

Livingston v. Jefferson—A Freestanding Footnote

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This commentary originated as a footnote to my in-process article on the “statutizing” of evidence law—an examination of how the laws regulating that subject have changed from purely decisional, English-style common law to their present-day status of codes and rules. The very first effort to construct a Code of Evidence was by an eminent American named Edward Livingston, sometimes from New York, sometimes from Louisiana, always a man of the world.¹

One of Livingston’s celebrated encounters was with Thomas Jefferson. It was a bitter dispute that lasted some decades and involved many other famous names of that era. The ruling of John Marshall that ultimately terminated their lawsuit, appropriately entitled *Livingston v. Jefferson*,² still lingers in civil procedure treatises³ and casebooks,⁴ and continues to confound law students. Although biographers of the participants usually state correctly the narrow ground of the ruling, they do so without any depth of exploration. These biographers are mostly historians by training, and, rightly enough for their purposes, they wholly ignore questions that may be of professional interest to lawyers.

So the story of *Livingston v. Jefferson* demanded telling, but the original footnote expanded so much that it would have had to have been printed as an Appendix to the “statutizing” article. Hence I have asked

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1. Sanford Kadish paints a short and useful picture of Livingston as the architect of the System of Penal Law and makes mention of some of Livingston’s other codifying ventures in Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098, 1099-106 (1978).

2. 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411).

3. See, e.g., J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.16, at 85-87 (1985); C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3822, at 204 (2d ed. 1986) (describing the local action rule as a venue rule that is “now firmly established in federal jurisprudence”). 11 MYER’S FED. DECISIONS (1885) prints the Marshall opinion under the topic “Locality” and under § 1699 treats it as a rule about *venue*.

4. Two widely used ones are J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS (4th ed. 1985), and D. LOUISELL, G. HAZARD, JR. & C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE (5th ed. 1983). Both of these casebooks also use *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952) to teach the local action rule. *Reasor-Hill* was a 3-2 decision by the Supreme Court of Arkansas no longer to follow the *Livingston* case.

this *Review* to print my expansive recount of the events as a brief but freestanding footnote.

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"Batture" is a French word for a sandbank built up by the currents of a meandering stream.⁵ A large batture had accumulated along the bank of the Mississippi where it curved through New Orleans, the "Crescent City." The batture that formed along that riverfront suburb had long been used by the public as a mooring spot for vessels and for loading and off-loading cargo. City residents believed the batture to be public property, so that soil could be removed from it freely; quite probably the soil made excellent material for the levees that were furiously being erected to contain the Mississippi during flood seasons.

With the influx of residents shortly after the Louisiana Purchase in 1803, previously unoccupied land outside New Orleans (known as the Faubourg Ste. Marie) became a prized place to live and build. The owners of the land adjacent to the river bank soon recognized the batture's potential value and claimed it as their own. They began subdividing it into dwelling lots and started to construct a levee to protect the batture against the floodings and erosion of the Mississippi. Thus, a sandbank that a decade before was regarded as nearly worthless became a subject of intense community controversy.

It was in 1805, less than a year after his arrival in New Orleans from New York, that Edward Livingston brought suit in the Superior Court for the Territory of Orleans on behalf of an owner of some river bank land to establish ownership of the adjoining batture against the public claims then being asserted by the city. By the time the case ended, Livingston had somehow acquired an ownership interest in part of the batture—by purchase, he asserted, although the public believed his portion (it was precisely one-third of his client's land) was but his contingent fee for the lawsuit he had instigated. Whatever the truth, his ownership was not mere land speculation: a few days after Livingston won that lawsuit, Livingston commenced improvements on his portion of the batture.

5. *Livingston* used the French word, but the wanderings of rivers have plagued all legal systems. Illustrative are: *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 369 n.5 (1978) (defendant admitted in its answer that its principal place of business was in Nebraska, but it became known during trial that the office was in Carter Lake, Iowa; although that city was adjacent to Omaha and on the Nebraska side of the river, it had originally been on the Iowa side of the river and remained part of Iowa even after the Missouri changed its bed); *Durfee v. Duke*, 375 U.S. 106, 107-08 (1963) (whether silt moved by the current of the Missouri River from the Missouri side to the Nebraska side of the river became the property of the riparian owner on the Nebraska side); *River Farms, Inc. v. Superior Court*, 252 Cal. App. 2d 604, 607, 60 Cal. Rptr. 665, 667 (1967) (whether a court that originally had jurisdiction to quiet title to land located in San Bernardino County, California, lost power to act when the Colorado changed course, placing the land on the Arizona side).

