



**Class  
of 2023**

Orientation Week

**ORIENTATION  
MATERIALS**

**Civil Procedure Class  
Professors Korn & Simpson**

**GONZAGA**  
UNIVERSITY

School of Law

## Chapter 1

# An Introduction to the Civil Action and Procedure

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### A. The Study of Procedure

The course in civil procedure focuses on the litigation process, by which parties seek to resolve civil disputes in the courts. While it involves a significant amount of technical material, the course requires more than mastering discrete rules and doctrines. It should foster critical thinking about the principles underlying the rules and doctrines, and about the role of litigation as a method of resolving civil disputes. The stated goal of modern procedure is contained in Federal Rule 1: “to secure the just, speedy, and inexpensive determination of every action and proceeding.” Throughout this course, we should consider whether that goal is achieved.

The focus of this course is on the *litigation* process through which parties seek to resolve their dispute by “going to court.” Contrary to depiction in popular media, however, this process consists of far more than a trial. In addition, we should keep in mind that litigation is not the only method for resolving disputes. In Chapter 15, we will discuss alternatives to litigation. Indeed, most disputes in this country are not resolved through litigation; they are privately settled without the need for filing suit. And of all those disputes that do get filed in court, only a very small percentage (generally two to four percent) will actually go to trial; they are resolved during the litigation process, perhaps by court order or, more likely, by settlement.

Although only a small percentage of all disputes will actually end in trial, use of alternatives, including voluntary settlement, are always made “in the shadow of the law.” Any negotiated settlement will be influenced by the parties’ assessment of what they could obtain through formal litigation. Thus, a full understanding of the litigation option is essential even for lawyers who ultimately pursue alternatives to it.

In this course, we are concerned with civil, as opposed to criminal, cases. The major goal of criminal law is to *punish* defendants for breaches of the general order rather than to *compensate* the victim of the crime. Civil cases, on the other hand, usually involve disputes between private parties,\* in which the plaintiff seeks to recover a remedy from the defendant.

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\* The government can be a party to a civil action. For example, it might sue a contractor who breached an agreement to build some public work. In that instance, it is not enforcing a penal law

For example, suppose defendant drives her car while under the influence of alcohol and runs into a car driven by plaintiff. Plaintiff is injured, and her car is destroyed. Defendant's act constituted a violation of the criminal (or penal) law, for which the government may prosecute. If the prosecution is successful, the state can punish defendant, perhaps by imprisonment, or by payment of a fine, or by an order to perform community service. Generally, however, any fine goes to the government and not to the injured person.

Defendant's act also constituted a *tort* for which the plaintiff can maintain a civil action against the defendant. The goal of that action will be to force defendant to compensate plaintiff for harm caused by her breach of a duty owed to plaintiff. The remedy may include reimbursement for the plaintiff's medical expenses and lost wages while recuperating, as well as compensation for pain and suffering and for the loss of her car.

Of course, not all civil cases involve criminal behavior. Breach of contract cases, for example, rarely involve misconduct that could constitute a crime. Similarly, the tort of negligence may be based on mere inadvertence which could not support a criminal prosecution. Civil cases play an important role in the administration of justice. They permit one party to sue another for breaching rules our society establishes governing relationships, even when those breaches fall short of criminal.

Throughout the law school curriculum, you will see procedural differences between criminal and civil cases. The prosecution must prove the criminal defendant guilty "beyond a reasonable doubt." The civil plaintiff generally must show that the defendant is liable "by a preponderance of the evidence." When charged, the criminal defendant is given warnings that the civil defendant is not. The court cannot compel the criminal defendant to testify at trial; the state must warn the criminal defendant that her statements may be used against her; the state must provide the criminal defendant with legal counsel if she cannot afford it. In short, more process is due the criminal defendant than the civil defendant.

The line between criminal and civil is not always bright. For example, in civil actions in which defendant has acted egregiously, our system may permit plaintiff to recover "punitive," or "exemplary," damages. Their purpose is expressly to punish—to "send a message" to the defendant that her behavior is intolerable. To the extent that punitive damages serve a function similar to the criminal law, some observers have argued that the state should afford the defendant various heightened procedural protections given criminal defendants.

A civil litigant determines whether she has a claim and, if so, against whom, through the *substantive* law. In contrast, civil procedure provides the vehicle for attempting to vindicate rights created by substantive law. As we will see, however, the line between substance and procedure is sometimes ephemeral.

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but is vindicating its private right. In addition, the government often enforces laws through civil actions, for example, by bringing an action to enjoin violations of antitrust laws.

In many respects, procedure is the unique province of lawyers. Lawyers understand that *how* rights are vindicated can affect dramatically the scope of those rights. A claim or defense that one cannot prove is not worth much. Procedure is relatively invisible to most of the world, but seemingly technical procedural changes may bring about significant alteration in the scope of substantive rights. Changes in the allocation of which party has the burden of proof on an issue, or how notice is given, or who is bound by a judgment can alter the underlying rights. As one scholar has summarized:

[N]eglecting the terrain of procedure is, as it always has been, a mistake. Fundamentally, that is because procedure is power, whether in the hands of lawyers or judges. Smart lawyers and judges recognize the power of procedure. \* \* \* Substantive rights, including constitutional rights, are worth no more than the procedural mechanisms available for their realization and protection.

Stephen Burbank, *The Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292–93 (2000). Throughout this course, you should consider whether seemingly neutral rules of procedure might have a distinctly substantive impact. For instance, Professor Madison has demonstrated the substantive impact of procedural provisions on human bias and the promotion of impartial justice. Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet But Crucial Role in Achieving Racial Justice*, 78 U.M.K.C. L. REV. 617 (2010).

## B. Federalism

Before there was a national government, the thirteen original states were separate sovereigns, governed by their individual constitutions and laws. The people of these states concluded, however, that their interests might be better served by institution of a centralized government, at least for some purposes. After experimentation under the Articles of Confederation, the people undertook to create a national entity. Importantly, however, this national government did not replace or eliminate the separate state governments. The Constitution creates the United States government, and through it, the people ceded to that government limited and enumerated powers.

In the first case in this book, Justice Stephen Field summarized these points succinctly:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States \* \* \*.

*Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

While federal power is limited to those areas enumerated in the Constitution, the Supremacy Clause of that document provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,

or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. \* \* \*” U.S. CONST., art. VI. Thus, where federal law exists and conflicts with state law, the federal law controls, so long as it concerns an issue properly within the purview of the federal government. Although most of the Constitution addresses the scope of federal power, it also imposes direct restrictions on the power of the states. For example, the Fourteenth Amendment provides that “No State shall \* \* \* deprive any person of life, liberty, or property, without due process of law; \* \* \*.” Any state law violating this precept is unconstitutional and invalid.

