

Civil Procedure Outline¹

Joseph Mornin
Berkeley Law School
joseph@mornin.org

Fall 2012

¹For Civil Procedure with Professor Andrew Bradt, Berkeley Law School, Fall 2012.

Contents

1	Structure of a Lawsuit	2
1.1	Preliminaries	2
1.2	Which Court?	2
1.3	Complaint, Filing, and Service of Process	2
1.4	Responding to the Complaint	2
1.5	Discovery, Summary Judgment, Settlement	3
1.6	Trial	3
1.7	Post-Trial or Post-Judgment Motions	4
1.8	Appeal	4
2	Provisional Remedies	4
2.1	<i>Kubrick</i> : Statute of Limitations	4
2.2	Due Process Requirements	5
2.3	<i>Fuentes</i> : Writs of Replevin	6
2.4	<i>Doehr</i> : Prejudgment Attachment of Real Estate	7
3	Jurisdiction	7
3.1	<i>Pennoyer</i> : Personal Jurisdiction and Territorial Power	7
3.2	<i>Hess</i> : Jurisdiction Over Out-of-State Drivers	8
3.3	<i>International Shoe</i> : “Minimum Contacts”	8
3.3.1	General and Specific Jurisdiction	9
3.4	<i>World-Wide</i> : Jurisdiction Over Out-of-State Car Dealers	9
3.5	<i>Burger King Corp. v. Rudzewicz</i>	10
3.6	<i>Goodyear Dunlop Tires Operations, S.A. v. Brown</i>	11
3.7	<i>J. McIntyre Machinery, Ltd. v. Nicastro</i>	11
3.8	Purposeful Availment and Purposeful Direction	12
3.9	Long-arm Statutes	12
3.10	<i>Benusan</i> : Online Activity	13
3.11	<i>Shaffer v. Heitner</i>	14
3.12	<i>Burnham v. Superior Court of Calif.</i>	15
3.13	Notice	17
3.13.1	<i>Mullance v. Central Hanover Bank & Trust</i>	17
3.13.2	<i>Jones v. Flowers</i>	18
3.14	Consent by Contract	18
3.14.1	<i>Carnival Cruise Lines, Inc. v. Shute</i>	18

1 Structure of a Lawsuit

1.1 Preliminaries

1. Find a lawyer.
2. Learn the facts.
3. Determine the dispute and remedy.

1.2 Which Court?

1. *Territorial jurisdiction*: there must be a minimal level of contact between the defendant and the court's territorial sovereign (e.g., the state).
2. *Subject matter jurisdiction*: federal courts have higher thresholds (e.g., interstate disputes in amounts above \$75,000). In cases of overlap, plaintiff can choose.
3. *Venue*: usually must have some connection to the place where the dispute occurred.

1.3 Complaint, Filing, and Service of Process

1. *Complaint*: plaintiff's statement of claims. Sometimes called petition or declaration.
2. *Filing*: file complaint at the courthouse. This is when the suit commences.
3. *Summons*: served to each defendant.

1.4 Responding to the Complaint

1. Preliminary objections
 - (a) E.g., disputes over territory or venue.
 - (b) Motions (to dismiss or quash).
 - (c) *Memorandum of law*: the legal arguments supporting a request.
2. *Default judgment*: occurs if the defendant does nothing. Can be set aside if justified.
3. Pleading in response to the complaint.
 - (a) In complaints, defendant don't try to prove their case—only to assert what he hopes can be proved.
 - (b) *Cause of action*: the violation of law in question.
 - (c) *General demurrer*: “even if you're right, you're not entitled to recover anything.” I.e., so what?

- (d) By default, defendants are deemed to admit allegations they don't deny.
- 4. Defendant's Answer:
 - (a) *Negative defenses*: contesting the facts.
 - (b) *Affirmative defenses*: contending other factual circumstances.
 - (c) *Motion to strike*: e.g., if plaintiff thinks defendant's answer is insufficient in point of substantive law.
- 5. Some jurisdictions allow the plaintiff to make a reply to the defendant's answer; otherwise, the answer is deemed denied by default.

1.5 Discovery, Summary Judgment, Settlement

- 1. *Discovery*: each side investigates its opponent's claims.
- 2. *Interrogatories*: written questions.
- 3. *Request for production*: documents, opportunities to inspect, other relevant items.
- 4. *Depositions*: Party questions a witness on camera and/or before a court reporter.
- 5. *Summary judgment*: Can be granted if something crucial can be determined beyond legitimate dispute.
- 6. *Affidavit*: Sworn statement.
- 7. *Pretrial conference*: attempt to resolve the dispute before litigating.