Angered citizens (who did not claim the land as their own but who thought the public, through the city, should have a right of free use) physically obstructed Livingston's laborers and repeatedly drove them away from the site.⁶

There was at that time no appellate route from the Superior Court for the Territory of Orleans, so city officials who had lost in court called upon Governor Claiborne to seek aid from Washington. The Territory asserted no property claim of its own to the land, but the governor quite reasonably feared that violence and even killing would ensue unless action was taken. So Claiborne implored President Jefferson to assert United States ownership of the batture. This Jefferson did, not by directing the Attorney General to sue—which Livingston would have accepted⁷ since the courtroom was an arena wherein he excelled—but instead by directing Secretary of State James Madison to instruct the United States marshall for the Territory to assert the title claims of the United States, using whatever force was necessary.⁸ Simultaneously, the Secretary of War authorized the local military commander to use military force to regain the batture should the governor request it.⁹

Livingston could not fight the marshall and the army, but he did press his case hard in public print and in pamphlets.¹⁰ He also sought the judicial forum that Jefferson had denied him, both by suing the marshall in the federal court in New Orleans, and by suing Jefferson (then no longer president) in the federal circuit court in Richmond.¹¹

Several features of the latter case that are overlooked by

6. See generally W. HATCHER, *EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT* 139-89 (1940) (describing in detail the controversy between Livingston and Jefferson).

7. But not preferred. He made protracted efforts, including trips to Washington, to persuade both Jefferson and Congress to recognize his title without his having to establish it in court. G. DARGO, *JEFFERSON'S LOUISIANA* 89-95 (1975). He pleaded with both in private correspondence and pamphleted the public for his cause. *Id.*; W. HATCHER, *supra* note 6, at 152-53.

8. G. DARGO, *supra* note 7, at 76. The text of Madison's letter, dated November 30, 1807, is printed in *Livingston v. Dorgenois*, 11 U.S. 363, 364, 7 Cranch 577, 578-79 (1813): "I am directed by the president, to instruct you to remove immediately from the . . . Batture . . . all persons who shall be found on the same." Nobody was named in the letter, but Livingston alone was removed. He later argued that if the United States as sovereign owned the batture, it owned the whole batture, not simply the space he claimed, yet he was the only claimant excluded. Jefferson seemed to accept that accusation, for his pamphlet, published under the pretext that it was written to advise his counsel (although not printed until the case was over in 1812), was entitled "The Proceedings of the Government of the United States . . . against the Intrusion of Edward Livingston." C. HUNT, *LIFE OF EDWARD LIVINGSTON* 143 (1864).

Historians spell the defendant's name in the above case as D'Orgenois. *E.g.*, W. HATCHER, *supra* note 6, at 152 *et passim*.

9. C. HUNT, *supra* note 8, at 141.

10. W. HATCHER, *supra* note 6, at 154-55; see also C. HUNT, *supra* note 8, at 143 (Jefferson's justification took 99 pages; Livingston's rebuttal took 195). Jefferson's justification, with additional notes, along with Livingston's answer to it, are reprinted in 5 AM. L. J. 1-290 (J.E. Hall ed. 1814).

11. Both were filed in the Spring of 1810. G. DARGO, *supra* note 7, at 95.

Livingston's biographers seem worthy of exploration in this legal discussion. The first is the issue of diversity jurisdiction. The Reporter of Decisions summarized, "This was an action of trespass, brought in the circuit court of the United States, for the district of Virginia, by *Edward Livingston, a citizen of the state of New York*, against Thomas Jefferson, a citizen of Virginia . . ."¹² Now Edward Livingston certainly once had been a citizen of New York,¹³ but by the time he brought this suit he had been residing in Louisiana for at least five years.¹⁴ He was a prominent member of both the bar and the community in New Orleans, and he had purchased a great deal of land there. Today it would be difficult to persuade a federal court that Livingston remained a New Yorker in light of these well-known, objective facts; however, this case was decided long before section 1 of the fourteenth amendment provided, as it now does, that American citizens are also citizens "of the State wherein they reside."¹⁵

If asked, why does it matter whether Livingston was still a New Yorker at the time of filing, since there would still be diversity, there is one overpowering reason—not until 1812, the year after the case was disposed of, was Louisiana admitted as a state. When Livingston filed (and until after the case ended), he resided in the Territory of Orleans. Unless he remained a New Yorker he was not a citizen of any state at all,

12. *Livingston v. Jefferson*, 15 F. Cas. 660, 660 (C.C.D. Va. 1811) (No. 8,411) (emphasis added).

13. He was born in New York in 1764 to a landed, wealthy, and politically prominent family and began his law studies in Albany because New York City was still occupied by British forces. He represented a New York district in Congress from 1795 until 1801, and thereafter was simultaneously United States Attorney for the District of New York and Mayor of New York City.

14. A tax collection scandal had ruined him politically, professionally, and financially, so in 1804 he moved from New York to the then new Territory of Orleans, carved out of the Louisiana Purchase, to recoup his fortunes. New Orleans had been highly touted to him by his older brother Robert, who as Jefferson's ambassador to France had negotiated the terms of the Purchase. W. HATCHER, *supra* note 6, at 1-72.

