

Winter 1992

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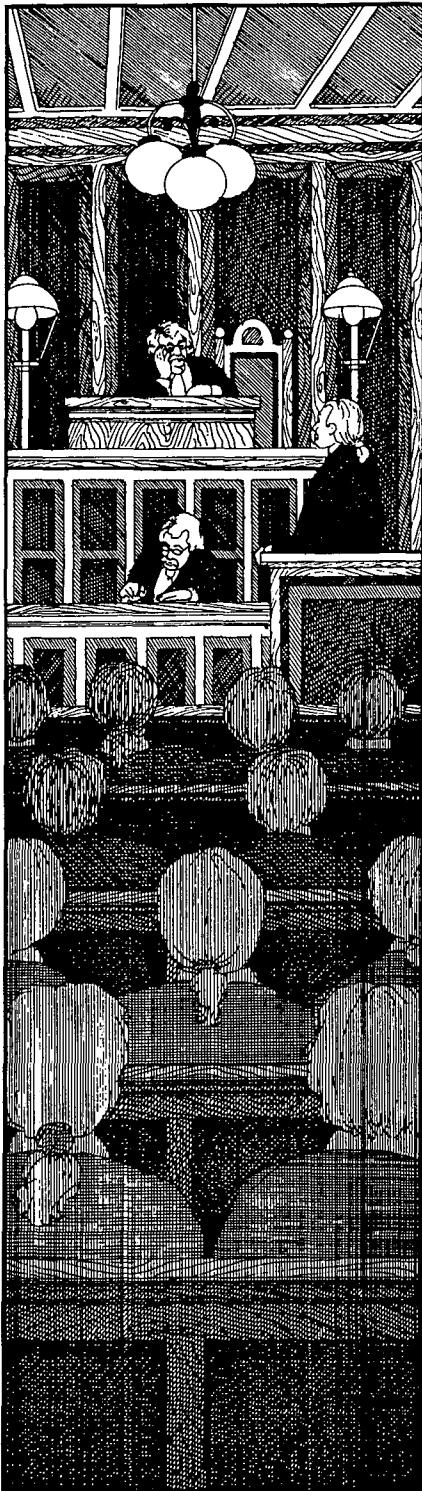
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Recommended Citation

Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process*, 18 *Litigation* 41 (1992).

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Legal Lore



Sin, Scandal, and Substantive Due Process

by Wendy Collins Perdue

For students of civil procedure, the names Pennoyer and Neff evoke these dry facts: In an initial suit, one J.H. Mitchell sued Neff in Oregon state court. Because Neff could not be found within Oregon, he was served by publication. Neff never appeared, and a default judgment was entered against him. To satisfy the judgment, Mitchell attached Neff's Oregon real estate. The property was sold at auction, and Pennoyer later acquired it. Nearly a decade later, Neff returned to Oregon and brought suit in federal court to evict Pennoyer from the land, claiming that the original judgment was invalid. The Supreme Court found for Neff in an opinion that has become a cornerstone of personal jurisdiction doctrine. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

Those familiar facts do not begin to tell the full story, which begins with a young man, Marcus Neff, heading across the country by covered wagon train, presumably to seek his fortune. Neff left Iowa in early 1848 at the age of 24, joining a wagon train of five companies of wagons. At that time, the question of Oregon statehood was being considered in Congress, and there was much speculation that large tracts of the vast, undeveloped land of

Oregon would be made available to homesteaders. The speculation proved to be correct, and Marcus Neff was one of the earliest settlers to claim land under the Oregon Donation Act.

To qualify for land under the Donation Act, one had to be a citizen living in Oregon and submit a request for land by December 1, 1850. Interestingly, Neff's land request was originally dated December 15, 1850, which would have made it too late, but "December" was crossed out and "September" written in. This is the first of many instances suggesting that events surrounding *Pennoyer v. Neff* may have been tainted by fraud and deception.