1.6 Trial

- 1. *At law*: for damages; can be tried by a jury.
- 2. *In equity*: e.g., for an injunction; normally triable without jury.
- 3. Jury selection: voir dire, challenged for cause, limited number of peremptory challenges
- 4. Trial process:
 - (a) Opening statements
 - (b) Case in chief (plaintiff)
 - (c) Direct and cross examination of witnesses
 - (d) Plaintiff rests
 - (e) Defendants can request judgment as a matter of law if they believe the claim is invalid

- (f) Case in chief (defendant)
- (g) Adverse witness: plaintiff himself is called
- (h) Either side can again call for a judgment as a matter of law
- (i) Closing argument (plaintiff)
- (j) Closing argument (defendant)
- (k) Judge instructs jury; jury deliberates and returns verdict
- (l) Jury often (but not always) must be unanimous

1.7 Post-Trial or Post-Judgment Motions

1. *Non obstante veredicto*: judgment notwithstanding the verdict, e.g., in response to earlier motions for judgment as a matter of law.
2. Parties can seek a new trial on the basis of procedural errors

1.8 Appeal

1. Can only happen after final judgment, even if there's a gross error early in the process
2. *Interlocutory appeal*: in some jurisdictions, appeal can be made before final judgment
3. *Mandamus*: requires the judge to do something
4. *Prohibition*: on the judge; usually comes from an appellate court in the form of a writ of prohibition
5. *Reversible error*: something on which an appellate court can reverse a decision and call a new trial
6. *Harmless error*: didn't affect the outcome of the trial
7. Appellate review is almost always on the basis of law, not on fact, unless there is "no substantial evidence" to support a factual determination
8. Appellate court will usually only consider objections that were raised in the trial court

2 Provisional Remedies

2.1 *Kubrick*: Statute of Limitations

1. When does the statute of limitations clock begin? *United States v. Kubrick* Plaintiff was rendered partially deaf from neomycin treatment at the VA. He discovered the possibility of malpractice only after the two year statute of limitations had expired. The issue is whether the claim

accrues when the plaintiff is aware of the existence and cause of his injury or when he is also aware of the possibility of malpractice. The Supreme Court (White) holds the former (Stevens dissenting).

2. Rule vs. standard:
 - (a) White: there's a clear rule here.
 - (b) Stevens: a rule is unnecessary—all we need is a looser standard that can be applied on a case-by-case basis.
3. Why does the statute of limitations exist? (see CB 54-55)
 - (a) Protect against the “cloud of litigation”
 - (b) Protect against “stale claims”
 - (c) Keep the plaintiff from sitting on his rights

Themes throughout the class:

1. Procedure as *policy*: how does procedure express values about justice?
2. Procedure as *strategy*: how do actors use process strategically?
3. Procedure and *power*: whom do rules benefit? Does access to rulemakers matter? Why have rules at all? How do state vs. federal issues come into play?

2.2 Due Process Requirements

1. Fifth Amendment: “No person shall be ... deprived of life, liberty, or property, without due process of law”
2. Fourteenth Amendment: “No **State** shall ... deprive any person of life, liberty, or property, without due process of law”
3. Remedies:
 - (a) *Plenary*: Usually awarded at the end of a lawsuit. Usual types: compensatory and punitive damages, injunctions, and declaratory judgments.
 - (b) *Provisional*: Can be awarded at any time while a lawsuit is pending. Usual types: attachment (seizure of property), temporary restraining orders, preliminary injunctions. They are “designed to stabilize the situation pending the final disposition of the case or to provide security to the plaintiff so that if she succeeds in obtaining judgment she will be able to enforce it effectively.”¹

¹Casebook p. 46.

2.3 *Fuentes*: Writs of Replevin

1. What are the due process requirements for ex parte decisions?
2. Do statutes that allow writs of replevin only upon ex parte application and posting of bond violate the Fourteenth Amendment?
3. *Fuentes v. Shevin* In multiple consolidated cases, a creditor was granted, ex parte, a writ of replevin for the property of a debtor in default (which was allowed by statutes in Florida and Pennsylvania). The court found that these statutes violate the Due Process Clause (Fourteenth Amendment). Absent extraordinary circumstances, due process requires notice and hearing before deprivation.
 - (a) Justice White: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. The right to be heard is a basic part of procedural fairness.
4. Key due process protections: **notice** and **opportunity to be heard** (in a meaningful way)

Similar cases:

1. *Mitchell v. W.T. Grant*: A similar statute in Louisiana was upheld on the grounds that (1) the applicant for the writ must declare the facts in a certified petition or affidavit, and (2) the showing must be made to a judge, not merely a court official.
2. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*: A similar Georgia statute was struck down because (1) the affidavit can be filed by the petitioner's attorney, who need not have any direct knowledge of the facts of the dispute, and (2) the writ is issuable by a court clerk, not a judge.