15. I have been unable to find much enlightenment in older cases about the then prevailing perception of the word "citizen" for diversity purposes. Early Supreme Court decisions all deal with whether diversity was properly pleaded, not about what constituted citizenship. An apt illustration is *Brown v. Keene*, 33 U.S. 71, 8 Pet. 112 (1834), chosen here not at random but because it, too, involved a dispute about "part of the batture at New Orleans." *Id.* at 71. Keene pleaded that defendant Brown was "a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles." *Id.* at 73. Chief Justice Marshall ruled that this did not allege diversity: "A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States." *Id.* at 73. Marshall reviewed the earlier decisions, all of which have the same flavor—persnickety review of the pleadings rather than genuine inquiry into the facts about citizenship.

The only real factual dispute in the *Brown* case appeared to be that Keene claimed to be a citizen of Maryland, while Brown had answered that both he and Keene were citizens of Louisiana. However, rather than resolve that dispute by inquiring into the facts, Marshall rendered an opinion based only upon the possibility that Brown could be both a resident and domiciliary of Louisiana, yet still not a citizen of the United States, and therefore not a citizen of any state.

and therefore there was no diversity under the then existing statute. The Supreme Court had already decided, in *Hepburn & Dundas v. Ellzey*,¹⁶ at least as much as that a resident-citizen of the District of Columbia was not a citizen of any state for diversity purposes. The logical consequence, that a resident-citizen of a territory was not a citizen of any state, was accepted only five years after *Livingston v. Jefferson* in *Corporation of New Orleans v. Winter*.¹⁷ Both opinions were written by the self-same John Marshall who ruled on *Livingston v. Jefferson*, although in that case he was sitting in his capacity as Circuit Justice for Virginia rather than as Chief Justice of the United States Supreme Court.¹⁸ Marshall had proven himself attentive to diversity objections and, had specious diversity been argued before him in *Livingston v. Jefferson*, the argument likely would have fallen on receptive ears. However, Jefferson's lawyers did not plead this subject inatter jurisdiction objection, and neither District Judge Tyler nor Circuit Justice Marshall raised the point on his own.

Marshall might have been excused for taking the allegation of citizenship at face value on first reading, since he had served in the House of Representatives for Virginia when Edward Livingston had been there representing New York.¹⁹ The fact in question was not the objective one of where Livingston physically lived or even how long he had lived there. Rather, it was the invisible one of whether Livingston had at any time formed an intent to remain in Louisiana indefinitely.²⁰ There was therefore nothing in the pleadings themselves to alert the judges to the possi-

16. 6 U.S. 265, 2 Cranch 445 (1804).

17. 14 U.S. 43, 1 Wheat. 91 (1816).

18. There was at that date both a District Court for Virginia, presided over by a single trial judge, and a Circuit Court for the District of Virginia, consisting of the District Judge and one Justice of the Supreme Court. This early-day Circuit Court exercised some appellate functions, but all diversity cases were in its original jurisdiction. Hence John Marshall was sitting and writing his opinion as simply one of two trial judges assigned to the case. The only possible appellate route then available was by writ of error to the Supreme Court. For a splendid historical sketch of this system, see C. WRIGHT, *FEDERAL COURTS* 4-6 (4th ed. 1983).

19. W. HATCHER, *supra* note 6, at 53-54; see also Speech of the Honorable John Marshall, delivered in the House of Representatives of the United States, on the resolutions of the Honorable Edward Livingston, relative to Thomas Nash, *reprinted in* 18 U.S. (5 Wheat.) 201 app. (4th ed. 1883).

20. The evidence on Livingston's intent to remain in Louisiana indefinitely unfortunately was not only ambiguous, but of the "chicken or egg" variety. He was widowed, and his three children remained in New York because he thought the Louisiana climate was unhealthy for them. His intent, two months after his arrival, was to make a fortune as soon as possible so he could repay his Treasury obligation and return to New York. G. DARGO, *supra* note 7, at 75 (quoting letter from Livingston to his sister Margaret). However, when he became involved in the batture dispute, his intent to return to New York turned upon the outcome of the controversy.

Hence on March 30, 1804, the date of the above letter, his intent was clear—to return to New York and his children as soon as possible. But one biographer records that on June 3, 1805, he found "a solace" in marriage to a young widow of New Orleans. Yet even after the marriage he voiced to another sister his continued sorrow at being separated from his family. C. HUNT, *supra* note 8, at 124-25. So there seemed to exist a contretemps. He would return to New York when he

bility of specious diversity. This may excuse the court's failure to inquire, but it does no credit to Jefferson's lawyers and seems a discredit to Jefferson himself. Jefferson knew perfectly well that Livingston had fled New York for New Orleans, because Jefferson had precipitated Livingston's New York downfall.²¹ Jefferson also knew about Livingston's activities in New Orleans, and he had refused to do anything that would permit Livingston to litigate the title claim in New Orleans. For example, as president he could have directed the United States Attorney to institute proceedings in the federal court in New Orleans to evict Livingston from the batture. It remains a puzzle why Jefferson did not raise the issue of Livingston's citizenship as a defense.