Not surprisingly, registration of a Donation Act claim required a certain amount of paperwork. In addition to the initial claim, the homesteader was required after four years to submit the affidavits of two disinterested people affirming that the homesteader had cultivated the land for his own use. Neff secured two affidavits, which were submitted prematurely in 1853 and resubmitted in 1856. The 1856 submission should have entitled Neff to receive a patent to the land, but the government was notoriously slow in processing claims, and 10 years passed before Neff received his land patent.

Early in 1862, Neff made the unfortunate decision to consult a local Portland attorney, J.H. Mitchell. Establishing the facts about events in which Mitchell was involved is partic-

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ularly difficult because, as one research librarian commented, "Mitchell was the kind of person who ended his correspondence with 'Burn this letter after reading.'" Although the nature of the legal services is unclear, Neff may have consulted Mitchell in an attempt to expedite the paperwork concerning his land patent. Neff was illiterate, and at the time he consulted Mitchell, the government had still not issued his patent. Mitchell, moreover, specialized in land matters. In mid-1862, several months after Neff first consulted Mitchell, another affidavit was filed on Neff's behalf. Several months thereafter, Neff received a document from the government certifying that he had met the criteria for issuance of a patent.

Whatever Neff's reasons for seeking Mitchell's legal services, he certainly could have done better in his choice of lawyers. "J.H. Mitchell" was actually the Oregon alias of one John Hipple. Hipple had been a teacher in Pennsylvania, who, after being forced to marry the 15-year-old student whom he had seduced, left teaching and took up law. He practiced with a partner for several years but apparently concluded that it was time to move on to greener pastures. Thus, in 1860 Hipple headed west, taking with him \$4,000 of client money and his then-current paramour, a local school teacher. They made their way to California, where Hipple abandoned the teacher, ostensibly because she was sick and her medical expenses had become too burdensome, and moved on to Portland, Oregon. There, using the name John H. Mitchell, he quickly established himself as a successful lawyer, specializing in land litigation and railroad right-of-way cases.

He also remarried without bothering to divorce his first wife. As one historian has observed, Mitchell's success as a lawyer cannot be attributed to either intellectual or oratorical skills; rather, his strengths included exceptional political instincts, a generous disposition, and a friendly handshake. What he lacked in ethics and ability, he made up for with persistence and a desire for success. In his subsequent political career, he became known as a man whose "political ethics justified any means that would win the battle." Mitchell was first elected to the state senate in 1862, became president of the state senate in 1864, was seven times a candidate for the U.S. Senate, and was elected in four of those contests.

Mitchell's ethical standards as a lawyer were no higher than his ethics as a politician. As the *Oregonian* observed in 1882: "His political methods are indeed pitched on a sufficiently low scale but not below his methods as a lawyer." Given Mitchell's reputation, one might at least question whether Neff in fact owed the money Mitchell claimed was due. Neff paid Mitchell \$6.50, but Mitchell claimed he was owed an additional \$209. Although Mitchell's services were rendered between early 1862 and mid-1863, Mitchell waited several years to take legal action against Neff, perhaps purposely waiting until Neff left the state.

On November 3, 1865, Mitchell filed suit against Neff in Oregon state court, seeking \$253.14 plus costs. Mitchell secured jurisdiction under Oregon statute § 55, which provided that after due diligence, if the defendant cannot be found within the state, he may be served by publication. Mitchell supplied an affidavit in which he asserted that Neff was living somewhere in California and could not be found. Mitchell provided no details as to what he had done to locate Neff, and given Mitchell's lack of scruples, one might wonder whether Neff's whereabouts were indeed unknown to Mitchell and whether he had made any attempt to locate Neff. Notice of the lawsuit was published for six weeks in the *Pacific Christian Advocate*, a weekly newspaper published under the authority of the Methodist Episcopal Church and devoted primarily to religious news and inspirational articles.

In initiating the litigation, Mitchell made what ultimately proved to be a crucial mistake. Mitchell's affidavit asserted that Neff owned property, but he did not attach the property at that time. Mitchell most likely neglected this step because Oregon law did not appear to require attachment as a prerequisite for reliance on § 55.

