Contempt Power of the Equity Court over outside Agitators.

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CONTEMPT POWER OF THE EQUITY COURT OVER OUTSIDE AGITATORS

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Ever since the early conflicts between the courts of common law and equity, when Lord Coke and his common law cohorts sought to eliminate their competition for jurisdiction over civil disputes (a source of not only power but wealth since courts operated on something of a commission basis), equity judges have exercised severe self-restraint in the interests of self-preservation in resisting the temptation to expand their jurisdiction. The paranoia generated by the early struggle of the equity courts for co-existence with the common law courts seems to have passed like a legacy, often a curse, down through the generations of equity judges. With a few exceptions, they have been careful to check their injunctive power behind conservative, often artificial, barriers which were created for reasons that have long since ceased to exist. At times, this self-restraint has prevented courts of equity from granting the only feasible remedy for problems of serious social consequence. The purpose of this article is to examine a current problem within that unfortunate category, and determine if a solution might not exist within the dominion of equity courts if they re-examine the scope of their power in terms of modern realities instead of mythological tradition.

JURISDICTION OF EQUITY

One of the basic determinations that had to be made in terms of defining the jurisdiction of the equity court was the delineation of precisely who is "bound" by an injunction. Admittedly, the word "bound" is susceptible of numerous interpretations; but in its most practical aspect, I consider an individual bound if he can be subjected to

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civil and criminal contempt sanctions for disobeying the injunction without violating his constitutional right to due process. After a number of fluctuations,[1] the line came to be drawn, practically in indelible ink, by Judge Learned Hand in the case of *Alemite Manufacturing Corp. v. Staff*.[2] An injunction had been issued against John Staff, "his agents, employees, associates and confederates,"[3] ordering the cessation of business activity that infringed the patent of the petitioner. Joseph Staff was a salesman in John's employ when the order was issued. Subsequently Joseph left John's business and set up an independent enterprise that was proven to have infringed the Alemite patent. The question before the court was whether or not Joseph was to be held guilty of contempt of the court's order. Judge Hand cast the issue in terms of defining the *power* of the court to bind any individual other than a properly named defendant in the injunctive action.

The Physical Concept of Jurisdiction

At this point a brief detour is necessary, because in order to appreciate the rule of law forged by Judge Hand in its proper perspective, it is necessary to understand the traditional conception that had permeated and imprisoned judicial thinking on the subject of jurisdiction since the 1877 decision of *Pennoyer v. Neff*.[4] That case involved the question of the validity of a judgment at law rendered without personal service on the defendant within the forum state. Mr. Justice Field used the case as a vehicle for constructing an integrated, concrete model of an area that was far more elastic, if not metaphysical, than he cared to believe—the potential jurisdiction of any court over a particular dispute.[5] He was influenced by the property-based concepts that had permeated the English system of law in its attempt to deter anarchy among the territorial feudal barons—a system of law from which the American system had taken its departure a mere hundred years earlier. It was therefore no surprise that he laid down as primary principles that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its *territory*,"[6] and that "no state can exercise direct jurisdic-

1. *See In re* Reese, 107 F. 942 (8th Cir. 1902).
2. 42 F.2d 832 (2d Cir. 1930).
3. *Id.*
4. 95 U.S. 714 (1877).
5. Codification of the intractable seemed to run in Justice Stephen Field's family. It was his older brother, David Dudley Field, who forged the famous code of procedure known as the New York State Code.
6. Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (emphasis added).

tion and authority over persons or property without its *territory*."[7] He was then able to deduce as the clear litmus paper test for the presence or absence of jurisdiction over a dispute, the *physical* service of process on the person or attachment of property *within the geographic boundaries of the state.*

The seductive clarity and tangibility of this model diverted the court from even considering any less physical alternative factors on which to base jurisdiction such as reasonable opportunity for the defendant to present his case in a particular court, practical access of the plaintiff to a particular court, interest of a state in providing a forum, or location of witnesses and physical evidence. Mr. Justice Field's formulation was accepted with unquestioning adherence by the judiciary as something of an immutable law of nature, in spite of the fact that there was no specific support for it in any constitution or other law of God or man.[8]