The limited nature of the national government’s power is reflected in the federal judiciary. Article III, section 2, of the Constitution sets the outer boundary of federal judicial power. Thus, as we will see in Chapter 4, litigants cannot file suit in a federal district court simply because they would like to be there. The case must be one as to which the Constitution and a congressional statute permit access to the federal courts. The two major types of cases which plaintiff can file in federal court are “diversity of citizenship” cases (in which the plaintiff and defendant are citizens of different states and in which the amount involved exceeds \$75,000) and “federal question” cases (in which plaintiff’s claim arises under a federal law).

What if the plaintiff has a dispute that cannot invoke one of these bases of federal subject matter jurisdiction? She can file in state court. Indeed, even the vast majority of those cases that can be filed in federal district court—all diversity of citizenship and most federal question cases—may also be filed in state court.\* Thus, the existence of separate state and federal court systems will usually give the plaintiff a choice of fora. In fact, plaintiff may have a choice of filing in federal or in state court in several different states.

Although federal law can trump state law, it is important to note that the federal courts do not have general power to review actions of state courts. In most instances, a civil litigant in a state trial court can appeal an adverse judgment *only* to an appellate court of that state. Once the case is filed in one system—state or federal—it is subject to appellate review only in that system. There is one significant exception to this rule. The United States Supreme Court can review a decision of the highest court of a state. However, it can review that decision *only as to matters of federal law*.

Suppose, for example, that the supreme court of State A holds that unmarried people living together are not entitled to the same property law benefits as married people. The United States Supreme Court cannot review this holding, because it raises only a question of state law, as to which state courts are supreme. If, however, a party challenged this state law on the basis that it denied equal protection of the law as guaranteed by the United States Constitution, the Supreme Court would have the power to review the case. The reach of the Equal Protection Clause is a federal question, as to which the Supreme Court is the ultimate arbiter.

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\* The only exception is with those federal question cases as to which federal district court jurisdiction is exclusive of the states. Such cases are rare. Examples include federal antitrust actions and patent cases.

The American system of justice faces often thorny questions of federalism because American citizens are subject to regulation by both state and national governments. Few other countries have such dual governments. Interestingly, for example, England, from which we inherit so much of our law and legal tradition, is not a federal republic.\*

## C. Overview of the Structure of a Court System

As we have noted, the federal government has a system of courts. Each state is free to establish its own judicial system largely as it sees fit. The federal courts and the courts of many (but not all) states are established in a tripartite model, consisting of (1) trial courts reviewed by (2) intermediate appellate courts reviewed by (3) a supreme court.

### 1. Trial Courts

These are the courts in which the plaintiff initiates civil litigation, usually by filing a complaint and having it and a court order (called a summons) delivered to defendant. Trial courts have *original* (as opposed to *appellate*) jurisdiction. Some states assign jurisdiction to different trial courts based upon subject matter. For example, they may have separate trial courts for probate matters, family law cases, and general civil disputes. Other states divide jurisdiction based upon the amount in dispute. For example, one court may take cases involving \$15,000 or less while another takes cases of greater amounts. States may use different names for their trial courts. Common names include superior, municipal, district, and circuit courts. The trial court in the federal judicial system is the federal district court. This book focuses almost entirely on the jurisdiction and procedure in trial courts, where the bulk of litigation is carried out.

### 2. Intermediate Appellate Courts

Despite a popular notion that a losing litigant can “fight to the highest court in the land,” there is no federal constitutional right to appeal a judgment in a civil case. Nonetheless, most American jurisdictions do provide one. For example, in a three level court structure, states may permit an appeal of right to the intermediate appellate court.

\* Though this course will focus primarily on procedure in the federal courts, we will also note divergences in state practice. The vast majority of litigation in this country takes place in state courts. Scholarship increasingly has begun to reflect an emerging appreciation for the study of state-court practice.

In particular, Professor Koppel urges consideration of uniform rules. See Glenn Koppel, *Reflections on the “Chimera” of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971 (2009); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005). See also *Symposium on State Civil Procedure*, 35 W. ST. L. REV. 1–304 (2007). See generally Benjamin V. Madison, CIVIL PROCEDURE FOR ALL STATES (2010).

In the federal judicial system, a litigant has a right to appeal an adverse district court judgment to the intermediate appellate court, which is known as the United States Court of Appeals. It consists of thirteen "circuits," eleven of which are grouped by geography into courts bearing a number. For example, the Fourth Circuit sits in Richmond, and hears appeals from federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The twelfth is known as the Court of Appeals for the District of Columbia Circuit, which sits in Washington, D.C. and hears appeals from the federal district court in Washington.\* The thirteenth United States Court of Appeals is for the "Federal Circuit," the jurisdiction of which is determined not by geography but by subject matter. It sits in Washington and considers appeals in specialized cases such as import transactions and patents.

Not all states have an intermediate court of appeals. In such states, a civil litigant who loses at the trial court may seek review at the state supreme court. Further, the existence of an intermediate appellate court does not guarantee a right of appeal in civil cases. In Virginia, for example, the intermediate appellate court reviews criminal and administrative matters, but not general civil cases. Here, too, then, a civil litigant losing at the trial court may seek review by the supreme court.

### 3. Supreme Courts

Supreme courts are appellate courts.\*\* Most states refer to their court of last resort as the supreme court. (In New York, however, it is called the Court of Appeals.) In the federal judicial system, the highest court is the United States Supreme Court. It consists of nine justices,\*\* and sits only at Washington, D.C. In most states, as in the federal system, the highest court is not required to hear all cases in which its review is sought. Indeed, in civil cases, supreme court review is almost always discretionary.\*\*\* In a typical year, for instance, the United States Supreme Court agrees to hear fewer than four percent of the cases (of any sort, criminal or civil) in which a party seeks its review.

### 4. Appellate Practice and the Doctrine of Precedent

Appellate courts review dispositions of the case by the lower court(s). Appellate practice, however, is very different from trial practice. Appellate courts do not try

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\* Each of these courts of appeals reviews decisions by administrative agencies. Because it is in Washington, the District of Columbia Circuit hears more of these than any other Circuit.

\*\* Interestingly, the United States Constitution gives the United States Supreme Court original (trial) jurisdiction over certain types of cases, including those in which a state is a party. U.S. CONST., art. III, § 2.

\*\*\* The Constitution is silent on how many justices shall sit on the Supreme Court. The number is set by statute. See 28 U.S.C. § 1. The original Judiciary Act of 1789 provided the Court with only six justices.

