, a graduate of Harvard College and the Harvard Law School, was appointed to the federal bench by President Hayes in 1878. He served for only three years. In 1881, he returned to the practice of law, and remained at the bar until his death in 1920 at the age of 90. He served as president of the New York

HeinOnline -- 28 U.C. Davis L. Rev. 735 1994-1995

that the due process issue in state judgments declaring live parties to be dead for purposes of premature administration of their estates was the lack of proper service of process, and hence the lack of jurisdiction over the person of the supposed decedent.[481]

City Bar Association from 1902-03. JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 87 (2d ed. 1983).

[481] At issue in *Lavin* were probate proceedings in both Rhode Island, where Lavin had been domiciled until traveling in 1866 to California for an expected five-year stay, and in New York, where he had left a bank deposit that had been paid to his Rhode Island administrator under ancillary letters of administration. Lavin married in California, and did not return with his family to Rhode Island until 1879, two years after the proceeds of his bank account had been paid to the administrator. A complicating issue was a New York statute relating to decedents' estates that the Court of Appeals of New York had construed in a curious fashion. It was unclear whether the defense of the bank to Lavin's action for payment of his account was based on the effect of the New York and Rhode Island judgments, or on the effect of the New York statute as operative in conjunction with, but somehow independent of, the New York judgments. From a modern perspective, the better view is probably that the statute was inapplicable absent an adjudication of death, so that the nonrecognition of the judgment rendered in the probate proceeding as a defense to an action by Lavin was the ratio decidendi of the case. Had Judge Choate adopted this view exclusively rather than alternatively, the case could have been decided on full faith and credit grounds given that Lavin, an Irish citizen, invoked the diversity jurisdiction of Judge Choate's federal circuit court. But given the bank's alternate argument that Lavin's property rights had been divested by operation of statute, binding on the federal court under the Rules of Decision Act, see *Lavin*, 1 F. at 649-50, Judge Choate also felt obligated to rule on the "police power" argument. Judge Choate therefore relied on the Due Process Clause of the Fourteenth Amendment, rather than on full faith and credit principles, to hold that Lavin's deprivation of property under New York law was a violation of his constitutional rights whether by judgment or by statute. The rationale of the due process violation was the same in both the judicial and legislative contexts: lack of any statutory requirement or judicial provision of notice to him by prejudgment attachment or service of process, so that for lack of personal jurisdiction over him by actual or constructive service of process according to a valid legislative scheme, and for lack of attachment of his property prior to its distribution, the judicial proceedings and the statutory estoppel predicated on those proceedings were invalid as to Lavin.

Since *Scott* expressly concurred in and incorporated as its own the due process holding of *Lavin*, an understanding of *Lavin* is essential to an understanding of *Scott*'s status as an expansive view case in which the judgment of a state supreme court was reversed for violation of federal due process principles of state-court personal jurisdiction. The following extensive quotations from *Lavin* demonstrate Judge Choate's application of due process principles to invalidate both of the bank's theories of defense — the prior-valid-judgment theory, and the statutory "police power" theory.

> These authorities show very clearly what are the essentials of "due process of law," in reference to any judicial proceeding which, directly or indirectly, operates to deprive any person of his property or its beneficial use or enjoyment, or the recovery of its possession in the courts. *What is absolutely indispensable is, unless he has consented to the act of deprivation, that he shall have notice of the*

HeinOnline -- 28 U.C. Davis L. Rev. 736 1994-1995

Borchers claims that *Spratley*[482] was the first case "squarely

---

the thing itself, and that he shall have an opportunity to be heard in defence of his right or title. If the proceeding is wanting in these essentials, then, by the principles of the common law, whatever force and effect the judgment may otherwise have, *it cannot bind him; he is not, and cannot be treated as a party to the judgment* without a violation of what is regarded as a fundamental rule of natural justice. This rule of the common law is obviously intimately connected with the constitutional prohibition upon the states and the general government, forbidding them to deprive any person of his property without "due process of law."

. . . .

In fact, the whole proceeding is based on the idea that there was no longer any such person as this plaintiff, and consequently *the statutes made no provision whatever for notice to or process to be served on him.* He was not in any sense a party to the proceeding, and, according to the principles of common law, the decision was not binding upon him. As repeatedly held by the supreme court the decision by the surrogate, as against him, that he is dead, *cannot be regarded as a valid judgment against him.* It is void for want of the essential and vital ingredients of a judgment.

The proceeding was *not a proceeding in rem*, so that the seizure of the property itself by the officer of the court could be considered as constructive notice. There was *no seizure anterior to the decree* or judgment declared to be binding on him. In all proceedings *in rem* the seizure precedes and supports the decree. Here the decree is relied on as justifying a possession subsequently taken.

. . . .

This justification of the statute is an attempt to bring this legislation within the limits of that large class of state legislation generally known as the police power of the states . . . .

. . . .

The position taken that all persons hold their property subject to existing laws must be conceded, with some very important limitations. Unquestionably all persons within the jurisdiction of the state hold their property subject to restriction as to its use by the exercise, on the part of the state, of the police power already referred to, and, in this sense, subject to the laws of the state, whether enacted before or after the title was acquired. But the laws must be valid and constitutional laws. The state cannot take away from property the essential character of property. *It cannot, under cover of the exercise of the police power*, make property already acquired, or thereafter to be acquired, subject to be taken away from its owner without due process of law. It could not pass a general law providing as to all after-acquired property that it should be held on the tenure or condition that, in certain prescribed cases, it should be taken from the owner and given to another *without any form of judicial proceeding, without notice or an opportunity to be heard.*

. . . .

