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A General Theory of State-Court Jurisdiction

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A GENERAL THEORY OF STATE-COURT JURISDICTION

*Pennoy v. Neff*¹ is, to borrow a phrase from Mr. Justice Frankfurter, not merely a venerable case. It represents a particular way of looking at the law of jurisdiction.² Its rules of jurisdiction have been gradually abandoned in detail, though in certain respects they still represent accepted law. But the conceptual structure established by *Pennoy* remains substantially intact. The questions of state-court jurisdiction continue to be formulated much as Justice Field formulated them: may the state exercise "power" or "authority" (as if these were indistinguishable notions) over the particular person, thing, or intangible in question (as if these were separable notions)?

Pennoy's conceptual endurance is not easily explained: the deflection of critical energies toward the kindred topic of conflicts of law, the accidental sequence in which the problems of jurisdiction came to the Supreme Court in the years after *Pennoy*, the pallia-

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In memoriam.—Like all laborers in this particular vineyard of the law, I have suffered special loss in the premature death of Brainerd Currie. The debt of each of us to him can be paid only by seeking to attain the high standards set by his example. I can only hope that this article comes close.

¹ 95 U.S. 714 (1877).

² In *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945), Mr. Justice Frankfurter said: "In overruling *Swift v. Tyson*, 16 Pet. 1, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."

tion of *Pennoyer's* worst defects by improvisation, all played a part. But most important is the fact that the inertia of the *Pennoyer* system has never been challenged by the appearance of an acceptable alternative.³

The principal components of a jurisdictional theory strong enough to displace *Pennoyer* are to be found in the "minimum contacts" approach of *International Shoe Co. v. Washington*.⁴ But no such theory has yet been constructed out of those components. The reasons why *International Shoe* has not been thus developed seem to be three. First, the minimum-contacts approach was itself associated only with in personam jurisdiction and had no apparent relevance to jurisdiction in rem or quasi in rem. A general theory such as *Pennoyer's* is not displaced by one of merely special application.⁵ Second, there seemed to be no satisfactory method of establishing limits on state-court jurisdiction if the minimum-contacts approach were applied generally. Limits were felt difficult enough to devise in the application of minimum-contacts analysis to in personam cases,⁶ and that could be regarded as justification not to borrow trouble by extension of the analysis to other types of cases. The vagaries of property situs that had emerged in the state taxation cases also warned against introducing similarly unpredictable flexibility into the rules of jurisdiction in rem.⁷

³ Cf. Ehrenzweig, *Pennoyer Is Dead, Long Live Pennoyer*, 30 ROCKY MTN. L. REV. 285 (1958).

⁴ 326 U.S. 310 (1945). In that case Mr. Chief Justice Stone had said: "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence, his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*. . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316.

⁵ Justice (now Chief Justice) Traynor suggested the general application of the minimum-contacts theory in his opinion in *Atkinson v. Superior Court*, 49 Cal. 2d 338, 345 (1957), where he said that the jurisdictional question in a case involving claims to a res should be determined by "the general principles governing jurisdiction over persons and property rather than in an attempt to assigning a fictional situs to intangibles."

⁶ See, e.g., *Conn v. Whitmore*, 9 Utah 2d 250 (1959).

⁷ See, e.g., *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174 (1942); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942).

A third reason why *Pennoyer* has not yet been abandoned is that only recently has its theoretical confusion deepened enough to make its abandonment a more attractive possibility than trying to live with it. To abandon a theoretical construct is to unsettle habits of mind, to deplete stores of knowledge, and perhaps to invite unforeseeable difficulties. A system of legal concepts, however inelegant, can easily persist beyond the point when it produces or invites bad results—these can be avoided by decisional manipulation. But when a conceptual system has become so involved that understanding it is more difficult than deciding how to apply it to particular cases, searching for new concepts is as attractive as attempting to retain the old.⁸ *Pennoyer v. Neff* would seem to have reached that stage a few years ago in *Hanson v. Denckla*.⁹ It is not easy to state what *Hanson* was about, but an attempt is required.

A Mrs. Donner while living in Pennsylvania established an inter vivos trust under the administration of a Delaware trust company, naming herself as life beneficiary and her estate the beneficiary upon her death, subject to a retained power of appointment. She then moved to Florida. Thereafter, she simultaneously made a will giving to two of her daughters the bulk of the property she still owned outright and endeavored to execute a power of appointment making the children of her third daughter the beneficiaries of the trust upon her death. (This would have divided her entire property about evenly among her daughters and their children *per stirpes*.) She died in Florida, her estate being probated there by the third daughter, whom she had named as her executrix.

A dispute arose in which the two daughters contended that the power of appointment was invalid so that the trust corpus passed to the decedent's estate and thus under the will to them. Litigation was commenced in Florida by the two daughters, and in Delaware by the daughter who was executrix. The Florida courts assumed jurisdiction on the alternative theories that the dispute concerned a res consisting of the decedent's estate, or an in personam controversy in which the executrix was personally served, and decided in favor of the two daughters. The Delaware courts assumed jurisdiction on the theory that the dispute concerned a res consisting of the trust corpus, and decided in favor of the executrix daughter.

⁸ Cf. Yntema, *The Historical Bases of Private International Law*, 2 AM. J. COMP. LAW 297, 304 (1953); KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1963).

⁹ 357 U.S. 235 (1958).

In a 5 to 4 decision, Mr. Chief Justice Warren reached the fair result, in favor of the executrix daughter, but by a line of analysis that in all charity and after mature reflection is impossible to follow, no less to relate. The Court held that Florida had neither jurisdiction in rem over the trust nor jurisdiction in personam over the trustee; that Delaware had jurisdiction because the trust corpus was within its territory. The difficulties in the opinion include at least the following: (1) Why was the dispute about the trust corpus, rather than the decedent's estate? The question was whether certain stock should be assigned to the trust corpus or to the decedent's estate; to assume it was a trust case was to assume the question in issue. (2) Why were not the "contacts" of the Delaware trustee—who had maintained an extended correspondence with the decedent—with Florida enough to satisfy the minimum required by *International Shoe* to establish in personam jurisdiction? The Court said that the trustee had not "performed any acts in Florida" but in *McGee v. International Life Insurance Co.*,¹⁰ a mail order insurance business had been held subject to jurisdiction in the state of residence of a policy beneficiary. (3) Why was it not sufficient that the Florida court had before it all those beneficially interested in the property, whether or not the Delaware trustee was also subject to jurisdiction?

These are not difficulties of decisional technique. They are intractabilities in the conceptual components of decision. As I shall develop more fully, I think it is impossible consistently to apply *Pennoyer* and *International Shoe*. *Hanson v. Denckla*, in its futile attempt to accommodate both, reveals the depth of the doctrinal chasm between them.

After *Hanson v. Denckla* the Supreme Court did not again struggle with the *Pennoyer* problem¹¹ until last Term when it decided two cases that subject the *Pennoyer* conceptual structure to further stress and, at the same time, contain useful bases for erecting a new structure. These were *United States v. First National City Bank*¹² and *Texas v. New Jersey*.¹³ The *Citibank* case involved the issuance of an injunction by the United States District Court for the

¹⁰ 355 U.S. 220 (1957).

¹¹ The Court did decide cases of relevance. These include *Western Union v. Pennsylvania*, 368 U.S. 71 (1961); *Schroeder v. City of New York*, 371 U.S. 208 (1962); and *Durfee v. Duke*, 375 U.S. 106 (1963).

¹² 379 U.S. 378 (1965).

¹³ 379 U.S. 674 (1965), final decree 380 U.S. 518 (1965).

Southern District of New York against the First National City Bank, whose headquarters are in Manhattan, that temporarily restrained the bank from honoring withdrawals of funds that had been deposited at its Montevideo, Uruguay, office by a Uruguayan corporation which allegedly owed income tax to the Government. *Texas v. New Jersey* involved claims of escheat by Texas, New Jersey, Pennsylvania, and other states against funds held by the Sun Oil Co., a New Jersey corporation with headquarters in Philadelphia, the funds being the product of transactions in Texas with persons who were, *inter alia*, Floridians.

What the Court decided in these two cases, and how it reached decision, seems useful, interesting, and supportive of a theory of jurisdiction that can displace *Pennoyer*. I will suggest such a theory in these pages, and in the process indicate the relevance of the two new cases to the general problem of jurisdiction. I will proceed by the following steps: first, observations on the historical setting of *Pennoyer* itself; second, consideration of the rationale in *Pennoyer*; third, review of some of the practical and conceptual difficulties created by the *Pennoyer* rationale; and, finally, suggestions for a different approach.

I. PENNOYER IN HISTORICAL SETTING

In deciding *Pennoyer v. Neff*, Justice Field undertook to establish a workable and consistent solution to two long-standing problems in the administration of civil remedies in the United States. The first problem is to provide decent assurance that a defendant in litigation be given reasonable notice of the pendency of proceedings against him. The second is to restrict the judicial remedial power of the respective states to matters of proper local concern.

The issues are put in these terms advisedly. To begin with the premise that the jurisdictional problem is a territorial one may appeal to beg a central question in the conflict of laws.¹⁴ I do not wish to deny the relevance of party intention, public interest, and other factors in assessing the appropriateness of a particular forum. Even with these, a geographical problem usually remains, at least in choice of forum that must be made within the United States. The homogeneity of the federal union, as distinguished from the hetero-

¹⁴ See Yntema, note 8 *supra*; EHRENZWEIG, *CONFLICT OF LAWS* 3-16 (1962).

geneity of the international community, makes choice of forum among United States courts rather a technical, legal problem than one of major political dimensions. The discussion in these pages is focused on the situation in the United States as a national rather than an international community. It has often been remarked that interstate jurisdictional and choice of laws problems are different from international ones,¹⁵ but it has not so often been brought to mind why they are different.

The jurisdictional problem in the United States is distinctive because, while the country is socially and economically essentially a unitary state, legally and politically it is in many respects a federation of distinct polities. It is this conjunction of circumstances that is peculiar. Our citizens have a legal right to move from state to state¹⁶ and cultural homogeneity makes it easy and inviting to do so. It is notorious that we are a mobile population, and we have been such since the beginning, as the lives of Franklin, Lincoln, and Stephen Field himself illustrate. Our citizens also have a legal right to project themselves commercially into all parts of the nation, not only to trade but to invest in business, to draw out profits, to buy property, and to become economically domesticated.¹⁷ The vastness and richness of the land has made wide-ranging economic adventure attractive. And this, too, has been true since the beginning of our history. Without these social and economic conditions, the federation could have remained an aggregation of social islands whose transactions *inter sese*, and whose conflicts and jurisdictional problems, would have remained the ancient and essentially simple ones of the merchant traders. (This, together with certain fairly standard problems of domestic relations, is what international conflict of laws was mostly about until the last two decades.)

At the same time, the legal and political pluralism of the American federation is also significant. If this were legally a unitary state, the problems of notice and of territorial jurisdiction would descend to those of venue.¹⁸ In fact, however, the states are autonomous in pre-

¹⁵ See Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); see also EHRENZWEIG, *op. cit. supra* note 14, at 16 n. 7.

¹⁶ *Edwards v. California*, 314 U.S. 160 (1941).

¹⁷ See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948).

¹⁸ In a country this large, venue is not an inconsiderable problem. Cf. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?* 40 IND.

cisely the respects that are relevant to the problems of judicial jurisdiction. The states are chiefly responsible in our federal union for the promulgation and enforcement of legal rules governing private relations and for the maintenance and operation of civil courts. Autonomy in respect to private law requires rules for choice of law, which in turn can be devised at least in part in terms of choice of forum. In any event, the existence of coordinate tribunals of presumptively equal competence requires rules for choice of forum, and there seems nothing artificial in conceiving of them as rules of jurisdiction and in a real sense territorial.

The peculiar features of the jurisdictional problem in the United States, then, is that our national economic and social unity is conducive to the full panoply of substantive transactions found internally in a unitary state but our political plurality requires a choice of law and jurisdictional rules as among separate sovereigns. The combination would be unendurable as a practical matter but for two facts. First, there are powerful historical and cultural forces that conduce to similarity and reciprocity of state law. Second, the Full Faith and Credit Clause and the Due Process Clause embody judicially enforceable limitations on state-court authority. However interpreted from time to time, they make state-court jurisdiction a matter of American municipal law and not a species of demi-international law.

Finally, it may be suggested that the simultaneous existence of economic and social homogeneity with judicial and private-law diversity has tended to magnify small problems and nice distinctions in the American law of jurisdiction and conflicts. If there were economic barriers and if there were social disengagement from state to state, it would have been impossible to solve the problems of jurisdiction and choice of law by the needlepoint of private case-law adjudication. They would have been resolved, if at all, in gross rather than in detail, by legislation rather than by judicial action. This is not to suggest that interstate jurisdiction in the United States presents inconsequential problems. It is to suggest, however, that if the difficulties had been more fundamental they could not have been resolved, as in fact they have been, by such loose judicial improvisation. The problems of notice and of jurisdiction will remain with

L.J. 99 (1965); LOUISELL & HAZARD, *PLEADING AND PROCEDURE, STATE AND FEDERAL* 421-22 (1962). But it is less of a problem than that which involves the additional circumstance of variations in governing law.

us, so long as there is not perfect similarity and reciprocity of law among the states, that is to say, so long as we remain a federation.

