

HAMLIN UNIVERSITY SCHOOL OF LAW--CIVIL PROCEDURE I

Professor Pielemeier

2008-2009

Initial Syllabus

Advance Assignment

For our first class on Wednesday, August 20, read the first seven plus pages of this Syllabus and the material assigned for Unit One, noted on page 8.

Required Course Materials

(1) Civil Procedure, A Contemporary Approach, by A. Benjamin Spencer (Second Edition, 2008), published by Thomson/West.

In a sleeve inside the back cover of this book, you will find a card with a code enabling access to an online version of the book. I encourage you to register for this online version and to experiment, to some degree, to determine whether this supplemental resource it is helpful to your style of learning. I anticipate that use will probably vary, with some of you using it extensively, while others may use it very minimally.

(2) Federal Rules of Civil Procedure 2008, Compiled by Kevin M. Clermont, published by Foundation Press.

(3) TWEN. I will be setting up an electronic course web site on TWEN (“The West Education Network”) to facilitate communication outside of class. All students in the course must sign on to the web site and provide an e-mail address no later than our second class session. To access TWEN, you will need a Westlaw password, which will be provided to you during orientation or, at the latest, during our first class. You can sign on by going to <http://lawschool.westlaw.com> and clicking on TWEN courses. Then click on Add/Drop Courses and you should then see all Hamline courses that have a TWEN page, where you can add this course.

(4) Supplemental photocopied materials to be made available on a periodic basis (probably three packets each semester). A charge of \$25.00, to be billed to your student account, will be made for these materials to cover the cost of copying. This charge will cover the cost of supplemental materials for both Civil Procedure I and Civil Procedure II.

Office Hours and E-Mail

Office hours are posted on my office door (Room 225W), and I will usually be in during those hours. In addition, I am normally here throughout the day on many days, so feel free to ask questions at other times as well. My preference, however, is not to be disturbed during the hour preceding one of my classes.

You can reach me by E-Mail at:

Jpielemeier@gw.hamline.edu

I am in the process of constructing a Civil Procedure page behind my "Home Page" on Hamline's World Wide Web Pages. It contains links to litigation oriented resources, and recent old examinations. You may access this web page at

<http://www.hamline.edu/personal/jpielemeier/civpro.html>

I will also provide a link on the TWEN home page for this course.

Supplemental Reading

It is not necessary to do any reading beyond that assigned. In fact, thoughtful consideration of the assigned materials is preferable to seeking other material, and I would not encourage extensive reference to outside materials. For those who want to go beyond the assigned materials, there is no single text or hornbook to recommend. Three that may be helpful are: (1) Glannon, *Civil Procedure, Examples and Explanations* (Aspen, 6th edition, 2008); (2) Friedenthal, Kane and Miller, *Civil Procedure* (West, 4th ed., 2005); and (3) James, Hazard, and Leubsdorf, *Civil Procedure* (Foundation, 5th ed., 2001) (available in both hard cover and soft cover). In addition, *Moore's Federal Practice* and Wright, Miller, and Cooper's *Federal Practice and Procedure*, both multi-volume treatises in the library, may be helpful. Also, the articles and books cited in the casebook have been carefully chosen and should afford a good discussion of the various questions at issue if you desire to read further. I would suggest that you refer to a law dictionary (or the online version of your casebook if a word is underlined) if you see a word in the assigned material that you do not understand.

Goals and Objectives

The basic goals and objectives of this course are to develop an understanding of the issues, rules, and policies involved in the process of civil (as opposed to criminal) litigation. They are also to

develop proficiency in legal methodology and problem solving. Coverage in this Fall Semester course in Civil Procedure I will include the first six chapters of the Casebook, as well as supplemental material.

Preparation and Attendance

You are expected to be prepared for discussion of the materials assigned for each day. If you are called upon and are not well-prepared, this will result in a waste of your classmates' time as well as your own. Thus, if for any legitimate reason, you are not well-prepared, please let me know *before* class begins, and you will not be called upon during that class period.

As the Academic Rules and Attendance Policy provide, regular and punctual class attendance and preparation are required. As a general rule, I consider absences in excess of five class hours per semester to be excessive. Since this class will meet two days a week for 75 minutes each, I will consider absences in excess three classes to be excessive. Potential sanctions for failure to meet these requirements are set forth in the HUSL Academic Rules and below under "Grades." If the permitted number of absences is exceeded, opportunities to pursue "make-up work," as opposed to being withdrawn from the course, will not be granted absent a strong justification for the excessive absence, such as incapacitating illness or injury, death in the family, childbirth, or analogous circumstances. Such make-up work, if permitted, will ordinarily be in the form of a required paper.

At my discretion, lateness to class may be deemed an absence. Please be on time (subject to snow emergencies) and remain in the classroom during each class session unless illness requires that you leave.

Technology Policy

You may use laptop computers or other electronic devices in class to take notes and access course related materials. You should not use your laptop or electronic devices for other purposes.

In addition to the usual courtesies due to your classmates, refrain from text-messaging and email, using cell phones, pagers, or any other communication device. Refrain also from displaying wallpaper, screen savers, or other material on your computer screen that can reasonably be expected to distract your classmates.