. . . The Rhode Island statute undertakes to do directly what the New York statute aims to accomplish by the more indirect method of declaring a judicial decision conclusive against *a person not a party to it.*

Id. at 666-69, 673, 675 (emphases added).

[482] Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899) (emphasis omitted).

HeinOnline -- 28 U.C. Davis L. Rev. 737 1994-1995

posing the issue" of the expansive view, because it was a "purely intrastate case; the judgment was both rendered and recognized in the Tennessee state courts."[483] But this "intrastate" criterion is too strong. To get beyond the domain of full faith and credit so as to test the independent force of due process, all that is required is (A) recognition of an arguably invalid judgment (under traditional common-law standards of territorial jurisdiction as articulated in *Pennoyer* and linked there to full faith and credit principles and the Due Process Clause) by (B) *any* state court. If the Supreme Court on writ of error reversed the recognition of such a judgment in *Scott*, it could only have been for due process reasons. Full faith and credit principles required recognition of valid sister-state judgments. They did not *forbid* recognition of invalid judgments, whether from a sister state, a territory, or Timbuktu.[484] Thus *Scott* must be a due process case — which is what the Court said it was — and because a state court was brought to heel for following its own views of jurisdictional validity rather than the federal principles articulated in *Pennoyer*, it must be an expansive view case as well.

3. From *Pennoyer* to *York* to *Scott*: The Timing Problem, Retrospectivity, Res Judicata, and the Time-Lag Hypothesis

Scott might seem to present a conundrum. How could a *territorial* judgment — the 1887 judgment in the probate proceeding — constitute *state* action in violation of the Due Process Clause? The *Scott* Court did not escape this conundrum by a loose construction of "state action" — it regarded the issue as irrelevant. The due process violation found and corrected by the *Scott* Court was the *recognition* by the state courts of Washington of the underlying territorial-court judgment. That judgment was violative of "due process of law" in the common-law sense.[485] The recognition of that judgment by the state courts was violative of "due process of law" in the constitutional sense, because Scott was thereby deprived of his property in his eject-

---

[483] Borchers, *supra* note 1, at 47.

[484] *See Jurisdictional Pragmatism*, *supra* note 3, at 566.

[485] *See* Scott v. McNeal, 154 U.S. 34, 46 (1894) ("No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.").

HeinOnline -- 28 U.C. Davis L. Rev. 738 1994-1995

ment action.[486]

---

[486] In the statement of facts, the Supreme Court of the United States noted that on appeal to the state supreme court "it was argued in [Scott's] behalf 'that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law.' But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment." *Id.* at 37 (quoting 5 Wash. 309). In its opinion, the *Scott* Court declared that the "prohibitions [of the Fourteenth Amendment] extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities." *Id.* at 45. The Court went on to treat the issue of whether the state supreme court had denied due process to Scott as dependent on the validity of the underlying probate judgment. The Court decided that this judgment was void for lack of notice to Scott or prejudgment attachment of his property, invoking *Pennoyer*'s articulation of the relevant jurisdictional principles. *Id.* at 46. The Court then invoked Judge Choate's holding that "letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; . . . and that *to hold such administration to be valid against him would deprive him of his property without due process of law*, within the meaning of the Fourteenth Amendment of the Constitution of the United States." *Id.* at 50 (emphasis added) (citing Lavin v. Emigrant Indus. Sav. Bank, 1 F. 641 (C.C.S.D.N.Y. 1880)). The Court concluded by noting that the defendants in Scott relied on no defense other than the invalid probate proceedings. Thus the judgment in their favor in the *present* proceedings was predicated solely on the invalid judgment in the prior probate proceedings, and for that reason the judgment of the state supreme court was reversed for constitutional error. *See id.* at 51.

The due process reasoning of the Court in *Scott* is identical to that of *Pennoyer*, at least as viewed by Professor Perdue. Analyzing *Pennoyer*'s due process dictum in conjunction with Justice Field's other decisions elaborating the Fourteenth Amendment, Perdue observes:

> Field treats the fourteenth amendment not as the *source* of the rights in question, but rather as a device for recognizing and enforcing preexisting and inalienable rights. This purely instrumental approach to the due process clause is apparent both from the structure of the *Pennoyer* opinion and from the due process discussion itself. The discussion of the due process clause comes at the end of the opinion, after Field concluded that there was no personal jurisdiction and that enforcement of the judgment could be resisted on the basis of the full faith and credit clause. Moreover, when Field does address the due process clause, his discussion strongly suggests that the due process clause is not itself the source of the personal jurisdiction principles. This is apparent from the last sentence of the paragraph in which Field discusses due process. In that sentence, Field talks about both personal jurisdiction and subject matter jurisdiction as prerequisites to a valid and enforceable judgment. Subject matter jurisdiction and personal jurisdiction are put on the same footing in his due process analysis, yet one would certainly not infer that Field meant to suggest that the determination of *whether* there is subject matter jurisdiction is controlled by the due process clause. All that Field says in *Pennoyer* is that due process requires that a court rendering a judgment have subject matter and personal jurisdiction. He does not say that the due process clause provides the criteria for determining whether such jurisdiction exists.