A. THE NOTICE PROBLEM

The notice problem long antedated *Pennoyer*, although it is not clear how far back its roots reach. In the common-law courts and the courts of equity the problem goes back no further than the eighteenth century, for it was only in that period that the default judgment was developed in these courts.¹⁹ In the absence of a pro-

¹⁹ This development is suggested in the series of statutes permitting use of summons rather than a *capias* as initial process in common law actions. 12 Geo. I c.29 (1725), "An Act to Prevent Frivolous and Vexatious Arrests," supplemented by 5 Geo. II c.27 (1732), provided: "No person shall be held to special bail upon any process issuing out of any superior court, where the cause of action shall not amount to the sum of ten pounds or upwards . . . and [in such cases plaintiff] shall not arrest or cause to be arrested, the body of the defendant or defendants, but shall serve him, her, or them personally within the jurisdiction of the court, with a copy of the process; and if such defendant or defendants shall not appear . . . it might be lawful to and for the plaintiff . . . to enter a common appearance . . . and to proceed thereon, as if such defendant . . . had entered his, her or their appearance. . . ."

The Act applied also to actions in inferior courts in which the cause of action was less than 40 shillings. By 19 Geo. III c.70 (1779), the provisions of the earlier act were made applicable to causes involving less than £10 whether in the inferior or superior courts. The 1779 Act also provided that where a judgment had been rendered in an inferior court and execution had been unavailing "and . . . the person or persons or effects of the defendant or defendants are not to be found within the jurisdiction of such inferior court," the record of judgment in the inferior court might be removed to a superior court at Westminster and writs of execution thereupon issued on the judgment "in the same manner as upon judgments obtained in the said courts at Westminster. . . ."

By 43 Geo. III c.46 (1803), certain further modifications were introduced and by 51 Geo. III c.124 (1811), the Act of 1725 was applied to causes involving up to £15 and to forms of action in which the original process had been by *distringas* rather than *capias*. 7 & 8 Geo. IV c.71 (1827) raised the amount to £20. The Uniformity of Process Act, 2 Wm. IV c.39 (1832), made the procedure of summons and default judgment upon failure of appearance applicable in common-law actions generally. Cf. 1 TIDD, PRACTICE 109-15 (9th ed. 1828).

On the equity side, it had been provided by 5 Geo. II c.25 (1732), "That if in any suit . . . commenced in any court of equity, any defendant or defendants, against whom any *Subpoena* or other process shall issue, shall not cause his . . . appearance to be entered . . . and an affidavit . . . shall be made to the satisfaction of such court, that such defendant . . . is . . . beyond the seas, or . . . could not be found so as to be served with such process, and that there is just ground to believe that such defendant . . . absconded, to avoid being served . . . [upon court order, posting and publishing of notice] . . . the court being satisfied of the truth thereof may order the plaintiff's bill to be taken *pro confesso*. . . ." See also MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE cc. 8, 21 (1952).

cedure for a default judgment, jurisdiction depended on personal appearance and the question of notice simply did not arise.

Since the Middle Ages,²⁰ a mechanism for default judgment has existed in the foreign attachment proceedings in local and customary courts. The best known and no doubt most frequently employed procedure of this type was that of the Lord Mayor's Court of London.²¹ The London procedure consisted of a garnishment, a pretended effort to serve the defendant personally, a default judgment, and an appropriation to the plaintiff of the garnished debt, subject to the right of the defendant to come in within a year and a day to open up the judgment and litigate the merits.²² The want of notice in this procedure had occasioned critical comment in the common-law courts as early as 1772,²³ but it seems nevertheless to have survived well into the nineteenth century.²⁴

In this country, too, default judgment was an incident of foreign attachment and with it came the problem of notice. The foreign attachment procedure appears to have been used chiefly against an absconding debtor.²⁵ Under the rules prevailing in the nineteenth century, the defaulted defendant could set aside the attachment by showing that he had not absconded. An appearance to show that he had not absconded required that the defendant, in fact, had knowledge of the suit, which in turn mooted the question of notice, for all practical purposes at least. On the other hand, if the defendant did not appear—for whatever reason—the default would remain final as a practical matter, and the question of notice would not be raised. Either way, therefore, the problem of notice in the foreign attachment cases remained unresolved.

²⁰ See generally Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 7-17 (1942).

²¹ See Locke, *The Law and Practice of Foreign Attachment in the Lord Mayor's Court*, in DRAKE, A TREATISE ON SUITS BY ATTACHMENT IN THE UNITED STATES, Appendix (2d ed. 1858).

²² See Locke, *supra* note 21, at 2, 12-13, 19.

²³ See *Fisher v. Lane*, 3 Wils. 297 (C.P. 1772), cited in *Pennoyer v. Neff*, 95 U.S. at 732. Compare the quite different report of *Fisher v. Lane* in 2 Blacks. 834, 95 Eng. Rep. 1065. Cf. *Williams v. Lord Bagot*, 3 B. & C. 772, 107 Eng. Rep. 920 (K.B. 1825).

²⁴ See *London Joint Stock Bank v. Mayor and Aldermen of the City of London*, 5 C.P.D. 494 (C.A. 1880). A brief but illuminating description of the London foreign attachment procedure is to be found *id.* at 497-99. See also note 55 *infra*.

²⁵ See DRAKE, *op. cit. supra* note 21, at §§ 67, 72 (1st ed. 1854); cf. Mussman & Riesenfeld, *supra* note 20, at 14-15.

The proposition had been frequently reiterated that "not to summon or give notice to a defendant in a suit commenced against him is contrary to the first principles of justice."²⁶ And it had been said that a judgment under such circumstances was null and void, uttered *coram non judice*, and without force, or validity.²⁷ Nevertheless, the state courts had been churning out default judgments against unserved absent defendants, no doubt in continuing response to the felt need to provide local creditors and property claimants with final determinations against actually or allegedly departed debtors, partners, and kinfolk.²⁸ Obviously, notice cannot be given to a defendant who, adventitiously or purposely, is unavailable to receive it. The courts were therefore confronted at an early date with the need either to qualify the proposition that notice is a prerequisite to valid judgment or to leave plaintiffs remediless against defendants who could not be personally served. The latter being inexpedient in the most fundamental sense, the line of appropriate movement lay in qualifying the rule about notice.

Qualification of the notice rule was effected in two formulations. It was said on the one hand that "constructive notice" was the legal equivalent of personal service at least in some kinds of cases.²⁹ It was also said that personal service was required only in cases where a "personal" judgment was sought, but not in proceedings in rem.³⁰

²⁶ Fisher v. Lane, 3 Wils. 297, 302, 95 Eng. Rep. 1065, 1068 (C.P. 1772).

²⁷ See, e.g., Borden v. Fitch, 15 Johns. 121 (N.Y. 1818); Harris v. Hardeman, 14 How. 334 (1852); see also the cases collected in Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 793 n. 77 (1955).

²⁸ It is of course a subsisting problem of government to provide efficacious civil remedies for the redress of debts and the determination of claims to property. E.g., compare VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILLE*, *passim*, with Hess v. Pawloski, 274 U.S. 352 (1927).

²⁹ See, e.g., The Mary, 9 Cranch 126, 144 (1815), where Chief Justice Marshall said: "[N]otice of the controversy is necessary in order to become a party, and it is a principle of natural justice . . . that before the rights of an individual be bound by a judicial sentence, he shall have notice, *either actual or implied*, of the proceedings against him. *Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself.*" (Emphasis added.)

³⁰ See, e.g., Borden v. Fitch, 15 Johns. 121, 142-43 (N.Y. 1818): "We have refused to sustain an action here, upon a judgment in another state, where the suit was commenced by attachment, and no personal summons or actual notice given the defendant, he not being, at the time of issuing the attachment, within such state. *In such cases we have considered the proceedings as in rem*, which could only

The first of these qualifications would admit the efficacy of "constructive" notice in cases that might not be regarded as in rem proceedings; the second would admit the efficacy of proceedings identified as in rem without any notice at all, constructive or otherwise. Hence, in the early nineteenth century, while it was recognized that proceedings on constructive notice and proceedings in rem were both somehow exceptions to the rule requiring notice, no logical relationship, and certainly no identity, had been established between them.³¹

The notice problem remained in limbo down to the time of *Pennoyer* itself. As late as 1870, in *Cooper v. Reynolds*,³² Justice Miller had made the following observations, without any apparent awareness of their inconsistency:³³

Jurisdiction of the person is obtained by the service of process, or by voluntary appearance of the party. . . .

[I]n reference to jurisdiction of the person, the statutes of the States have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service . . . depend altogether upon the effect given to it by the statute.

[T]he judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit.

We do not deny that there are cases, not partaking of the nature of proceedings in rem . . . in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suits to the notice of the party in some other mode, when he is not within the territorial jurisdiction.

bind the goods attached, and that the judgment has no binding force in personam. . . . [T]o bind a defendant *personally* by a judgment, when he was never personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice. . . ." (Emphasis added.)

³¹ Nor could there have been such an identification within the framework of the developed law. By 1800, the English common-law courts could enter judgment on constructive notice in actions for money up to a limited amount and the courts of equity had long had power to enter decrees *pro confesso* on service by publication. See note 19 *supra*. Whatever else might be included in the concept "in personam judgment," in this context it clearly included actions for money and proceedings in equity. Since default judgments were allowed in these types of cases, and since these types of cases proceeded on constructive notice, it would have been impossible to regard judgments entered on constructive notice as limited to proceedings in rem.

³² 10 Wall. 308 (1870).

³³ *Id.* at 316-17, 318, 319, 320.

On the eve of *Pennoyer*, it therefore could not be said what the requirements of notice were. Must the summons be manually delivered, delivered at the abode, posted at the abode, publicly proclaimed, published in a newspaper? Nor could it be said in what situations something less than manual delivery of summons would suffice: actions of attachment, partition, condemnation, quiet title, mechanic's lien? In particular, it was fully true then, as Mr. Justice Jackson later observed in *Mullane v. Central Hanover Bank & Trust Co.*,³⁴ that "American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service not required because the action was *in rem*."

It was clear, moreover, that statutory proceedings leading to final determinations based on service by publication or other device of substituted service had been the instruments of travesties of justice on a broad scale. The cases cited by Justice Field in his opinion in *Pennoyer* were abundant illustration,³⁵ but there were plenty of others.³⁶ All and all, the law in 1877 with respect to notice was in sorry condition. Its theoretical structure was an incongruity of arching principle and subverting qualifications. In practical application it failed to achieve its expressed objectives.

B. THE PROBLEM OF TERRITORIAL JURISDICTION

The protracted confusion in the rules about notice may have contributed to postponing the development of a systematic theory of territorial jurisdiction in Anglo-American law. A theory of territorial jurisdiction would in any event have been premature in England before, say, 1688, or perhaps even 1832. Problems of jurisdiction were the essence of medieval English law and remained signifi-

³⁴ 339 U.S. 306, 312 (1950). Cf. *Matter of Empire City Bank*, 18 N.Y. 199, 215-16 (1858).

³⁵ E.g., *Boswell's Lessee v. Otis*, 9 How. 336 (1850), where a settler in Ohio obtained a default decree impressing a lien for work and labor on land patented to his alleged erstwhile employer; *Webster v. Reid*, 11 How. 437 (1850), where the Sac and Fox Indians had their reservation lands sold in default proceedings to satisfy the lien for services asserted by commissioners of audit who had been appointed to ascertain the Indians' interest in the lands.

³⁶ E.g., *Galpin v. Page*, 18 Wall. 350 (1873) (by Field, J.), 9 Fed. Cas. 1126 (No. 5206) (C.C. Calif. 1874) (proceedings at circuit before Field, J.), and the notorious *Case of Broderick's Will*, 21 Wall. 503 (1874), in which the estate of the deceased Senator Broderick of California was cleaned out under a forged will administered in *ex parte* probate proceedings.

cant until the period of Victorian reform. But until after 1800 it would have been impossible, even if it had been thought appropriate, to disentangle the question of territorial limitations on jurisdiction from those arising out of charter, prerogative, personal privilege, corporate liberty, ancient custom, and the fortuities of rules of pleading, venue, and process. The intricacies of English jurisdictional law of that time resist generalization on any theory except a franchisal one; they seem certainly not reducible to territorial dimension.³⁷

The English precedents on jurisdiction were therefore of little relevance to American problems of the nineteenth century. Pending further inquiry, it is necessary to speak with considerable diffidence on this subject, but it would appear that, until 1830, there was no developed English common law on what we now call interstate or international jurisdiction. Most of the reported cases concerned jurisdictional relationships within the British Empire—Ireland, Scotland, and the plantations—and not relationships with the equal sovereignties of Europe. As a result, they are parochial, not only in conceptual development but also in legal policy. There is an unmistakable element of imperial supervision running through the cases, and one can perceive a tacit assumption that matters of any consequence ordinarily should and would be brought to Westminster or Whitehall for determination.³⁸ Moreover, the attitude toward territorial jurisdiction chiefly reflected two concerns, that the English courts not get themselves in a position of entering an unenforceable judgment and that the colonial courts not overreach themselves.