A default in judgment in the amount of \$294.98 was entered against Neff on February 19, 1866. Although Mitchell had an immediate right to execute on the judgment, he waited until early July of 1866 to seek a writ of execution, possibly waiting for the arrival of Neff's land patent. The title, which was sent from Washington, D.C., on March 22, 1866, would have taken several months to arrive in Oregon and thus probably arrived in Oregon shortly before Mitchell sought the writ of exe-

cutio. Interestingly, although Mitchell had alleged that Neff could not be found, the Oregon land office apparently had no difficulty delivering the patent to Neff.

Under Oregon law, to secure execution, one had to obtain a writ of execution and post and publish notice for four weeks. All the steps were apparently taken. On August 7, 1866, the property was sold at a sheriff's auction for \$341.60. Notably, the buyer was not Sylvester Pennoyer, as the Supreme Court opinion and commentators have implied. The property was purchased by none other than J.H. Mitchell, who three days later assigned the property to Sylvester Pennoyer.

Pennoyer had much in common with Mitchell. He, like Mitchell, was a Portland lawyer, involved in politics (Mitchell was a Republican; Pennoyer was a Democrat) and active in real estate speculation. There is no evidence available on whether Pennoyer had actual knowledge of or connection to the original action, though it is certainly possible. Moreover, because he took title through Mitchell, it is not clear that he should have been treated as a true innocent third-party purchaser.

It appears that for the next eight years, Pennoyer peacefully minded his own business, doing those things one would expect of any property owner: He paid taxes, cut some timber, and sold a small portion of the land. The peace was broken in 1874 when Neff reappeared on the scene.

The evidence suggests that Neff began making trouble for Pennoyer several months before he actually filed suit, because in July of 1874, Pennoyer began taking steps to protect the validity of his title. It seems that when the property was originally sold at the sheriff's auction, local officials had been somewhat lax in the matter of title. The sheriff's deed was not signed until five months after the sale, and then it was signed by the deputy sheriff, not the sheriff. In an apparent effort to ensure that this carelessness was not the basis for an attack on his title, Pennoyer obtained the signature of the then-current sheriff on a second deed dated July 21, 1874. Not taking any chances, three days later he acquired still a third deed, this one signed by the man who had been sheriff at the time of the sale. But all the precautions were for naught; ultimately, Pennoyer was evicted.

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If you are fortunate enough to have the prosecution hand you an issue involving questionable prosecutorial conduct, play it to the jury. Particularly when an unethical practice will not result in reversible error but can be exposed at trial, you can wreak havoc with the prosecution's case.

Prosecutors have historically used the media to further political agendas or to respond to public outcries for action. There are situations in which putting the prosecution on trial in the media may be in your client's best interest. At the very least, a defense lawyer can throw a prosecutor off-balance by focusing on the prosecution's conduct rather than the defendant's.

Whether an issue involves withholding of key exculpatory evidence or distorting or manipulating witness testimony, prosecutors are exceedingly uncomfortable when their conduct finds its way into the substantive aspects of the case. The prosecutor's self-image as the good guy wearing the white hat may be punctured. The prosecutor may do some rethinking, particularly if the media has now put the prosecution's conduct under a microscope.

In *Olmstead*, Justice Brandeis urged that the courts should ensure that governmental overreaching be firmly dealt with:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S. Ct. 564, 575 (1928).

The prosecutor wields awesome power in our system of justice. Only the combined willingness of the courts, defense lawyers, and prosecutors to vigorously challenge prosecutorial misconduct can prevent abuse of that power. □

Legal Lore

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The case of *Neff v. Pennoyer*, 17 F. Cas. at 1280, was filed in federal court on September 10, 1874, before Judge Matthew Deady. There is no question that by the time of *Neff v. Pennoyer*, Deady knew of Mitchell's lack of scruples. Deady was not only a distinguished jurist and long-time resident of Oregon, he was also an acute observer of life and politics in Oregon. He kept extensive diaries in which he referred to the events and prominent people of the day. By the time *Neff v. Pennoyer* arose, Mitchell's prior activities in Pennsylvania and his bigamous marriage had received wide public attention in Oregon, and Deady had closely followed the scandal.