\*\*\*\* In some states, a defendant in certain criminal cases, such as those involving capital punishment, has a right to review by the supreme court.

cases, so they do not receive evidence or hear witnesses. Instead, they rely on the record below, briefs filed by counsel and, usually, oral argument on legal points. In intermediate courts of appeals, it is common to have a panel of three judges review each case. At the supreme court level, usually the entire panel of justices (commonly consisting of seven or nine) considers each case.

It is important to appreciate the role of appellate courts. The intermediate court (or the supreme court if it is reviewing the trial court directly) is not interested in whether it would have decided the case differently from the trial court; it does not retry the case and for the most part does not reexamine the facts. Instead its review is generally limited to errors of law. Even where there were errors, the doctrine of "harmless error" allows an appellate court to affirm a judgment even when the lower court made a mistake, if the result would have been the same anyway.

When reading any opinion, note what court is deciding it. If it is an appellate court, note the issues as to which it is particularly deferential to the trial court. Note also the disposition of the appellate court. Does it affirm or reverse outright? Does it remand with instructions? How clear are the instructions?

Most supreme courts have a limited, though critical, role. Rather than simply correcting mistakes made by lower courts, most supreme courts act principally as final arbiter of the content of the jurisdiction's law. This role is reflected in the fact that most are not required to hear all cases in which parties seek their review. Thus, a supreme court may accept cases for review in particular substantive areas because it needs to clarify the law there.

Appellate pronouncements on questions of law are binding on all lower courts in the jurisdiction through the doctrine of *precedent*, or *stare decisis*. This doctrine lends consistency and stability to the law. In addition, under the same principle, an appellate decision on a point of law binds the same court in later cases. Thus, once a state supreme court has held that a plaintiff's contributory negligence bars her recovery, that court will apply the same rule in deciding subsequent cases. *Stare decisis* does not, however, freeze the law forever. Responding to relevant changes, the court that rendered an opinion (or a higher one) can overrule the precedent. Although overruling precedent is unusual, courts regularly elaborate on or modify rules announced in prior cases. This process of elaboration and gradual modification is at the heart of our common law system.

## D. The Adversary System

One fundamental characteristic of American litigation is its adversarial nature. In our adversary system, each side to a dispute presents its case vigorously, in the best light possible. The parties take the initiative to bring suit, raise issues, present evidence, and persuade the factfinder. One obvious assumption of the system is that parties motivated by self-interest will only pursue worthwhile litigation and will invest the time and resources necessary to present their positions well. Another is that this clash

of self-interested combatants hones the issues in such a way as to enhance the possibility of finding the truth and reaching a just result. Throughout the course, consider whether the adversary system relies too much on the notions that all lawyers are of equal ability and that all parties are of equal financial means.

The Constitution grants to federal courts jurisdiction only over “cases” or “controversies.” Thus, courts may not render opinions on questions not presented in the context of an actual case. For example, assume that a legislature (federal or state) passes a statute that plainly violates the Constitution. No matter how egregious the violation, no federal court can declare the statute unconstitutional until the question is proffered in an actual case. The Founders expressly rejected a proposal that the Chief Justice sit with Congress to advise it on the constitutionality of its bills. Many (but not all) state court systems impose a similar limitation.

No plaintiff can sue unless she has “standing,” which generally means that she must have suffered some injury before she can bring suit. Our system does not permit litigation simply because someone is upset over something or wants the courts to issue an advisory opinion; she has to be injured, to have a personal stake in the litigation, before the court is presented with the appropriate adversarial vehicle for resolution. Standing and similar doctrines governing “justiciability” of issues often present vexing questions; you will deal with them in detail in courses on constitutional law and federal courts.

Litigation is not unrestricted combat. Much like rules of a sporting contest, rules of procedure curb pure adversariness. For example, Federal Rule 11 imposes sanctions on litigants or counsel for various misdeeds, including documents filed “for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Rule 16 imposes sanctions for failure to cooperate in pretrial efforts to settle the case or to frame issues for trial. Rule 37 does the same for abuses in the area of discovery, through which litigants are permitted to find out contentions and evidence of opponents. In addition, rules of professional responsibility impose several important duties on counsel. Thus, a lawyer may not raise frivolous issues, conceal or destroy evidence, misrepresent facts, or offer false evidence. Counsel also must reveal controlling authority contrary to her position.

Under the traditional adversary model, the judge is usually passive and reactive. The parties, not the court, are responsible for initiating and developing the case, framing the issues, discovering the evidence and presenting it at trial. Under this model, the judge rarely intervenes unless asked by the parties. For example, one might make a *motion*,\* that is, a request for an order, on any of dozens of grounds, such as a motion to dismiss the case, or to transfer the case to another venue, or to strike a pleading. In addition, at trial, the judge monitors the admissibility of evidence. Here, although her need to rule is usually dictated by objections made by the parties, she can and will intervene to protect witnesses from harassment and to shield the

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\* “Motion” is the noun. “Move” is the verb. Parties never “motion” the court. They “move” or “make a motion” for the desired order.

jury from irrelevant or prejudicial evidence. Although the court is entitled to ask questions of witnesses at trial, historically courts have been reluctant to do so. In general, then, the decision makers (judge and jury) consider issues and evidence proffered by partisan advocates.

Not all judicial systems envision such a passive judge. In most of continental Europe, for example, the courts follow an "inquisitorial" model, in which the judge is expected to make an independent investigation into the merits of the case. She routinely questions witnesses and generally takes charge of the case in a way American lawyers would find intrusive. Inquisitorial procedure is also characteristic of the English Chancery, one of the courts that has influenced American law.

Increasingly, American judges, particularly in federal courts, are borrowing some aspects of the inquisitorial system. In response to a perception that there is too much litigation (particularly too much expensive pretrial litigation), judges have assumed an activist role in managing cases, rather than simply reacting to the parties' requests. Recent amendments to the Federal Rules of Civil Procedure foster this new activism, which is changing (at least to a degree) the traditional view of the judge in the adversary system. Indeed, it is not uncommon now to hear some federal district judges complain that their job has become more "bureaucratic" or "managerial" than umpireal. The primary responsibility is often "keeping the parties' feet to the fire" and facilitating settlement.

Among many questions, the adversary system raises the issue of who should bear the cost of litigation. Litigation is expensive. Although the public provides the courthouse and the judges and jurors, the adversary system puts the primary burden for expense on the parties. They pay the filing and other court fees, they pay to uncover evidence, they pay expert witnesses, and, most importantly, they pay attorney's fees. Attorneys are usually paid by the hour. Outside of small claims matters, cases do not get to trial without months, even years, of pretrial activity involving pleadings, motions, discovery, and settlement negotiations. Throughout these activities, the "meter is running."