Only a brief statement of the English cases is possible here, but enough I hope to suggest their dimensions. Until *Mostyn v. Fabrigas*³⁹ in 1774, most of the cases involved the question whether defendants served (and, so far as appears, resident) in England were

³⁷ For this reason a search of the period for precedents supporting modern concepts of jurisdiction based on the principle of *forum conveniens* seems to me in the strictest sense anachronistic. Of course the facts of most of the cases sustain a *forum conveniens* analysis, as do many of the remarks uttered in the opinions. But the same is true of most of the cases decided at *Pennoyer's* apogee in 1900 or thereabouts, and it would be surprising if the cases manifested any other pattern. This being so, the cases cannot be read as somehow foreshadowing a point of view and analysis that they do not enunciate. Here I depart from my friend and mentor, Albert Ehrenzweig, with whom I share many conclusions but not so many premises. See EHRENZWEIG, *op. cit. supra* note 14, at 7-8, 88 *et seq.*

³⁸ Cf. *Williams v. Fanning*, 332 U.S. 490 (1947).

³⁹ 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774), see note 46 *infra*.

subject to suit in the Court of Chancery over real or personal property located elsewhere. A qualified affirmative was given in 1675;⁴⁰ a clear one was given shortly thereafter by Lord Chancellor Nottingham in *Arglasse v. Muschamp*.⁴¹ A half-century later, Lord Hardwicke expressed contradictory dicta,⁴² but in the famous case of *Penn v. Lord Baltimore*⁴³ affirmed his jurisdiction. Still later, in 1806, Chancery assumed it had jurisdiction to enjoin the foreclosure of an allegedly fraudulent contract for the sale of land in the colony of Demerara.⁴⁴ It would seem therefore to have been established that

⁴⁰ *Cartwright v. Pettus*, 2 Ch. Ca. 214, 22 Eng. Rep. 916 (Ch. 1675): "They were Jointenants of Lands in Ireland; the Plaintiff prays an Account of the Profits, and a Partition of the Lands.

"... The Lord Chancellor declared, that as to the Profits the Bill was good, the Person being in England, for they are in the Personality; but as To the Partition, which was the Realty, he could not here proceed, for he could not award a Commission into Ireland: And the Bill ... was in the Nature of a Writ of Partition at the Common Law, which lieth not in England for Lands in Ireland."

⁴¹ 1 Vern. 75, 135, 23 Eng. Rep. 322, 369 (Ch. 1682). Nottingham sarcastically adverted to the question whether equity can act in rem, and whether it can only act so, in words that later generations of legal theorists might have heeded: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you, that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local. . . ."

⁴² *Roberdeau v. Rous*, 1 Atk. 543, 26 Eng. Rep. 342 (Ch. 1738); *Foster v. Vassall*, 3 Atk. 587, 26 Eng. Rep. 1138 (Ch. 1747).

⁴³ 1 Ves. 444, 27 Eng. Rep. 1132 (Ch. 1750). This suit was for specific performance of an agreement settling the boundaries between Pennsylvania and Maryland. The chief question of jurisdiction was whether the matter was properly in Chancery rather than the Privy Council. The imperial concerns in the case were, as Hardwicke observed, of "great consequence and importance[,] . . . it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy of judicature of a Roman Senate rather than of a single judge. . . ." As to the question of territorial jurisdiction, he said: "As to the court's not enforcing the execution of their judgment; if they could not at all, I agree, it would be in vain to make a decree; and that the court cannot enforce their own decree in rem, in the present case . . . but the party being in England, I could enforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this court." Cf. *Provost of Edinburgh v. Aubery*, Amb. 236, 27 Eng. Rep. 157 (1753). See also *Concerning the Jurisdiction of Chancery in Foreign Parts*, in 1 Eq. Cas. Abr. 133, 21 Eng. Rep. 937; *Burn v. Cole*, Amb. 415, 27 Eng. Rep. 277 (P.C. 1762); *Pike v. Hoare*, Amb. 428, 27 Eng. Rep. 286 (Ch. 1763).

⁴⁴ *White v. Hall*, 12 Ves. Jr. 321, 33 Eng. Rep. 122 (Ch. 1806); cf. *Cranstown v. Johnston*, 3 Ves. Jr. 170, 30 Eng. Rep. 952 (Ch. 1796), discussed in text *infra*, at note 48.

a suit would lie in Chancery where the defendant was before the court, so long as there seemed to be some good reason to assert jurisdiction and relief could effectively be administered, either in the form of a decree for money or by coercing the defendant to act by sequestering his local property.

In *Mostyn v. Fabrigas* and some similar cases, Lord Mansfield sustained actions in England for torts committed elsewhere, in each instance against defendants subjected to process in England. Some of the actions were ones which under English law were "local" and it was urged on this account and others that they should have been dismissed, but jurisdiction was affirmed.⁴⁵ The defendant's presence in England seems to have been less a reason for asserting jurisdiction than an obviation of a reason why it should not be asserted; it could hardly be said that personal presence was the basis for jurisdiction. The fact is that each of the cases involved public law implications, and indeed the assertion of jurisdiction was justified on that ground.⁴⁶

⁴⁵ *Mostyn v. Fabrigas* was an action for trespass for assault and false imprisonment by a resident of Minorca against the governor of the island, who had determined that plaintiff was a troublemaker and summarily packed him off to Spain. Mansfield refers to unreported cases in the same vein: "At the last sittings there were two actions brought by Armenian merchants, for assaults and trespasses in the East Indies. . . . I have had some actions before me, rather going further than these transitory actions; that is going to cases which in England would be local actions: I remember one, I think it was an action brought against Captain Gambier, who by order of Admiral Boscawen had pulled down the houses of some sutlers who supplied the navy and sailors with spiritous liquors. . . . I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular Courts of Judicature. . . . I quoted a case of an injury of that sort in the East Indies, where even in a Court of Equity Lord Hardwicke had directed satisfaction to be made in damages. . . ."

"I recollect another cause . . . for destroying fishing huts upon the Labrador coast. After the Treaty of Paris, the Canadians early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fishermen who came from England. . . . However the admiral from general principles of policy ordered these huts to be destroyed. . . . There are no Local Courts among the Esquimaux Indians upon that part of the Labrador coast; and therefore whatever injury had been done there by any of the King's officers would have been altogether without redress, if the objection of locality would have held." 1 Cowp. at 180-81, 98 Eng. Rep. at 1031-32.

Campbell v. Hall, 1 Cowp. 204, 98 Eng. Rep. 1045 (K.B. 1774), was an action to recover export duties collected by the defendant as tax collector on the island of Grenada, duties which plaintiff contended were illegally imposed. No question was raised as to jurisdiction.

⁴⁶ "[T]hough the charge brought against him is for a civil injury, yet it is likewise of a criminal nature; because it is an abuse of the authority delegated to him by the King's letters patent, under the Great Seal. . . . So that emphatically the

A later decision, *Doulson v. Matthews*,⁴⁷ refused to entertain an action for trespass to a dwelling house in Cauada on the ground that the Court of Common Pleas "may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." It is hard to say whether the apparently private character of the dispute was significant and, therefore, whether or not *Mostyn v. Fabrigas* was being repudiated in whole or in part. It is clear nevertheless that the objections to actions arising abroad were framed in terms of the court's *domestic* jurisdictional limitations, so that the cases would have little cogency in situations, as in the United States, where the domestic jurisdiction of a state court was not the focus of concern.

These two groups of cases are reducible to the principle that personal service is a necessary, if not a sufficient, condition for the exercise of jurisdiction. A similar theme may underlie a group of cases at the end of the eighteenth century which concerned the validity of judgments rendered *ex parte* on posted notice in island plantation courts. *Cranstown v. Johnston*⁴⁸ was a suit to restrain colonial proceedings in execution of such a judgment; *Buchanan v. Rucker*⁴⁹ was an action to collect such a judgment in England; and *Cavan v. Stewart*⁵⁰ was an action for money due that was defended on the ground of prior payment, defendant having been garnished in a colonial court at the suit of a creditor of the present plaintiff. These cases curiously present a modern textbook trilogy of recognition problems: stay of foreign proceedings, local affirmative enforcement, local defensive recognition. They were all decided adversely to the colonial judgments, the first on the ground of lack of notice,⁵¹

governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent legally and properly; or whether he has abused it in violation of the laws of England, and the trust so reposed in him." *Mostyn v. Fabrigas*, 1 Cowp. at 173, 98 Eng. Rep. at 1028.

⁴⁷ 4 T.R. 503, 100 Eng. Rep. 1143 (C.P. 1792).

⁴⁸ 3 Ves. Jr. 170, 30 Eng. Rep. 952 (Ch. 1796).

⁴⁹ 9 East 192, 103 Eng. Rep. 546 (K.B. 1808).

⁵⁰ 1 Stark. 525, 171 Eng. Rep. 551 (K.B. 1816).

⁵¹ "[A] summons left upon the freehold . . . of a person who had no freehold in possession; who had no tenant, upon whom this constructive notice could be served . . . neither that law nor any law in his Majesty's dominions could be, I hope, carried to the extent of authorising a sale without actual or constructive notice." *Cranstown v. Johnston*, 3 Ves. Jr. at 181, 30 Eng. Rep. at 958.

the other two on the ground that the defendant was not shown to have been present in the colony.⁵²

The rule applied in the last three cases was, of course, inconsistent with the practice of foreign attachment that still prevailed in the Mayor's Court of London.⁵³ Recognition of this may have influenced decision in what appears to be the next English decision, *Douglas v. Forrest* in 1828.⁵⁴ That was an action on a Scottish default judgment rendered on notice by "proclamation at the market-cross of Edinburgh" against a defendant who was a native Scot but who had departed overseas. The point was pressed in argument that if the judgment was invalid, so were London foreign attachment proceedings.⁵⁵ The court enforced the Scottish judgment but in doctrine so cautious that it is difficult to evaluate.⁵⁶ In the last English decision before 1834, the Court of King's Bench unbent perhaps a little more in recognizing a foreign judgment, allowing an action on a judgment rendered in Mauritius for a tort committed there in which the proceedings had been commenced after defendant had left the island.⁵⁷

⁵² "By persons absent from the island [in the Tobago statute] must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction." *Buchanan v. Rucker*, 9 East at 194, 103 Eng. Rep. at 547. "It is perfectly clear on every principle of justice, that you must either prove that the party was summoned, or at least that he was once on the island." *Cavan v. Stewart*, 1 Stark. at 529-30, 171 Eng. Rep. at 552.

⁵³ See notes 21-24 *supra*. ⁵⁴ 4 Bing. 686, 130 Eng. Rep. 933 (K.B. 1828).

⁵⁵ Counsel for the plaintiff said: "Nor is there anything in the practice repugnant to the law of England; for under process of foreign attachment in the city of London, if a creditor issued a summons against a debtor to which there is a return of nihil, goods belonging to the debtor in the hands of a third person may be attached; and though DeGray, C. J., in *Fisher v. Lane* . . . expressed his disapprobation of the practice, yet it has always prevailed. . . ." 4 Bing. at 693-94, 130 Eng. Rep. at 936.

⁵⁶ "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided there." 4 Bing. at 703, 130 Eng. Rep. at 940. See also *Russell v. Smyth*, 9 M. & W. 810, 152 Eng. Rep. 343 (Exch. 1842).

⁵⁷ *Becquet v. MacCarthy*, 2 B. & Ad. 951, 958-59, 109 Eng. Rep. 1396, 1399 (K.B. 1831): "[I]t was urged, that it was contrary to the principles of natural justice that any one should be condemned unheard, and in his absence. Proof,

Such was the course of English precedent over a period of 150 years. Three things are clear about these cases: They were dominated by considerations of domestic jurisdiction and procedure, they cannot be reduced to a set of general principles of jurisdiction, and none of them described jurisdiction in the terms "in personam," "in rem," or "quasi in rem," or in equivalent English terms.

This posture of English law seems to have much importance in the development of the American law of jurisdiction in the early years of the Republic. After the Revolution, the problem of territorial jurisdiction among the states was very real and very delicate, and was hardly less so after the adoption of the Constitution with its vital but mysterious Full Faith and Credit Clause.⁵⁸ Yet in the resolution of these problems the American courts had received no helpful common-law heritage. The crucial fact is that American jurisdictional concepts were largely fashioned by Story out of Continental sources and particularly the work of the Dutch jurist Huber.⁵⁹ The lines of this transmission have apparently not been worked out in detail, but the transmission is not surprising in view of the dearth of English sources and the receptivity of the colonies to Continental political and legal philosophy in the eighteenth century.