By June of 1873, Deady thought all the scandals would be the end of Mitchell. As he explained: "I think he [Mitchell] must go down. Seduction, desertion, theft, clandestine change of name and absconding and bigamy are too much for a man to carry in the Senate, though he is making a desparate [*sic*] fight of it." Mitchell nonetheless survived and even flourished. As time went by, Deady's diary entries displayed an increasing contempt for the man. After 1873, Deady generally referred to Mitchell by his born name, Hipple. On election day in 1876, Deady stated in disgust: "Have not voted for Congressman since the Republicans put Hipple in the platform in 1873 and don't think I will until they take him out . . ."

Deady also had further reason to doubt Mitchell's integrity. In 1873, allegations of bribery by Mitchell and others surfaced in connection with a

Senate election. Deady recorded in his diary that Ben Holliday, a political ally of Mitchell's, had reportedly spent \$20,000 in bribes to buy the votes necessary to ensure Mitchell's election. Deady, along with the U.S. attorney in Oregon, pushed for a prompt and thorough investigation of the matter. When one grand jury refused to return an indictment, Deady ordered a new grand jury.

It looked as if indictments might be returned until Mitchell managed to use further bribery to bring the investigation to a halt. The attorney general at that time, George H. Williams, also from Oregon, had recently been nominated to the U.S. Supreme Court, but his confirmation was in doubt. Senator Mitchell approached Williams and offered to vote for confirmation if, in exchange, Williams would halt the grand jury. Williams agreed and ordered the Oregon U.S. attorney to drop the matter. When he refused, Williams fired him. Commenting on this incident, Deady called the removal of the U.S. attorney "[a]n atrocious act for which W[illiams] & M[itche]ll deserve severe punishment."

Neff apparently had prospered in California. He had settled in San Joaquin with a wife and family as well as servants, property, and livestock. He was prepared, however, to leave his home in California and move himself, his wife, and his daughter to Oregon for a year to pursue his various legal actions.

The opening salvo between Neff and Pennoyer was fired when Neff sued to evict Pennoyer, but the war did not end there. After Pennoyer lost the eviction suit and costs were awarded against him, he battled bitterly over the amount of those costs. Neff was again the winner, and adding insult to injury, he proceeded to sue Pennoyer again—this time to recover money damages sustained as a result of Pennoyer's cutting down timber on the property. Pennoyer counterclaimed to collect property taxes that he had paid from 1866 to 1875. The counterclaim was dismissed, and Pennoyer's defense of the damage action proved to be the closest he got to a victory: The jury found for Neff but awarded only nominal damages.

When the dust had settled, Pennoyer, who the Supreme Court assumed was a bona fide purchaser for value, was left holding the bag. Pennoyer had pur-

chased the land for "valuable consideration" and paid the taxes on it for a number of years, yet he found himself evicted, with nothing to show for his money and subject to suit for trespass for entering the land he thought he owned. There is no evidence that Pennoyer did or could ever recover the loss from anyone.

Following the litigation, Neff disappeared into obscurity; not so Pennoyer and Mitchell. Pennoyer went on to be governor of Oregon for two terms, followed by one term as mayor of Portland, but he remained bitter about his defeat in *Pennoyer v. Neff*. Ten years after the Supreme Court decision, in his inaugural address as governor, Pennoyer decried that decision as a usurpation of state power. He remained a vociferous critic of the Supreme Court, urging at one point that the entire Court should be impeached, explaining:

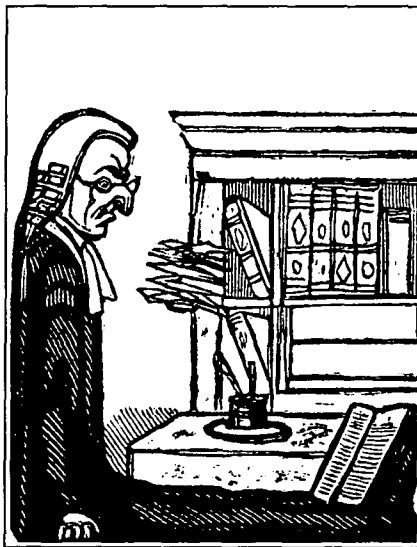
We have during this time been living under a government not based upon the Federal Constitution, but under one created by the plausible sophistries of John Marshall. . . . Our constitutional government has been supplanted by a judicial oligarchy.