Grades

First year Civil Procedure consists of two three credit courses, one in the fall and one in the spring. A separate written examination and grade for three credits will be given each semester. In Civil Procedure I, the final examination will be the exclusive basis for your grade. The focus on the exams will be on topics covered during the semesters they are given.

As you will see, however, topics covered throughout the course will have various degrees of relationship with each other. Because some topics covered during the spring semester require some understanding of topics covered during the first semester, the spring exam will assume that you have a competent understanding of topics covered during the first semester.

The only qualifications to the foregoing are as follows: The right is reserved pursuant to the Academic Rules (Rule 1-107 C.5(a)), to instruct the Registrar's Office to enter a grade as much as one grade increment lower (e.g., from a B- to a C+) than your exam grade for repetitious apparent lack of preparation by a student without legitimate excuse. ("Legitimate excuse" entails such matters as illness, childbirth, or family emergencies. It does not include such matters as working on a paper or some other project for another course).

Assignments

In Civil Procedure, supplemental materials such as these will contain the assignments for several "units" of the course. I used to call these "units" "classes." That, however, was misleading because the amount of time given in class to each unit varied. The units are now grouped more by subject matter than by the amount of time likely to be spent on them.

I will let you know at the end of each class session the actual assignment for the next class.

Although on occasion specific rules or statutory provisions will be stated as part of the next assignment, I will usually only assign page numbers. You should assume that rules, statutes, and constitutional provisions mentioned in the assigned pages are also part of the assignment, and you should therefore study them as well as the assigned pages. (Such provisions appear in your Federal Civil Rules Supplement: item number (2) of the required materials.)

The remainder of this document contains additional introductory material that is identical to what will appear in the supplemental handout, as well as the assignments for Units 1, 2, and 3.

For our first class session on Wednesday, August 20, prepare for the material assigned later in this handout for Unit 1.

A Note on The Federal Rules

A great portion of the course will be devoted to a study of the application and interpretation of the Federal Rules of Civil Procedure. These are the rules applied in the Federal Courts. The Federal Court system is a separate system which exists in addition to a separate system of State Courts in each State. In many cities, the Federal Courts are in a building just down the street from where the State Courts are sitting. In several situations, a party may have a choice whether to file a lawsuit in State Court or Federal Court. During portions of the first semester, we will be studying the "types" of cases that may or must be filed and determined in Federal Court.

Although most lawsuits are in fact filed in the State Courts, we will be focusing on the Federal Rules for two reasons. First, they apply to Federal Courts sitting in all the states and therefore will be pertinent regardless of where a student decides to practice. Second, while there are often some minor differences, a majority of the states have adopted Rules of Procedure to be applied in their State Court System that are modeled after the Federal Rules. As such, a study of the Federal Rules is the best means by which to discuss procedural issues which will arise in both Federal and virtually all State Courts.

Although they will not be extensively discussed because of wide variations, you should be aware that almost all Federal Courts (both District Courts and Courts of Appeals) have promulgated local rules which supplement (usually only in minor respects) the Federal Rules. The same holds true in many State Court systems in that in addition to following a set of Rules of Civil Procedure that has statewide application, courts within a more limited geographical area (such as all those within a given city) may have a set of local rules which supplements the state rules and which applies only to lawsuits filed in courts within that area. (Minnesota also has an additional set of "General Rules of Practice for District Courts," which are of statewide application and establish some of the more practical details involved in litigation). In addition, in some areas individual judges have issued "Standing Orders" which describe some of the more specific details of practice before an individual judge. An attorney should not practice before any Court without determining whether such local rules or standing orders exist and their effect.

Furthermore, at times special rules will be applicable to special types of proceedings. For example, a separate system of rules is used in federal Bankruptcy proceedings, even though such proceedings are in fact "civil" actions which are determined by the Federal Courts. Such special rules can normally be found by reference to the statutes that govern the type of proceedings involved, and they supersede the general procedural rules on those matters that they cover.

In addition to "Court Rules" which generally are printed in pamphlets such as the one you have purchased for this course, many procedural matters are governed by statutes and, less often, a constitution. Such statutes can usually be found by referring to the names of various "chapters" of state statutes or statutory index references to the subject matter involved. In pursuing any course of action, an attorney should always consult the statutes of the state in which he or she is practicing (or, if a federal claim is involved, the federal statutes) to determine whether any such statutes are applicable.

Many of the assignments in this course will include a reading of one or more Federal Rules. However, you should be aware of the fact that we will not be covering all of the rules. Rather, we will focus on the more major issues involved in civil procedure and the rules that are pertinent to these issues. Even though some of the rules will not be specifically assigned, however, you should at some point during the year skim through all of the rules.

Your Federal Civil Rules Supplement has two versions of the federal rules. On December 1, 2007, massive changes to the rules became effective as a result of a “restyling” project. This project was a lengthy process designed to clarify, simplify, and modernize the language of the rules without changing their meaning. These restyled rules, now in effect, appear beginning on page 13 of your Rules Pamphlet. The preceding version of the Rules appears beginning on page 801 of your Rules Pamphlet. When covering the Rules, your study should focus on the current (restyled) version of the rules. We may, however, occasionally do some comparison between the older version and the restyled Rules.