Yet what might Jefferson have gained by challenging the existence of diversity jurisdiction? True, he would have escaped from one court in Virginia, the federal, but would still have been suable in another, the state court. Nonetheless, today's litigator would see some substantial advantage at least tentatively accruing: in federal court, Jefferson would be before John Marshall, whom he hated and distrusted. Jefferson had sound reason to suppose that Marshall bore exactly the same sentiments toward him. In fact, Jefferson was already actively working to stack the Supreme Court in his favor for what he regarded as an inevitable appeal from a ruling that he was certain would be against him.²² Escaping the federal court would also have meant getting out of Richmond and being sued instead before Jefferson's friends and neighbors in Charlottesville. The federal forum's disadvantages for Jefferson may well have motivated Livingston to invoke a dubious diversity; it ought equally to have

recovered the batture or its value, which might indeed have been never and, we shall see, took nearly 30 years to accomplish.

Final evidence that he remained a New Yorker in intent developed long after *Livingston v. Jefferson* was filed. In his six years representing Louisiana in the House of Representatives, Livingston returned to Louisiana only once. He spent the Congressional recesses in New York City. In fact, he completed the task of preparing his *System of Criminal Law for Louisiana* from a family house on lower Broadway in Manhattan. C. HUNT, *supra* note 8, at 291. When his public life ended, after serving President Jackson as Ambassador to France, Livingston lived out his remaining years at an ancestral home in New York. When he died in 1836, he was buried at the family estate, Clermont. Yet however confident we are that Livingston was born a New York citizen and died one, we can never know whether he was a bona fide New Yorker or a citizen of the Territory of Orleans at the critical filing date in the spring of 1810.

21. Although it was Treasury Secretary Albert Gallatin who instigated Livingston's disgrace by having his tax collection accounts audited and by disclosing a discrepancy, it was Jefferson who demanded Livingston's resignation as United States Attorney. It was when this became public that all was lost. The audit had revealed a shortage of \$44,000, at a time when unskilled laborers earned about one dollar for a ten hour day. However, Livingston's earnings were also impressively large—his annual salary as Mayor alone was a princely \$15,000. He also had his federal attorney income, plus income from the private practice he maintained. Assembling \$44,000.00 nonetheless would have required time, time that Gallatin and Jefferson would not allow him. W. HATCHER, *supra* note 6, at 72-99, and especially at 96-98.

22. See *infra* text accompanying note 41.

occurred to Jefferson that challenging diversity might have tilted the balance of prejudice more in his favor.

In addition to his questionable assertion of diversity, Livingston endeavored in the rest of the complaint, as summarized in narrative form by the reporter of the decision, to misrepresent the facts through the venerable technique of pleading fictitious allegations. Although the original pleadings are not available to me, the reporter's summary states that defendant Jefferson entered the Batture

on the 25th day of January, 1808, at the city of New-Orleans, in the district of Orleans, to wit, at Richmond, in the county of Henrico, and district of Virginia, with force and arms.²³

In those few lines there are two blatant falsities either of which, if accepted as true, would be sufficient to avoid what Livingston rightly foresaw as being possibly dispositive of his case, namely the English rule that actions for injury to land could be brought only where the land was located. First, most Americans knew even then that New Orleans (in what is now Louisiana) was not located in Richmond, Virginia. The other falsehood, which is more subtle, is that the injury of which Livingston complained was a trespass *quare clausum fregit* and not "with force and arms." Trespass "with force and arms" (*vi et armis*) alleged injury to a person, a harm suable anywhere, while trespass *quare clausum fregit* lay for injury to land and could be brought only where the land was located. In the parlance of the times, and even still, the land action was "local" and the personal action "transitory."²⁴ Thus Livingston had pleaded adroitly to escape a rule applicable to local actions by mischaracterizing his suit as one that was transitory. Although recent law school graduates would not discern these niceties, Livingston and Jefferson and Marshall²⁵ (and Tyler too)²⁶ most certainly did.

23. *Livingston*, 15 F. Cas. at 660 (emphasis added).

24. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 3, § 2.16; F. JAMES & G. HAZARD, JR., *CIVIL PROCEDURE* § 2.30 (3d ed. 1985) ("Local Action Rule").

25. Marshall's discussion turns on its head the way we think today, but his outcome is the same as ours. He explained that all English contracts, for example, at first could be sued on only in the county where made, but that later permissible fictitious pleading allowed a nontraversable allegation that the contract was made in the county where suit was brought. Our reality was the fiction of his time, but Marshall still ruled that land title suits could be brought only where the land was located. He said that a greater judge than most, Lord Mansfield, had tried to change that rule but failed. *Livingston*, 15 F. Cas. at 663-64. But in Marshall's day a fictitious John Doe still brought actions on imaginary leases, and venue most especially was manipulable. To the shame of all us realists, that remains true today. See Fnlr, *Legal Fictions* (pts. 1-3), 25 ILL. L. REV. 363, 513, 877 (1930-1931).