At all events, it is clear that no later than the early reported American decisions, a distinction was recognized between jurisdiction in rem and jurisdiction in personam⁶⁰ in form generally similar

however, was given, that by the law of the colony, in the case of a person formerly resident in the island, absenting himself, and not leaving any attorney upon whom process in a suit might be served, the Procurator-General or his deputy was bound to take care of interests of such absent party. . . . [I]t must be presumed that he would do whatever was necessary in the discharge of that public duty; and we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served."

⁵⁸ Nadelmann, *Full Faith and Credit to Judgments and Public Acts: An Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 37 (1957).

⁵⁹ Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919); Yntema, *supra* note 8, at 306-07; Rheinstein, *supra* note 27; Nadelmann, *supra* note 58, at 77; Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230-31 (1961).

⁶⁰ *Kibbe v. Kibbe*, Kirby 119, 126 (Conn. 1786): "[T]he defendant was an inhabitant of the state of Connecticut, and not within the jurisdiction of the [Massachusetts] court, at the time of the pretended service of the writ; therefore, the court had no legal jurisdiction of the cause. . . ." *Phelps v. Holker*, 1 Dall. 261, 264 (Pa. 1788): "This is a proceeding *in rem*, and ought not certainly to be extended further than the property attached. . . . [T]he judgment obtained in Massachusetts cannot be considered as conclusive evidence of the debt. . . ." And

to the cognate concepts of the modern *Restatement of Conflicts*.⁶¹ It is said on this basis that Justice Story can not properly be credited, if that is the word, with developing the basic American notions of state-court jurisdiction.⁶²

It is quite true that Story did not invent the dichotomy of jurisdiction in personam and jurisdiction in rem. It is also true, as Professor Nadelmann has said, that Story borrowed from Huber the idea of the exclusivity of sovereign authority, and the correlative idea of comity.⁶³ But Story did two things that Huber had not done and these are of such significance that Story deserves the attribution for a good deal.

In the first place, Story worked significant changes in the formulation of Huber's propositions. These changes were achieved by elaborating implications from Huber, but it is the elaboration that is important. Huber had put his propositions this way:⁶⁴

- (1) The *laws* of each *state* have force within the limits of that government and bind all subject to it, but not beyond.
- (2) *All persons* within the limits of a government, whether they live there permanently or temporarily, *are deemed subjects thereof*.
- (3) Sovereigns will so act by way of comity. . . .

In *Picquet v. Swan*, which in certain respects anticipates his treatise, Story said:⁶⁵

see, e.g., *Kilburn v. Woodworth*, 5 Johns. 37, 41 (N.Y. 1809): "[The defendant's] domicile was in this state, and being in person here, and not within the jurisdiction of the court of Massachusetts, he was not, and could not have been served with process. The attachment of an article of his property could not bind him; it could only bind the goods attached, as a proceeding *in rem*. . . ." *Fenton v. Garlick*, 8 Johns. 194, 197 (N.Y. 1811): "The original suit, in both cases, is rather a proceeding *in rem*, than *in personam*."

⁶¹ RESTATEMENT, CONFLICT OF LAWS c.1, Introductory Note; § 32, Comment *a*.

⁶² See Nadelmann, *supra* note 59.

⁶³ See STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 30 (1834).

⁶⁴ As rendered in Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247, 271-72 (1920). (Emphasis added.) Compare the shorter restatement in Yntema, *supra* note 8, at 306: "[F]irst, that the laws of a state (*imperii*) apply within its territory, binding all those subject thereto, and not without; second, that *all persons*, permanently or temporarily commorant within the territory of a state, are to be deemed subject to its laws; third, that the rights of each nation exercised within its territory, are by comity recognized as having their effect everywhere. . . ." (Emphasis added.)

⁶⁵ 19 Fed. Cas. 609, 611, 612 (No. 11,134) (C.C. Mass. 1828). (Emphasis added.)

[A] court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. . . .

[N]o sovereignty can *extend its process* beyond its territorial limits, to subject either *persons or property* to its judicial decisions.

And in his treatise on conflict of laws, Story combined the generality of Huber with particularities of his own and said this:⁶⁶

[E]very nation possesses an *exclusive sovereignty* and *jurisdiction* within its own territory. The direct consequence of this rule is, that the laws of every state affect, and *bind directly all property*, whether real or personal, within its territory; *and all persons*, who are resident within it, whether natural born subjects, or aliens. . . .

[N]o state or nation can, by its laws, *directly affect, or bind property* out of its own territory, *or persons* not resident therein, whether they are natural born subjects, or others. This is a natural consequence of the first proposition.

It is difficult to exaggerate the importance of these embellishments:

1. A mild statement about territorial sovereignty of states is converted into a rule limiting judicial jurisdiction.
2. The proposition that persons within the territory are subject to jurisdiction is expanded to include property within the jurisdiction.
3. The proposition is advanced that the jurisdiction over persons and property is exclusive, which does not follow necessarily from Huber's propositions. The weasel word "directly" is added in anticipation of possible difficulties.

In addition to his expansion of Huber's propositions, and equally important, Story was instrumental in transforming Continental political theory into legal rules operative in a federal union. The Continental theorists were after all just that: They were building intellectual constructs for critical enlightenment, not administering the law in its intricate routine. Story, by the force of his prose and his learning, suggested that Huber's concepts were to be used to decide concrete cases and were consonant with the law as it stood.

In the light of the then existing decisions, this was no mean achievement. The state of English precedent has already been canvassed.⁶⁷ Some of those precedents, notably *Buchanan v. Rucker*,

⁶⁶ Story, *op. cit. supra* note 63, at 19, 21.

⁶⁷ See text *supra*, at notes 39-57.

denied the validity of a garnishment judgment rendered in the place where the property was situated.⁶⁸ Some, notably *Penn v. Lord Baltimore*, had announced the validity of a decree in Chancery that determined interests in property situated outside the territorial limits of the court's process.⁶⁹ And some had enforced foreign in personam judgments that had been rendered against defendants who had been neither present nor personally served.⁷⁰ American precedents can easily be found that are not inconsistent with Story,⁷¹ but that proves little because most of the cases are consistent with a variety of jurisdictional theories. Aside from Story's own opinion in *Picquet v. Swan*, there appears to be no case before 1834 that contains the rhetoric of exclusive jurisdiction found in his treatise. And the American decisions taken as a whole were as much at variance with Story's postulates as were the English.⁷²

In the light of the decided cases and of the wide range of problems to which jurisdictional rules had been adapted, Story's system reflected neither decided authority nor critical analysis. Taken literally, his system permits disposition of the trivial situations where all persons and all objects of property pertinent to the case are within one territorial precinct, or where none of them is.⁷³ Alternatively, the system's coherence depends entirely on the distinction between

⁶⁸ See notes 51 and 52 *supra*.

⁶⁹ See notes 40-43 *supra*.

⁷⁰ See notes 56 and 57 *supra*. All the cases referred to were known to Story: he cited them.

⁷¹ See, e.g., note 60 *supra*; *Fisher v. Consequa*, 9 Fed. Cas. 120 (No. 4,816) (C.C. Pa. 1809); *Bissell v. Briggs*, 9 Mass. 462 (1813); *Borden v. Fitch*, 15 Johns. 121 (N.Y. 1818).

⁷² Thus, there were cases in which a decree compelled transfer of interest in land located outside the jurisdiction. *Massie v. Watts*, 6 Cranch 148 (1810); *Ward v. Arredondo*, Hopk. 213, 223 (N.Y. 1824); *Mitchell v. Bunch*, 2 Paige 606 (N.Y. 1831). There were cases refusing to exercise jurisdiction over persons served personally or refusing to recognize its exercise by another court. *Tingley v. Bateman*, 10 Mass. 344, 346 (1813); *Mead v. Merrit*, 2 Paige 402 (N.Y. 1831); *Fenton v. Garlick*, 8 Johns. 194 (1811). There were dicta that a nonresident could appear and contest in a proceeding in which his property had been attached without thereby being subject to personal jurisdiction. *Bissell v. Briggs*, 9 Mass. 462, 469 (1813); *Pawling v. Bird's Ex'rs*, 13 Johns. 192, 207 (1816). And there was a case in which a creditor's claim against his debtor was extinguished in a foreign garnishment proceeding to which he was not a party. *Taylor v. Phelps*, 1 Harris & Gill 492 (Md. 1827).

⁷³ See *Lawrence v. Smith*, 5 Mass. 362 (1809).

"directly" affecting persons or property and "indirectly" doing so.⁷⁴ If this is the correct interpretation, then the system is question-begging. These difficulties will be explored presently.

Finally, it should be noted that Story was not indifferent to the problem of notice.⁷⁵ He did not, however, indicate how it would be possible to give notice to a person absent from the jurisdiction consistent with the rule that "no sovereignty can extend its process beyond its own territorial limits."⁷⁶ Since the key notice problems had arisen in regard to persons absent from the jurisdiction, Story's system left the question of notice suspended in irresolution.

II. THE RATIONALE OF PENNOYER

It will have to await further study to say to what extent Story's propositions were influential in the interval between his first edition and the decision in *Pennoyer v. Neff*.⁷⁷ There is no question, however, that Story influenced *Pennoyer v. Neff* itself. The basic organization, the intellectual structure, and much of the language of Justice Field's opinion is taken straight from Story, with the consequence that all the logical and practical difficulties implicit in Story's system were translated wholesale into constitutional law. Moreover, fateful and astonishing, Justice Field *justified* adoption of Story in part because he saw it as a solution to the notice problem. That dismal inspiration has begotten difficulty ever since.

The opinion in *Pennoyer v. Neff* is in some respects not well organized,⁷⁸ but its main features are straightforward: A statement of

⁷⁴ This seems to be the way Story conceived his system. Of the equity decree concerning foreign lands, he said that "the Court of Chancery will not act directly upon [foreign] lands." STORY, *op. cit. supra* note 63, at 457. He did not notice the contradiction between his notion of exclusive jurisdiction and the concept of foreign attachment. *Id.* at 461. And he ignored the implications of the cases recognizing in personam jurisdiction based on domicile. *Id.* at 459-61, discussed *supra*, at note 56.

⁷⁵ *Id.* at, e.g., 458-59.

⁷⁶ *Id.* at 450.

⁷⁷ It is said that Story's influence was substantial. See, e.g., Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934). Clearly it was of consequence. See, e.g., French v. Hall, 9 N.H. 137 (1838); DeWitt v. Burnett, 3 Barb. 89 (N.Y. 1848). But it is impossible to determine how important it was without a careful analysis of the cases.

⁷⁸ The statement of facts begins in 95 U.S. at 719-20, is interrupted at 720 by a recitation of certain propositions based on Story and the citation of *Darcy v. Ketcham*, 11 How. 165 (1850), returns at 721 to a consideration of the circumstances attending the publication itself, and only then, at 722, swings into the

the facts,⁷⁹ recitation of Story's principles including the qualification that they apply only to "direct" exercise of authority,⁸⁰ a review of the authorities said to support the Story principles,⁸¹ a justification of the "seizure" requirement in terms of notice and intrinsic necessity,⁸² a reference to the new Fourteenth Amendment's Due Process Clause,⁸³ and, finally, a brushing aside of the annoying inconsistencies of divorce jurisdiction and substituted service on corporations and business associations.⁸⁴

Often as *Pennoyer* has been rehashed, the main features of the argument are worth some examination. First, it is interesting to observe the premise on which Story's principles of sovereignty were accepted. The principles, said Justice Field, are "principles of public law respecting the jurisdiction of an *independent* State over persons and property. The several States of the Union are not, it is true, *in every respect* independent. . . . But, except as restrained and limited by [the Constitution], they possess and exercise the power of independent States, and the principles of public law to which we have referred are applicable to them."⁸⁵ If this premise were fully ac-

main body of argument. Story's principles are reiterated at 722, and *Darcy v. Ketcham* is cited again and discussed at length at 729-30.

One apparent oddity of the case is that the dissenting opinion of Justice Hunt says, at 743, that *Galpin v. Page*, note 36 *supra*, "is cited in hostility to the views I have expressed." In fact, this case is not cited in Field's opinion.

These two circumstances suggest that Field's published opinion is a rewrite, the first part of which survived from a draft in which he made short work of the case but which had to be revised to meet a vigorous dissent.

⁷⁹ 95 U.S. at 719-22. The action was one of ejectment by which Neff sought to recover a tract of Oregon land formerly his. *Pennoyer's* defense was that he held title by virtue of a sheriff's deed given at an execution sale upon an earlier judgment against Neff in favor of one Mitchell. (Mitchell's action against Neff had been for recovery of fees rendered as an attorney.) At issue therefore was the validity of the execution sale and the judgment it undertook to enforce.

There had been no personal service in the action of *Mitchell v. Neff*, Neff having been out of the state. There had been newspaper publication of notice of the suit, a default judgment, and then the execution sale. Neff contended the judgment was invalid because of a failure to comply with the Oregon statutes specifying the procedure for publication. It does not appear that he contended the procedure was invalid in any event because it did not provide for "seizure" of the property before entry of judgment; this seems to have been a suggestion advanced by the Court itself.