Sample Documents

A separate packet accompanying this document contains a number of sample documents. We will not discuss these samples extensively in class, although we may refer briefly to some later with a critical eye. However, you should look them over briefly no later than the end of the first two weeks of classes.

They are included to provide you with examples of what some documents used in litigation “look like.” They are more simplistic than one would ordinarily see in substantial litigation, but they generally would be deemed sufficient and should serve the purpose noted above.

The documents, while reflecting a hypothetical case filed in a federal court in Minnesota, are in a form that is typical in federal courts throughout the United States. Slight variations in the way things are done exist from state to state (and even among different courts in the same court system within a given state), but such variations can easily be ascertained by consulting local court rules and local attorneys. These documents include some brief “NOTES,” which elaborate on their use and purposes.

INTRODUCTION

One possible definition of a Civil Procedure course is "A Study of the Mechanics of a Civil Law Suit." In a sense, however, this definition is misleading in that the means by which the substantive rights and duties of litigants are implemented, through the courts or otherwise, are not mechanical in the sense of being predetermined by rigid rules. Rather, the "rules" of civil procedure provide only a framework within which an attorney representing a client in litigation must work. In general, the manner in which a lawsuit will proceed is determined by the attorneys for the litigants, not by the rules themselves. The rules are merely tools which an attorney may or may not use or invoke, depending on the facts and circumstances of a given case.

This course will focus primarily on the procedure used in the courts. Less formal procedures (generally referred to as Alternative Dispute Resolution, or "ADR" Processes) are also often used to resolve disputes. Your casebook has a relatively brief amount of material on ADR in chapter 9, and it's possible that I will supplement them in Civil Procedure II. (Hamline offers several upper class courses in this area.)

The procedural mechanisms utilized in alternative dispute resolution systems often differ to a great extent from those used in the court system, in part because it has often appeared that the procedure used in the courts is not the best method of resolving certain types of problems. In fact, Rule 114 of the Minnesota General Rules of Practice for District Courts, adopted in 1994, requires that the parties to many actions filed in court make an *attempt*, before extensively proceeding with the normal litigation process, to resolve the matter through ADR processes. When studying the materials in this course, you should query whether there might be better ways than those actually employed to resolve the dispute at hand. Questions of this sort have led to the establishment of less cumbersome alternative dispute resolution systems.

Notwithstanding the existence of these other mechanisms, the most typical way of resolving disputes that are not informally settled is through the use of the courts, and it is for this reason that "court" procedure will be the focus of our study. Because most cases that are filed are settled before an actual trial, resulting in the vast majority of the litigator's time being spent on issues that arise during that time period, most of the course will be devoted to such pretrial issues.

The importance of a solid knowledge of Civil Procedure to the practice of law cannot be understated. Even if an attorney never gets *directly* involved in the handling of a lawsuit (and many with various specialties do not), it is the rare attorney who never comes into *some* contact with litigation, and a knowledge of procedure is essential to an understanding of what is taking place and communicating with the attorneys who are handling the litigation. A good understanding of procedure is also frequently necessary to understand fully cases that set forth legal principles in numerous areas of the law. It is even more important to persons who will be directly involved with litigation.

As was stated earlier, the "rules" of procedure are a framework within which the attorney involved in litigation must work. They are starting points and tools for the resolution of disputes. However, often the manner in which a given rule should be interpreted or applied in a given case

is not clear. As such, you should concentrate upon learning the purposes of the rules and developing the skills of arguing how the rules should be applied. In doing so, think about what goals we should seek to attain (those mentioned in Rule 1 and others) in building a system for the resolution of disputes, taking into account the constitutional structure of the United States.

ASSIGNMENTS AND SUPPLEMENTAL MATERIALS

For our first class session on Wednesday, August 20, prepare for the material assigned below for Unit 1.

Unit Number 1—A general introduction.

Assignment: The materials in this supplemental packet to here, Note 1 below, the excerpt from the Landsman article following it, and Casebook pages 1-20.

1. Before we begin our coverage of this subject, it will be helpful to reflect on what some of the goals of our dispute resolution system should be. Assume you are one of the pioneers in setting up a new society. You have concluded that one aspect of that society should be a governmental mechanism, or system, for resolving disputes that persons seem unable to resolve through informal discussion and compromise among themselves.

What should be the goals of that system? In thinking about this, bear in mind that in many situations, the persons involved may have disagreements about the underlying facts leading to the dispute, as well as disagreements as to how the applicable substantive law applies in its resolution.

Rule 1 of the Federal Rules of Civil Procedure (page 17 of your Rules Supplement) suggests that “the just, speedy, and inexpensive determination” of legal controversies should be goals of the system. Few, if any, would dispute that notion. But can we be any more specific? See if you can think of three more specific characteristics or goals of a system for resolving disputes that you think would be appropriate. We will have some discussion of these goals in class.

The following article excerpt by Stephan Landsman summarizes the adversary system, which forms the background of civil dispute resolution in United States courts today. The twenty some years since the article was published have seen some moderation of the system’s components, and some modern alternative dispute resolution methods depart from its structure substantially. In reading the excerpt, give some thought to whether the adversary system is likely to achieve goals you think are appropriate.