The local action rule so rudely criticized is not at all ridiculous. It was then and remains today the lodestar venue rule which locates land title actions. See, e.g., CAL. CIV. PROC. CODE § 392. The quite admirable opinion in *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952) also assumed that an Arkansas corporation could not be sued in Missouri if it engaged in no activity there, even if its product was foreseeably applied to crops in Missouri. Since long-arm statutes have

Today, falsity in pleading as blatant as this would draw harsh penalties in any federal court under the sanctioning provisions of Federal Rule of Civil Procedure 11, which makes an attorney's signature on a pleading a certification that all the allegations contained therein are made after a reasonable inquiry and with good grounds to support them. But Jefferson did not move for sanctions or even berate the falsity. In an era when fictitious pleading was an acceptable art, there was no reason to denounce transparent falsities; they did not deceive anybody and were never intended to do so. Instead, Jefferson denied that the batture was in Richmond and alleged that it was in the Territory of Orleans, pleading (along with many pleas to the merits)²⁷ the local action rule as a plea in abatement. The truth of Jefferson's plea in abatement carried with it no guarantee of success, however. Fictitious pleading gave judges the option of making "nontraversable" a fact allegation they knew to be false when they felt themselves powerless to change an existing rule. The technique has a venerable history, and in the early nineteenth century it remained a viable art. When you can't change the law, change the facts.

Both District Judge Tyler and Circuit Justice Marshall proceeded directly to the objection to jurisdiction under the local action rule, and both ruled for Jefferson. Tyler simply ignored Livingston's fictional allegation. He wrote briefly, explaining that he was too ill to expand further.²⁸ Marshall, however, explained at length why he could not accept the allegation that the batture was in Richmond. He expounded on the command of the local action rule and the compulsion to apply it regardless of the deplorable fact that this rendered suit by Livingston against Jefferson impossible anywhere.

The absence of any available forum resulted from the combined action of two rules: one, that suit could be brought only in New Orleans where the land was, and the other, that Jefferson could be sued personally for money damages only where he was found and served with process. A third overlay, although superfluous here, was that under the

come into vogue, that suit now could (and hence maybe should) be brought in Missouri, where the land was located. But that would be a *forum non conveniens* decision, not an absolute venue rule.

This note was composed at a time when it was reasonable to suppose that the "stream of commerce" theory articulated in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1951), remained good law. Doubts are cast upon that by the recent decision in *Asahi Metal Ind. v. Superior Court*, 107 S. Ct. 1026 (1987), where the Supreme Court seems divided 4 to 4 on that theory. The cases are readily distinguishable, but it is not certain that they will be distinguished.

26. District Court Judge John Tyler was the father of one having the same name who ran for vice-president on the ticket headed by William Henry Harrison, the Hero of Tippecanoe. The son became president when Harrison died shortly into his term.

27. In addition to his pleas to the jurisdiction and his claims of U.S. ownership, Jefferson asserted that he had acted to abate a nuisance and to protect navigability, both items properly federal regardless of federal ownership of the land.

28. *Livingston*, 15 F. Cas. at 663.

Judiciary Act then in force suit could be brought only in a federal district where one of the two antagonists resided. Unlike today, no other federal court would do.²⁹

The rule that Jefferson could be sued only where he could be physically found and served with process was simply assumed by all participants in the case, so none of them even discussed it. It is, of course, the rule that later came to bear the name *Pennoyer v. Neff*.³⁰ It might be contested even today whether acts committed in Louisiana by persons operating there under instructions from somebody in the District of Columbia might oblige the nonresident to answer in Louisiana courts. The answer may be debatable today, but the question was not even askable in 1809.

At least it was not askable by common law lawyers. Would civil law lawyers have had the same instinctive response? Would the French law tradition of Louisiana have denied a forum to a local resident who had suffered injury to his land located in that jurisdiction? At this late date the answer would be very difficult to ascertain and of little consequence in any event. Any judgment resulting from a default could not have been enforced against Jefferson's Louisiana assets, for he had none. Furthermore, although there was then no fourteenth amendment due process clause to render such a judgment void, there was a developing view that full faith and credit need not be given to money judgments rendered by a court that had not obtained good common law jurisdiction. (That is, of course, the precise holding of *Pennoyer v. Neff*. As Justice Field's opinion in that case notes, he was merely following old doctrine, not announcing any new one.)³¹

Also worthy of mention about the *Livingston* case is an aspect remarkable by its absence: any pleading or discussion of sovereign immunity. To be sure, one plea in Jefferson's answer was that he had acted as president under authority of a statute, evidently the Squatters Act, to expel Livingston's laborers from land assertedly owned by the United States. A president's first response today, by motion to dismiss rather than in an answer, would be sovereign immunity. That plea today almost certainly would succeed.³² It might have failed in 1810, but surely it would have been worth raising.³³

29. See C. WRIGHT, *supra* note 18, at 138.

30. 95 U.S. (5 Otto) 714 (1877).