⁸⁰ *Id.* at 722-23; cf. *id.* at 734.

⁸¹ *Id.* at 724-26, 728-32.

⁸² *Id.* at 726-28.

⁸³ *Id.* at 733.

⁸⁴ *Id.* at 734-36.

⁸⁵ *Id.* at 722. (Emphasis added.) Justice Field acknowledged that "many of the rights and powers which originally belong to them [were] now vested in the gov-

cepted, the opinion should have stopped there, for under the principles said to apply to such independencies the acts of the sovereign state of Oregon in its own territory were beyond scrutiny. On the other hand, if the states are in truth sovereign only in a limited way, the question of proper limitations cannot have been reached from a proposition that excluded the possibility of limitation. This was the first analytical miscarriage in *Pennoyer*.

Field then stated Story's propositions:⁸⁶

One of these principles is, that every State possesses *exclusive jurisdiction* and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants . . . and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle . . . follows from the one mentioned; that is, that no state can exercise *direct* jurisdiction and authority over persons or property without its territory.

The difficulty with these propositions has been intimated,⁸⁷ but some amplification is appropriate. The first principle can be taken as a legal and political truism, that in a modern independent political regime the lawgiving and law-enforcing agencies of that regime, and not of some other, regulate the affairs of person and property in the territory ruled by that regime. They are not regulated, that is, by the Holy Roman Emperor, the law of God as uttered by anointed kings, or the prescriptions of the United Nations. Alternatively, the principle can be taken as a statement of positivist legal theory, that the law of a particular place is the emanation of an identifiable political organization and not a logical extension or local

ernment created by the Constitution." *Ibid.* Powers such as that of making war and peace, maintaining the army and navy, providing a coinage, building an interstate navigational and rail system, and disposing of the western lands constituting nine-tenths of the national geographic area. Justice Field failed to mention that the Constitution also withdrew certain powers from the states and by this negative means tended to unify the nation: the powers to exclude citizens of sister states or to deny them equal privileges and immunities, to re-evaluate sister-state judgments, and, following the civil disturbance lately concluded, to deny any person due process or equal protection of the laws. It is difficult to imagine what diminution of state powers would have sufficed to change Justice Field's premise; it was surely an ideological fixation rather than an attempted statement of legal fact.

⁸⁶ *Ibid.* (Emphasis supplied.) Compare Story's formulation, text *supra*, at note 66.

⁸⁷ See text, *supra*, at note 73.

variation of natural or universal law. The principle can also be taken as a statement of the political attitude which sovereign states manifest toward their relations with other sovereign states, one of jealous concern for a local monopoly of political power and legal authority.⁸⁸

There are doubtless other ways in which the Story principles can be understood that are equally true and enlightening. But the one context in which the principles are either not true or not enlightening is precisely that in which they have been typically invoked, that is, in the adjudication of civil controversies having multistate elements. If no multistate elements are involved, because either all elements are in a particular state or none of them is, the formulation of a jurisdictional principle is purely a scholastic exercise. Since in such a case there is no problem in reality, no boundaries of reality exist to confine conceptual imagination within contours of fact, policy, and definition that real legal problems entail.

On the other hand, when adjudication of civil controversies does involve multistate elements, it is fatuous to think of any court having *exclusive* jurisdiction of anything. The jurisdictional problem exists precisely because there is no single tribunal that has exclusive jurisdiction in the territorial sense. This is quite apparent in cases where persons who are within the territorial jurisdiction litigate claims to property outside the territory, such as the suit for specific performance of land located elsewhere.⁸⁹ It is equally apparent in cases determining claims to property within the territorial jurisdiction that are asserted by persons who are outside the territory.⁹⁰

Two other situations are believed to have characteristics such that they can be placed in a category of exclusive jurisdiction. It is this belief that appears to be responsible for perpetuation of the Story principles as restated in *Pennoyer*. The first of these situations is the ordinary action for money damages, in which it is thought that

⁸⁸ The second principle is a corollary or an extension *pari materia*, however the first is interpreted.

⁸⁹ These are cases of the *Penn v. Lord Baltimore* type. See notes 40-44 and 72 *supra*.

⁹⁰ Foreign attachment cases are of this type, for the local property interest of an absent alleged debtor is converted into a property interest of the attaching creditor. See text *supra*, at notes 20-25. So are suits to remove clouds on title of local real property, e.g., *Arndt v. Griggs*, 134 U.S. 316 (1890), or to conclude claims to or against personal property or a fund, cf., e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

jurisdiction relates only to the person of the defendant because the essence of the proceeding concerns his personal legal duty and obligation. An action for damages does indeed concern the personal legal duty and obligation of the defendant, but it does so in no different sense than does, say, an action for specific performance or for an injunction against waste. The elements of the obligation to be enforced are quite independent of the kind of remedy sought to be obtained. Indeed, in all cases in theory, and in many cases in fact, the remedy for a given breach of obligation can be either damages or specific relief. Since there is no analytical difference between the obligation that gives rise to a claim for compensatory damages and that which gives rise to injunctive relief, the obligation cannot be used to differentiate the jurisdictional concepts applicable to the respective situations. Accordingly, the damage action cannot be distinguished from specific performance or other types of injunctive relief as a uniquely in personam proceeding.

The obligation involved in a damage action, moreover, is of practical interest because it is the predicate for a determination of a property interest. As every plaintiff's lawyer knows, an in personam judgment is of operative significance only because and to the extent that it is the initial stage of a compensatory transfer of defendant's property to the plaintiff. When this is done by rendition of a judgment in state A followed by execution and sale of defendant's land in state A, it is perfectly obvious that the proceedings taken as a whole concern both defendant and his property. It should be no less obvious when the judgment of state A is reduced to judgment in state B and defendant's property in that state is then forfeited to the plaintiff.⁹¹ Hence, it is not possible to isolate the money judgment for damages into a special category of truly exclusive in personam jurisdiction over the defendant. If the judgment is entitled to

⁹¹ By force of the Full Faith and Credit Clause, it is legally obligatory in state B that the judgment of state A be taken as conclusive, reduced to a local judgment, and enforced. This procedure is somewhat more complicated than execution proceedings against property in state A would have been and the complications may have serious practical dimensions. But neither of these circumstances detracts from the fact that the judgment of state A was the basis for a conclusive alteration of property interests in state B. Hence, it is not true to say that the judgment in state A merely affects the defendant personally and does not involve his property in state B.

Attachment proceedings, though brought to enforce in personam obligations, obviously involve claims to property. An ordinary money judgment *cum* execution may be thought of as a delayed and complicated form of attachment.

recognition in state B, the state A proceedings that led to the judgment affect property in state B in no more restricted sense than a state A decree of specific performance would affect the property in state B.

The other type of case with multistate elements that is thought nevertheless to involve exclusive jurisdiction is the so-called true in rem proceeding. In this kind of proceeding, an object of property within the territorial jurisdiction of the court is identified as the subject of jurisdiction. Upon specified procedures, such as publication or issuance of a monition, interests in the property are established "against all the world."⁹² But this kind of proceeding also involves people as well as the object of property. "The whole world" that is said to be bound by such proceedings after all consists of individual persons, even though for *res judicata* purposes they are lumped together as a large-size crowd. To foreclose the interests and claims of an indeterminate number of persons is operationally no different than to do so *vis-à-vis* one or more specified persons, as in the case of foreign attachments. That an indeterminate absentee's claims are foreclosed upon lesser notice than those of a determinate absentee does not alter the fact that the absentee, whoever and wherever he may be, is having his rights to the property adjudicated. That being so, the exercise of jurisdiction in such a proceeding is not without legal consequence to persons elsewhere and should not be thought of as somehow being in rem in a way different from a garnishment proceeding against an absentee.⁹³

⁹² The archetype is said to be the admiralty condemnation proceeding, though the effect of the decree in such cases is supported largely if not entirely by dicta. See *The Mary*, 9 Cranch 126, 144-45 (1815). See LOUISELL & HAZARD, *op. cit. supra* note 18, at 356-57.

⁹³ Cf. Holmes, J., in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 76 (1900): "If the technical object of the suit is to establish a claim against some particular person . . . or to bar some individual claim or objection . . . the action is in personam, although it may concern the right to, or possession of, a tangible thing. . . . If on the other hand the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established . . . the proceeding is in rem. . . . All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected."

This statement has been taken as demonstrating an inherent difference between in rem and in personam proceedings. It seems to me to have precisely the opposite implications. To test the point, it would be pertinent to ask how many persons would be a sufficient number, and what degree of uncertainty in their identification would suffice, to transform a particular proceeding from one in personam to one in rem. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, *supra* note 90.

In this light, it is impossible satisfactorily to maintain the idea that exclusive jurisdiction can be exercised in any class of cases with multistate elements. Focusing attention on the person of the defendant before the court does not render a proceeding purely in personam, if the defendant has property elsewhere that will have its legal status affected by the proceeding. Focusing attention on an object of property before the court does not render a proceeding purely in rem, if there are persons elsewhere whose legal interest in the property will be affected by the proceeding. The categorical structure of proceedings in personam, in rem, and quasi in rem collapses. Upon its collapse all that remains are the facts that in cases with multistate elements, sometimes the persons concerned are within the court's territorial jurisdiction but the property concerned is not, and sometimes the reverse is true, and there is in such situations a problem of determining whether one or more coordinate courts can appropriately award a civil remedy in the circumstances.⁹⁴ This is but a return to the starting point of the inquiry.

The third step of Field's opinion was a review of the previously decided cases for the purpose of showing their consistency with the Story system. This may be passed with the statement that the demonstration withstands critical analysis no better than Story's own effort to do so.⁹⁵

⁹⁴Perhaps a word more may be said about the wisdom and utility of trying to distinguish between "directly" affecting persons or property elsewhere and doing so "indirectly." Both Story and Field attempted this distinction, Field with this statement: "But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way . . . no objection can justly be taken; whilst any direct exertion of authority upon them . . . would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated. . . ."

"Thus the State . . . may compel persons . . . to execute . . . respecting property elsewhere situated . . . instruments . . . to transfer the title. . . ."

"So the State . . . may . . . appropriate any property owned by . . . non-residents to satisfy the claims of its citizens." 95 U.S. at 723.

Surely it is odd to think of a decree compelling a transfer of land as "indirectly" affecting the land and the extinction of a person's valid interest to property as only "indirectly" affecting his personal rights. It is also difficult to see how these processes differ from an execution sale and an imposition of judgment liability, respectively. And to say that the difference lies in the fact that the former are valid but the latter invalid assumes the answer to the question being addressed.

⁹⁵ Compare text and footnotes *supra*, at notes 67-72.

The fourth step was new and, all things considered, perhaps the most unfortunate of all. This was the proposition that where jurisdiction was founded on the presence of property within the state, it was essential to "seize" the property prior to judgment. This proposition appears to have been wholly novel, for the existing authority seemed to require only that the writ of attachment be "levied" prior to judgment. A levy on personal property required actual or "constructive" seizure but a levy on real property was apparently achieved by the sheriff's filing papers at the courthouse.⁹⁶

Justice Field's argument in support of the seizure requirement was twofold, of which the first branch is the important one.⁹⁷ Field argued that seizure was essential as a matter of notice. After alluding to the dangers inherent in rendering money judgments without notice,⁹⁸ he explained why seizure should be required in cases where jurisdiction was based on the presence of property:⁹⁹

⁹⁶ See Drake, *op. cit. supra* note 21, at § 231 (1st ed. 1854): "The requisites of an attachment of real estate are generally determined by statute. Where, however, that is not the case, the rule which has obtained in Maine and Massachusetts would probably be received and applied—that it is not necessary for the officer to go upon the land, or into its vicinity, or see it, or do any other act than make return upon the writ that he had attached it." The same statement is repeated in § 236 of Drake's third edition published in 1866.

It is worthwhile noting that it was on this point—the requirement of seizure—that the Court divided in *Pennoyer v. Neff*. The dissent by Justice Hunt argued that seizure was not required because the procedures for exercising jurisdiction by attachment and garnishment "are exclusively within the judgment of the legislature, and . . . the judiciary cannot review them." 95 U.S. at 747. So far from disagreeing with Field on the theory of jurisdiction, Justice Hunt was remorselessly more doctrinaire.

⁹⁷ The second branch of the argument was that unless there were a seizure in advance of judgment, it could not be determined whether the judgment was an effort to determine interests in local property, which would be valid, or an effort to render a judgment of personal liability without personal service, which would be invalid. "[I]t would . . . make the validity of the proceedings and judgment depend upon the question whether, before the levy of execution, the defendant had or had not disposed of the property. . . . This doctrine would introduce a new element of uncertainty in judicial proceedings." 96 U.S. at 728. The argument is not particularly convincing but, in any event, is of no direct relevance to the formulation of the jurisdictional principles themselves.

⁹⁸ 95 U.S. at 726: "If, without personal service, judgments *in personam*, 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, could be upheld and enforced, they would be the constant instruments of fraud and oppression."