Perdue, *supra* note 267, at 505-06 (footnotes omitted); *see also infra* note 488 (discussing Perdue's related views on irrelevance to *Pennoyer* of date of underlying invalid judgment).

HeinOnline -- 28 U.C. Davis L. Rev. 739 1994-1995

This is the expansive view on a grand scale. If a state court gave effect to a judgment that was invalid under traditional common-law principles of personal jurisdiction, *Scott* held that the act of *recognition or enforcement* was itself a due process violation — independently of whether the rendition of the underlying judgment in the first place had also been a due process violation[487] — and as such was correctable by writ of error from the Supreme Court of the United States to the offending state court.

This view of due process expands the unenforceability of invalid judgments in a temporal as well as a jurisdictional sense. Indeed, its effect on the timeline of unenforceability was far more significant than its effect in negating any state action requirement. According to *Scott*'s conception of due process, had Neff sued Pennoyer in an Oregon state court, that court would have had a constitutional obligation to deny recognition to Mitchell's judgment despite the fact that it had been rendered prior to the ratification of the Fourteenth Amendment.[488]

---

[487] York v. Texas, 137 U.S. 15 (1890), held that states were not required by the Due Process Clause to permit nonresident defendants to appear specially to object to an invalid attempt to assert personal jurisdiction over them based on constructive service of process. *See supra* note 369. Borchers reads *York* to hold that due process does not limit a state's power to summon defendants ineffectually or to render invalid judgments — only its power to *give effect* to judgments that are invalid for lack of personal jurisdiction over improperly summoned defendants who have not entered an appearance. *See* Borchers, *supra* note 1, at 50 n.196. Thus Borchers contends that *York* was "probably overruled" by Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915), in which a state court judgment was reversed on due process grounds, for lack of personal jurisdiction over the nonresident defendant, prior to any attempt to enforce the judgment. *Id.* Whether or not *York* and *Menefee* are thus inconsistent — and this is by no means clear given that North Carolina permitted special appearance while Texas did not, and thus the North Carolina courts in *Menefee* had ruled erroneously upon the due process objection that in Texas could be made only by collateral attack on an invalid default judgment — it is clear that Borchers is thus cognizant of the "problem of timing" regarding when an invalid assertion of personal jurisdiction becomes redressable state action violative of the Due Process Clause. *Id.*

[488] Professor Perdue has reached a similar conclusion based on her analysis of Justice Field's Fourteenth Amendment reasoning in *Pennoyer*. *See supra* note 486 (discussing parallel between Court's reasoning in *Scott* and Perdue's analysis of Field's reasoning in *Pennoyer*). She concludes that the fact that Mitchell's judgment antedated the Fourteenth Amendment would have been irrelevant had Neff sued Pennoyer in a state rather than a federal court, since "the relevant question [pursuant to Field's reasoning] is not whether the due process clause existed at the time of the original judgment, but whether it existed

HeinOnline -- 28 U.C. Davis L. Rev. 740 1994-1995

This impact of *Scott* on the retrospectivity of *Pennoyer* cannot be deemed an inadvertent consequence of a decision in which the timing problem related to the date of statehood, not the date of ratification of the Fourteenth Amendment. The holding of *Scott* was foreshadowed by, and fully consistent with, the holding of *York v. Texas*[489] with regard to the general "problem of timing."[490] In holding that a state may constitutionally forbid a defendant from objecting to a lack of personal jurisdiction by special appearance, *York* reasoned that no unconstitutional deprivation of property would occur (given the lack of any prior conclusive adjudication of the jurisdictional issue) until the time at which the judgment was enforced.[491]

I have already discussed prudential concern for security of title under long-concluded judgments as a ground for the Court's refusal to beat the drum of *Pennoyer*'s due process dictum in every subsequent jurisdictional case.[492] This reason for reluctance to go beyond the full faith and credit or Conformity

---

at the time of the enforcement proceeding. . . . Field does not rely on the clause as the source of the criteria for determining the validity of the original judgment but simply as the reason for refusing to enforce the judgment." Perdue, *supra* note 267, at 500 n.142.

[489] 137 U.S. 15 (1890).

[490] Borchers, *supra* note 1, at 50.

[491] According to *York*, a state can constitutionally delay and to some extent burden the opportunity to raise a due process objection to personal jurisdiction by denying the defendant the "convenience" of "object[ing] to the service, and rais[ing] the question of jurisdiction" in the trial court, thereby forcing upon the defendant the choice between waiver of the objection or judgment by default. *York*, 137 U.S. at 21. The idiosyncratic practice of the Texas courts in denying the privilege of special appearance was not unconstitutional because the defendant's jurisdictional objection could still be heard at the ultimate moment of due process reckoning, in collateral proceedings to restrain or resist the enforcement of the default judgment. *See generally supra* note 369 (discussing *York* in context of *Hart v. Sansom*).