It was from that rigid school of jurisdiction that Judge Hand approached the question in *Alemite* of whom an equity court had the power to bind by its injunction. As a true disciple, he began with the proposition that

> no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it.[9]

The critical problem, however, was how to deal with that troublesome class of individuals that fell somewhere between named parties and the world at large. This class encompassed those who were aware of the injunction and deliberately either aided and abetted or somehow compelled the named party to disobey it. It had long since been recognized that if an equity court were literally limited to enforcing its decrees against named parties, the court's power could be easily evaded, such as by accomplishing the enjoined act through an agent. From an early period, therefore, practicality wrung an exception from the iron fist of the physical concept of jurisdiction to close that loophole.[10] The point

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7. *Id.* at 722 (emphasis added).

8. In effect, the court in *Pennoyer* was giving its concrete interpretation to the very general language of the fourteenth amendment which simply requires that no state shall "deprive any person of life, liberty or property, without due process of law." The fifth amendment places an identically vague stricture on the federal government.

9. Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930). The Latin phrase may roughly be translated as "sound and fury signifying nothing."

10. *See In re* Lennon, 166 U.S. 548, 554 (1897); Seaward v. Patterson, [1897] 1 Ch. 545, 551-52 (C.A.).

remaining to be defined by Judge Hand in 1930 was how extensive that exception should be. In practical terms of notice, opportunity to contest the original injunction, or pragmatic necessity in enforcing the injunction, there is no reasonable basis on which to distinguish between those who aid and abet a party in violating an order and those who deliberately prevent a party from obeying it, and yet that is precisely where Judge Hand chose to draw the dividing line. He held that "the only occasion when a person not a party may be punished, is when he has helped to bring about . . . an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him."[11]

The court could easily have reached the conclusion that both those who *aid* and those who *compel* a party to violate an order fit within its definition of those non-parties who can be held in contempt—"a person . . . [who] has helped to bring about . . . an act of a party."[12] Yet it chose to exclude the latter group. The basis for the distinction is one that can only be appreciated by viewing the situation through the eyes of a judge steeped in the entire fiction of *Pennoyer*. The key to penetration of the court's ingrained proclivity to limit the reach of an injunction to parties properly served with process was an ancient doctrine that had grown beside and become enmeshed with the physical concept of jurisdiction—the doctrine of privity. This amounted to the fictitious presumption of some sort of *unity* between certain groups such as principals and agents, or enjoined parties and their aiders and abettors.[13] The doctrine of privity enabled the court to presume the interests of aiders and abettors to be totally submerged within those of the named parties (in spite of any actual divergences) and thereby salved the conscience of the court in both extending the *Pennoyer* boundaries and in binding an aider and abettor by an injunction without giving him a hearing.[14] Even

11. Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930).

12. *Id.* at 833.

13. Any attempt at a comprehensive definition of the concept of privity would be like trying to set physical boundaries around a spirit. Historically, the concept seems to have served the purpose of a metaphysical buffer to allow occasional adjustments to be made in the rigidly conceptualized legal procedure of pre-revoluntionary English law. It defies definition except in terms of the particular purpose a court seeks to make it serve in a given situation. For example, when the court found it essential to have an injunction bind not only *current* owners of a nuisance such as a house of prostitution, but also all successive owners and lessees, regardless of actual notice of the injunction, it simply conjured up a mythical unity between the current and successive owners with the magic phrase, "privity of title." *See* State v. Terry, 168 P. 513, 514 (Wash. 1917).

14. Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930). In a contempt hearing, the defendant is limited to contesting the issues of whether he had notice of the

the elastic doctrine of privity, however, could not be stretched to encompass those who independently interfere with a party's obedience of the injunction. Thus the rule was fixed that aiders and abettors with knowledge of the injunction are bound, while those who knowingly and deliberately either interfere with obedience of an injunction by a party or compel a party to disobey it are not bound. The Supreme Court adopted this rule for the federal courts in *Chase National Bank v. City of Norwalk*,[15] and it was subsequently incorporated in the Federal Rules of Civil Procedure.[16]

EQUITY ENFORCEMENT OF INJUNCTIONS

That unfortunate distinction has returned in a number of serious instances to haunt the equity court in its attempt to enforce its injunctions. One typical example occurred in Florida in 1972. After 11 difficult years of litigation, the Federal District Court for the Middle District of Florida entered a final order in the case of *Mims v. Duval County School Board*[17] requiring the Duval County, Florida, school board to complete the desegregation of the county's schools in accordance with the Supreme Court decision in *Swann v. Charlotte-Mecklenburg Board of Education*.[18] The order required, among other things, the pairing of Ribault Senior High School (predominantly white) with William E. Raines Senior High School (predominantly black), so that the resulting black enrollment would be 59 percent at Raines and 57 percent at Ribault. When the order was carried out, racial tension and violence developed at Ribault to the point that the school had to be temporarily closed. Subsequently, the superintendent of schools and the sheriff of Jacksonville petitioned the district court for injunctive relief, alleging that black outsiders had instigated violence and unrest by their activities on and around the Ribault campus.

The court issued an order enjoining all students of Ribault Senior High School and "other persons acting independently or in concert with them and having notice of this order" from harassing, threatening, or

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injunction and whether his conduct was in violation of it. He cannot raise the issue of the propriety of issuing the injunction.

15. 291 U.S. 431, 436-37 (1934).

16. FED. R. CIV. P. 65(d) states that an injunction issued by a federal court "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert to participation with them who receive actual notice of the order by personal service or otherwise."

17. 329 F. Supp. 123 (M.D. Fla.), *aff'd*, 447 F.2d 1330 (5th Cir. 1971).

18. 402 U.S. 1 (1971).

intimidating any student or teacher of the Ribault school or "committing any other act to disrupt the orderly operation" of the school.[19] In addition, the court enjoined any person other than a student, teacher, administrator, or other person having lawful business on the campus from entering the premises of the Ribault school. A copy of this order was served on Eric Hall, although he was never joined as a party to the action in *Pennoyer* terms. Four days later, Hall violated the order by appearing on the Ribault campus. When asked what he was doing there, he replied that he was on the premises for the purpose of violating the court's order. He was arrested, found guilty of contempt by the federal district court, and sentenced to imprisonment for 60 days.[20]

On appeal, the Court of Appeals for the Fifth Circuit was squarely faced with the dilemma that had been created by Judge Hand in *Alemite*. Eleven years had gone into constructing a fragile solution to the multi-faceted problem of integration in Duval County. The temporary peace was like a tinderbox, and it was impossible to predict which member of the various militant groups might be about to produce a match. To fully appreciate the extent to which the *Alemite* rule tied the hands of the court in such a situation, consider the possible remedies at the court's disposal.

First, the actual joinder as a party defendant of every possible independent agitator who might destroy the ability of the original parties to obey the injunction would have been patently impossible. Not only were problems of identification insurmountable, but the potential defendants' hour to hour presence or absence from the jurisdiction could easily be arranged to frustrate any attempt at service of process.

Second, the court could consider use of its inherent power to punish with criminal contempt sanctions those who interfered with the functioning of court procedures. The difficulty here arises from the fact that in any situation other than a contempt committed in the immediate presence of the court, the defendant is entitled to a full-scale jury trial, in which it must be proven beyond a reasonable doubt that the defendant deliberately interfered with the administration of justice.[21] The cumbersome nature of such a procedure, with its built-in potential for delay and difficulties of proof, makes it an ineffective remedy in a

19. Mims v. Duval County School Bd., 338 F. Supp. 1208, 1209 (M.D. Fla. 1971).

20. United States v. Hall, 472 F.2d 261, 264 (5th Cir. 1972). The injunction violated was the order of the district court in Mims v. Duval County School Bd., 338 F. Supp. 1208 (M.D. Fla. 1971).

21. Bloom v. Illinois, 391 U.S. 194, 201-202 (1968).

volatile situation involving a large segment of the community, as in desegregation and other civil rights cases.