Stephan Landsman, A Brief Survey of the Development of the Adversary System, 44 Ohio State Law Journal 713, 713-717, 736-739 (1983). Copyright 1983, The Ohio State Law Journal. Reprinted with Permission.

I. INTRODUCTION

Since approximately the time of the American Revolution, courts in the United States have employed a system of procedure that depends upon a neutral and passive fact finder (either judge or jury) to resolve disputes on the basis of information provided by contending parties during formal proceedings. This dispute-resolving mechanism is most frequently termed "the adversary system." Whether to continue relying upon the adversary system has become a subject of intense debate in the United States. Champions of change, from the Chief Justice of the United States Supreme Court to the American Bar Association Commission on Evaluation of Professional Standards (the Kutak Commission), have challenged adversarial principles and proposed an array of reforms. Chief Justice Burger has suggested that the various elements of the adversary system deny justice to litigants, impair faith in the courts, and raise the specter of a "breakdown" of the judicial machinery. He has suggested substantial modification of the system to deal with these problems. The American Bar Association Commission shares Chief Justice Burger's concerns. In its Model Rules of Professional Conduct, first presented in January 1980, it proposed revisions of the lawyer's code of ethics designed to substantially reduce the adversarial nature of attorney behavior.

The adversary system and its constituent parts are taken for granted in America today. The implications of reliance on an adversarial mechanism have been considered only infrequently. One way to improve our understanding of the system is by reviewing the history of its development: this review can assist in identifying the values the system was intended to serve and the methods by which various procedures came to be incorporated into that system. Unfortunately, legal historians have not focused their attention on the development of the adversary system. Not even the date or the manner of its establishment has been authoritatively fixed. This Article will attempt, through the use of secondary sources, to delineate approximately when adversarial procedure came into use and to relate its rise to contemporaneous social and political events. It is hoped that the insights gained in this effort will help clarify the aims and worth of adversary procedure.

II. THE ADVERSARY SYSTEM DEFINED

The first step in the historical quest is to define the meaning of the term "adversary system." Adversary procedure should not be viewed as a single technique or collection of techniques; it is a unified concept that works by the use of a number of interconnecting procedures, each of real importance to the process as a whole. The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.

Like any brief definition of a complex subject, the foregoing description of the adversary system fails to indicate some of the most important principles and practices inherent in adversary methodology. To present an accurate picture, the key elements in the system -- utilization of a neutral and passive fact finder, reliance on party presentation of evidence, and use of highly structured forensic procedure -- must be described more fully. This additional information will be particularly helpful in determining when the adversary system became a fully integrated entity.

A. Neutral and Passive Fact Finder

The adversary system relies on a neutral and passive decision maker to adjudicate disputes that have been aired by the adversaries in a contested proceeding. He is expected to refrain from making any judgments until the conclusion of the contest and is prohibited from becoming actively involved in the gathering of evidence or in the parties' settlement of the case. Adversary theory suggests that if the decision maker strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence.⁸

Adversary theory further suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society that the judicial system is trustworthy; when a decision maker becomes an active questioner or otherwise participates in a case, society is likely to perceive him as partisan rather than neutral. Judicial passivity thus helps to ensure the appearance of fairness.¹⁰

⁸ Herein the term "passivity" will be defined as a significant degree of judicial deference to the parties in the management and presentation of litigated questions. However, it is not intended to connote the quiescence of a "well-behaved child, [who] speaks only when spoken to," Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30, 41 (H. Berman ed. 1971). The requirement that fact finders be both passive and neutral frequently has been viewed as fundamental to the adversary system. See C. CURTIS, *IT'S YOUR LAW* 1, 82 (1954); But see 9 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2551 (Chadbourn rev. 1981) (asserting that passivity was an historical accident imposed on the judiciary because of the enmity of the 18th and 19th century electorate); Langbein, *supra* note 5, at 284-300 (remarking the long-standing English tradition of judicial activism that endured at least until the middle of the 18th century).

Active inquiry has frequently been identified as a threat to neutrality. See, e.g., W. GLASER, *supra* note 4, at 4; Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decision-Making*, 86 *HARV. L. REV.* 386 (1972).

¹⁰ One implication of insistence on decision-maker neutrality and passivity is that it favors the use of lay juries rather than professional judges. Judges, who are constantly called upon to make rulings and otherwise direct the contest, become deeply involved in the management of lawsuits. Their passivity and neutrality are likely to be strained as they perform these functions.

B. Party Presentation of Evidence

Intimately connected with the requirements of decision-maker passivity and neutrality is the procedural principle that the parties are responsible for production of all the evidence upon which the decision will be based. This principle insulates the fact finder from involvement in the contest. It also encourages the adversaries to find and present their most persuasive evidence and, therefore, affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof. Moreover, it focuses the litigation upon the questions of greatest importance to the parties, thereby increasing the likelihood of a decision tailored to their needs.

Because of the potential complexity of legal questions and the intricacy of the legal mechanism, parties generally cannot manage their own lawsuits. Rather, they, and the adversary system, have come to rely upon a class of skilled professional advocates to assemble and present the testimony upon which decisions will be based. The advocates are expected to provide the legal skills necessary to organize the evidence and formulate the issues.