Borchers expresses some dismay about the willingness of the *Menefee* Court to review a state court's ruling on a due process objection to its jurisdiction, properly presented by special appearance, on direct appeal from the judgment of the state court and thus prior to the attempted enforcement of the judgment. Borchers, *supra* note 1, at 50 n.196. But this is not a "problem of timing," *id.* at 50, only the consequence of res judicata. Because of the binding effect of the adjudication of a jurisdictional objection raised by special appearance, the objecting defendant was required to seek reversal of the adverse jurisdictional ruling by direct appeal and, if necessary, writ of error to the Supreme Court of the United States. Absent reversal on appeal, that adjudication would be preclusive of any collateral attack on jurisdictional grounds. *See generally infra* text accompanying notes 494-95 (discussing contemporaneous principles of res judicata).

[492] See *supra* text accompanying notes 351-52.

HeinOnline -- 28 U.C. Davis L. Rev. 741 1994-1995

Act holdings of those cases is reinforced by *Scott*'s revelation of just how long a shadow of retrospectivity was cast by *Pennoyer* over title conveyed by jurisdictionally invalid judgments. Decades were yet to pass before the retrospective effect of changes in constitutional law was held to be a matter for case-by-base determination, with due deference to be given to the operative effect of unconstitutional statutes or final judgments predicated on erroneous views of the governing law.[493]

The only formal brake on *Pennoyer*'s retrospectivity was provided by the law of res judicata. Although the definitive opinions on "jurisdiction to determine jurisdiction" were yet to be written,[494] contemporaneous principles of res judicata clearly established that parties were bound not only by prior litigation of jurisdictional objections, but also by the prior opportunity to raise those objections in the course of the underlying litigation.[495] Thus any *contested* pre-*Pennoyer* judgment was proof

---

[493] In the *Pennoyer* era, the overruling of a precedent or the invalidation of a statute as unconstitutional was generally given retrospective effect, see Boyd v. Alabama, 94 U.S. 645, 649 (1876) (Field, J.), except in cases involving "vested rights" under bonds or other instruments of debt, which the Court deemed to be protected from retroactive impairment by the Contracts Clause of the Constitution, see Douglas v. County of Pike, 101 U.S. 677, 687 (1879); *cf.* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) ("The actual existence of a statute, prior to such a determination [of its unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."); Linkletter v. Walker, 381 U.S. 618, 627 (1965) ("the effect of [a] subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'"), *overruled on other grounds*; Griffith v. Kentucky, 479 U.S. 314 (1987). *But see* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2516-17 (1993) (endorsing return to régime of "presumptively retroactive effect" of new rules announced by Supreme Court).

[494] *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940) ("The lower federal courts are all courts of limited jurisdiction . . . [b]ut none the less they are courts with authority, . . . to determine whether or not they have jurisdiction to entertain the cause."); Stoll v. Gottlieb, 305 U.S. 165, 172 (1938) ("After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact."); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524 (1931) (ruling upholding court's personal jurisdiction against objection of a specially appearing defendant, even if erroneous, "amounts to res judicata on the question of the jurisdiction of the court which rendered it over the person of the respondent").

[495] *See* Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876) (Field, J.); Austin v.

HeinOnline -- 28 U.C. Davis L. Rev. 742 1994-1995

against collateral attack on due process grounds if the state court, when asked to upset title that had passed under a jurisdictionally invalid judgment, chose to invoke state principles of res judicata as a bar to relitigation of the jurisdictional point that had been decided — erroneously, in retrospect — or could have been raised in prior contested proceedings.

In light of the importance of res judicata principles in reining in the retrospective effect of *Pennoyer*, it is tempting to make the speculative argument that these principles inspired the Supreme Court's conservative choice of words in the various non-due process cases in which the Court applied *Pennoyer*'s jurisdictional teachings. It was undoubtedly true that in any number of previous cases constructive service of process on nonresidents *had been* "allowed in some States in purely personal actions,"[496] and resulting personal judgments *had been* "received as evidence"[497] in state courts, which now "might perhaps feel bound to give effect to the service made as directed by [state] statutes,"[498] by refusing retrospectively to invalidate personal judgments predicated on constructive service that at the time *had been* "recognized as valid by [their] legislative acts and judicial decisions."[499] But this argument fails because each of these cases involved default judgments, not contested judgments. Moreover, it is clear that then, as now, the Full Faith and Credit Act[500] was understood to require federal courts to give a valid state judgment the *same* preclusive effect as it would be given by the courts of the judgment-rendering state[501] — so it would not make sense for federal courts to treat the conclusiveness of prior, jurisdictionally erroneous, state-court judgments as greater in state court than in federal court if, for res

---

Hamilton County, 76 F. 208, 211 (7th Cir. 1896); Black v. Black, 77 F. 785, 786-87 (C.C.E.D. Pa. 1896).

[496] Insurance Co. v. Bangs, 103 U.S. 435, 439 (1881).

[497] St. Clair v. Cox, 106 U.S. 350, 353 (1882).

[498] Hart v. Sansom, 110 U.S. 151, 155 (1884).

[499] Goldey v. Morning News, 156 U.S. 518, 522 (1895).

[500] Act of June 25, 1948, ch. 646, 62 Stat. 947 (currently codified at 28 U.S.C. § 1738 (1988)).

[501] *See* Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234 (1818); Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813). This obligation was, of course, subject to the proviso that the judgment-rendering state had the power to render a binding personal judgment against the defendant. *See* Pennoyer v. Neff, 95 U.S. 714 (1878).