A third possibility is enforcement through a federal statute providing that one who by threats or force, obstructs the exercise of rights or the performance of duties under a court decree, may be fined $1,000 or imprisoned for one year or both.[22] The problem is again the necessity for a full-blown criminal prosecution with all attendant appeals, which make it cumbersome, slow, uncertain, and generally unsuited to the immediate patching of any crack that appears in the rather fragile dike. It is also ineffective in those delicate situations such as civil rights cases or teachers' strikes, involving generally law-abiding citizens, where courts are prone to accept an ultimate peace with a "let bygones be bygones" attitude, and usually refrain from enforcing any continuing penalty or stigma of criminal conviction once the situation returns to normal.

A fourth possible solution is the class action, whereby the named defendant is the class of all of those who might potentially interfere with obedience of the court's order. What makes the class action inappropriate in this type of situation is the fact that under Rule 23 of the Federal Rules of Civil Procedure the court is required to find that "the representative parties share a common interest with the class and will adequately represent the individual class members . . ." before allowing a class action.[23] That would pose an almost insurmountable problem here, since the broad spectrum of interests that might become involved in opposition to the attempted plan of desegregation, from teachers, parents, students, to simple racists, each with his own peculiar reason for opposing some phase of the plan, would be nearly impossible to lump into one "class" homogenous enough to pass the rigid test of rule 23. The problem of giving reasonable notice to each member of this practically unidentifiable class as required by rule 23(c)(2) would be another serious obstacle to any widespread use of the class action to solve the problem.

A fifth approach would be to identify the specific troublemakers by their actions and then join them as party defendants in the original action in order to bring them within the traditonal sweep of the injunction. The obvious flaw in this procedure is that it requires the court to give any number of outsiders one free bite at the apple; in the typical

22. 18 U.S.C. § 1509 (1970).
23. FED. R. CIV. P. 23(a).

tinderbox atmosphere of school desegregation and other civil rights cases, that may be all it takes to sweep away the thin veil of self-restraint and change it from a non-violent to violent confrontation.

In fact, the only adequate remedy for the situation is to review the doctrine of *Alemite*, and determine whether courts of equity might be held to possess the power to bind non-parties who knowingly and intentionally interfere with the performance of the court's injunction. The result of such a holding would be that at the *first attempt* of any non-party with knowledge of the injunction to disrupt its peaceful observance, the petitioner in the action could ask the court to cite the individual for civil, as well as criminal, contempt and impose the immediate civil sanction of imprisonment until the individual is prepared to give the court assurances of his intention to cease interfering. Simultaneously the court could impose a fine to be paid to the plaintiffs as compensation for any measurable damages suffered by them through the individual's interference. This could be accomplished in a summary proceeding before the judge sitting without a jury. Since the procedure would be civil rather than criminal, it would be less encumbered with constitutional safeguards that would make it more lengthy and less suitable to the immediacy of the situation. Finally, the civil contempt proceeding would be initiated and prosecuted by the plaintiff as a part of the original injunctive action, whereas criminal contempt would involve a totally separate action, prosecuted for the purpose of vindicating the authority of the court rather than for the express benefit of the plaintiff.

In a situation such as that of the *Hall* case, there is simply no adequate substitute for the kind of control over the incendiary situation that comes with having present jurisdiction over potential interferers. To its undying credit, the Court of Appeals for the Fifth Circuit recognized the necessity and penetrated the shadows of *Alemite* for the first time since its pronouncement in 1930. The court held that Hall could be cited in contempt for his deliberate interference with the district court's order. In doing so, the court overcame both the common law tradition of *Alemite* and its legislative echo in the form of Rule 65(d) of the Federal Rules of Civil Procedure in what could have been a landmark case. I say could have been because unfortunately, although the holding was a clear advance in the law, the supporting opinion provided little by way of valid justification for the change. For example, the court attempted to draw support from the Supreme Court's opinion in *United*