31. 95 U.S. at 729-33. The precise holding of *Pennoyer* was that an Oregon federal court was not required to give full faith and credit under what is now 28 U.S.C. § 1738 to a judgment rendered by an Oregon state court that lacked jurisdiction under Justice Field's perception of international law. *Id.* at 729.

32. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

33. The explanation may be that, at that time, the defense was more narrowly conceived, available to the government itself but not to the individual officer. See Engdahl, *Immunity and*

Could Livingston have done anything to improve his chances of recovery? Probably not very much—he already was suing in the New Orleans federal court the marshal who had forced him off the batture, and he did in fact later obtain some redress in that proceeding.³⁴

It seems much more than probable, however, that while Livingston indeed wanted redress, a powerful motivation for his bringing suit was to obtain redress *from* Jefferson personally. He wanted to be paid, and paid by Jefferson, for his undoubted injury. Jefferson had ten years before wounded Livingston by driving him out of office as United States Attorney in New York. This also forced Livingston out of his concurrent office of Mayor of New York City, thereby depriving him of any source for repayment of a tax collection defalcation, not of his personal making, but for which he had accepted responsibility and confessed judgment against himself in favor of the United States. That judgment was entered in the federal district court in New York and also recorded against Livingston in the District of Orleans.³⁵

Out of the batture land he now claimed to own, he had expected to make enough profit to satisfy the consent judgment in favor of the United States Treasury. Jefferson's conduct of the batture affair almost gratuitously injured Livingston, who would have been willing (although not

Accountability for Positive Governmental Wrongs, 44 U. COLO. L. REV. 1, 14-21 (1972). Early 19th-century law was much influenced by early editions of Story's works on agency as well as by the writings of Blackstone, as is demonstrated in the Engdahl article. Since the state itself was immune from liability for the unlawful acts of its agents, the agents themselves remained liable (or not) on standard agency principles.

34. W. HATCHER, *supra* note 6, at 180-89. Livingston records his own triumph in that proceeding in a Postscript to his pamphlet dated September 1, 1812. Livingston, *An Answer to Mr. Jefferson's Justification of His Conduct in the Case of the New Orleans Batture*, reprinted in 5 AMERICAN LAW JOURNAL 105, 290 (J.E. Hall ed. 1814) (announcing that a ruling in the district court declared the marshal's warrant illegal and "directed that the plaintiff should be restored to his possession, which was accordingly done").

After nearly 30 years, Livingston finally discharged his indebtedness to the Treasury for the defalcations of his faithless clerk. The United States fared well, eventually collecting \$151,924.16 to cover the audited shortage of \$43,666.21. Hatcher says in defense of the government that it "waived" its interest, which over three decades would have added a substantial amount to what was collected. *Id.* at 185. Although no one has suggested it, the government may have caused the delay by making it impossible to pay and should have forfeited the interest.

Other commentators have questioned Jefferson's conduct in the Batture affair. See Schmidt, *The Batture Question* in 1 LOUISIANA LAW JOURNAL (No. 2) 84-151 (G. Schmidt ed. 1841) (Jefferson indeed acted shabbily in refusing Livingston's desire to get to court, but Livingston should have lost in the Superior Court); Brown, *Law and Government in the "Louisiana Purchase": 1803-1804*, 2 WAYNE L. REV. 169 (1956) (recounting how Jefferson had once held that the laws of Spain governed Louisiana territory, yet changed his mind to argue in 1812 (perhaps earlier) that the law of France persisted except as specifically altered by the O'Reilly Code or other explicit acts. "No statement made by Thomas Jefferson should be dismissed lightly. It is necessary, however, to recognize that he did change his opinion completely between 1803 and 1812 and that it was in his interest to do so." *Id.* at 185.)

35. The paragraph in text is a composite summary of events described in the immediately preceding footnote and in note 13 *supra*.

anxious) to litigate title to the batture. After all, he had already prevailed in Territorial Superior Court against the City of New Orleans. Livingston certainly was not a "squatter" upon public lands of the United States.³⁶ He might have lost on some other points, but he was inescapably right on that one.

Yet, if revenge was even one purpose, and certainly it could not have been far from Livingston's mind, why did he seek it in the federal court in Richmond? A federal or a Virginia state court were the only choices he had, and Jefferson was trapped in whichever forum Livingston chose—then (and still) a defendant could not remove a diversity case brought in the courts of the state in which he resides.³⁷