HeinOnline -- 28 U.C. Davis L. Rev. 743 1994-1995

judicata reasons, these erroneous judgments were nonetheless valid judgments.

A more plausible, if still speculative, reason for the qualified language used in the Supreme Court's post-*Pennoyer* full faith and credit and Conformity Act cases treats as intentional the failure to resolve the timing problem prior to *Scott*. I call this the "time-lag hypothesis." The radically retrospective construction in *Scott* of state-court due process obligations to deny recognition to invalid in personam judgments was consistent with *Pennoyer* and foreshadowed by *York*, but compelled by neither decision. In the meantime, there was virtue in leaving the timing problem unsettled.

By the time *Scott* was decided, the security of title that had passed under retrospectively invalid judgments was protected not only by res judicata principles where the invalid judgment had been contested, but by state statutes of limitation where the invalid judgment had been rendered by default, and thus remained subject to collateral attack. State periods of limitation applicable to ejectment actions, permitting title to vest in an adverse possessor after a set period of years, were as long as twenty years in some states, but with a general trend to shorter periods, especially in the western states or when the adverse occupancy was "under color of title."[502] By the time *Scott* resolved the timing problem, few pre-*Pennoyer* default judgments could be collaterally attacked free of the bar of the statute of limitations.

Thus the qualified language of the full faith and credit and Conformity Act cases served to discourage — or at least refrained from unnecessarily encouraging — wholesale efforts to upset invalid default judgments. Title conveyed under color of such default judgments was, of course, subject to invalidation by federal courts exercising diversity jurisdiction. But this did not

---

[502] GEORGE A. PINDAR, AMERICAN REAL ESTATE LAW § 12-3, at 474 (1976). *See generally* GEORGE W. THOMPSON, 5 COMMENTARIES ON THE MODERN LAW OF PROPERTY § 2552, at 656, 657 n.3 (John S. Grimes, ed., 1979) (providing historical background on statutory periods and state-by-state survey of current law); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 462 n.146 (1982) ("[T]he direction of the law has been to shorten adverse possession periods."); William E. Taylor, *Titles to Land by Adverse Possession*, 20 IOWA L. REV. 551, 554-61 (1935) (discussing special provisions and shorter periods pertaining to claims of adverse possession under color of title).

HeinOnline -- 28 U.C. Davis L. Rev. 744 1994-1995

constitute an abrupt constitutional intrusion into state-court administration of local property law because it was rooted in the long-established jurisdictional principles of full faith and credit law. By postponing elaboration of the extent of state courts' parallel due process obligations to deny recognition to invalid default judgments until *Scott* was decided in 1894, the Supreme Court avoided having to consider whether due process might have an equitable estoppel component of the sort Justice Field had referred to in *Bangs* as justifying "exceptional" cases in which invalid judgments had been sustained against collateral attack in state courts, prior to ratification of the Fourteenth Amendment, because "disturbance of the judgment was likely to lead to great hardship and injustice."[503]

By 1894 the likelihood that constitutional due process would force state courts to disturb titles conveyed under color of pre-*Pennoyer* default judgments was becoming vanishingly remote. This time-lag hypothesis accommodates whatever felt need may have existed to blunt the destabilizing effects of *Pennoyer* on security of title just as effectively as Borchers's alternative hypothesis that, by the limited view, federal due process limitations on state-court personal jurisdiction were simply not obligatory on state courts. And unlike the limited view, the time-lag hypothesis explains the qualified language in the full faith and credit and Conformity Act cases while cohering with the clear expressions of the expansive view in *York* and *Scott*.

4. State Court Cases Expounding the Expansive View

I have already noted that the state courts of New York and Texas accepted the expansive view as obligatory on them during the period in which Borchers has contended that the limited view remained a live alternative. Similar cases may be found in many states.[504]

Borchers does not cite these cases, and I think I can explain

---

[503] Insurance Co. v. Bangs, 103 U.S. 435, 441 (1881). *See generally supra* text accompanying notes 351-52 (discussing Field's sensitivity to effect of *Pennoyer* on security of title).

[504] *See, e.g.*, Anderson v. Goff, 13 P. 73, 75 (Cal. 1887); Bickerdike v. Allen, 41 N.E. 740, 741 (Ill. 1895); Eliot v. McCormick, 10 N.E. 705, 709-10 (Mass. 1887); Elmendorf v. Elmendorf, 44 A. 164, 165 (N.J. Ch. 1899); Kingsborough v. Tousley, 47 N.E. 541, 543 (Ohio 1897); Wallace v. United Elec. Co., 60 A. 1046, 1048 (Pa. 1905).

HeinOnline -- 28 U.C. Davis L. Rev. 745 1994-1995

why they failed to attract his attention. He was looking at the Supreme Court's case law for evidence of his limited view, and none of the state court cases to the contrary — in which the party relying on the expansive view of due process prevailed in state court on federal due process grounds — were reviewed by the Supreme Court. Had they been so reviewed, and affirmed, the stake would truly have been driven through the heart of the limited view. But they could not be reviewed, because a state court judgment *upholding* a claim of federal right — however erroneous the theory of federal law expressed or implied by the judgment — was not subject to review by the United States Supreme Court until the eve of 1915.[505] If a state court enforced a putative federal right in circumstances in which federal law did not in fact so require, the rules of federal appellate jurisdiction let the judgment stand.