States v. United Mine Workers.[24] In that case, the party defendant had deliberately disobeyed a temporary restraining order forbidding the union to strike. There was a substantial question as to whether the Norris-LaGuardia Act[25] had deprived the district court of power to enjoin the strike. The Supreme Court held that even if it were ultimately found that the district court lacked subject matter jurisdiction, the court had the inherent power to maintain the status quo while deciding that threshold question; the defendants could therefore be held in criminal contempt for violating the temporary restraining order. The *Hall* court cited this holding for the board proposition that a court has inherent power to protect the efficacy of its judgments. Unfortunately, it missed one significant difference between the two cases. In *United Mine Workers,* the court had unquestioned personal jurisdiction over the defendants in the *Pennoyer* sense. The only possible defect was in *subject matter jurisdiction.* The *United Mine Workers* court gave no indication that it would bend the traditional strictures in the slightest if the defendants were not parties or aider or abettors.

The *Hall* court also attempted to draw support by way of analogy to the traditional in rem injunction, which attaches to a particular piece of property and binds the rights of anyone, party or otherwise, who deals with the property with knowledge of the injunction.[26] Unfortunately, the support is weak here too. First, the in rem doctrine has always been an established encrustation on the *Pennoyer* model of jurisdiction, and therefore provides little precedent for a *break* with the rule of *Pennoyer.* Second, since the court in an in rem action is limited to adjudicating what is to be done with or to some specific res within its physical power, there is not even support by way of analogy for an attempt by the court to adjudicate purely personal rights of a non-party. Third, without resorting to mind-boggling flights of imagination, there is no conceivable res, or even quasi res in the *Hall* type of case to which the court could attach an in rem or quasi in rem form of jurisdiction.

The court was equally ambiguous with Hall's contention that rule 65(d) precluded holding him bound by the order since he was not a party, officer, agent, servant, employer nor attorney of a party. Here the court engaged in some sleight of pen by stating that "[r]ule 65(d), as a *codification* rather than a *limitation* of court's common-law powers, cannot be read to restrict the inherent power of a court to protect its

24. 330 U.S. 258 (1947).
25. 29 U.S.C. §§ 101-110 (1970).
26. *See* State v. Terry, 168 P. 513, 515 (Wash. 1917).

ability to render a binding judgment."[27] The difficulty with this formulation is that once a common law rule is solidified by the process of codification, it is, by the nature of the act, limited until the code is amended. There is no other purpose or meaning to codification.

When the issues are presented clearly, therefore, the true thrust of the court's rationale is apparent:

> School orders are, like in rem orders, particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties. In such cases, as in voting rights cases, courts *must have* the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judgment . . . . Similarly broad applications of the power to punish for contempt *may be necessary*, as here, if courts are to protect their ability to design appropriate remedies and make their remedial orders effective.[28]

In other words, justification or not, equity courts *need* to have the power to bind those who will interfere with their orders in cases of this kind if they are to be able to provide a meaningful remedy to the petitioner, and therefore the Fifth Circuit held that they have this power.

The clearest evidence of the weaknesses in the rationale of the *Hall* opinion is the fact that in spite of the usefulness of its holding in any number of civil rights and collective bargaining situations, no case has been found to date in which any court has followed where the *Hall* court led. This is unfortunate but correctable. There are at least two possible avenues of approach by which the *Hall* holding can be firmly supported.

The less adventurous approach would be to work within the existing framework, and to re-interpret the holding in *Alemite*. It could justifiably be argued that in defining the class of those bound by an injunction, Judge Hand had never considered the possible category of individuals who would interfere with a party's obedience for independent motives and therefore had no intention of including or excluding them. The facts of *Alemite* support that theory since no such category or individual was involved. Any pronouncement on the subject by Judge Hand would have been pure dicta; it is more likely that he never intended to touch on it at all. The words in his opinion that seem to exclude that class could be considered purely fortuitous. The court is

27. United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972) (emphasis added).
28. *Id.* at 266 (emphasis added).

therefore free to write on a clean slate, without disturbing any existing principle.