⁹⁹ *Id.* at 727.

Substituted service by publication . . . may be sufficient to inform the parties . . . where the property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, by person or by agent; and it proceeds on the theory that its seizure will inform him. . . .

However, he said, publication was ineffectual to found jurisdiction in personam because:¹⁰⁰

Process from the tribunals of one State cannot run into another State. . . . Publication of process or notice cannot create any greater obligation upon the non-resident to appear.

These propositions were of major significance. The equation of seizure with notice was tendered as an answer to the objection that it was unfair to condemn an absentee's property without notice. This meant, for however long the Court adhered to this proposition, that absentees whose property was being appropriated in in rem proceedings were "deemed" notified by the seizure, which, in fact, would not necessarily have that effect, or by the publication that accompanied the seizure. Thus, the defendant was relegated to chance notice: As Justice Field noted, "mere publication of process . . . in the great majority of cases, would never be seen by the parties interested."¹⁰¹ In addition, affirmance of the proposition that "process cannot run into another state" precluded the possibility that conscientious states might try to provide better notice than publication. Not only was notice to absentees not required; in legal contemplation it could not even be given.

Justice Field then went on to assert that the limitations on state-court jurisdiction were matters within the purview of the Due Process Clause of the Fourteenth Amendment. This rested on better ground in the precedents than is sometimes assumed and in any event can be passed as a now accepted and workable legal premise.¹⁰²

¹⁰⁰ *Ibid.*

¹⁰¹ See note 98 *supra*.

¹⁰² The idea that a court without jurisdiction was *coram non judice* and that its judgments were a nullity goes back to medieval law. Historically, the leading case is probably the Case of the Marshalsea, 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1613). Fisher v. Lane, 3 Wils. 297, 95 Eng. Rep. 1065 (C.P. 1772), expresses the same view in terms of the "first principles of justice," which were echoed down the century. The New York State constitutional provision on due process had been referred to with approval in a challenge of a judgment in Matter of Empire City Bank, 18 N.Y. 199, 215-16 (1858), and Happy v. Mosher, 48 N.Y. 313 (1872). And Justice Cooley, in his new COMMENTARIES ON CONSTITUTIONAL LIMITATIONS

The last step in Justice Field's opinion was his attempt to deal with cases that were not apparently reconcilable with the propositions he had so uncompromisingly advanced. "To prevent any misapprehension," he said, "we do not mean to assert" that a state might not, first, conclusively determine the status of its citizens vis-à-vis persons outside the state, referring in particular to divorce proceedings,¹⁰³ and, second, require a foreign corporation or a "partnership or association" to appoint a local agent for service of process.¹⁰⁴ It is necessary only to suggest why these exceptions are baffling: the absent spouse and the absent business association are affected by the proceedings he specified in no lesser way than proceedings which he had earlier said could not affect absentees. The only coherent explanation of these inconsistencies is that Justice Field was simply freezing the procedural status quo.

Appraised by contemporary critical standards for assessing logic and policy in judicial decision, *Pennoyer v. Neff* arouses dismay and even despair. It is an example *par excellence* of what Karl Llewellyn called the Formal Style in juristic reasoning.¹⁰⁵ That it

402-07 (3d ed. 1874), had emphatically pronounced that the question of jurisdiction was a matter of due process, citing good authority in support. That the Fourteenth Amendment was not effective at the time of the entry of the state-court judgment is not relevant to the validity of the argument.

¹⁰³ 95 U.S. at 734-35. His solicitude for *ex parte* divorce was prompted by recognition that if the guilty party absented himself, the complaining party might "be without redress." *Id.* at 735. One wonders why Justice Field did not see the general relevance of that expedient consideration.

¹⁰⁴ 95 U.S. at 735. Justice Field did not notice that there was a material difference in the legal basis on which a state could compel a foreign corporation to appoint a local agent and the basis on which it might lay down a similar requirement regarding partnerships and associations. A foreign corporation could be excluded from local entry under *Bank of Augusta v. Earle*, 13 Pet. 519 (1839), and with that leverage compelled to appoint an agent, *Lafayette Ins. Co. v. French*, 18 How. 404 (1856). But a partnership or association was regarded as an aggregate of citizens and as such could not be excluded from a state because of the prohibitions of the Privileges and Immunities Clause. If Justice Field had in mind some other legal basis on which a state could compel appointment of an agent, he did not intimate it.

He also said explicitly that in default of appointment of an agent, the state could validly provide for service on a state official instead and thereupon enter judgment "binding upon the non-residents both within and without the State." 95 U.S. at 735. How this reconciled with the proposition that "no State can exercise direct jurisdiction and authority over persons or property without its territory," *id.* at 722, he did not explain.

¹⁰⁵ LLEWELLYN, *THE COMMON LAW TRADITION* 38-39 (1960).

survives at all is some kind of a monument to American legal thought.

III. PENNOYER IN ASCENDANCE AND DECLINE

Pennoyer v. Neff dominated the American law of jurisdiction for nearly three-quarters of a century down to the decision in *International Shoe Co. v. Washington*.¹⁰⁶ It is accordingly regarded as "the law" in that period, although it had a less secure place in particular application than it did in general theory. There are in any event three aspects to the *Pennoyer* regime that can be separately identified. First, *Pennoyer's* principle limiting the reach of state-court process proved highly inconvenient in automobile accident cases and in actions against corporations. The adjustment to these inconveniences culminated in an abandonment of the principle. Second, its rule that seizure is notice proved to be an engine of injustice and has been repudiated. Third, *Pennoyer's* categorical differentiation between actions in personam and actions in rem proved impossible to maintain with consistency and predictability. These developments did not appear at the same time: The automobile cases came to a head in the 1920's and the corporation cases in the 1940's; the notice problem was not pressed hard until the *Mullane* case in 1950¹⁰⁷ and has not yet made its full impression,¹⁰⁸ and the confusion arising out of the categorical structure has only recently reached critical proportions, largely as a result of the changes in the other two aspects of *Pennoyer*.

The difficulties with *Pennoyer's* first aspect, the territorial limitation on service of process in damages actions, is a tale so often told that it can be foreshortened. With respect to corporations, the cue was taken from Justice Field's concluding dictum that the states could require foreign corporations doing local business to appoint an agent for service of process and could provide that if they failed to do so, effective substituted service could be made on an officer of the state.¹⁰⁹ The states that had no statutes of this sort soon enacted them. The pattern being fixed, the disputed question was

¹⁰⁶ 326 U.S. 310 (1945).

¹⁰⁷ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

¹⁰⁸ Compare Note, *In Rem Actions—Adequacy of Notice*, 25 TENN. L. REV. 495 (1958), with, e.g., *Stevens v. Torregano*, 192 Cal. App.2d 105 (1961).

¹⁰⁹ See text *supra*, at note 104.

whether, in cases where the corporation had not appointed an agent, the local activity of the corporation was sufficient to sustain substituted service of process.¹¹⁰ For a long time the inquiry was whether the local activity was sufficient so that it could be said that the corporation was "present" in the state, in deference to *Pennoyer*'s major theoretical premise that presence was required. Judge Learned Hand's exposure of this fiction¹¹¹ was approved in *International Shoe*¹¹² and the question of amenability to service was recast in terms of "minimum contacts."¹¹³

There is a sidelight in this development that is worth noting. Under *Pennoyer*, the theory was that where the corporation failed to appoint an agent, the state official designated to receive substituted service was the agent of the corporation. (This was essential under the theory because otherwise the corporation would not have been served within the territorial boundaries of the state.) Taking this literally, it would follow that a default judgment entered after service on the state official would be valid, he being the corporation's agent and acting on its behalf, even if he threw the process into his

¹¹⁰ At one point, the logic by which Justice Field had approved substituted service on foreign corporations reappeared to create difficulties. The theory of substituted service on foreign corporations was that since the state could refuse to recognize the local existence of a foreign corporation, it could enforce the less rigorous measure of requiring actual or constructive appointment of an agent as a condition of local entry. After *Pennoyer* had been decided, it was established that a foreign corporation engaged exclusively in interstate commerce had a constitutional privilege under the Commerce Clause to carry out that commerce locally despite the state's opposition. See *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). This undermined the theoretical basis for substituted service of process on foreign corporations engaged exclusively in interstate business. But the gap was soon closed by the proposition that local activity, even though immune from state restriction, constituted "presence" and therefore subjected the corporation to service of process under the rule in *Pennoyer*. This was one of the improvisations that at the same time modernized the law and preserved *Pennoyer* from earlier repudiation.

¹¹¹ *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930).

¹¹² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹¹³ "[D]ue process requires only that in order to subject a defendant to a judgment in personam, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316.

The fuller history of this development and the parallel ones presently referred to in the text is given in Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

wastebasket. Substantially this kind of a problem did arise, and the Supreme Court of the time had no difficulty in sustaining the judgment even though the corporation apparently had no notice of the suit against it.¹¹⁴ This rule is obsolete now but it is indicative of the difficulties into which *Pennoyer* could lead.

The automobile accident problem—the visiting motorist who strikes and then retreats home before he can be served—required similar manipulation of the *Pennoyer* system. The agency device was again employed to escape the territorial restrictions on service of process, the idea being that the visiting motorist appointed the state's secretary of state as agent for process in return for being allowed to drive on the local roads.¹¹⁵ It, too, was taken literally in certain states, which provided for service on the secretary of state but did not provide for giving notice of the suit to the absent motorist. In a decision whose result seems entirely sound but which is unattainable within the *Pennoyer* system, the Court held that mail notice to the absentee, or its equivalent, was required by due process.¹¹⁶

These two lines of expansion of state-court jurisdiction merged following *International Shoe*. They now sustain the widely enacted "long arm" statutes, which provide for service of process against absentees who have committed a local tort, entered a local contract, own local property, and sundry variations.¹¹⁷ Unless the 1958 decision in *Hanson v. Denckla*¹¹⁸ augurs a retreat, which seems most unlikely, the theoretical structure of the rules for service of process in damage actions seems securely established in *International Shoe's* minimum-contacts concept. The twenty years since its decision have been occupied by the pointillist process of locating particular cases on one side of the line or the other. Some states retain the formality of local service on the secretary of state, and some courts, still transfixed by *Pennoyer's* inhibitions on interstate service of process, have

¹¹⁴ *Washington v. Superior Court*, 289 U.S. 361 (1933).

¹¹⁵ *Hess v. Pawloski*, 274 U.S. 352 (1927).

¹¹⁶ *Wuchter v. Pizzutti*, 276 U.S. 13 (1928). For no apparent reason, no effort was made to reconcile this holding with that in the parallel situation in *Washington v. Superior Court*, *supra* note 114.

¹¹⁷ See D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 ILL. L. FORUM 533.

¹¹⁸ 357 U.S. 235 (1958); see text *supra*, at note 9.

thought this important.¹¹⁹ With these qualifications and aberrations, the rule now amounts to this: a state can subject a person to its jurisdiction by service of process anywhere in the country, so long as the litigation has substantial local elements. What remains of the aspect of *Pennoyer* that precluded extraterritorial service is difficult to see, although some authorities with more tenacity than persuasiveness still profess the new rule to be only a qualification of the old.

The second problem in the *Pennoyer* system was the matter of notice in in rem proceedings. Not long after *Pennoyer* was decided, it was held that due process required no more than seizure or an equivalent manifestation of jurisdictional initiative. Accordingly, upon seizure or its equivalent it was unnecessary to make other efforts to give notice of the proceedings to persons concerned.¹²⁰ The rule was applied in condemnation and statutory quiet-title proceedings,¹²¹ and a number of cases involved statutory proceedings for the forfeiture of abandoned property.¹²² In one context and another there was unshaken adherence to the rule that a court had jurisdiction if the "thing" was seized and that it was up to the absentee to find out about the proceedings. This attitude was strengthened by the fact that no provision for notice could have been required consistent with *Pennoyer*, for this might have called for extraterritorial service of process.

The decision in *Mullane v. Central Hanover Bank & Trust Co.*¹²³ abruptly intruded on this aspect of *Pennoyer v. Neff*. That case involved a New York statutory procedure for the settling of a trustee's accounts concerning common trust funds held in its custody. The procedure was substantially identical to accountings for ordinary trustees, executors, and administrators, and resulted in a decree approving the accounts and exonerating the trustee from claims of liability in connection with the trust. It clears the trust corpus and it also clears the trustee, a kind of declaratory judgment certifying the rectitude of the trustee's conduct.

The question in *Mullane* was whether the proceedings were con-

¹¹⁹ See, e.g., *Bond v. Golden*, 273 F.2d 265 (10th Cir. 1959).

¹²⁰ See, e.g., *Ballard v. Hunter*, 204 U.S. 241 (1907).

¹²¹ See *Huling v. Kaw Valley R.R.*, 130 U.S. 559 (1889) (condemnation); *Arndt v. Griggs*, 134 U.S. 316 (1890) (statutory quiet-title suit).

¹²² See, e.g., *Security Savings Bank v. California*, 263 U.S. 282 (1923).