The minimum constitutional requirements for valid ex parte prejudgment and seizure appear to be:

1. An application grounded in facts.
2. Issued by a judge, not a court official.
3. A speedy hearing.
4. Only applicable to a limited range of transactions².

²See California's version of these statutes, Casebook p. 82 top.

2.4 *Doehr*: Prejudgment Attachment of Real Estate

1. Does prejudgment attachment of real estate (a) without prior notice or hearing, (b) without extraordinary circumstances, and (c) without a bond satisfy the Due Process Clause in the Fourteenth Amendment? *Doehr*: no.
2. *Connecticut v. Doehr*: Under a CT statute, DiGiovanni won a \$75,000 prejudgment attachment on Doehrs home in conjunction with a civil action for assault and battery. The court unanimously held that the CT statute would allow deprivation for cases where the defendant's property claim would fail to convince a jury. Without exigent circumstances, a preattachment hearing is required.
3. Concurrences:
 - (a) Marshall, Stevens, O'Connor, White: Bonds are also necessary in all cases.
 - (b) Rehnquist, Blackmun: Liens can serve a useful purpose (e.g., for laborers to enforce their interests over delinquent landowners). Also, the terms "bond" and "exigent circumstances" are overly vague.
4. *Mathews* rules provide a test for whether deprivation meets due process requirements:
 - (a) Consideration of the private interests that the deprivation will affect.
 - (b) Examination of the risk of erroneous deprivation, and the safeguards in place.
 - (c) Attention to the interest of the party seeking the judgment remedy (in *Mathews* originally, this was the government; here it's the private plaintiff).³

3 Jurisdiction

TODO: difference between territorial jurisdiction and personal jurisdiction?

3.1 *Pennoyer*: Personal Jurisdiction and Territorial Power

1. In an in personam case, does service by publication to a non-resident defendant establish territorial jurisdiction? *Pennoyer v. Neff*: Mitchell sues Neff in Oregon state trial court for nonpayment of legal fees rendered in 1862-1863. Neff is nowhere to be found, so Mitchell publishes notice of the suit in a newspaper. Neff does not appear, so the court orders a default judgment. The property is attached and then sold to Mitchell, who sells it to Pennoyer. Eight years later, Neff successfully sues Pennoyer to recover

³Casebook p. 85.

the property. The court (Justice Field) relies on an analytical framework in which the basis for jurisdiction is a state's territorial power. States are all-powerful within their borders, and powerless beyond. It holds that service by publication isn't good enough for in personam suits against a non-resident (though it might be good enough for in rem suits). Thus, the original judgment against Neff was void.

2. Doctrine of **collateral attack**: a judgment void when rendered is void forever.
3. The Due Process Clause (Fourteenth Amendment) governs personal jurisdiction.

3.2 *Hess*: Jurisdiction Over Out-of-State Drivers

1. Can a state implement a statute that requires out-of-state drivers to give implied consent to jurisdiction within that state? *Hess v. Pawloski* Plaintiff, a Pennsylvania resident, "negligently and wantonly drove a motor vehicle on a public highway in Massachusetts," causing injury to the defendant. In a MA Superior Court, plaintiff contested MA's jurisdiction, which was denied. The Supreme Judicial Court upheld the order. Plaintiff appealed to the Supreme Court on Fourteenth Amendment grounds. The court reasoned that earlier cases (e.g., *Kane v. New Jersey*) have upheld the constitutionality of statutes that require out-of-state drivers to appoint an agent to receive process before using the highway. States can legitimately require to appoint similar agent implicitly, and these kinds of statutes do not constitute discrimination against non-residents. Therefore, it is consistent with the Due Process Clause for states to require out-of-state drivers to implicitly appoint an agent to receive process, thereby establishing jurisdiction over those drivers if civil actions arise.

3.3 *International Shoe*: "Minimum Contacts"

1. Can a state have jurisdiction over an entity if the entity does not have a permanent presence within the state? What constitutes the necessary contact to establish jurisdiction? *International Shoe Co. v. Washington*: The State of Washington sued International Shoe to recover unpaid contributions to the state unemployment compensation fund. Justice Stone wrote the opinion.