Once that point is reached, the next step is to deal with rule 65(d) on the same terms. Since the rule is generally agreed to be a codification of the existing common law founded on *Alemite*,[29] and under this reinterpretation, the common law did not deal with jurisdiction over this class of individuals, the next step would be to simply conclude that rule 65(d) also did not comprehend this class within its sweep, and therefore should not be held to limit jurisdiction where it was never intended to do so. A similar approach was taken by federal courts that have extended the reach of their injunctions to cover successors in both private and public office.[30]

This back-door type of attack, whereby the court deftly avoids any accusation of making waves by adjusting its choice of words to appear to be working within the traditional system rather than chancing criticism for its attempt to improve it, has worked well in other areas. For example, equity jurisprudence was once the victim of an unfortunate dictum of Lord Eldon in *Gee v. Pritchard*,[31] that left it hobbled with the principle that equity will protect only property rights and will not extend its sanctions to protect personal rights. For decades, courts paid verbal homage to that irrational principle in cases involving personal rights that demanded vindication, while at the same time coming in the back door by way of discovering, creating, or fictionalizing some "property interest" in what was patently a personal right to justify the granting of an injunction. The prime example is *Gee v. Pritchard* itself, in which the plaintiff sought to protect the reputation of her dead husband against

29. *See* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

30. In Lucy v. Adams, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd per curiam*, 328 F.2d 892 (5th Cir. 1964), the court found it necessary in the circumstances to hold that an injunction against discrimination on the basis of race was extended to the *successor* in office of the Dean of Admissions of the University of Alabama, although there was no evidence of collusion or agency between the enjoined dean and his successor. While the court referred to rule 25(d), which provides generally for the substitution of the successor of a *public* office holder as a party in an action, it drew its major support in "interpreting" its way around rule 65(d) from a fiction that arose out of state case law such as Crucia v. Behrman, 84 So. 525, 527 (La. 1920), wherein the court held the successor of an enjoined police inspector bound on the theory that "[i]n such cases the [injunction] runs against the office, and embraces all who are charged with the execution of its functions, . . . whether by the present incumbent or others who might succeed to their duties." Other federal decisions have followed the *Lucy* approach. Wright v. County School Bd., 309 F. Supp. 671 (E.D. Va. 1970), *rev'd sub nom.* Wright v. Council of City of Emporia, 442 F.2d 571 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

31. 36 Eng. Rep. 670, 675 (Ch. 1818).

the publication of certain private letters. Lord Eldon laid down his rule and then avoided it by fictionalizing a property interest in the letters.

The problem with this type of approach is that while it may be technically correct, it reiterates assumptions that have been built into years of case law and legislation since *Alemite*. Whether Judge Hand actually considered this particular problem or not, his rigid rule of law has been the basis for the entire concept of equity jurisdiction since it was handed down. Similarly, regardless of the drafters' intent, the wording of rule 65(d) is specific and unyielding, leaving little room for departures under the guise of adherence.

The Exceptions by Necessity

The second, and infinitely more honest and therapeutic approach, begins with a reappraisal of the *Pennoyer* "physical power" approach to jurisdictional thinking. The time is ripe to view case law development over the past four decades not as extensions of *Pennoyer*, but rather as the steady erosion of it. The first crack in the wall came in 1927 when the Supreme Court decided the case of *Hess v. Pawloski*.[32] The Court upheld a Massachusetts statute which allowed the state court to obtain personal jurisdiction over a nonresident motorist defendant for a tort committed on a Massachusetts highway, by service of process on the state registrar of motor vehicles with mere notice sent to the out-of-state defendant. The alleged basis for the decision, to attempt to bring it within the *Pennoyer* formula, was a fictionalized consent to this type of service on the part of the driver in exchange for the privilege of using the Massachusetts highway. Obviously the driver had never heard of the statute and had never intended to enter into any such arrangement. Rationalization aside, the kingpin of the decision allowing a state to sidestep *Pennoyer* in this limited instance was the notion that automobiles are dangerous. The Court concluded that "[i]n the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways."[33]

That kind of "exception by necessity" re-occurred several years later in *Doherty & Co. v. Goodman*,[34] where the Court allowed a state court to obtain personal jurisdiction over an out-of-state defendant through a

32. 274 U.S. 352 (1927).
33. *Id.* at 356.
34. 294 U.S. 623 (1935).

similar statute in an action for damages arising out of the sale of securities. Again the court denied the violation of fourteenth amendment rights by the defendant, relying on the device of fictionalized consent.