C. Highly Structured Forensic Procedure

Elaborate sets of rules to govern the pretrial and post-trial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics) are all important to the adversary system. Rules of procedure produce a climactic confrontation between the parties in a single trial session or set of trial sessions. This confrontation yields the evidence upon which the decision will be based and diminishes the opportunity for the fact finder to undertake a potentially biasing independent investigation.

The evidence rules protect the integrity of the testimonial segment of adversary proceedings. They prohibit the use of evidence that is likely to be unreliable and thereby insulate the trier from misleading information. These rules also prohibit the use of evidence that poses a serious threat of exciting unfair prejudice against one of the parties. By strict enforcement of this prohibition, the adversary system seeks to preserve the neutrality and passivity of the decision maker. Moreover, rules of evidence enhance the power of the attorney to control the fact-presentation process by providing her with a precisely formulated set of principles for determining the admissibility of each piece of evidence. Thus the rules confine the authority of the judge to manage the proceedings: judges are not free to pick and choose the evidence they think most appropriate, but are bound to obey the previously fixed evidentiary prescripts.

See, e.g., Frankel, *The Adversary Judge*, 54 *TEX. L. REV.* 465 (1976). Except in cases of unusual notoriety, juries are unlikely to face similar strains. Further, the corporate nature of the jury, the availability of voir dire, and the use of peremptory challenges help to insure a level of jury neutrality that cannot be assured when an individual judge sits as fact finder. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); D. LOUISELL & H. WILLIAMS, *THE PARENCHYMA OF LAW* 57-58 (1960); Powell, *Jury Trial of Crimes*, 23 *WASH. & LEE L. REV.* 1, 7 (1966).

Because the highly competitive nature of adversary procedure may tend to promote a win-at-any-cost attitude, the adversary system employs a set of ethical rules to control the behavior of counsel. To ensure the integrity of the process, tactics designed to harass or intimidate an opponent, as well as those intended to mislead or prejudice the trier of fact, are forbidden. In addition, the rules of ethics are designed to promote vigorous adversarial contests by requiring that each attorney zealously represent his client's interests at all times. To ensure zeal, the ethical rules require attorneys to give their clients undivided loyalty.

Reliance on elaborate sets of rules to structure the adversary process has led to the establishment of courts of appeals, which ensure that litigants and judges comply with mandated procedures. Appellate judges review the records of trial proceedings and determine whether the various legal prescriptions have been obeyed. If error is found, the appellate courts are empowered to redress the harm done. Appellate review also encourages attorneys and judges at the trial level to adhere to the requirements of the law in order to avoid reversal on appeal.

E. Reasons for the Development of the Adversary System

Although it is not clear why adversary process came into its own during the eighteenth and nineteenth centuries, a variety of social and economic considerations may have influenced its development. The 1700s and 1800s were a time of intense social and economic ferment. They were the centuries of the American and French revolutions and of dramatic industrialization. The traditional bases of wealth and power in English society -- real property and aristocratic position -- were steadily undermined by growing profits from trade and manufacture. Those who profited in the new industries swelled the ranks of the middle class, and as this class grew in size and strength, its champions argued that fundamental changes should be made in the organization of society. Among the changes sought was a significant extension of the franchise. The democratization of the electorate achieved during this era had the effect of accelerating the shift of power from the landed gentry to urban, energetic, nonaristocratic groups.

The forces that sought voting rights also pressed for expansion of individual political and economic freedoms. The freedoms of speech, assembly, and petition were all vigorously asserted and given wider recognition. On the economic scene, freedom was associated with the dissolution of social restraints on wages, prices, and profits.¹⁷³ It was also associated with the

¹⁷³ See W. NELSON, *supra* note 172 [omitted], at 143.

The shift in the philosophy of contract was merely one part, however, of a broader shift in men's understanding of the role of law in the economy. In the prerevolutionary period the function of law had been to render the distribution of wealth stable by granting individuals property rights in the wealth and by making

principle of freedom of contract, which allows each person the right to enter into whatever agreements he thinks proper. Economic competition and social change rather than stability became the hallmarks of society. The disappearance of the old restraints released forces that transformed society. Those who could function effectively in the market place, like the entrepreneurs and the business corporations, grew in prominence, while individual laborers faced greater privation and suffering than they had ever known before.

The demise of stability led to a new legal situation. The numbers and types of disputes that were brought to the courts grew significantly. Amidst all the conflict and change, it is likely that a desire arose for a legal mechanism that could meet the problems of the day and yet preserve some continuity with the more stable past. The adversary mechanism met these requirements. It was an outgrowth of procedures that had been used for several hundred years in England and America. The idea of a neutral and passive fact finder was not a radical departure, but rather the extension of trusted and traditional methods. At the same time, the adversary courts were receptive to new claims. They allowed the parties to define the issues and the evidence and, therefore, provided a forum for questions that no other institution in society would hear or resolve.