Might Livingston have fared better had he chosen a Virginia state court? Livingston did his wily pleader's best to avoid the anticipated defense of the local action rule in federal court. He failed. Would he have encountered it and been defeated the same way in Virginia state courts? Nobody knows. The local action rule was English, not American, in origin. It did become American, although Livingston could not have predicted it, since the decision in his cause against Jefferson was the first to give it any American prominence. Once Marshall applied the rule, however, and stated it with such painful reluctance, and in such inagisterial terms, most people forgot that it was still an open issue in state courts. Indeed, this is still misunderstood by most law students, who fail to remember that not every pronouncement by John Marshall is federal constitutional law, binding upon both state and federal courts. Without the Marshall imprimatur, might Virginia courts have felt free to declare that the local action principle was not part of their jurisprudence, because in England it was merely a venue rule that did not prevent lawsuits but only governed their location? Might Virginia courts have concluded that, if applied in the United States, the rule would be a disaster because it could prevent bringing suit anywhere? It would have been easier for Virginia judges to have rejected the local action rule as unsuited to American circumstances before John Marshall's opinion in

36. See a letter from Jefferson to Albert Gallatin, his Treasury Secretary and one of his closest advisers in the batture controversy from the beginning, quoted in IV A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 107-08 (1919). Gallatin had originally advised transfer of the United States interest in the batture to the City of New Orleans, which presumably then would sue to recover on this new title claim what it had earlier lost on its own claim. G. DARGO, *supra* note 7, at 78. Jefferson's strategy seemed devised to keep Livingston out of any court, for he had proved himself dangerous when in them.

37. C. WRIGHT, *supra* note 18, at 214.

The case certainly posed federal questions also, especially Jefferson's defense based upon the Squatter's Act. But there was in those days no general federal question jurisdiction for private litigants; even after one was statutorily created in 1875, a defendant could, and still can, remove only if the federal question appears on the face of the complaint, not when it is posed by defendant's answer. *Id.* at 210.

the *Livingston* case than it was for them afterward. A few states have since rejected the rule,³⁸ and for reasons posed in my questions above.³⁹

In the end, Livingston simply may have been judge shopping for motives less pure than mere rule avoidance. By selecting the federal court in Richmond he also chose John Marshall as a judge. In the House, Livingston and Marshall had been political opponents, but amiable ones.⁴⁰ Livingston knew Marshall had reasons to be an enemy of Jefferson. What better reason to forum shop than to choose a court where the judge is friendly to you and a known enemy of your opponent? Further, there was no way to get to John Marshall's Supreme Court by appealing an adverse trial court decision, other than by filing originally in federal court. Even Chief Justice Marshall would have been hard put to characterize a state local action rule as a federal question warranting Supreme Court appeal—at least before there existed a fourteenth amendment.

In the federal court, by contrast, an adverse ruling in the Circuit Court for Virginia was appealable to the Supreme Court. How much this fact may have motivated Livingston we do not know, but it struck absolute terror into Thomas Jefferson. Jefferson desperately hoped to win in the trial court, but he simultaneously was preparing for an expected appeal to a Supreme Court then dominated, four to three, by his political enemies. He felt he had a stroke of luck when the district judge for Virginia, Cyrus Griffin, sickened and died, to be replaced by President Madison with John Tyler, the then governor of Virginia and Jefferson's nominee.⁴¹ In a letter to Madison, Jefferson commended Tyler as strong enough to stand up to that unprincipled villain John Marshall with whom Tyler would sit as the circuit court. Jefferson also informed Madison that the writer was being sued by Livingston for one hundred thousand dollars.⁴² He even hinted that some others might become involved, at least as witnesses—a logical possibility being James Madison himself, who, as Secretary of State under Jefferson, personally had signed and dispatched the order directing the United States marshal in New Orleans to remove Livingston from the batture.⁴³ The letter ends with a

38. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 3, § 2.16. The state of current law is hard to ascertain, since the point does not arise with sufficient frequency to be sure whether old cases that have not explicitly been overruled remain good law. Further, long-arm statutes have created an available forum where the land is located in so many instances that only rarely, if ever, would a landowner today be without any forum at all. *Id.* In fact, this suggests that the true villain was not the local action rule but the territorial constraint on personal jurisdiction later expressed in *Pennoyer v. Neff*.

39. See *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, at 208.

40. See C. HUNT, *supra* note 8, at 81-83.

41. See IV A. BEVERIDGE, *supra* note 36, at 104-06 (quoting Jefferson letters).

42. *Id.* at 105.

43. *Id.*

diatribe against Marshall, adding that "nobody seems to doubt that he is ready prepared to decide that Livingston's right to the batture is unquestionable, and that I am bound to pay for it with my private fortune."⁴⁴

Jefferson's good fortune arising from the deaths of others continued: nine months later Associate Justice Cushing died. Jefferson reacted to that news with unseemly glee: "old Cushing is dead. . . The event is a fortunate one, and so timed as to be a Godsend to me."⁴⁵ The divine providence, of course, was that a replacement could be counted on to make four Supreme Court votes against Marshall's three in the batture controversy; Jefferson expected that a loss in the Circuit Court was inevitable and that an appeal would be required.