Under the "American Rule," each side pays her own attorney's fees.\* The fact that it is called the American Rule implies that it is not followed in most other nations. Indeed, England now provides basically that the prevailing party recovers her costs *and* attorney's fees. In this country, there are exceptions to this rule (some created by courts, others by legislatures), and commentators and legislators increasingly advocate rejection of the American Rule. Still, it remains. Can you articulate policy support for the rule? Can you articulate policy reasons for rejecting the rule?

The expense of litigation—principally of attorney's fees—is an important factor in plaintiff's assessment of whether to attempt to enforce her substantive right. Sup-

\* It is important to distinguish between "costs" and attorney's fees. When lawyers speak of "costs" they mean "taxable" or "recoverable" costs. Generally, the prevailing party in litigation recovers her costs from the other side. These costs include such things as docket fees, court reporter fees, and clerk's costs, and usually amount to relatively little money. See 28 U.S.C. § 1920. They do not include attorney's fees, which will almost always be the most substantial cost of litigation.

pose, for example, that D has swindled you out of \$35,000; there is no question that D is liable to you for that sum. Suppose that you retain a lawyer who charges \$350 per hour. If she spends only 50 hours litigating the case through trial, her fee will be \$17,500. Thus, even if you go to trial and win a judgment for \$35,000, you will actually recover a net of \$17,500. Moreover, you will have spent several months (perhaps years) in the litigation process.

Under these circumstances, you may instruct the lawyer to invest as little time as possible and to settle the case. Suppose the lawyer invests five hours and receives an offer from the other side to settle the case for \$10,000. Will you agree to the settlement? It would give you \$10,000, out of which you pay your lawyer (based on the hourly rate) \$750. You end up with \$9,250. On the other hand, you obviate the need to go to trial, and receive the money now rather than months or years from now.

Sometimes, plaintiff's lawyer bears the risk of attorney's fees by agreeing to take a case on a contingent fee arrangement. By this, the client agrees to pay the lawyer a percentage (typically one-third) of any recovery she gains. Some observers hail this arrangement, saying that it helps plaintiff bring some actions that would never be brought if plaintiff had to pay an hourly rate. Others criticize contingent fees for this very reason, saying the arrangement tends to foment litigation.

Other critics worry that the contingent fee arrangement gives the lawyer too great an incentive to settle a case quickly, rather than to go through trials. Suppose, for example, lawyer could settle a case for \$60,000 (and take a \$20,000 contingent fee) after investing 30 hours. Suppose also that if the case goes to trial, plaintiff might win as much as \$600,000; or, of course, plaintiff could win nothing. To go through trial will require several hundred attorney hours. It might be in the lawyer's economic interest to settle rather than litigate; critics worry that this economic incentive may color the advice the lawyer gives to her client.

Many lawyers, clients, judges, and commentators are addressing these and similar issues more seriously today than ever. Many are convinced that there is a "litigation crisis." Others disagree. But many observers seem to agree that litigation is too expensive and takes too long to resolve many disputes. Not surprisingly, people are looking to alternatives.

## E. Alternatives to Litigation

This course focuses almost exclusively on litigation—the adversary system—to resolve disputes. That model has drawbacks. As noted, it is expensive. It relies in part on the fictive notions that all lawyers have equal ability and that all litigants have equal financial resources. Litigation, when pursued to adjudication (as opposed to settlement), is a zero-sum game; someone wins, and someone loses. It is also retrospective, forcing litigants to look back to what happened in the past rather than focus on the future. All of this suggests that litigation may be better suited to some kinds of disputes than to others. We will address these issues in more detail in Chapter 15.

Alternative dispute resolution (ADR) has become an important topic for an upper division law school course. In our course, we hope to raise awareness of the possibility that litigation may not be the most appropriate method for resolution of your client's dispute. Our goal here is to survey the major methods of ADR. None is a panacea. None will ever totally supplant litigation. But throughout your law school career, consider whether the disputes you consider in your cases might have been handled better through ADR.

For example, consider a dispute between two persons who envision an ongoing relationship. This could be a dispute between family members over something personal, such as inheritance of a family heirloom. Or it could be the continuing relationship between a wholesale distributor and a retailer who, except for this disruption, have gotten along fine for years. Or perhaps it is an employer-employee relationship. In such situations, the best resolution may focus on the future, on continuing the relationship, on working out an arrangement to keep the relationship intact. Traditional, retrospective, zero-sum litigation may not be optimal. But what other choices are there?

*Negotiation* is the most widely used ADR tool. In fact, the vast majority of cases filed in court end up in a negotiated settlement. When negotiation works, and results in a settlement, it avoids the zero-sum-game aspects of litigation. The parties are free to structure the settlement in any way they see fit. They may take into account future relations and can be more creative than courts in fashioning remedies. An early settlement avoids the expense and trauma of trial and appeal, and it can substantially lessen overall litigation costs. Although parties can enter settlement negotiations at any time, often they do so only after the litigation dance has progressed for awhile, perhaps to the discovery stage. At that point, the lawyers begin to understand the facts of the dispute better, and they may have a clearer idea of what the case is "worth."

At about that point as well, clients begin to realize not only the expense of protracted litigation, but that they are required to devote great time to the cause as well. For example, the other side will undoubtedly take the deposition of your client, in which she must respond under oath to questions by counsel for other parties. The experience is often traumatizing and sobering. On the other hand, it also gives the client a chance to speak directly to the other side and to "tell her story." This process is often cathartic. Indeed, there are some data showing that some litigants, especially those not routinely involved in litigation, consider the process a success (regardless of the outcome) if they get this opportunity.

*Mediation* is essentially negotiation through the auspices of a third party who facilitates settlement of the dispute by helping the parties to find common ground. Like negotiation, it avoids the zero-sum game nature of litigation. The mediator and the parties are usually free to structure the mediation sessions in any appropriate way. Usually, the mediator will allow each side to "tell its story" and to exchange information. Sometimes, the mediator will suggest creative resolutions and can be especially helpful in disabusing one party of an unrealistic position.

Mediation is often voluntary, but an increasing number of courts require parties to submit to mediation sessions before continuing with litigation. Some litigants are offended by mandatory mediation; if they have a right to seek redress in the courts from a wrongdoer, why should they be made to sit down and try to negotiate a settlement?