The first major change in rationale, as well as result, came in *International Shoe Co. v. Washington.*[35] The State of Washington brought an action against the International Shoe Company to collect contributions alleged to be due the State Unemployment Compensation Fund. The defendant had no office in Washington, made no contracts and kept no stock of merchandise there. It merely hired 13 Washington commission salesmen to show samples and solicit orders. The defendant argued that its activities within the state were not sufficient to evidence its "presence," therefore, to be made subject to the jurisdiction of the state was a violation of its right to due process.

The Court used this cleanly presented issue as a springboard to launch the beginning of an entirely new conceptual basis for jurisdiction.

> Historically, the jurisdiction of courts to render judgments *in personam* is grounded on their de facto power over the defendant's person. Hence, his presence within the territorial jurisdiction of the court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff* . . . . But now . . . 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.'[36]

For once, the Court considered the nature of the transaction between the parties rather than the fortuitous location of the defendant. For the first time, in deciding whether the defendant was deprived of due process, the Court analyzed the extent of any *actual* burden in being compelled to defend an action in a particular jurisdiction.

The Court recognized that in leaving the safe island of *Pennoyer* it was entering on a course that could be guided by no easy rules of the sextant. "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[37]

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35. 326 U.S. 310 (1945).
36. *Id.* at 316.
37. *Id.* at 319.

In *McGee v. International Life Ins. Co.*,[38] the Court continued the trend by upholding California's jurisdiction in an insurance contract action over a defendant insurance company whose only contact with the state was the mail order sale of the policy. It introduced two new elements of consideration in upholding or denying a state court's jurisdiction over an action: first, the manifest interest of a state in providing a means of redress for its residents (particularly strong in the case of insureds dealing with out-of-state insurance companies), and second, whether or not the disproportionate inconvenience to the parties in having to plead their cause out of state might not justify reversing the usual preference for accommodating the defendant in choice of forum.[39]

Mr. Justice Black added his wisdom to the field in *Travelers Health Association v. Virginia*,[40] a case involving service of process on the Secretary of State of Virginia in cases arising under the Blue Sky Law. The defendant was an insurance dealer who did a strictly mail order business from out-of-state. In his typical, straightforward manner, Mr. Justice Black stated that "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."[41] He talked in terms of the nature and consequences of the activities of parties, the presence of witnesses and evidence in the forum state, the relative inconvenience to the parties of trying the case out-of-state, and the state's interest in protecting its citizens against injustice. He summarized the shift from *Pennoyer* stating: "Metaphysical concepts of 'implied consent' and 'presence' in a state should not be solidified into a constitutional barrier against Virginia's simple, direct and fair plan for service of process on the Secretary of the Commonwealth."[42]

A NEW APPROACH

The net result of all of this is that a new day has dawned in all areas of thinking about the power of courts to act. The lesson is equally clear for courts of equity that outdated, empty formulae should be relegated

38. 355 U.S. 220 (1957).
39. *Id.* at 223. In the insurance area, where claims are often small and the claimants are often unable to afford the cost of an out-of-state suit, the insurance companies are too frequently judgment-proof.
40. 339 U.S. 643 (1950).
41. *Id.* at 647.
42. *Id.* at 649.

to history in favor of a rational, clean look at whether or not any particular exercise of power in fact violates due process rights. With the chains of *Alemite* broken, a court has three major considerations to deal with in deciding whether or not due process rights would be violated by holding those who interfere with its injunctions subject to contempt. The first is the problem of giving every defendant his day in court. Since the class of interferers are first brought into the action at the stage of the contempt hearing, they will have had no opportunity to be heard on the basic issue of the propriety of issuing the injunction in the first place. This is compounded by the fact that under usual equity procedure, the propriety of the injunction is not open to re-litigation in a subsequent contempt hearing. The class of interferers would therefore seem to be held bound by an injunction that they were never accorded the opportunity to contest.

