

Civil Procedure Outline¹

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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 Due Process

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

3.1 *Pennoyer*: Personal Jurisdiction

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 the property. The court (Justice Field) relies on an analytical framework in which the basis for jurisdiction is a state's territorial power. States

³Casebook p. 85.

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. Bradt: a judgment void when rendered is void forever.