*Arbitration* involves resolution of the dispute by a third party other than a court. Like litigation, someone wins and someone loses. The advantage is usually in time and expense. Because the discovery rules of civil litigation usually do not apply to arbitration, the parties tend to spend less money in preparation for the hearing. The hearing is less formal than a civil trial, there is no jury, and the court rules governing admissibility of evidence do not apply. The arbitrator takes evidence and makes a decision. Sometimes, as in major league baseball arbitration, the parties require that the arbitrator choose between their respective offers. When this is not done, the arbitrator is free to fashion what she sees as an appropriate award and may "split the difference" between the parties.

Arbitration is often consensual. Parties to a contract commonly agree that any dispute will be submitted to arbitration. They should spell out terms for selection and payment of the arbitrator(s), and for invocation of the process. Increasingly, commercial agreements include arbitration agreements for disputes. The terms of the agreements vary greatly. Under some, a party submitting to arbitration may waive significant rights, such as the right to jury trial and the right to seek some remedies, such as punitive damages, and the right to appeal. Most arbitration awards are reviewable only on very narrow grounds, which usually do *not* include the arbitrator's incorrect application of the law.

In some states, court-annexed arbitration requires parties to submit to arbitration before proceeding with litigation. For example, in several states, a plaintiff may not sue for medical malpractice until after she has gone through arbitration. Absent agreement of the parties, the arbitrator's decision is not binding. Either side can seek a trial *de novo* in court. Frequently, however, there are strong disincentives to this, such as provisions imposing various costs on that party unless she receives a better result at trial. As a result of collective bargaining agreements, many employees are required to submit to arbitration any grievances with their employers.

While arbitration offers advantages, it has its critics. Because the arbitrator is not a judge, and because her award is subject only to limited review, some have assailed arbitration as dispute resolution "without law." Moreover, there is a growing concern that the arbitration format favors "repeat players," particularly in the process of selecting the arbitrator.

Some disputes will involve traditional litigation and ADR. Indeed, much of ADR has found its way into the litigation process. As noted, it has long been true that parties negotiate a settlement to the vast majority of civil cases. Several Federal Rules enhance the prospects of settlement by forcing litigating parties to work together at various stages of suit. In addition, creative lawyers have used ADR techniques such

as arbitration to resolve specific issues in the course of litigation. Creative judges have also been able to bring ADR techniques and benefits into the litigation stream.

## F. A Brief History of Our English Judicial Roots

We inherited much of our law and legal tradition from England. It is impossible to understand the American legal system fully without some background in English legal history.

Before the Norman Conquest of England in 1066, the administration of justice in what is now Great Britain was entrusted to a myriad of local courts, run by feudal lords, and enforcing rights in accord with local custom. William the Conqueror did not replace the local courts, but augmented them by establishing three royal courts: The King's Bench, the Exchequer, and the Court of Common Pleas. Litigants wishing to sue in one of the royal courts sought a writ (order) from the chancellor (a royal officer, akin to chief of staff to the King). Each court heard only certain types of cases, as defined by the writs each could entertain.

In early development, the royal courts heard a limited number of cases concerning possession of land, actions on contract (*ex contractu*), and actions in what today would be called tort (*ex delicto*). Over time, however, they expanded the number of writs which would invoke their jurisdiction. The feudal barons who controlled the local courts tried to stop this expansion of the royal courts' power. Ultimately, though, their efforts failed, and the royal courts developed a series of new writs in the thirteenth and fourteenth centuries.

While expanding their jurisdiction by recognizing new forms of action, the royal courts became increasingly inflexible in their administration of justice. Their rigidity denied justice to many suitors because of their failure to dot the "i" or cross the "t" on some seemingly arcane procedural point. The royal courts routinely dismissed cases despite proof at trial that the plaintiff was entitled to relief, simply because plaintiff had chosen the wrong writ at the outset of the case.

In addition, the royal courts became increasingly unwilling to give a successful plaintiff any remedy other than damages. To this day, of course, many plaintiffs seek exactly that; they want to be compensated in money for injuries inflicted in tort or to recover the benefit of their bargain in contract. Often, however, damages do not give the plaintiff true relief.

For example, suppose defendant steals a piece of plaintiff's jewelry. The jewelry has a market value of \$500, but is a sentimental treasure to the plaintiff. If money is the sole remedy available, the plaintiff cannot be made whole. What she wants is *specific* relief. She wants a court order commanding the defendant to return the jewelry. The royal courts largely refused to give this type of relief.

The hypertechnicality of royal court procedure, coupled with this limitation on remedies, led to pressure to reform the English practice. Litigants, used to petitioning the chancellor for a writ to sue in the royal courts, started to ask the King's Council (of which the chancellor was a minister) to intervene directly and to "do justice." In cases in which the remedy at law (through the royal courts) was inadequate, or in which a suitor alleged an enormous disparity of power between himself and his opponent, the chancellor started issuing orders on behalf of the Council to achieve equity. By the middle of the fourteenth century, Chancery (for the chancellor) was recognized as a separate court.

Over the next two centuries, this *equity* practice expanded. For example, the chancellor would enforce trusts (by which one could evade the common law rule that one could not devise land by will) and assignments of claims. The law courts would recognize neither. In addition—and most threatening to the royal courts—the chancellor could enjoin a party from enforcing a fraudulent judgment from a royal court. This seeming affront to the dignity of the common law judges led to a serious debate in the early seventeenth century. Francis Bacon, appointed by King James I as head of a commission addressing the matter, resolved the dispute in favor of equity practice. The commission upheld the chancellor's power to enjoin parties from enforcing royal court judgments procured by fraud. Because such orders were directed at a party (that is, they were in personam), and not to the court that rendered the judgment, they did not constitute a direct infringement of the power of the royal courts.

After that, Chancery developed into a complete system of courts, procedures, and remedies. This system worked alongside the royal courts, which continued to administer the common law. Thus, England had a bifurcated system of civil justice—the royal (or "law") courts and Chancery (or "equity") courts. Law courts continued to award damages while equity developed a panoply of specific remedies, including the injunction, specific performance, rescission, and reformation of contracts and other documents. A plaintiff could invoke equity's jurisdiction only by demonstrating that the remedy at law was inadequate. In addition, equity developed the "clean-up doctrine," by which it would award damages incidental to the issuance of equitable decree. For example, a plaintiff might win an injunction against further trespasses by the defendant, as well as an award of "clean-up" damages to compensate for past trespasses.

The two systems developed different procedures and terminology. Law courts generally used a jury to determine facts, while equity courts generally did not. Consequently, the law courts usually allowed live witness testimony. Equity, which developed from an English inquisitorial system, came to permit more introduction of evidence through sworn statements. Law courts entered "judgments," while equity courts entered "decrees." Law courts had "judges," while equity courts had "chancellors."