International Shoe argued first that the Washington statute imposes an unconstitutional burden on interstate commerce. The court rejected this on the basis that "it is no longer debatable" that the commerce clause gives Congress broad power to regulate interstate commerce.

Second, it argued that merely soliciting orders within a state "does not render the seller amenable to suit within the state." The court notes that

historically, physical presence within a state is a prerequisite for jurisdiction in in personam cases (*Pennoyer*). But now, **minimum contacts** are sufficient. “Presence” is a symbolic term that can refer to business activities within a territory; in other words, it can refer to activities that give rise to the liabilities at issue in the suit. Moreover, since an entity enjoys certain benefits and protections from a state’s laws, it also has an obligation to that state.

The court held that Washington is entitled to recover the unpaid contributions.

*...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.”*⁴

2. Justice Black, concurring: States have a constitutional power to tax and sue corporations that do business in the state’s territory. The test of “fair play and substantial justice” is “confusing” and gives the court the unwarranted power to strike down any legislation it might see as violating “natural justice.”
3. Unlike in *Pennoyer*, in personam jurisdiction is based on “minimum contacts,” not territorial principles.

3.3.1 General and Specific Jurisdiction

1. **General jurisdiction:** The defendant has substantial enough contacts with a state that any dispute can be litigated in that state, regardless of whether the dispute arises from those contacts.
2. **Specific jurisdiction:** Contacts to the forum are related to the specific dispute.

3.4 World-Wide: Jurisdiction Over Out-of-State Car Dealers

1. Does selling a car in one state constitute the necessary minimum contact (under the *Shoe* test) to establish in personam jurisdiction over the seller in another state? ***World-Wide Volkswagen Corp. v. Woodson***: The Robinsons purchased an Audi in New York. It caught fire in an accident in Oklahoma.

Justice White: To establish jurisdiction, defendants must have minimum contacts, and the contacts must not violate “traditional notions of fair play and substantial justice” (forum State’s interest in adjudicating the

⁴Casebook p. 179.

dispute; convenient venue for plaintiff; interstate judicial system's interest in efficient resolution; and shared interest in fundamental policy goals). Jurisdictional rules have been relaxed, but the Constitution nonetheless privileges state sovereignty. "Petitioners (World-Wide and Seaway) carry on no activity whatsoever in Oklahoma." Petitioners could not reasonably predict being haled into court in OK. Corporations can "purposely avail" themselves of the benefits of conducting activity in the forum state—but there is no such availment here. No contacts, so no jurisdiction.

Justice Brennan, dissenting: The Court reads *Shoe* too narrowly. The seller and dealer purposefully injected their product "into the stream of interstate commerce," thus establishing minimum contact.

Justices Marshall and Blackmun, dissenting: The dealer and seller chose to become part of a global marketing and servicing network. Cars derive their value from being mobile. The dealer and seller received economic advantage from the ability to draw revenue from Oklahoma.

Justice Blackmun, dissenting: Confusing why the distributor and seller are getting sued here. Also, cars are mobile by nature.

2. Questions from Bradt:

- (a) Who are the defendants in the case, and which defendants are challenging personal jurisdiction? What is the basis of jurisdiction for the defendants who are not so challenging?
- (b) In what states do you think the Robinsons could sue defendants over whom the Oklahoma courts do not have jurisdiction?
- (c) Note on page 192 Justice White's statement that even if the forum the plaintiff has chosen will not be abusive to the defendant, the Due Process Clause may bar the plaintiff's choice "acting as an instrument of interstate federalism." Is this consistent with *International Shoe*? And what do you think of this statement after reading *Burger King*? Should federalism play any role here?
- (d) Pay close attention to Justice White's discussion of "purposeful availment" on page 194, and Justice Marshall's dissent on that point on pages 197–198. Who has the better of the argument? Do you think *Worldwide and Seaway* should have been subject to jurisdiction in Oklahoma in this case?

3.5 *Burger King Corp. v. Rudzewicz*

1. TODO: Brief

2. Questions from Bradt:

- (a) Is this a case of specific jurisdiction or general jurisdiction?

- (b) How did Rudzewicz “purposefully direct” his activities toward Florida? Are you persuaded that his actions justify Florida’s exercise of jurisdiction over him?
- (c) Who has the better of the argument as to whether it’s fundamentally fair to subject Rudzewicz to jurisdiction in Florida, Justice Brennan or Justice Stevens?
- (d) Why did Seaway and Worldwide VW benefit from the protections of the Due Process Clause while Mr. Rudzewicz didn’t? The Court seems to make a lot of Mr. Rudzewicz’s business sophistication and the benefits he received from participation in the national market—why weren’t those factors persuasive in Volkswagen? Is the work that purposeful availment’s doing here justified? (Note that two justices (Burger and Rehnquist) thought that there was no jurisdiction in VW but that there was in BK, and Justice O’Connor (who was on the Court for BK, but not VW), thought there was jurisdiction in BK despite that VW was a controlling opinion.)