The special needs of eighteenth and nineteenth century society accentuated the adversarial aspects of Anglo-American judicial procedure. The increased number of participants in the legal process and their affiliations with different social and economic classes created a need for a demonstrably neutral mechanism. The best means to demonstrate neutrality was by using a disinterested and passive fact finder. The jury readily filled this need. Respect for the principle of neutrality made the courts a credible dispute-resolving mechanism. It also tended to make the courts an open forum to which each new social group could come seeking vindication of its rights. This tradition of openness to new claims of right has continued into the twentieth century.

The element of party control of proceedings apparent in English procedure from the earliest times was also attractive to the intensely individualistic polity of the eighteenth and nineteenth centuries. The English and American judicial process made increasing allowances for each party to run his lawsuit as he saw fit, to voice his claims, and to select his evidence. The judicial decision was directly tied to the presentations of the parties. Clearly, these facts of procedure were particularly suited to an age preoccupied with the establishment of individual political and

it difficult for them to lose it in exchange transactions. After the Revolution property ceased to be viewed as a man's stable portion of the community's resources. Instead, his property became his starting stake in a rapidly changing economy -- which he could use as he wished, by combining with other entrepreneurs or by making sharp bargains so as to promote his own aggrandizement. Massachusetts, in short, had been transformed from a society where men with stable places in the economy concentrated on pursuing ethical ends to a society where economic place was uncertain and many men used their wealth chiefly for the purpose of acquiring even greater wealth. The prerevolutionary legal system, in which community was the primary social value, had largely been destroyed. A new system emphasizing rugged individualism as its fundamental value had begun to take its place.

Id.

economic rights.

These tendencies toward adversarial procedure were further sharpened by the lawyers and judges who controlled the legal system. Members of the bench and bar in both England and the United States were practical men with broad worldly experience. They knew their society and shared the social and economic values it was coming to adopt. Undoubtedly, in their legal activity they attempted to respond to the needs they perceived. Further, the adversarial process was in the interest of lawyers as a group. It created more work for attorneys because increasing numbers or potential litigants availed themselves of legal advice. For all the above reasons, adversary procedure was the right procedure for the times; it did not pose a threat of radical change, but could, in a credible manner, accommodate the demands of the forces of change at work in English and American society.¹⁷⁹

IV. CONCLUSION

As examination of the history of the adversary system provides a variety of insights about the values it vindicates and the reasons for its present structure. While the adversary system as a whole did not begin to coalesce until the 1700s, its component parts had been developing for centuries. What made the system come together when it did is not easy to say. However, its synthesis is clearly associated with the social and economic changes that occurred between 1700 and 1800. These changes included the rise of the modern industrial state, the acceptance of an expansive doctrine of individual liberty, and the demise of the static social tranquility that had marked both England and America in the preceding epoch. From all this, some ideas about the values served by the adversary system can be gleaned. These values include freedom from restraint on economic and political action, tolerance of change in both business and social relations, and willingness to adjudicate questions not previously considered by society.

Despite the great changes that are reflected in the rise of the adversary system, Anglo-American legal history reveals the remarkable inclination of both English and American society to preserve existing judicial institutions. Rather than fabricate new procedures, jurists and lawyers in the English-speaking world repeatedly adapted existing processes to new needs. This is strikingly apparent in the development of the jury: in the period between 1300 and 1800

¹⁷⁹Although it is not the purpose of this Article to address the decline of the adversary system, it should be noted that in a wide range of settings courts in the United States have abandoned previously utilized adversarial techniques. The decline of the adversary system is not a trend that began only recently but is the outgrowth of social and economic forces that have been building for a considerable length of time. The individualistic adversarial approach is, to a significant degree, inconsistent with what Max Weber has described as the fundamental requirements of modern "bureaucratic" government and industry -- that official business be dispatched with "utmost speed, precision, definiteness, and continuity." M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 350 (M. Rheinstein ed. 1954). Adversarial process is slower and more individualized than a variety of other procedures. See Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 499-501, 525-28 (1980). These characteristics and a number of other considerations have made the adversary system a target of reformers. For a discussion of the nature of the decline of the adversary system, see *id.*

the jury was transformed from an instrument of royal inquiry to a neutral and passive fact finder inclined to protect individuals from government overreaching. This significant change in objective was accomplished while jury procedure retained much of its original structure.

The tendency to preserve the existing legal machinery may have served to insulate British and American society from the worst excesses of government tyranny. Again, experience with the jury provides a convenient example. The existence of jury procedure had the effect in the thirteenth century of blocking introduction of inquisitorial methods into England. Thus, by adhering to the existing legal framework, England avoided significant reliance on the rack as a means of seeking justice.

Unwillingness to change has not always been felicitous for English and American courts. It led to excessive tolerance of delay and technicality. However, the historical lesson concerning the value of preserving traditional legal methods should not be overlooked.

Reminder: Read pages 1-20 of the casebook.

Unit Number 2: Personal Jurisdiction–Early Principles

Assignment: The brief excerpt from Hall's Specialties (below), notes 1-11 below, Article IV, Section 1 and Amendment XIV, section 1 of the U.S. Constitution (on pages 508-509 and 510 of your Rules pamphlet), and 28 U.S.C. section 1738 (pages 591-592 of your Rules pamphlet) (these provisions are all pertinent to Pennoyer, the primary case assigned for today), casebook pages 21-36., and note 12 below.