Law and equity also differed dramatically in their methods of enforcing judicial decisions. Law enforced its judgments in rem, that is, against property. If plaintiff at law won a money judgment, and defendant refused to pay, the plaintiff could obtain a writ of execution, by which the sheriff would seize property owned by the defendant

and sell it at public auction to satisfy the judgment. If defendant had no property to seize, plaintiff was out of luck. Equity, on the other hand, enforced its decrees in personam, that is, against the person. For example, if the chancellor ordered the defendant to return property to plaintiff, or to sign a deed conveying property, or to desist from some conduct, he could order defendant jailed until he agreed to do so.

Earlier in our history, most American states and the federal courts bifurcated law and equity practice. Some did so with separate courts, others with separate divisions of the same court. In 1938, Congress adopted the Federal Rules of Civil Procedure. Among many important advances, the Federal Rules abolished separate law and equity dockets in the federal courts and provided that there is a single form of action, known as the "civil action." Federal Rule 2. Although most states have done the same, this merger is not universal.

Notwithstanding the widespread merger of law and equity, however, the distinction between the two continues to have practical importance in this country. For one, all jurisdictions differentiate between "legal" and "equitable" remedies. A plaintiff seeking equitable relief generally must demonstrate the inadequacy of a legal remedy. For another, the Seventh Amendment preserves federal court litigants a jury trial in civil "[s]uits at common law."\* Thus, consistent with historic practice, there is no constitutional right to a jury at equity. In Chapter 9, we will explore what this means after procedural merger of law and equity.

In other areas, equity practice came to dominate modern procedure. For instance, the joinder rules, which determine the scope of litigation by prescribing who may be parties and what claims may be asserted borrow liberally from equity practice. See Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

## G. General Topics of Civil Procedure

Although fourteen chapters follow this one, it is helpful to view them as raising six groups of topics. Here we review these groups to provide a preview of the major procedural issues we will address in the course. We will do so using the facts from a case we will read in Chapter 2, *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

That case involved a tragic vehicular collision that seriously injured three members of a family in the process of moving from New York to Arizona. Harry and Kay Robinson had three children, Sam, Eva, and Sidney. Harry's doctors recommended that he leave his Massena, New York, home and move to a drier climate. The family decided to move to Arizona. They set out in two vehicles—one a rented truck to carry furniture and the other their Audi 100 LS. They had purchased the Audi from

\* There are similar state constitutional or statutory provisions establishing a right to jury trial in state court in actions at law.

Seaway Volkswagen in Massena. The car was manufactured in Germany by Audi, imported to the United States by Volkswagen of America, and distributed to Seaway by World-Wide Volkswagen, which does business in New York and two neighboring states.

The trip went well until the family was driving on a freeway near Tulsa, Oklahoma. Harry and Sidney drove in the truck while Kay, Eva, and Sam followed in the Audi. Near Tulsa, a car driven by an inebriated Lloyd Hull, a citizen of Arkansas, collided with the rear of the Audi. The Audi caught fire. Kay and her two children were trapped inside the vehicle until a witness was able to smash the windows and rescue them. The three were burned horribly. Kay underwent more than thirty operations and spent 77 days in the intensive care unit of a Tulsa hospital. Each of the three was hospitalized for weeks.

The three Robinsons suffered enormous physical pain and incurred great financial loss. In inflicting this pain and loss, Lloyd Hull committed a crime. But, as we discussed above, the state's punishing him for driving while under the influence of alcohol would not compensate the Robinsons. Before commencing a civil case to seek compensation for the Robinsons, their lawyer had to review the substantive law to assess who might be liable and for what remedy. Obviously, as a matter of substantive law, the Robinsons could sue Lloyd Hull. Unfortunately, Hull had no appreciable assets from which to pay compensation. He also had no liability insurance. In short, Hull was "judgment proof"; any judgment against him would be uncollectible.

As a result, attorneys for the Robinsons had to consider whether the substantive law provided claims against any of the four corporations involved in manufacturing, importing, distributing, and selling the Audi to the Robinsons. In your torts class, you will study the development of various products liability theories. The Robinsons were injured and brought suit in the 1970s, when such theories were emerging and when the law in Oklahoma was not completely clear. Still, the Robinsons' lawyers determined that they could assert claims against all four (the manufacturer (Audi), the importer (Volkswagen of America), the distributor (World-Wide) and the retailer (Seaway). Put generally, the claims centered on the theory that the car was defective because the gas tank was mounted so as to make it susceptible to rupture in a rear-end collision. For a complete discussion of the facts of the case, see Charles Adams, *World-Wide Volkswagen v. Woodson*—*The Rest of the Story*, 72 NEB. L. REV. 1122 (1993).

## 1. Selecting the Forum (Chapters 2–5, 10)

The first procedural issue is where to file the suit. The first group of chapters in this book addresses various constitutional and statutory limitations on plaintiff's choice of courts. It may not seem obvious at first, but the issue of where litigation takes place can be of enormous practical importance. Many plaintiffs, for instance, would like to sue "at home," without incurring the expense of travel and the inconvenience of hiring a lawyer in a distant forum. But not all plaintiffs can do this. The court must have *personal jurisdiction* over the defendants. Unless it does, the court

cannot enter a valid judgment against the defendant. We will study the historical development of the constitutional and statutory limitations on a state's power to enter such binding judgments. Even in advance of that study, however, it makes some intuitive sense that the court of a state cannot enter binding orders over defendants who are not present there or who have no affiliation with the state.

Where does that leave the Robinsons? They no longer lived in New York; neither had they established a home in Arizona. Because of the lengthy hospitalization there, Oklahoma was about as convenient as anywhere else for them. Plus, the witnesses, police investigators, hospital records, and other important evidence was there. But would Oklahoma courts have personal jurisdiction over Audi, Volkswagen of America, World-Wide, or Seaway? If not, would New York? If New York had personal jurisdiction, then the Robinsons would be forced to litigate far from most of the relevant witnesses and evidence.

Remember that civil litigation takes place under the auspices of a government. Thus, whatever state has personal jurisdiction over the defendants, its court must have a method for giving notice to them that they have been sued and telling them the time in which they must respond. The court gives this notice, and manifests the state's personal jurisdiction over the defendants, by prescribing rules for *service of process* on the defendants.

Even if the Robinsons' lawyer decides that Oklahoma would have personal jurisdiction over the four defendants and that there is a mechanism for serving process on them, she may then face another choice. Should she file the case in an Oklahoma state court or in the federal district court in Oklahoma? In other words, what court—state or federal—will have *subject matter jurisdiction* over the dispute? Recall from *supra* Section B that federal courts can hear (among others) cases arising under federal law and cases between citizens of different states.