3.6 *Goodyear Dunlop Tires Operations, S.A. v. Brown*

1. TODO
2. Bradt questions:
 - (a) Note the Court’s definitions of “general” and “specific” jurisdiction (4). The Court, per Justice Ginsburg, defines general jurisdiction as where the defendant is “essentially at home.” According to Justice Ginsburg, what are the “paradigm places” where the defendant is “at home”?
 - (b) What provision of the North Carolina long-arm statute did the plaintiffs rely on in order to obtain personal jurisdiction over the foreign subsidiaries?
 - (c) Goodyear USA (the parent corporation) consented to the North Carolina court’s jurisdiction over it. Could Goodyear USA, which is based and incorporated in Ohio, have successfully challenged personal jurisdiction in North Carolina? Was there “general jurisdiction” over Goodyear in North Carolina? Specific jurisdiction?
 - (d) The Court notes that some of the foreign subsidiaries’ tires made their way to North Carolina (to be used on horse trailers, etc.)? Let’s say one of those tires allegedly caused an accident in North Carolina? Do you think there would be specific jurisdiction over the foreign subsidiaries in that case? (Think about that in light of *J. McIntyre*.)

3.7 *J. McIntyre Machinery, Ltd. v. Nicastro*

1. TODO

2. Bradt questions:

- (a) In *J. McIntyre*, is there a rule that a majority of the Court agrees on regarding the exercise of specific jurisdiction when a defendant places goods in the stream of commerce? What open questions remain?
- (b) Do you agree with Justice Kennedy's minimum-contacts analysis? Is he right that J. McIntyre did not purposefully avail itself of New Jersey's market? Or does Justice Ginsburg have the better of this argument?
- (c) Where do Justice Kennedy and Justice Breyer agree? Disagree?
- (d) Note Justice Kennedy's reasons for rejecting Justice Brennan's framework from *Asahi* (p. 19–20). Do you find these persuasive?

3.8 Purposeful Availment and Purposeful Direction

1. TODO (pp. 237-241)
2. Bradt on *Calder v. Jones*: California actress Shirley Jones (of “Partridge Family” fame) sued the National Enquirer for libel based on a story it published essentially calling her a drunk. Jones sued in California state court. The Enquirer, which is based in Florida, contested jurisdiction on the ground that it did not have minimum contacts with California. The reporter had only gone to CA once, and everything else was essentially done in Florida. The Supreme Court held that there *was* personal jurisdiction over the Enquirer in California on the ground that it “expressly aimed” its conduct toward California. This is an interesting spin on purposeful availment commonly referred to as the “effects test”—if a defendant commits an intentional tort aimed at the forum state and causes harm in the forum state, there is specific jurisdiction over the defendant in cases arising out of that harm in the forum state. In *Calder*, the Court found that the Enquirer had aimed its conduct at California because (a) it knew that's where Jones lived and worked and would therefore suffer the brunt of the injury, and (b) because California was the largest state for circulation of the Enquirer, so it knew the harm in that state would be significant.

3.9 Long-arm Statutes

1. “A court will not find in personam jurisdiction unless there is statutory authorization for the exercise of that jurisdiction.”⁵
2. Long-arm statutes enable states to assert jurisdiction beyond their borders.
3. Some extend jurisdiction to the full extent that the Constitution allows. Others specify the circumstances in which states can extend jurisdiction.

⁵Casebook p. 241.

4. Detailed long-arm statutes can make the law more predictable.
5. Federal courts usually follow the long-arm statutes of the states in which they sit.
6. If the state long-arm statute does not extend to the full constitutional limits of in personam jurisdiction, the only question before the court is statutory (e.g., in *Bensusan*, below).