This may be more of an apparent hurdle than a real one. In the first place, equity courts have never been seriously concerned with the fact that aiders and abettors are in exactly the same position. They, too, first become parties to the action when they are cited for contempt, and they, too, are deprived of the right to litigate underlying issues concerning the injunction at the contempt hearing. The assumption that their interests are adequately represented by the party with whom they are considered to be in "privity" is pure soul-salving fiction. Although the aider and abettor is cast in the role of merely helping the party in the violation, the actual circumstances often indicate that their interests in violating the injunction are vastly different. *In re Lennon*,[43] for example, presented a situation where the court had ordered the defendant railway to accept and move the cars of another railway whose employees were on strike. The defendant ordered its employees to comply with the order, but one of the employees, in sympathy with the strikers, refused to move the cars and was cited for contempt. As an employee (aider and abettor), he had brought about what the court had forbidden—the defendant railway's neglect to move the cars. Surely even the limits of fiction are stretched in assuming that the interests of the employee were so identical with those of the defendant railway as to have been competently represented.

Second, potential interferers have open to them the same opportunity to obtain a hearing as do aiders and abettors by way of a petition to intervene in the original injunctive action on the grounds that they have

43. 166 U.S. 548 (1897).

interests that will be directly affected if they are subsequently held bound by the injunction. In practical terms, this can present a tactical dilemma for the interferer. Does he intervene for the sake of an opportunity to be heard and possibly convince the court not to issue the injunction at the obvious risk of becoming a clearly named party defendant, or does he stand clear and take his chances in violating the injunction that the court will not hold him bound by it? That may be a serious problem for the potential interferer, but it does not rise to the level of a denial of due process. As long as the door is open to a hearing by way of intervention as an alternative to simply taking the direct action of violation, he has been afforded sufficient opportunity for a day in court.

If any substantial doubts about due process remain, there is a third possibility. In view of the dire necessity of extending the reach of the court's power to cover interferers, in cases such as *Hall*, it might be worth the inconvenience to make an exception in the procedure of the contempt hearing to allow the alleged interferer to raise the issue of the impropriety of the injunction. Surely this, together with the possibility of intervention, will adequately cover any problem of due process.

The second major concern is that if courts of equity are allowed to expand the scope of individuals bound by their injunctions beyond some reasonable limit, they will assume the function of legislators. This was one of Judge Hand's prime considerations in fixing clear perimeters around the court's power. The answer to this concern is simple. The class of those who, with knowledge of the injunction, will deliberately interfere with its observance is generally small and clearly defined.[44] The change would amount to moving the boundary from one clearly marked position a short distance to another clearly marked position. Such a change could hardly engender legitimate fears of a power-mad equity court run rampant.

The third major problem is that of rule 65(d). First, to put the problem in perspective, rule 65(d) only affects injunctive actions in federal courts, and leaves untouched the entire span of injunctive actions before state courts. The problem for federal courts, however, is a serious one. The wording is direct and severe and allows little room for interpretive game-playing. A federal injunction "is binding only upon

44. Note, for example, that in the *Hall* case, those groups and individuals who were potential interferers were generally known to the court. Hall himself was served with a copy of the court's order in anticipation of his possible interference, althouth he was never made a party of the action.

the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them."[45] In fact, if this "honest approach" to the problem of the court's jurisdiction is to remain honest throughout, it will be necessary to admit that there is no clean way over, under, or around rule 65(d). The sole answer is to remove the obstruction by an amendment to the rule extending the court's power over interferers. Since the rule is simply a codification of the previous common law status, initiation of the move toward amendment could quite properly come from opinions of the courts themselves indicating the need for a change. The sooner the rule catches up with modern thinking on jurisdiction, the better for the system. Otherwise, increasing numbers of courts are likely to succumb to the overpowering temptation to bring jurisdictional concepts into the modern age by "interpreting" the rule under the table, as did the *Hall* court.

CONCLUSION

Courts of equity are now in a position to render a double service. By taking an honest approach on the issue of binding interferers, they can advance the court-wide movement toward rationality in structuring jurisdiction, and at the same time close a critical loophole that exists in their ability to deal with such inflammatory situations as cases involving desegregation, busing, and labor disputes.

45. FED. R. CIV. P. 65(d).