The Robinsons' case does not involve federal law, but it might qualify for diversity of citizenship jurisdiction. If so, their lawyer will have to choose whether to file in state or federal court. She will base this decision upon a variety of practical factors, including her experience with each court, how long it will take to get to trial, procedural mechanisms available, differences in choosing jury members, and many others. In *World-Wide Volkswagen*, the Robinsons' lawyer preferred state court because of the perception that juries in a particular county were extremely generous to plaintiffs. But should the plaintiffs' decision to eschew the federal court end the matter? As we will see, there may be a way for defendants to force the case into federal court.

Another issue that may affect one's choice of forum is an assessment of what law the different fora would apply. In Chapter 10 we address the question of what law applies in federal court.

## 2. Obtaining Provisional Remedies (Chapter 6)

The Robinsons were seeking "damages at law," otherwise known as money damages, as compensation for their injuries. In cases like this, the plaintiffs must wait for the

case to reach a final judgment or settlement in order to obtain the remedy to which they might ultimately be entitled. In some lawsuits, however, the parties might ask the court to grant temporary relief, also known as a provisional remedy, that will maintain the status quo or preserve important assets while the litigation is pending. This chapter will survey the most common provisional remedies that are available in American courts.

### 3. Learning About the Opponent's Case (Chapters 7 & 8)

The third major block of material addresses the rules governing how litigants learn about each other's contentions. The first tool is *pleadings*, documents in which each side alleges facts underlying their claims and defenses. Like all plaintiffs, the Robinsons initiated suit by filing what most jurisdictions call a *complaint*, in which they set forth factual allegations supporting their legal claims for relief. The defendants have several options in response. They might bring a motion to dismiss for any of myriad reasons, such as lack of personal jurisdiction. Or they may challenge the sufficiency of the complaint by arguing that it is unclear or incomplete.

Rather than bring a motion, the defendants may file a pleading which most jurisdictions call an *answer*, in which they respond to the allegations of the complaint and raise affirmative defenses. For example, if the defendants felt that Mrs. Robinson contributed to her own injuries by mishandling the car in some way, they could assert that in the answer. In some jurisdictions, the plaintiff responds to such affirmative defenses with a pleading called a *reply*.

After pleading, the parties embark on the *discovery* phase of the case, in which they have the right to require each other to produce relevant information through a variety of tools. They may request production of documents, send interrogatories that must be answered under oath, or take depositions of persons by asking questions under oath and "live," transcribed by a court reporter. Indeed, parties must surrender specified information without a request by another party. Modern discovery provisions are extremely broad. This is consistent with modern theory that parties should not be required to plead facts in detail; factual detail is to be provided through discovery. What information would the Robinsons want to discover from the defendants? What sort of information would the defendants want to discover from the Robinsons?

Through the discovery process, the parties may find that they agree on certain facts, or that certain legal contentions are no longer tenable. Throughout this phase, the parties often start talking seriously about settlement. Recent developments foster such negotiations. The court can hold conferences to foster settlement and, if that fails, to narrow and clarify the issues remaining for adjudication.

### 4. Adjudication With or Without a Jury (Chapter 9)

After the discovery phase, counsel and the court start to focus on adjudication. Although the popular image of adjudication is plenary trial, in some instances other

mechanisms can dispose of a case without the necessity of trial. If the case is tried, one important issue is whether the parties are entitled to have the case submitted to a jury. If so, counsel and the court must assess the division of labor at trial between the judge and the jury. Even after the jury has rendered its verdict, the court may have the power to change the result. Obviously, however, respect for the jury requires that this power be used narrowly.

## 5. Preclusion, Joinder, and Supplemental Jurisdiction (Chapters 11–13)

By the end of Chapter 10, you will have the tools to understand how a relatively simple dispute proceeds from beginning through adjudication. We then will address how a case can become more complicated. Two sets of rules foster the inclusive packaging of all related claims and parties into a single case. The first set consists of the *preclusion doctrines*, which prohibit parties from relitigating some issues already decided, and, in some instances, bar a plaintiff from raising things that she could have raised in an earlier case. These doctrines may counsel the Robinsons to raise all their claims in a single proceeding.

Against the background of the preclusion rules, litigants may make wiser use of the second set of rules promoting packaging—the joinder devices. These rules define the scope of litigation in terms of parties and claims. They delineate the plaintiffs' ability to join co-plaintiffs and multiple defendants in a single proceeding. In addition, they specify the circumstances under which the court, the defendants, and, in some instances, nonparties, can override the plaintiffs' structure of suit by adding new parties and claims. In *World-Wide Volkswagen*, these rules permitted the Robinsons to join together as co-plaintiffs and to sue the four defendants, all in a single case. In addition, the defendants may have been able to join claims against their insurance companies or, if the allegedly defective gas tank were manufactured by a subcontractor, to join the subcontractor to the pending litigation.

## 6. Appeal (Chapter 14)

All of the activities discussed to this point take place in a trial court. In Chapter 14, we will address appellate review. The most important restriction here is the final judgment rule, by which a party cannot appeal until the trial court has determined the entire dispute. In *World-Wide Volkswagen*, two defendants (WorldWide and Seaway) moved to dismiss on the ground that Oklahoma lacked personal jurisdiction over them. The trial judge disagreed. Unless they could invoke an exception to the final judgment rule, the defendants could not obtain appellate review of that order until after trial.

## 7. Litigation Alternatives (Chapter 15)

At the end of Chapter 14, we will have reviewed all major doctrines governing litigation. We will then be in a position to assess strengths and weaknesses of the liti-

gation process by comparing it to alternatives. Such alternatives include not only mechanisms of ADR discussed in Section E, but dispute resolution mechanisms from other countries and cultures.

## 8. A Quick Note on Materials

In addition to this casebook, your professor probably asked you to acquire a booklet with the phrase “Federal Rules of Civil Procedure” on the cover. This booklet contains materials that will complement the cases and text in this book and which are essential to your learning Civil Procedure. Despite the title, you should realize that the booklet contains more than the Federal Rules of Civil Procedure (FRCP). Those Rules, which will be referred to and discussed throughout this casebook, are promulgated by the Supreme Court (though they are drafted by an Advisory Committee, not the Justices), and govern the procedures for the federal trial courts (known as district courts). The Rules are amended from time to time, so occasionally the language in the current version will differ from that in a case decided just a few years ago. We will note such changes in language in brackets in the cases.