3.10 *Bensusan*: Online Activity

1. Does New York have jurisdiction over an out-of-state defendant because of his online activities? *Bensusan Restaurant Corp. v. King*: Bensusan and King both own cabarets in New York City and Columbus, MO, respectively. King build a website, and Bensusan sues for compensatory damages, punitive damages, costs, attorney's fees, and to enjoin King from using the name "Blue Note." The New York long-arm statute (N.Y.C.P.L.R. 320(a)) requires that the defendant must have been physically present in the state when he committed the act. The court finds that King was not physically present, and does not meet any of the other statutory requirements for jurisdiction.
2. Federal court cannot be an authoritative source of state law—it can only infer what New York courts would do in a comparable case.
3. In *Inset Systems, Inc. v. Instruction Set, Inc.*, a Connecticut district court held that advertising online could potentially reach "as many as 10,000 Internet users within Connecticut" and is "continuously available." Therefore, the advertiser has "purposefully availed itself of the privileges of doing business in Connecticut."
4. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, Zippo (the lighter company) sued Zippo (the publishing company). The Pennsylvania district court established the Zippo test for determining jurisdiction in Internet cases. The test relies on a scale of commercial activity. On one side of the scale are sites that exists exclusively to do business online. If a defendant knowingly enters into a contract with residents of a foreign jurisdiction, then personal jurisdiction is proper. On the other side of the scale are sites that passively post information. Personal jurisdiction cannot be asserted for those sites. In the middle are sites in which the user can exchange information with a host computer. In those cases, the "level of interaction" and the "commercial nature of the exchange" are the basis for determining the exercise of jurisdiction.

TODO: pp. 259-261 notes 2-5; Rulebook pp. 24-25: FRCP 4(k)

3.11 *Shaffer v. Heitner*

Should *quasi in rem* proceedings be based on the *Pennoyer* framework of territorial power (which would allow jurisdiction) or the *International Shoe* framework of minimum contacts consistent with traditional notions of fair play and substantial justice (which might not)?

Heitner, the respondent, owned one share of stock in Greyhound Corp., a Delaware corporation with its primary place of business in Phoenix. Heitner originally sued 28 of its officers and directors for damages in a case involving antitrust and criminal contempt violations in Oregon. Under a Delaware statute, he filed for an order of sequestration against the property of the officers. The property consisted of Greyhound options and 82,000 shares of common stock. The defendants (here, appellants) argue that the sequestration statute did not accord due process of law and that the property seized could not be attached in Delaware. Delaware courts rejected this jurisdictional challenge.

Justice Marshall:

1. *Quasi in rem* jurisdiction has traditionally been based on physical presence, not minimum contacts (*Pennoyer*).
2. The *Pennoyer* framework included a few exceptions (marriage, foreign corporations doing business in a state, etc.).
3. Modern realities expanded the *Pennoyer* framework (e.g., *Hess*) without fundamentally changing it.
4. The *International Shoe* framework supplanted *Pennoyer* for *in personam* cases. No similar conceptual revision has occurred for *in rem* cases, though lower courts have moved strongly in that direction.
5. Key break from *Pennoyer*: asserting jurisdiction over a thing is a “customarily elliptical way” of asserting jurisdiction over the interests of a person in a thing.
6. *Pennoyer* led to odd situations where property serves as the basis for jurisdiction in causes of action that are completely unrelated to the property (like the present case). It is illogical, though *Pennoyer* permits it, to assert jurisdiction indirectly, via property, if direct assertion of personal jurisdiction would not be allowed.
7. There are no good historical reasons to cling to *Pennoyer*.
8. We should therefore use the *International Shoe* test for all assertions of state court jurisdiction.
9. Appellants’ holdings do not constitute minimum contacts with Delaware—thus, Delaware does not have jurisdiction.

Justice Powell, concurring:

1. Property that is “indisputably and permanently” within a state (e.g., real estate) might pass the *International Shoe* test. The court should reserve judgment on that issue.

Justice Stevens, concurring in the judgment:

1. Fair notice requires warning that a particular activity will open the actor to the jurisdiction of a foreign sovereign. Buying stock includes no such warning.
2. Agree with Powell.
3. There are other longstanding methods of asserting jurisdiction based on territory that should not be discounted.

Justice Brennan, concurring in part and dissenting in part:

1. Delaware explicitly did not enact a law basing *quasi in rem* jurisdiction over shareholders on a minimum contacts test. For the court to invalidate this imaginary statute is a pure “advisory opinion.”

The court unanimously (sans Rehnquist) held that Delaware did not have jurisdiction over the defendants. The Delaware Supreme Court ruling was reversed.

Rule: Jurisdiction in *quasi in rem* actions must be based on the minimum contacts test (*International Shoe*), not the territorial power framework (*Pennoy*).

3.12 *Burnham v. Superior Court of Calif.*

Is a person’s mere presence within a state sufficient to establish that state’s jurisdiction over that person?

The petitioner, Burnham, and his wife decided to separate. Before his wife moved to California, the couple agreed to divorce on grounds of “irreconcilable differences.” After she left, however, the petitioner filed for divorce on grounds of “desertion.” His wife brought suit in California. Some months later, the petitioner was on a business trip in California, where he was served with court summons and a divorce petition.