The result of this jurisdictional quirk is that the only cases coming to the Supreme Court from the state courts were cases in which due process claims were overruled — the *Spratley*[506] and *Dewey*[507] cases noted by Borchers,[508] the *York*[509] and *Scott*[510] cases that he overlooked, and ultimately *Menefee.*[511] He criticizes *Spratley* and *Dewey* and *Menefee* for failing to explain their rejection of his supposed limited view.[512] But if the limited view was never thought of at the time, and if the state courts themselves — those courts most likely to embrace the state autonomy granted by the limited view — were routinely enforcing the expansive view, it is hardly surprising that the Supreme Court treated the odd contrary case as governed by "'self-evident'" principles.[513]

---

[505] *See* Act of Dec. 23, 1914, ch. 2, Pub. L. No. 63-224, 38 Stat. 790 (granting certiorari jurisdiction over cases in which claims of federal rights are upheld by state courts). *See generally* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4006, at 545 (1977) (discussing legislative history of Act of Dec. 23, 1914).

[506] Connecticut Mut. Life Ins. v. Spratley, 172 U.S. 602 (1899).

[507] Dewey v. Des Moines, 173 U.S. 193 (1899).

[508] Borchers, *supra* note 1, at 47-48.

[509] York v. Texas, 137 U.S. 15 (1890).

[510] Scott v. McNeal, 154 U.S. 34 (1894).

[511] Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915).

[512] Borchers, *supra* note 1, at 47-48, 51.

[513] *See id.* at 51 (quoting *Riverside & Dan River Cotton Mills*, 237 U.S. at 193).

HeinOnline -- 28 U.C. Davis L. Rev. 746 1994-1995

V. CONCLUSION

At the outset of his original article Borchers made clear the motivation for his re-examination of the legal and historical foundations of the constitutionalization of the law of state-court territorial jurisdiction: the resulting web of due process constraints on the power of state courts to render binding judgments resembles a vast jigsaw puzzle whose randomly detailed but essentially featureless components defy logical construction.[514] Borchers sought to put that puzzle to the sword, cutting through it as if he were Alexander the Great, and the puzzle were the Gordian knot. Having declared the death of the constitutional law of state-court personal jurisdiction in his original article, Borchers now offers "jurisdictional pragmatism" to take its place.

But good intentions are no guarantee of good law — or good history. Borchers's history is not just unpersuasive. It is essentially fictitious, founded on two false hypotheses. First he hypothesizes that Justice Field's despised opinion in *Pennoyer* was intellectually bankrupt — riddled with too many conundrums to catalog, so inconsistent with prior law that only editorial license preserved the appearance of integrity. Second, he hypothesizes his limited view of *Pennoyer*'s due process dictum as a plausible construction of Justice Field's "messy" opinion, and as a plausible explanation for the Court's qualified language in several post-*Pennoyer* cases — cases in which dispositive federal rules of jurisdictional validity were contrasted with varying state rules in terms that did not address, in further dicta, whether the state variations could survive the application of *Pennoyer*'s due process dictum. Borchers's efforts as an historian, which begin by attacking the integrity of the *Pennoyer* opinion with little more than innuendo, end with his postulating the prima facie plausibility of the limited view. He then rushes on to propose his program of reform without doing any of the standard historical homework by which he might have tested the hints he has teased from fragments of the historical record. He neglects abundant historical material relevant to the truth of his hypotheses: the precursors of *Pennoyer*, the facts and

---

[514] *Id.* at 20.

HeinOnline -- 28 U.C. Davis L. Rev. 747 1994-1995

holdings of the subsequent cases from which he coaxes his hypothetical limited view, the understanding of the law by contemporaneous state courts of last resort, even two Supreme Court cases that rejected the limited view years before the later cases he criticizes for having treated the issue as well-settled and beyond dispute. When these materials are examined, the limited view is revealed to be an invention with no detectable footing in fact whatsoever.

A. "Hint and Run" History

By drawing attention to numerous errors and distortions in Borchers's treatment of the historical record, I do not seek to engage in a game of "gotcha." Perhaps flaws will be found in my work too. If so, I hope that they will in turn be identified. My attitude toward legal history — or any history, for that matter — is that accuracy is not a style but a commitment. Borchers's sometimes casual treatment of the relevant material seems to reflect a different attitude, which infects modern legal discourse generally but is especially inappropriate in arguments from history. This attitude might be called the "hint and run" approach to argumentation.

Rather than treat historical inquiry as a challenging effort to reconstruct from limited data not only what happened in the past but why — by exploring the recorded events in the context of the institutions of the time, the personalities and experiences of the individuals involved, and the complex interplay of psychology and social dynamics that shapes human consciousness and ambition — Borchers treats legal history like the most sterile form of statutory construction. A canon here, a canon there — you quote this part of the case, I'll quote another — as if the truth were merely a construct, and the game to be won by wit and rhetoric without concern for an underlying reality. I am no fan of deconstructionist theories of interpretation, but whatever merit they may have in literary theory or debates about the meaning of "law," they reduce history to nonsense. It strikes me as absurd to suppose that Justice Field really had no personal sense of the proper understanding of *Pennoyer*, and that were he consulted in the grave he would

HeinOnline -- 28 U.C. Davis L. Rev. 748 1994-1995

respond: "Gee, I don't know."[515]