Your booklet also contains statutes that are part of the Judicial Code of the United States (Title 28 of the United States Code). These statutes will be especially important in Chapters 4 and 5 of this book. For instance, 28 U.S.C. § 1332 grants subject matter jurisdiction over cases “between citizens of different states”—the so-called “diversity jurisdiction.” Note that these statutes are *not* FRCP. Instead, they are legislation enacted by Congress to set the subject matter jurisdiction and venue of the federal courts. Both the FRCP and the statutes are important, but the statutes are of greater dignity in this sense—the FRCP cannot affect the jurisdiction or venue of the federal courts; only statutes can do that. See Federal Rule 82.

**The following reading is  
for class conducted  
Monday, August 24**

Professor Korn

Professor Simpson

Civil Procedure Fall 2020

*Pennoyer vs. Neff*, the Story<sup>1i</sup>

Our story begins with a young man, Marcus Neff, heading across the country by covered wagon train, presumably to seek his fortune. Neff left Iowa in early 1848 at the age of 24, joining a wagon train of five companies of wagons. At that time, the question of Oregon statehood was being considered in Congress, and there was much speculation that large tracts of the vast, undeveloped land of Oregon would be made available to homesteaders. The speculation proved to be correct and Marcus Neff was one of the earliest settlers to claim land under the Oregon Donation Act.

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

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

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<sup>1</sup> Wendy Perdue, *Sin, Scandal, and Substantive Due Process: Personnel Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev 479 (1987).

government was notoriously slow in processing claims, and ten years passed before Neff received his land patent.

Early in 1862, Neff made the unfortunate decision to consult a local Portland attorney, J. H. Mitchell. Although the nature of the legal services is unclear, Neff may have consulted Mitchell in an attempt to expedite the paperwork concerning his land patent. Neff was illiterate, and at the time he consulted Mitchell, the government had still not issued his patent. Mitchell, moreover, specialized in land matters. In mid-1862, several months after Neff first consulted Mitchell, another affidavit was filed on Neff's behalf. Several months thereafter, Neff received a document from the government certifying that he had met the criteria for issuance of a patent.

Whatever Neff's reasons for seeking Mitchell's legal services, he certainly could have done better in his choice of lawyers. 'J. H. Mitchell' was actually the Oregon alias of one John Hipple. Hipple had been a teacher in Pennsylvania who, after being forced to marry the 15-year-old student whom he had seduced, left teaching and took up law. He practiced with a partner for several years, but apparently concluded that it was time to move on to greener pastures. Thus, in 1860 Hipple headed west taking with him four thousand dollars of client money and his then current paramour, a local schoolteacher. They made their way to California where Hipple abandoned the teacher, ostensibly because she was sick and her medical expenses had become too burdensome, and moved on to Portland, Oregon. There, using the name John H. Mitchell, he quickly established himself as a successful lawyer, specializing in land litigation and railroad right-of-way cases. He also remarried without bothering to divorce his first wife. As one historian has observed, Mitchell's success as a lawyer cannot be attributed to either intellectual or oratorical skills; rather, his strengths included exceptional political instincts, a generous disposition, and a friendly handshake. What he lacked in ethics and ability, he made up for with persistence and desire for success. In his subsequent political career, he became known as a man whose political ethics justified any means that would win the battle.

Mitchell's ethical standards as a lawyer were no higher than his ethics as a politician. As the Oregonian observed: 'His political methods are indeed pitched on a sufficiently low scale, but not below his methods as a lawyer.' Given Mitchell's reputation, one might at least question whether Neff in fact owed the money Mitchell claimed was due. Neff paid Mitchell \$6.50 but Mitchell claimed he was owed an additional \$209.36. Although Mitchell's services were rendered between early 1862 and mid-1863, Mitchell waited several years to take legal action against Neff, perhaps purposely waiting until Neff left the state.

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

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

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

in Oregon, and thus probably arrived in Oregon shortly before Mitchell sought the writ of execution. Interestingly, although Mitchell had alleged that Neff could not be found, the Oregon land office apparently had no difficulty delivering the patent to Neff.

Under Oregon law, to secure execution one had to obtain a writ of execution and post and publish notice for four weeks. All of the steps were apparently taken. On August 7, 1866, the property was sold at a sheriff's auction for \$341.60. Notably, the buyer was not Sylvester Pennoyer, as the Supreme Court opinion and commentators have implied. The property was purchased by none other than J. H. Mitchell, who three days later assigned the property to Sylvester Pennoyer. Pennoyer had much in common with Mitchell. He, like Mitchell, was a Portland lawyer, involved in politics, and active in real estate speculation. There is no evidence available on whether Pennoyer had actual knowledge of, or connection to, the original action, though it is certainly possible. Moreover, since he took title through Mitchell, it is not clear that he should have been treated as a true innocent third party purchaser.

It appears that for the next eight years Pennoyer peacefully minded his own business, doing those things one would expect of any property owner—he paid the taxes, cut some timber, and sold a small portion of the land. The peace was broken in 1874 when Neff reappeared on the scene. The evidence suggests that Neff began making trouble for Pennoyer several months before he actually filed suit, because in July of 1874 Pennoyer began taking steps to protect the validity of his title. It seems that local officials had been somewhat lax in the matter of title when the property was originally sold at the sheriff's auction. The sheriff's deed was not signed until five months after the sale, and then it was signed by the deputy sheriff, not the sheriff. In an apparent effort to ensure that this carelessness was not the basis for an attack on his title, Pennoyer obtained the signature of the then current sheriff on a second deed dated July 21, 1874. Not taking any chances, three days later he acquired still a third deed, this one signed by the man who had been sheriff at the time of the sale. But all the precautions were for naught; ultimately, Pennoyer was evicted.

The case of *Neff v. Pennoyer* was filed in federal court on September 10, 1874, and the ensuing battle confirms that vindictive and protracted litigation is not a recent phenomenon. Neff apparently had prospered in California. He had settled in San Joaquin with a wife and family, as well as servants, property, and livestock. He was prepared, however, to leave his home in California and move himself, his wife, and his daughter to Oregon for a year to pursue his various legal actions.

### The lawsuits

1. Mitchell sues Neff for what? What actions does Mitchell take to get this lawsuit going?
2. What does the court decide in *Mitchell vs. Neff*? What are the reasons behind its holding?
3. What does Neff do? Is this the same as an appeal?
4. Who is Pennoyer?
5. How does it get to the United States Supreme Court? What does the Supreme Court think of the lower court's rationale?
6. What does the Supreme Court hold? Why?

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<sup>i</sup> This story is taken from Wendy Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev. 479 (1987).