Petitioner filed a motion to quash on the argument that his brief contacts with California did not meet the requirements to establish jurisdiction. The Superior Court denied the motion and the Court of Appeal denied mandamus relief.

Justice Scalia:

1. The question is whether physical presence is enough to establish jurisdiction, or whether the person must also have minimum contacts.
2. There has never been a case that suggests in-state service is insufficient to establish personal jurisdiction.

3. *Pennoyer* broadened over the 20th century; *International Shoe* established a different standard.
4. The petitioner seeks to establish that presence in the forum state is no longer sufficient to establish jurisdiction. This is entirely wrong. The *International Shoe* test was developed by analogy to the “physical presence” test, and it would be “perverse” to use the *Shoe* test to undermine it.
5. *Shaffer* involved an absent defendant, and it held that the defendant’s contacts must include property related to the litigation to establish jurisdiction (or, in a different light, that *quasi in rem* and *in personam* are really one and the same). There is no absent defendant in the present case.
6. In response to Brennan’s concurrence: (1) Brennan proposes a standard based on “contemporary notions of due process”—but this is hopelessly subjective. (2) Brennan argues that the concept of transient jurisdiction—of presence within a state creating a “reasonable expectation” of being subject to suit—is based on fairness. Really, though, it’s based on the same traditions that Brennan tries to dismiss. “Justice Brennan’s long journey is a circular one.”

Justice White, concurring in part:

1. It would be unworkable to decide in each case whether service was delivered fairly. The rule should stand as-is.

Justice Brennan, concurring in the judgment:

1. A rule does not comport with due process simply because of its pedigree.
2. *Shaffer* established that all rules, regardless of pedigree, must comport with modern understandings of due process.
3. More than a century of the rule’s existence gives defendants ample notice that their presence within a state can subject them to that state’s jurisdiction.
4. By visiting a state, a defendant avails himself of that state’s benefits. Without the transient jurisdiction rule, the actor would have the full benefit of access to the state’s courts as a plaintiff while remaining immune from the same courts’ jurisdiction. This asymmetry would be unfair.

Justice Stevens, concurring in the judgment:

1. The other justices’ opinions are overly broad [though he doesn’t say how].

The Superior Court’s ruling is affirmed.

Rule: presence within a state is sufficient to establish jurisdiction.

3.13 Notice

3.13.1 *Mullance v. Central Hanover Bank & Trust*

1. A New York law required a judicial settlement of a common trust fund. In strict compliance with the statute, the Central Hanover Bank and Trust gave notice to beneficiaries by publication in a local newspaper. Does the NY statute requiring, at a minimum, notice by publication for trust beneficiaries violate the Fourteenth Amendment?
2. The NY Court of Appeals overruled objections that notice by publication here violates the Fourteenth Amendment.
3. Justice Jackson:
 - (a) The only notice to beneficiaries appeared in a local newspaper, in strict compliance with the NY statute.
 - (b) At the time of the first investment, the trust had contacted each person by mail.
 - (c) It doesn't matter whether this proceeding is *in rem*, *quasi in rem*, or *in personam*. In all cases, courts have the right to protect claimants' rights to notice and hearing and determine claimants' interests.
 - (d) There's not much precedent here.
 - (e) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is **notice reasonably calculated**, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an **opportunity to present their objections**."
 - (f) Notice by publication is chancy at best compared to notice in person—"we are unable to regard this as more than a feint."
 - (g) It's not necessary to put huge effort into finding unknown claimants. Notice by publication is fine if it's not reasonably easy to make contact.
 - (h) For parties with known contact information, notice by mail is the minimum requirement. The NY statute requiring a minimum of notice by publication in all cases is unconstitutional.
4. The notice requirements in the New York statute are unconstitutional. Judgment for the appellant (Mullane).
5. Rules:
 - (a) The constitutionality of the method of service is independent from the classification of the cause of action as *in rem*, *quasi in rem*, or *in personam*.
 - (b) If it's easy to serve notice by mail or in person, notice by publication does not satisfy due process requirements.