HALL'S SPECIALTIES, INC. v. SCHUPBACH

758 F.2d 214 (7th Cir., 1985)

EVANS, District Judge.

An Indiana resident read an ad in an Indiana publication that offered a specific item (a 1963 Trinity propane anhydrous ammonia tanker transport) for sale. The ad stated that the seller was from Illinois. Mr. Indiana, in direct response to the ad, telephoned Mr. Illinois to discuss the tanker, and Mr. Illinois sent pictures and literature about the tanker to Mr. Indiana. Mr. Indiana traveled to Illinois, examined the tanker, decided to purchase it, did so, and transported it back to Indiana. The tanker soon proved to be defective (the fact that it ultimately blew up is not important on the jurisdictional issue), and this suit essentially for breach of warranty and rescission of the sales contract was born.

Now, one would think that in a rational system, especially one that seeks (or should seek) clarity and definiteness, experienced lawyers could simply and with conviction unanimously answer Mr. Indiana's question: "Can I sue the guy who sold me the tanker here in Indiana?" But alas we know, to our embarrassment, that the only honest answer the lawyer can probably give is a "Gee, I can't say for sure."

NOTES

1. The short excerpt from Hall's Specialties, which you just read, is included simply as a "warning"--to encourage and reinforce your tolerance for uncertainty, which you'll need in your study of this and many other topics. Be advised, however, that the last six words of the excerpt are not, standing alone, an adequate answer to an exam question.

2. Four potential issues are involved in determining whether the court where a case is filed is a court that can hear the case: (1) subject matter jurisdiction, (2) personal jurisdiction, (3) venue, and (4) service of process (adequate notice). The existence of each of these four matters is a prerequisite to a court's ability to hear a case. Note, however, that lack of any of the last three prerequisites can be waived by a party who might otherwise contest their existence. Lack of subject matter jurisdiction, however, cannot be waived.

3. Our focus during the next few class sessions will be on personal jurisdiction. Generally speaking, we will be asking, "In what state, or states, can a lawsuit be brought?" Often there will be more than one state in which a suit can be brought. The focus in the cases, however, is whether the particular state in which the suit was brought has personal jurisdiction.

Personal jurisdiction involves the question of the authority of a court in a given state over the parties to the lawsuit. A court will not have the power to render a judgment that is legally binding on a party if the court lacks personal jurisdiction over that party.

Generally, we are concerned only about whether the court has personal jurisdiction over defendants. Caselaw suggests that, by filing the lawsuit, plaintiffs have consented to personal jurisdiction by the court where the suit was filed.

4. When a potential plaintiff comes into your office, thinking he or she has a valid claim against someone from a different state, you will need to consider where the potential defendant or defendants can be sued. Generally, plaintiffs will prefer to sue in their own home town and state, if for no other reason than convenience. However, if you believe that personal jurisdiction over the potential defendants is unavailable or shaky in the plaintiff's home state (and that a motion to dismiss on that ground is therefore likely to be granted), you may need to advise your client to retain an attorney (through you or on the client's own) in another state that is more likely to have personal jurisdiction over the defendants.

In addition, even if you think courts in your client's home state can assert personal jurisdiction over the defendants, you may, in rare cases, conclude after research that the law of another state (which you think may also have personal jurisdiction) may be more favorable to your client than its home state's law, suggesting at first blush that it may be better to sue elsewhere.

(This brings up the following, which is something of a side point but which is something to be aware of in connection with this issue. In some instances, state courts will not apply their own state's law, but rather will apply the law of another state to a suit before them. For example, a traditional, but no longer universally-applied rule, is that a court, wherever located, will apply the law of the state of the accident in ordinary tort suits. Which state's law a court will apply depends on a body of law covered in a three-credit upper class course entitled Conflict of Laws).

If you conclude, however (1) that another state's law would definitely be more favorable to your client than its home state's law; (2) that the other state would apply its more favorable law, and the home state would not; and (3) that other state can probably assert personal jurisdiction over the defendant, then you may well advise your client that it would be better off suing in that other state.

5. In any event, you will want to bring suit in a state where you believe the court can assert personal jurisdiction, because if the defendant successfully moves to dismiss on the ground that the court lacks personal jurisdiction, your client will have to begin over again in another state, assuming it still can (assuming, for example, that the statute of limitations has not run before the second suit is filed).

6. We will be spending a substantial amount of time on personal jurisdiction, for essentially three reasons: (1) the area gets a bit complex; (2) coverage of the area is a good exercise in reading,

analyzing, and synthesizing cases, and developing the ability to do these things effectively is an appropriate goal during one's first semester in law school (bear in mind that although they cover several years, most of the cases we will study are still viable precedent--you should focus on how the cases build upon each other and blend together to form the current body of the law of personal jurisdiction); and (3) motions to dismiss for lack of personal jurisdiction are in fact quite frequent.

7. Our primary focus will be on constitutional limitations on the exercise of personal jurisdiction. Note, however, that there are also statutory limitations. Generally, these statutory limitations are in the form of "long-arm statutes," which exist in each state. Such statutes spell out the circumstances under which each state's courts are authorized to assert personal jurisdiction over defendants served outside the state. As you will see, in most situations the power of a federal court to assert personal jurisdiction is the same as that of the courts of the state in which the federal court is sitting. Thus, the personal jurisdiction of the federal courts is also limited not only by the Constitution, but also by the state's long-arm statute.