History is of course a process of interpretation, and historical conclusions should be expressed cautiously, because any account of history is necessarily constructive — but the truth that history seeks to reveal is not itself constructive, and the enterprise should be treated as a serious search for truth, and not as a game of wits to be won on a "he said/she said" basis, with the winner of the day determined by the last quote left standing. Yet this seems to be the spirit of Borchers's history. His revisionist arguments for an alternative, "limited" view of *Pennoyer* smack of indifference to the truth of the matter. The conventional, "expansive" view of *Pennoyer* is concededly "plausible," but if the limited view can be coaxed across some minimal "threshold of plausibility," then all historical bets are off. As between the two, it would seem, anything goes. To hell with precedent, let's declare history dead (or at least so much of it as deals with *Pennoyer*), stop worrying about the past, and march on together under the pragmatist flag. At the level of detail, this approach results in caricatures of complicated cases.[516]

B. The Vice of Pragmatic Instrumentalism

I must confess to surprise at my discovery of such flaws in Borchers's history. How can such a well-meaning and talented scholar have gone wrong? I think that the vice lies in his embrace of pragmatism as a philosophy of law, and that this instrumental approach to law has colored his approach to history. Pragmatism is concerned with the future, not the past.[517] It

---

[515] Although I will not expound the point here, I should make express what this statement implies. The personal understanding of the author of a judicial opinion, even when it is an opinion for the court as a whole, is relevant to the meaning of that opinion in a way that is far stronger than, and institutionally distinct from, the lesser significance that I attach to the personal understanding of a statute by the drafter of the statute. *Cf. supra* text accompanying notes 272-73 (disputing the relevance of Judge Deady's understanding of Oregon Code of Civil Procedure § 506 to its proper construction).

[516] It is a useful technique of legal history in the modern era to take soundings of the relevant case law by running string searches on Westlaw or Lexis. But such soundings do not, of themselves, sound history make. Otherwise historical inquiry is reduced to reporting a series of "hits" in response to database queries — key words quoted within small blocks of surrounding text. Unless the historian takes due care to understand the context in which the key words were used, he or she will produce a rather strange tale: all clues and no plot.

[517]

HeinOnline -- 28 U.C. Davis L. Rev. 749 1994-1995

seeks to make the future better, and consistency with history and tradition is a virtue only instrumentally, not intrinsically.[518] Too much change produces conflict and even chaos, and

---

> Pragmatism is a skeptical conception of law because it rejects genuine, nonstrategic legal rights. It does not reject morality, or even moral and political rights. It says that judges should follow whatever method of deciding cases will produce what they believe to be the best community for the future, and though some pragmatic lawyers would think this means a richer or happier or more powerful community, others would choose a community with fewer incidents of injustice, with a better cultural tradition and what is called a higher quality of life. Pragmatism does not rule out any theory of what makes a community better. But it does not take rights seriously. It rejects what other conceptions of law accept: that people have distinctly legal rights as trumps over what would otherwise be the best future properly understood. According to pragmatism legal rights are only the servants for the best future: they are instruments we construct for that purpose and have no independent force or ground.

RONALD DWORKIN, LAW'S EMPIRE 160 (1986).

[518]

> It is important to give the legal theory under study an appropriate name, and "pragmatic instrumentalism," though cumbersome, is more descriptively apt than any other. A theory of this type is instrumentalist in several related ways. First, it conceives the primary task of legal theory to be the provision of a coherent body of ideas about law which will make law more valuable in the hands of officials and practical men of affairs. . . . Second, a theory of this type is instrumentalist in its view that legal rules and other forms of law are most essentially tools devised to serve practical ends . . . . Third, the type of legal theory treated and developed here is also distinctive in its focus on the instrumental facets of legal phenomena, including: the nature, variety, and complexity of the goals law may serve; law's implementive machinery; the kinds of means-goal relationships in the law; the variety of legal tasks that officials must fulfill to translate law into practice[;] the efficacy of law; and its limits.
>
> . . . .
>
> Though it might seem redundant to say that a theory "instrumentalist" in the foregoing ways is also "pragmatic," this is in fact not the case. The adjective "pragmatic" designates features of this type of theory which are not implicit in the term instrumentalism. Perhaps most important, the type of theory here treated is pragmatic in its concern for the law in use. . . . It treats the "law in action," not just "the law in books." . . .
>
> This theory is also pragmatic in its general view that physical and social reality can be marshaled and deployed for human use. Although reality has some inner order, many instrumentalists assume that we can readily alter reality to serve practical ends. In the hands of legal personnel, reality — including especially the law's own machinery — is significantly malleable. Furthermore, instrumentalism is pragmatic in that, rather than concentrating on rules and other legal forms, it addresses the roles played by official personnel — especially judges. Viewing legal personnel as "social engineers," it treats

HeinOnline -- 28 U.C. Davis L. Rev. 750 1994-1995

so the improvement of the future that pragmatism seeks must be attained incrementally, one step at a time. There is much that is attractive in such a philosophy, if one overlooks the consequence that it affirms, in capital letters, that the end justifies the means.