3.13.2 *Jones v. Flowers*

1. When notice of a tax sale is returned undelivered, is the government required to take additional reasonable steps to satisfy the Due Process Clause?
2. The plaintiff, Jones, was delinquent on his property taxes. The state sent two certified letters to his address over the course of two years, both of which were returned as “unclaimed.” Just before the property was to be auctioned, the state also published a notice of public sale in a newspaper. The house was sold to Flowers.
3. The trial court granted summary judgment in favor of the defendants (the Commissioner and Flowers). The Arkansas Supreme Court affirmed.
4. Justice Roberts:
 - (a) Due process does not require that the property owner receive actual notice, but it does require a reasonable attempt (*Mullane*).
 - (b) A person who actually wanted to inform someone about an impending tax sale would surely take extra steps if a certified letter of notice was returned unclaimed.
 - (c) The state could have resent the letter by regular mail or posted it physically at the address. (It should not be required, though, to hunt for Jones’s contact information.)
5. Justice Thomas, dissenting:
 - (a) Process requirements must be determined ex ante. They should not be dependent on the outcome of the first attempt. state should take additional steps to give notice.
6. Reversed and remanded.
7. If notice by mail of an impending tax sale is returned unclaimed, the

3.14 Consent by Contract

3.14.1 *Carnival Cruise Lines, Inc. v. Shute*

1. The plaintiffs, the Shutes, purchased tickets for a seven-day cruise through a travel agent. The cruise line, Carnival, sent the defendants the tickets by mail. The tickets included a contract that named Florida as the forum state for any litigation regarding the contract. By purchasing the tickets, the Shutes agreed to the terms of the contract.
2. Mrs. Shute injured herself during the cruise by slipping on a mat. The Shutes sued in Washington for negligence. Carnival argued that (1) the forum selection clause in the contract requires the Shutes to bring suit in

Florida, and (2) Carnival did not have sufficient contacts with Washington to allow its courts to exercise personal jurisdiction.

3. The U.S. District Court for the Western District of Washington granted Carnival's motion to dismiss on the grounds that Carnival had insufficient contacts with Washington to exercise personal jurisdiction. The Court of Appeals reversed on the grounds that Mrs. Shute would not have been injured but for Carnival's solicitation of business in Washington. The Court of Appeals further held that the forum selection clause could not be enforced because (1) it was not freely bargained for, (2) the Shutes are physically and financially incapable of pursuing litigation in Florida, and (3) the clause violates the Limitation of Vessel Owner's Liability Act.
4. Issues:
 - (a) Is the forum selection clause enforceable?
 - (b) Is it too inconvenient for the Shutes to pursue litigation in Florida?
 - (c) Does the forum selection clause violate the Limitation of Vessel Owner's Liability Act?
5. Justice Blackmun:
 - (a) In their briefs, the respondents (the Shutes) conceded that they received adequate notice of the forum selection clause.
 - (b) In *The Bremen*, the court upheld the validity of a forum selection clause in international admiralty between two commercial actors. The Court of Appeals applied *The Bremen* in this case to hold that the forum selection clause was unenforceable because the parties had not negotiated it. The Supreme Court (Blackmun here) argued that the Shutes (individuals) did not negotiate with Carnival (large corporation).
 - (c) The lack of bargaining does not automatically invalidate the contract, however. There are plenty of reasons why a non-negotiated forum selection clause would be reasonable: (1) avoid litigation in every single passenger's different forum, (2) dispelling confusion about the proper forum, and (3) reduced fares resulting from the limited fora. Thus, the clause is enforceable.
 - (d) Re Florida as an inconvenient forum: Shutes have not satisfied the burden of proof to show heavy inconvenience.
 - (e) Re violation of the Limitation of Vessel Owner's Liability Act: no evidence that Congress intended to avoid having a plaintiff travel to a distant forum in order to litigate.
6. Justice Stevens, dissenting:
 - (a) Only the most meticulous passenger will be aware of the forum selection clause.

- (b) Passengers will not be able to evaluate the contract until they agree to it by purchasing a non-refundable ticket. Negotiation is not possible.
 - (c) Clause *is* null and void under the Limitation of Vessel Owner's Liability Act.
 - (d) This is a contract of adhesion. The Shutes did not know or consent to all of its terms.
 - (e) Forum selection clauses are not enforceable if they were not freely bargained for.
 - (f) The forum selection clause makes it more difficult for the Shutes to recover damages for the slip-and-fall, which is contrary to public policy.
7. Holding: The Court of Appeals is overturned (i.e., the forum selection clause was enforceable; the forum was not inconvenient; and the clause did not violate the Limitation of Vessel Owner's Liability Act).
8. Rules:
- (a) Forum selection clauses can be enforced even if they were not freely bargained for.
 - (b) Plaintiffs have a high burden of proof to show that a forum is so inconvenient that it violated due process.
 - (c) The Limitation of Vessel Owner's Liability Act does not protect plaintiffs from traveling to distant forums to litigate their disputes.