Mitchell also remained in the public eye. He was elected to the U.S. Senate in 1872, lost his senate seat in 1879, but was reelected in 1885. By modern standards, Mitchell's reelection is quite extraordinary. Shortly before the 1885 election, Judge Deady, the lower court judge in *Pennoyer v. Neff*, came into possession of a set of love letters that Mitchell had written to Mitchell's second wife's younger sister during the five years he carried on an affair with her. Deady turned over the love letters to a newspaper, the *Oregonian*, an outspoken critic of Mitchell. The *Oregonian* willingly published the letters for all to read and enjoy. Despite the scandal, Mitchell was elected four days later, something that Deady called "a disgrace to the state and a reproach to humanity."

Scandal was a way of life for Mitchell. In 1905, he, along with a number of other prominent Oregon officials, was indicted in connection with a massive land fraud scheme. The scheme was a simple one. After passing the Donation Act, Congress had passed the Homestead Act of 1862 and the Timber and Stone Act of 1878. All

of them offered small tracts of land to individual settlers. Aspiring lumber barons trying to assemble large tracts of land transported huge numbers of settlers to land offices to file dummy applications. With a few well-placed bribes, the applications would be approved, and the settlers would then transfer their deeds to Mitchell and others in exchange for a modest payoff.

In July of 1905, while still serving in the U.S. Senate, Mitchell was convicted and sentenced to six months in jail, a \$1,000 fine, and complete disbarment from public office. In December of that same year, while his appeal was pending, Mitchell died, apparently from complications following a tooth extraction. The *Daily Oregon Statesman* reported that the Senate adjourned



without any official recognition of Mitchell's death, though the chaplain "recalled the situation to mind in his prayer by referring pointedly to corruption and death and by praying that the members of the Senate might be given strength to bear each other's burdens." Possibly moved by the chaplain's prayer, the Senate later passed a resolution to pay Mitchell's funeral expenses.

The fraudulent scheme is interesting not only because it was the last and among the most public of the scandals that had become a way of life for Mitchell but also because the nature of the scheme itself raises a nagging, though unanswerable, question: Were the initial transactions between Neff and Mitchell part of an aborted fraudulent arrangement? One can only wonder. □

Creative Defenses

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reports, but you will hear about it at trial. There are two possible responses. One is the classic cross-examination, designed to demonstrate the importance of thoroughness and accuracy in report writing. In essence, you argue to the jury that if it is not in the reports, it did not happen. The other approach is to incorporate the new fact into the defense. Your expert can help do this.

The new fact in my case was that my client was totally calm after being strip-searched. She was not crying; she did not appear frightened; she was not hysterical. As you might expect, my expert helped fit this fact into my theory. Of course she was calm, my expert testified: She was finally safe. She had finally escaped her tormentor. She had found sanctuary. My closing argument began to take its final shape as my expert testified:

Ladies and gentlemen of the jury, is that consistent with a sophisticated heroin smuggler? They are calm at the border and then panic when arrested. My client's reaction was just the opposite.

By using the new fact to my advantage, I had actually strengthened the defense case.

My experience is that jurors are truly undecided at the close of proof in syndrome cases. They go back and forth in their minds. It is difficult for them. The defendant is an admitted heroin smuggler, an admitted cocaine distributor, or an admitted methamphetamine manufacturer, and the jurors are being asked to set the defendant free. Under the circumstances, you will be under more pressure than usual to sum up effectively.

Make your closing argument as dramatic and powerful as possible. For example, by the time your summation is finished in a posttraumatic stress case, the jurors should be in the foxholes, in the mud with your client, watching their best friends dying around them. They should be able to hear the bombs exploding overhead. They should be uncomfortable and