¹²³ 339 U.S. 306 (1950).

clusive on beneficiaries of the trust who had not been served or otherwise notified of the proceedings. It was argued in support of the statute that the proceeding concerned a trust res, that the proceeding was therefore in rem, and that the beneficiaries were accordingly bound regardless of notice. *Per contra* it was argued that the proceedings concerned the personal obligation of the trustee to the beneficiaries, that the proceeding was therefore in personam, and that service of notice was necessary before the beneficiaries could be concluded.

It was held that a reasonable effort to give actual notice to the beneficiaries had to be made, at least to the extent of mailing notice to the beneficiaries whose addresses were known. The Court acknowledged that a balance had to be struck between giving notice to parties interested and providing a device for winding up trustee accounts, and observed that it had "not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet."¹²⁴ And the Court intimated that the old *Pennoy* formula retained little decisional power:¹²⁵

Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more vaguely still, "in the nature of proceeding *in rem*." . . . But in any event we think that the requirements of the Fourteenth Amendment . . . do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.

Not long afterward, in *Walker v. City of Hutchinson*,¹²⁶ a condemnation proceeding which the state court had faithfully characterized as in rem,¹²⁷ the judgment was set aside because the property owner had been given notice of the valuation hearing only by publication. *Mullane v. Central Hanover Bank & Trust Co.*, said the Court, "establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."¹²⁸

¹²⁴ *Id.* at 314.

¹²⁵ *Id.* at 312.

¹²⁶ 352 U.S. 112 (1956). See also *New York v. N.Y., N.H., & H. R.R.*, 344 U.S. 293 (1953).

¹²⁷ *Walker v. City of Hutchinson*, 178 Kan. 263, 267 (1955).

¹²⁸ 352 U.S. at 115.

The rule was applied more recently in *Schroeder v. City of New York*.¹²⁹

It is surely not reading too much into these cases to say that the Supreme Court will hold that no proceeding concludes a person who can be identified and located with reasonable effort unless that person is notified of the proceeding by means no less dignified than regular mail. In practical context this amounts to a requirement of service of process on all persons except those who have disappeared for some time or are deliberately hiding. The vast stores of information about people that are readily available in our bureaucratized society make it hard to lose someone—the post office, telephone companies, utilities, and credit bureaus usually know or can find them. In historical perspective, transmittal of process by the modern post office is at least as trustworthy as it was by the eighteenth-century sheriff; in comparative perspective, it may be recalled that European civil process is routinely delivered by mail.¹³⁰ As to the absconders, there may still be some utility in the idea of service by publication, although it seems to me there are more attractive ways of meeting that problem.¹³¹

When the rule is made clear, as there is every indication it will be, that service of notice is a general requirement, the presence of property in the jurisdiction loses the vestiges of its special jurisdictional significance. Process, delivered either by the sheriff or by the postman, must issue whether the property is real or personal, whether it is seized or not, and whether the interested parties are found locally or elsewhere. The property—the land, the trust fund, the bank account—no longer has significance as a “thing” over which the court has jurisdiction, but is merely an event that is the proper occasion for exercise of local jurisdiction, like an automobile accident or a claim for attorney’s fees.¹³² I think we have now about reached this stage. That being so, there is nothing left by which to differentiate proceedings in personam and those in rem, and the keystone of *Pennoyer*’s conceptual structure is gone.

The *Pennoyer* conceptual structure has indeed long since proved inadequate to hold the problem cases in predictable and useful

¹²⁹ 371 U.S. 208 (1962).

¹³⁰ See EHRENZWEIG, *op. cit. supra* note 14, at 92.

¹³¹ See text following note 161 *infra*.

¹³² Cf. *Durfee v. Duke*, 375 U.S. 106 (1963).

relationship to each other, which is what a conceptual system is for. Something has already been said on this point,¹³³ and the critical observations of Mr. Justice Jackson have already been noted.¹³⁴ But the difficulties appeared without being recognized many years ago in two cases that since have become landmarks, *Harris v. Balk*¹³⁵ and *New York Life Insurance Co. v. Dunlevy*.¹³⁶ A few words about them may be appropriate to drive home the weaknesses of the *Pennoyer* system.

Harris v. Balk was a garnishment proceeding in Maryland brought by one Epstein to collect a sum allegedly due him from Balk, who lived in North Carolina. The garnishee was Harris, who concededly owed Balk \$180. Harris also resided in North Carolina and was passing through Baltimore when Epstein happened—so far as the record shows—to catch him with a writ of attachment garnishing his debt to Balk. Balk, having no notice of the proceeding, defaulted and Harris pursuant to the judgment paid the money over to Epstein. Balk later sued Harris in North Carolina to recover the \$180, the defense being the prior payment pursuant to the Maryland garnishment.

Balk argued that the Maryland court had no jurisdiction because the debt was not “in” Maryland, where Harris had been only casually and temporarily, but rather was “in” North Carolina where Harris permanently resided. On the other side, it was argued that Harris himself while in Maryland was personally subject to Maryland’s jurisdiction. The Court was thus confronted with competing conceptualizations of the situation, each manifesting fidelity to the facts and each plausible within the *Pennoyer* scheme.

This was not, let it be emphasized, a “borderline” situation in the sense that it was a case lying uncertainly close to a conceptual boundary line. On the contrary, the situation was a dual occupant of two conceptual categories that purported to be mutually exclusive. Selection of the “proper” category in such a situation is literally arbitrary, because the conceptual system by its very terms does not recognize that a choice is necessary and therefore provides no tools of analysis by which the choice can be made.

On the other hand, plausible argument could be advanced in terms of the *Pennoyer* system that the debt could be garnished in

¹³³ See text *supra*, at notes 90–94.

¹³⁵ 198 U.S. 215 (1905).

¹³⁴ See text *supra*, at note 125.

¹³⁶ 241 U.S. 518 (1916).

neither Maryland nor North Carolina. It could not be garnished in North Carolina, so it could be said, because Harris was out of the state, and therefore beyond the territorial limits of its jurisdiction, and therefore not amenable to North Carolina garnishment process. At the same time, it could not be garnished in Maryland because garnishment procedure contemplates that "the plaintiff [*i.e.*, Epstein] is really, in such a proceeding, a representative of the creditor of the garnishee [*i.e.*, Balk], and therefore if such creditor himself [Balk] had the right to commence suit to recover the debt . . . his representative has the same right. . . ."¹³⁷ To recognize Epstein as a plaintiff is therefore to constitute him Balk's representative for the occasion. But the appointment of a personal representative empowered to manage and consume the principal's property is tantamount to the direct exercise of authority and jurisdiction over the principal himself. Since Balk, the principal, was not within the jurisdiction of the Maryland court, so it could be argued under *Pennoyer*, the Maryland proceedings were void.

In the line of analysis just suggested, the situation in *Harris v. Balk* would lie wholly outside the *Pennoyer* system, a conceptual system that purports to be inclusive, and would be one in which no court could enter a valid judgment. This analysis need not be accepted, of course. The key points are that it is as plausible as the one the Court did adopt and that it cannot be rejected by any argument derived from *Pennoyer* itself.

New York Life Ins. Co. v. Dunlevy presented the same difficulty. In that case a man named Gould had a paid-up insurance policy that had become due. Gould had a daughter, Mrs. Dunlevy, to whom the policy allegedly had been assigned. A creditor of Mrs. Dunlevy brought garnishment proceedings in Pennsylvania against the insurance company, seeking to reach the policy proceeds and joining Gould as an additional party. The company admitted the sum was due, alleged that Gould claimed the policy proceeds, paid the money into court, and requested that Mrs. Dunlevy and Gould be interpleaded. Mrs. Dunlevy defaulted, judgment was entered in favor of Gould, and the money was paid to him. Mrs. Dunlevy in the meantime moved to California, sued the insurance company there on the policy, and recovered judgment. The company pleaded that the Pennsylvania proceeding determined the interests of Gould and Mrs. Dunlevy in the fund, but this defense was rejected.

¹³⁷ 198 U.S. at 226.

The Supreme Court affirmed. It held that the interpleader proceeding "was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts. . . . The established general rule is that any personal judgment a state court may render against one who . . . is not . . . served with process in its borders . . . is void, because the court had no jurisdiction over his person."¹³⁸ This was assuredly an analysis permitted by *Pennoyer's* rules. It is not clear, however, why the analysis would not have been equally applicable in *Harris v. Balk*: That proceeding did not merely "discover" Balk's property in Maryland and "apply it to debts"; the Maryland proceeding determined in Balk's absence that he owed a debt to Epstein and it is impossible to see why that was not "an attempt to bring about a final and conclusive adjudication of [Balk's] personal rights" to the extent of \$180.¹³⁹

On the other hand, the interpleader suit in *Dunlevy* just as easily could have been analyzed as a proceeding to determine the interests in a specific res, *i.e.*, the insurance proceeds. That "thing" was within the territory of Pennsylvania, because the debtor-insurance company was there, and the fund had been taken into the custody by its officials.¹⁴⁰ The adjudication of the conflicting claims to the fund would be in substance a quiet-title proceeding, which under *Pennoyer* could be held—and held only?—in the state where the "thing" was located.¹⁴¹

¹³⁸ 241 U.S. at 521, 522–23.

¹³⁹ The fact that Balk's liability to Epstein in excess of \$180 was left open by the Maryland judgment does not vitiate the fact that his liability was conclusively determined up to that amount. If the amount Harris owed Balk had been, say, \$500, and the amount claimed by Epstein was only \$300 (as it was in fact), the garnishment judgment would have determined Balk's "personal rights" as exhaustively as an in personam judgment. The piecemeal character of the adjudication could not have altered the character of Balk's legal relationship to Harris.

¹⁴⁰ A year later, the Court so characterized a bank account in a sequestration proceeding: "Indebtedness due from a resident to a non-resident . . . is property within the state. . . . The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of the proceedings, and the opportunity of the owner to be heard." *Pennington v. Fourth National Bank*, 243 U.S. 269, 271, 272 (1917).

¹⁴¹ See *Arndt v. Griggs*, *supra* note 121. The recent decision in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), I think has the effect of repudiating the *Dunlevy* decision. The *Western Union* case was a suit in Pennsylvania by the state to escheat sums held by the telegraph company representing unclaimed money orders. Pennsylvania claimed the amounts of money orders

The *Pennoyer* system, in addition to its other defects, is thus a revolving door as applied in quasi in rem situations; where you come out in analyzing the jurisdictional problem depends on where you decide to stop. Its inadequacy as a general theory can be summarized as follows: whereas an object is "property" because people have legal claims to it, and any legal claim for material redress is a claim to be compensated in property, *Pennoyer* requires the impossibility of thinking of property without an owner and compensation without payment.

IV. SUGGESTIONS FOR A NEW THEORY

Ever since *International Shoe*, *Pennoyer v. Neff* has been eligible for oblivion. Chief Justice Traynor plainly suggested that the step be taken, and that all jurisdictional problems be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation.¹⁴² Surely this is not difficult to conceive in the present posture of the law.

1. The "long-arm" statutes are settling into familiar application in multistate tort and contract cases. If drafted to embrace multiparty litigation—disastrous accidents, claims for impleader in manufacturer's liability cases, and the like—they would close a gap that has long existed in the remedial system of the United States.¹⁴³ It seems

bought in that state but not collected by the senders, wherever they might have been. The state of New York claimed the same funds on the ground they were "in" New York, the company's corporate domicile and principal headquarters. Other states made similar claims, along the lines of those in *Texas v. New Jersey*, see text *supra*, at note 13. The Supreme Court held that Pennsylvania could not proceed against the company in a suit in which New York was not a party, because a person in the defendant's situation "is deprived of due process of law if he is compelled to relinquish [the property] without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." 368 U.S. at 75. Although the Court limited its discussion to cases where jurisdiction was asserted in rem and perhaps to escheat cases, it is difficult to see why the same principle would not be held applicable in a situation like *Dunlevy*, especially since *International Shoe* and *Mullane* have removed any obstacles to giving notice to the absent claimants.

In the *Western Union* case, an original proceeding in the Supreme Court was necessary because the rival claimants were states and not amenable to the process of courts of other states. That is no barrier where the claimants are individuals or corporations. See generally LOUISELL & HAZARD, *op. cit.* *supra* note 18, at 429-31.

¹⁴² *Atkinson v. Superior Court*, 49 Cal.2d 338 (1957).

¹⁴³ See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Proposed Final Draft No. 1, pp. 119 *et seq.* (1965).

clear that legislation along these lines would be sustained by *International Shoe* as buttressed by *Mullane*.¹⁴⁴ This would supply the jurisdictional basis for the damage actions that are the general run of litigation.