Geography dictated that Cushing's successor come, as Cushing had, from New England. Politics required that the nominee be (if at all possible) of the Jefferson-Madison party. There was one rather ambiguous political prospect, Joseph Story of Massachusetts, who at the ripe age of twenty-nine was an outstanding leader of the bar both in Massachusetts and in Washington. Jefferson knew that Story's politics were not bad for his Republicans, but he nevertheless objected to Story both politically and because of his youth.⁴⁶ Not incidentally, he also knew that while Story was on duty in Washington he had become almost chummy with John Marshall.

Madison tried his best to accomodate his friend and patron Jefferson, going through five other names (one of them John Quincy Adams) before accepting the unavoidable and nominating Story. On November 18, 1811, Story took office as Associate Justice. But Jefferson's well-founded fears about how Story would have ruled⁴⁷ were never tested, for on December 5 of that same year, the decision was released, and Tyler as District Judge and John Marshall as Circuit Justice sustained Jefferson's plea of the local action rule.⁴⁸

Thus ended the lawsuit, and nearly ends too our exploration of it. This piece does not dispute that Thomas Jefferson was a great national hero whose memory is properly revered to this day. Still, if all one knew about Jefferson was his conduct in the matter of the New Orleans batture and his treatment of Edward Livingston, a different conclusion would emerge, a portrait of a petty politician and a contriver extraordinaire

44. *Id.* (quoting letter from Jefferson to Madison dated May 25, 1810).

45. *Id.* at 108 (quoting letter from Jefferson to Gallatin dated Sept. 27, 1810).

46. *Id.* at 109.

47. Years later, Story wrote of Jefferson: "Who . . . can remember, without regret, his conduct in relation to the batture of New Orleans?" *Id.* at 115 (quoting 1 W. STORY, LIFE AND LETTERS 186 (1851)). Of course, we cannot conclude that because Story thought Jefferson had behaved badly, Story would have voted against him. After all, Marshall also was outspoken in his attitude about Jefferson but mustered the resolve to rule in his favor.

48. *Livingston*, 15 F. Cas. at 665.

who was not at all above manipulating the federal judiciary to serve his own selfish purposes.⁴⁹ I end still admiring Jefferson, but less ardently than before this inquiry commenced.

Livingston eventually succeeded in his efforts to regain his batture land and later made some profit from it.⁵⁰ His career as a drafter of legislation and preeminent codifier continued, both in the Louisiana legislature after statehood and during three more terms in the House of Representatives and a single term in the Senate, to which the Louisiana legislature elected him after the voters rejected his attempt for a fourth term in the House.⁵¹

While in the Louisiana Assembly, Livingston obtained a commission to draft a new penal code, and he worked at it assiduously even after his election to Congress. When published (both in Louisiana and by the House of Representatives) it excited the admiration of the Western world, though not adopted verbatim by any legislature.⁵² It even drew a personal letter of praise from Thomas Jefferson,⁵³ who had reached an age and equanimity that perhaps prevented him from hating anybody any longer. Two brilliant men who had so much in common that they could not stand each other while living thus ended their lives reconciled.

49. In his multi-volume work *Jefferson and His Times*, even Dumas Malone, who was Jefferson's premier biographer (and who tended toward the idolator style of biography) was compelled to admit that, in the batture affair, "this characteristically humane and normally tactful man was manifesting very bad taste." D. MALONE, *THE SAGE OF MONTICELLO* 66 (1981). Malone's final conclusion was that Jefferson "does not appear at his best in this affair." *Id.* at 73. Although the major events sued upon occurred during the period covered by Malone's fifth volume, see D. MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809* (1974), Malone entirely avoids mention of the episode in this volume. He does devote 18 pages to Jefferson's conflict with Livingston in *The Sage of Monticello*, his sixth volume, which appeared after Dargo's and Hatcher's works were published. However, Malone writes as if unaware that Jefferson's hostility toward Livingston dated back to Livingston's New York days (see *supra* note 21 and accompanying text), writing as if the first sally occurred when Governor Claiborne wrote to Jefferson asking for federal aid to remove Livingston from the batture. See *supra* text accompanying notes 7-9.

50. See *supra* note 34.

51. He resigned from the Senate to serve as Andrew Jackson's Secretary of State and later as Jackson's ambassador to France. It was an instance of old cronyism at work, since Jackson and Livingston had also served together in the House, and Livingston had served as Jackson's civilian aide-de-camp in the Battle of New Orleans. W. HATCHER, *supra* note 6, at 356, 418-19.

52. See *id.* at 284-86.

53. Jefferson's letter, dated April 4, 1824, is printed in full in C. HUNT, *supra* note 8, at 284-87. Livingston responded in kind after Jefferson's death. In an argument before the Supreme Court, Attorney General Butler cited and relied upon Livingston's batture pamphlet. See *supra* text accompanying note 10. This provided his opponent Edward Livingston (assisted in the case by Daniel Webster) the opportunity to remark that he was happy to say about Jefferson "that at a subsequent period, the friendly intercourse with which, prior to that breach, he had been honoured, was renewed." *New Orleans v. United States* 35 U.S. 526, 550, 10 Pet. 662, 691 (1836).