Of course I do not mean to contend that pragmatists are monsters. Most, like Borchers, have good intentions. They seek to preserve the best of what we have now by way of rules and institutions, and to improve only those features which seem unsatisfactory. Nor do I mean to suppose some dichotomy between pragmatism and the status quo, with the latter supported by a phalanx of reactionaries dedicated to preserving, for widely varying philosophical reasons, what the pragmatist seeks constructively to change. My concern is for how change occurs, and within the particular arena of constitutional law I want change to be undertaken responsibly, not recklessly.

Our Constitution is a constitution of diffused power, compartmentalized into competing and overlapping branches and levels of government, and checked at every level by entrenched respect for individual rights. Rights are both precious and costly. They add inertia to the structure of government and thus make change difficult, but they also channel change in ways that protect the few from the many, and measure claims of progress in the scales of fairness. Rights are also vulnerable. They are constructs founded in history and tradition as well as current consensus, and they are disserved by the pragmatist's recurrent clamor that the past ought to guide progress, but not unduly restrain it.

Borchers clearly wishes to strip all but the most minimal rights against arbitrary state action from the law of state court personal jurisdiction. "Stripped of its constitutional clothing," he says, "personal jurisdiction is a subject whose dimensions are almost completely procedural," and therefore subject to "utilitarian assessment."[519] That means, in classic pragmatist fashion, that the law Borchers seeks for the future should serve the greater good of the greater number, at (almost) whatever cost

---

their roles, the skills they must deploy, and the effects of their behavior.

ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20-22 (1982).

[519] *Jurisdictional Pragmatism*, *supra* note 3, at 582.

HeinOnline -- 28 U.C. Davis L. Rev. 751 1994-1995

to those who may pay dearly to achieve the common good.

It may well be — indeed I strongly suspect it to be so — that the current constitutional law of state-court personal jurisdiction is a poor elaboration of individual rights against state power within a federal structure. I seek not to praise that law but to exhume it — ill perhaps, but still breathing — from Borchers's attempted burial. It was founded, however imperfectly, in respect for the rights of parties such as Franklina Gray and Marcus Neff, divested of property by overreaching use of the judicial process aided and comforted by state legislation responsive to local political concerns and indifferent to the rights of citizens of other states. How far these rights should be conceived as derivative from territorial limits of state sovereignty rather than normative limits of fairness remains a lively question for a body of law that is not yet dead.

C. *The Virtue of* International Shoe *as a Model for Jurisdictional Reform*

In reviving the constitutional law of state-court personal jurisdiction, I would seek to celebrate rather than to denigrate *International Shoe* as a model of law reform. Justice Stone's opinion in *International Shoe* did not condemn the past, but sought to reinterpret it. No case was overruled, no precedent was disavowed, but the teachings of those cases were harmonized with the changing realities of modern interstate litigation. This was inspired by a different sort of pragmatism than Borchers's, one which argues for the abstract clauses of the Constitution to be interpreted in the style of the common law. It thus takes seriously both history and such rights as are historically recognized, and seeks to improve the future by accommodating the past to the present.

This model argues for a reformulation of "minimum contacts" theory in which the concept of purposefulness is more carefully defined as the criterion for what "contacts" count, and in which the intertwined concepts of the magnitude of the contacts and their relationship to the claim in issue are more carefully defined as criteria for whether the cognizable contacts meet the required "minimum." And it argues as well for a parallel reformulation of the concepts of sovereignty and subject within a federal union in which economic integration and the

HeinOnline -- 28 U.C. Davis L. Rev. 752 1994-1995

transformation of property into information have profoundly altered the traditional relationships of territoriality, power, and politics.[520]

But this is not the style of interpretation that Borchers's "jurisdictional pragmatism" recommends. He has treated history as a rhetorical device, looking to it for arguments for reform with no serious concern for whether these arguments are historically supported. Having concluded that personal jurisdiction should be structured so as to maximize utility with scant concern for the rights recognized in precedent, he devalues precedent to the point of ignoring it behind a facade of pseudo-historicism. He writes with the zeal of an advocate, but we should be cautious of what he advocates. There may be a baby in the bathwater.

American constitutional case law has, to date, been self-consciously traditional — defining the scope of textual rights against governmental power by a deliberately incremental process of adaptation. According to the standards of this practice, *Pennoyer v. Neff* and its constitutionalization of state-court personal jurisdiction may not have been incremental enough. For this reason, and in virtue of the general dynamism of our constitutional practice, due process regulation of state-court personal jurisdiction is certainly not exempt from deep reconsideration. But to disavow *Pennoyer* today would require the uprooting of nearly 120 years of consistent precedent — consistent in its commitment to the abstract force of due process as a jurisdictional limitation, if not in the details of what due process thus demands. The limited view purports to provide a blade for cutting through that precedent close to its source, but it turns out to be an illusion. What cannot be cut out must be dug out, and if we dig as deeply into history as would be required to overrule the basic idea that the Due Process Clause limits state-court personal jurisdiction, we shall have dug ourselves a very deep hole indeed. Who knows what other constitutional rights might thereby be undermined? The better course is the one

---

[520] *Cf.* John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2238-45 (1993) (discussing effects on federal system of distinction between "hard" and "soft" property created by digitization of information).

HeinOnline -- 28 U.C. Davis L. Rev. 753 1994-1995

recommended by our constitutional tradition: to keep faith with history by seeking constructive growth of the law, asking courts to prune its branches, but not to uproot its trunk.

HeinOnline -- 28 U.C. Davis L. Rev. 754 1994-1995