2. The presence of a res—a tract of land, a fund—is of no peculiar jurisdictional significance but is rather the transactional event that provides a legitimate basis for plenary jurisdiction pursuant to the minimum-contacts rule. The process is issued to nonresidents in such cases in order to comply with *Mullane*'s notice requirement. That process, because it issues from a state having minimum contacts with the litigated transaction, has potency in virtue of *International Shoe* to permit entry of whatever judgment is necessary to determine the controversy, without regard to limitations formerly associated with in rem proceedings.¹⁴⁵

3. The attachment cases are appropriately limited by the minimum-contacts rule to situations where either the obligation secured by the attachment arose from a transaction with local elements,¹⁴⁶ in which case there is plenary jurisdiction because of minimum contacts anyway, or where the plaintiff can show that attachment is probably necessary if he is to realize on his claim,¹⁴⁷ in which case attachment is employed for its proper use as a security device. Since these two categories include practically all the cases where attachment is presently employed, only minor practical change will result from this revised conceptualization. Serious inconvenience regarding the place of trial occasioned by attachment as a security device can be avoided or mitigated by dismissal conditioned upon a bond

¹⁴⁴ In *Mullane*, Justice Jackson had said that "the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside the State can somehow be determined." 339 U.S. at 313. There is no reason to believe that a state's legitimate concern with cleaning up complicated situations is restricted to trust administration.

¹⁴⁵ Cf. *Durfee v. Duke*, 375 U.S. 106 (1963).

¹⁴⁶ Cf. *Tingley v. Bateman*, 10 Mass. 344 (1813), *supra* note 72, refusing to allow garnishment of a transient obligor, the same situation as in *Harris v. Balk*.

¹⁴⁷ It seems not farfetched to see this interest as one that any state may enforce in the interest of all the states taken together. Maintenance of a state-court system of remedial justice that is actually effective is a legitimate objective to which each state may *pro tanto* make contribution. Cf. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

being posted by defendant to meet judgment liability should it ultimately be established.¹⁴⁸

In this scheme of things, there are two defects that inhibit acceptance of a general minimum-contacts theory of jurisdiction. The first is that the vagueness of the minimum-contacts general principle can make jurisdictional litigation uncertain at the trial level and frequent at the appellate level. The second is that it provides no solution to the problem of the claimant who cannot be located or identified—he being among those constituting “all the world” that were concluded by in rem proceedings.

The first defect can be resolved by the technique of particularization—arbitrary particularization if you will—within the general minimum-contacts framework.¹⁴⁹ This technique is manifested legislatively in the “long-arm” statutes, though they could be greatly improved upon.¹⁵⁰ It is also manifested judicially in the two recent cases which are the pretext for this essay.

In *Texas v. New Jersey*,¹⁵¹ Mr. Justice Black considered the prospect of applying the general minimum-contacts principle to numerous and various state escheat claims, and found it unmanageable:¹⁵²

The “contacts” test as applied in this field is not really a workable test at all—it is simply a phrase suggesting that this Court should examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State’s claim to those pennies or dollars seems stronger than another’s.

He then announced a series of specific rules: escheat of debts owed to persons for whom a last address is known shall be to the state where that address is located; escheat of debts owed to persons for whom there is no record of address shall be to the state of the debtor’s corporate domicile; and a variation was announced to cover

¹⁴⁸ Cf. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950).

¹⁴⁹ It seems infinitely preferable to have a sensible general theory with arbitrary categorial subsystems than, as in the *Pennoy* system, an unsensible general system with arbitrary categorial subsystems. In the former situation, the subsystems can be criticized and corrected intelligently and without using fictions.

¹⁵⁰ Cf. EHRENZWEIG, *op. cit. supra* note 14, at 117–18.

¹⁵¹ 379 U.S. 674 (1965).

¹⁵² *Id.* at 679.

cases where a particular state had no escheat law. What is interesting is not the particular rules themselves but their particularity.¹⁵³ A similar technique could reduce the minimum-contacts principle to like particularity in identified needful areas of jurisdictional law.¹⁵⁴

The other case manifesting a useful technique of particularization is the *Citibank* case.¹⁵⁵ That case involved issues far afield of the jurisdiction of state courts, but the manner in which the Supreme Court cautiously handled the question of remedy is relevant to the present discussion. The government had brought suit in the Southern District of New York to recover income taxes allegedly due from Omar, S. A., a Uruguayan corporation, and joined the First National City Bank as a party. On a showing that Omar was liquidating and withdrawing its assets from the United States, the government obtained a temporary injunction restraining the bank from dispersing Omar's account maintained at the bank's Montevideo branch. The bank appealed the temporary injunction and won reversal in the Second Circuit. The Supreme Court in turn reversed, reinstating the injunction.

The Government summarized its main point in this way:¹⁵⁶

The District Court had authority to enjoin respondent, over whom it had personal jurisdiction, from participating in the dissipation of assets belonging to an absent taxpayer pending the service of valid process on the taxpayer.

The bank argued in more traditional terms:¹⁵⁷

Accounts maintained on the books of foreign branches of American banks are contractual obligations created by, existing under, and performable in accordance with, foreign law. They constitute property or property rights within the for-

¹⁵³ Mr. Justice Black observed: "We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and equity." 379 U.S. at 683.

¹⁵⁴ The whole scheme of "divisible divorce," allowing Nevada to divorce New Yorkers but reserving to New York the chief authority to determine post-divorce property arrangements, can usefully be regarded as a scheme of particularized jurisdictional rules that is not "entirely one of logic" but "fundamentally a question of ease of administration and equity." Cf. note 153 *supra*. There appears to be no more coherent way of looking at it. Cf. EHRENZWEIG, *op. cit. supra* note 14, at 265 *et seq.*

¹⁵⁵ *United States v. First National City Bank*, 379 U.S. 378 (1965).

¹⁵⁶ Brief for Petitioner, p. 10.

¹⁵⁷ Brief for Respondent, p. 6.

eign country which permits the branch to operate. Courts in the United States have no jurisdiction in rem or quasi in rem over such accounts.

It is pertinent to observe that the Government limited the case it made to the case at hand: temporary relief against dissipation of the assets of a taxpayer pending service of process against him. It did not rest on the broader ground that the account was "in" New York for the purposes of any type of litigation—a commercial claim by the Government, for example—nor that it was "in" New York for all purposes of the present proceeding.

The decision of the Supreme Court was no broader:¹⁵⁸

If it were clear that the debtor (Omar) were beyond reach of the District Court so far as personal service is concerned, we would have quite a different case—one on which we intimate no opinion. . . .

Whether the Montevideo branch is a "separate entity," as the Court of Appeals thought, is not germane to the present narrow issue. It is not a separate entity in the sense that it is insulated from respondent's managerial prerogatives. . . . This is not to say that a federal court in this country should treat all the affairs of a branch bank the same as it would those of a home office.

This disposition reflects the approach suggested for analyzing the jurisdictional basis of foreign-attachment proceedings. Jurisdiction to attach or sequester is appropriate where there are minimum contacts with the transaction being litigated, or to employ attachment or sequestration as a security device when eventual collection is shown to be jeopardized.¹⁵⁹ It is noteworthy in this connection that in *Citibank* the government proposed to serve process on the defendant Omar under the terms of the New York "long-arm" statute permitting service on a non-domiciliary who "transacts any business in this state."¹⁶⁰ Moreover, there was a clear implication that jurisdiction to secure the assets does not require presupposition of jurisdiction to determine the merits: "If it were clear that the debtor (Omar) were beyond reach of [process] . . . we would have quite a different case."¹⁶¹ It is not difficult to take the next step that if the defendant provides security in lieu of the assets, then assertion of

¹⁵⁸ 379 U.S. at 381, 384.

¹⁵⁹ See text *supra*, at notes 146–48.

¹⁶⁰ See 379 U.S. at 381.

¹⁶¹ *Id.* at 381.

jurisdiction to decide the merits would be improper in the absence of minimum contacts with the transaction sued on.¹⁶²

This analysis accommodates the attachment cases within the structure of the minimum-contacts principle. Damage actions, specific performance suits, condemnation, and interpleader types of cases have already been accommodated. This brings us to the problem of the persons who cannot be located or identified.

There are differences between the problem of the person who can be identified but not located and that of the person who cannot even be identified. The person who can be identified though not located has two characteristics that are different from the one who is unidentified. First, the problem of notifying him turns on the degree of effort that must be expended in seeking him. Second, he is a person against whom it may be practical to obtain a compensatory judgment. On the other hand, the unidentified person—"unknown heirs" are the prototype—may be nonexistent, so that efforts to find him will necessarily prove futile. Moreover, the unidentified person is never in practical terms the target of a compensatory claim because it is impossible to identify "his" property and thus to realize redress. As to him, the only litigating objective can be to foreclose claims he may have against others.

With these differences in mind, it is not difficult to put the identified but unlocated person into place in the minimum-contacts framework. The limiting case here would be where, in an action for damages or other compensatory relief, reasonable effort is made to deliver notice but notice is in fact not delivered to the defendant. Can a valid judgment for compensatory relief be granted in such a case? This depends on whether the condition of rendering a valid judgment under the Due Process Clause is defined as the giving of notice or the making a reasonable effort to give notice. If the former, then the plaintiff is helpless to obtain compensation—for example, from the defendant's insurance company—unless he can actually deliver notice to the defendant. The Supreme Court has never gone beyond holding that due process requires a reasonable opportunity to be heard and that reasonable effort to give notice of the hearing sufficiently affords that opportunity. But the Supreme Court has never passed on the precise question raised, although many lower courts have. The problem has arisen recurrently under the automo-

¹⁶² See note 148 *supra*.

bile "long-arm" statutes. Most courts have ducked the issue by reading—sometimes by straining to read—the local state statute to require actual notice.¹⁶³ Those courts that have faced the issue all appear to have held that failure of actual delivery of notice does not preclude valid judgment, so long as a reasonable and technically punctilious effort has been made, *i.e.*, there has been compliance with a statutory procedure that is itself reasonable.¹⁶⁴ And this seems a correct analysis of the due process requirement as established by the Supreme Court.

This brings us to the last stage of the analysis, the problem of the person who cannot be identified. By hypothesis such a person cannot be given notice of the proceedings despite reasonable efforts to identify and locate him within the state and without. Yet there are necessities that require proceedings that can close the door conclusively on all future disputation. "Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on. . . ."¹⁶⁵ The trust accounting in *Mullane* was such a case, decedents' estates are such cases, and so are bankruptcy, quiet-title, and many other proceedings conventionally denominated in rem proceedings.

The traditional device of foreclosing the absentee is notice by publication. Indeed, achievement of the objective of finality is the only real justification for service by publication, and the tradition and the need no doubt will keep the ceremony of service by publication a part of the law of jurisdiction. But determination of the unidentifiable absentee's interest can be rested on ground more secure in concept and policy.

The more appropriate approach, it seems to me, is the notion of bar by statute of limitation. This notion has pervaded the law of jurisdiction to an extent perhaps not fully appreciated. The fact is that the prototype foreign attachment proceeding, that of the Lord Mayor's Court of London, was not conclusive on the absentee

¹⁶³ See, *e.g.*, *Syracuse Trust Co. v. Keller*, 35 Del. 304 (1932); *Muncie v. Westcraft Corp.*, 58 Wash.2d 36 (1961); *Emery Transport Co. v. Baker*, 119 N.W.2d 272 (Iowa 1963).

¹⁶⁴ *E.g.*, *Morris v. Argo-Collier Truck Lines*, 39 F. Supp. 602 (W.D. Ky. 1941); *Powell v. Knight*, 74 F. Supp. 191 (E.D. Va. 1947); *Hendershot v. Ferkel*, 144 Ohio St. 112 (1944).

¹⁶⁵ *Case of Broderick's Will*, 21 Wall. 503, 519 (1874).

debtor until the expiration of a year and a day after judgment.¹⁶⁶ The same was true also of the Maryland statute in *Harris v. Balk*.¹⁶⁷ Most probate statutes fix a period for claims,¹⁶⁸ and so do the bankruptcy laws.¹⁶⁹ Escheat and abandoned property forfeitures are predicated on the bar of time, as are many statutory quiet-title procedures. Many procedures that are not explicitly founded on the principle of limitation are nevertheless consonant with it—"absconding debtors" and "unknown heirs," the typical personages, do not become such overnight.

On this analysis, the problem of serving notice on unknown absentee disappears. The claims of those who cannot be found are concluded instead by an official signal—such as the commencement of proceedings—that time is running, and the imposition of bar when it has done so. The limiting case would be that of an absentee who ultimately proved to have been an incompetent: Could the bar of time validly be raised to his claims? The Supreme Court has indicated it can,¹⁷⁰ and there is no reason to suppose a retreat from this view. That being so, the minimum-contacts principle, particularized in needful special areas, attended by a notice requirement, and supplemented by systems of time bar, provides an adequate general theory of state-court jurisdiction. We can release *Pennoyer's* grip on our minds.

¹⁶⁶ See Locke, *op. cit. supra* note 21, at 19.

¹⁶⁷ See 198 U.S. at 227.

¹⁶⁸ Cf. *Stevens v. Torregano*, 192 Ca. App.2d 105 (1961).

¹⁶⁹ See *MACLACHLAN, BANKRUPTCY* 142 (1956).

¹⁷⁰ *Vance v. Vance*, 108 U.S. 514 (1882).