The upshot of all this is that two questions are involved in resolving any issue of personal jurisdiction, at least when one is dealing with an out-of-state defendant. The first is whether jurisdiction is permitted by statute (i.e. has the legislative branch given its courts power to exercise jurisdiction over this non-resident?).

If the answer to this first question is "no", then a court doesn't even need to address the constitutional issue. Its governing statutes don't give it the power to assert jurisdiction over the defendant, and that's the end of the matter, even if the court could assert jurisdiction consistently with the United States Constitution. (The U.S. Constitution generally limits the powers of states--nothing says they must exercise all the powers they can exercise).

If the answer to the first question is "yes," however, then one needs to consider whether the assertion of jurisdiction would violate constitutional limitations.

Sometimes the statutory issue will require virtually no analysis. For example, some long-arm statutes explicitly say that a state's courts may assert personal jurisdiction to the extent permitted by the Constitution, and several others have been construed to that effect. Occasionally, however, a long-arm statute might not permit jurisdiction, even though its assertion would be constitutionally permissible.

8. Although Pennoyer v. Neff (page 23) is more than 100 years old, one can trace its roots even further back. In medieval England (the country from which much of our system developed), a civil lawsuit was begun by the sheriff arresting the defendant and putting him in jail awaiting trial. People eventually concluded that this wasn't particularly appropriate in civil cases, and this method eventually gave way to having the sheriff simply serving the defendant with a summons commanding him to appear for trial.

But in both situations (arrest or summons), the sheriff's authority was limited to the boundaries of his county or shire. Finding the defendant in the county or shire and serving him there gave the court jurisdiction over him.

As you should glean from Pennoyer, this sort of territorial limitation on the ability of the court to assert jurisdiction carried over to an extent to American law and still has some impact today. Although we're not concerned with jurisdictional limitations on counties or shires anymore, we are concerned with jurisdictional limitations on the states, which Pennoyer deals with. It sets forth the accepted rules of jurisdiction as of the date of its decision, and is an appropriate starting point for any study of personal jurisdiction.

9. Some terminology. (This note constitutes some elaboration on point b on pages 30-31.) Pennoyer makes distinctions, to an extent, between a state's jurisdiction over persons and its jurisdiction over property. In reading the opinion, you will see some reference to terms like "personal judgment," "suits in personam," and "proceedings in rem." To get some handle on the meaning of these terms, it may be helpful to be aware of the three basic historical types of actions or types of jurisdiction, which are as follows.

a. In personam (or personal): This is the sort of jurisdiction involved in your ordinary lawsuit and will be the focus of the vast majority of our time. A court will be asserting (or may be unable to assert) jurisdiction over the "person" of the defendant. An "in personam" action is one to determine the personal rights and obligations between the parties. (E.g., It may be an action to determine that defendant owes plaintiff certain damages, that defendant has no interest in a certain piece of property, that defendant should be enjoined from certain conduct--an in personam action can involve virtually any alleged rights and obligations between the parties). For example, the first suit in Pennoyer was one for attorney fees. If, in such a case, the court has personal jurisdiction over the defendant and the plaintiff obtains a judgment, that judgment will be binding on the defendant personally, and the plaintiff can have the judgment enforced ("executed") against any of the defendant's property (so long as it's not exempted from execution by state law). In addition, other states must recognize and enforce a judgment of a court with such jurisdiction pursuant to their full faith and credit obligations (Contained in the statutory and constitutional provisions you'll read shortly).

b. In rem. "In rem" actions are actions in which the court is determining rights to certain property, and the court is asserting jurisdiction over that "property." A true "in rem" action will be binding on the "whole world." For example, in some states an action may be brought to "register" property--to sort out who has what interests in a certain piece of property. Such an action will result in the issuance of a certificate listing all the interests the court has determined to exist in the property, and if anyone subsequently claims he or she had an interest in the property at the time of the certificate and that interest is not reflected on the certificate, they will be precluded from successfully asserting that interest--they have lost it because it wasn't proven in the registration proceeding. The proceeding determined what rights everyone in the entire world had in the property, and it is binding on everyone. Generally, true "in rem" actions are provided for by statutes that have very extensive notice provisions.

c. Quasi in rem. This is the type of jurisdiction the court in Pennoyer is talking about when it speaks of jurisdiction "in rem" or jurisdiction based on the attachment of property. It is an action involving the determination of personal rights and obligations between the individual parties (for example, it could be a suit for attorney fees, like in Pennoyer, or it could be an action directly related to the property, like an action to enforce a lien on the property). However, even though the rights being asserted are the same as might be asserted in an in personam action, the court does not have personal jurisdiction over the defendant. Instead, it only has jurisdiction over

certain property of the defendant. In a sense, the plaintiff is suing the property for the obligations of its owner (although the pleadings will generally name the owner as the defendant). A quasi-in-rem action will determine the rights to the property as between the parties. No-one else will be bound by the judgment (in contrast to a true "in rem" action which binds the whole world). And, if there was no personal jurisdiction over the defendant, the judgment is effective (binding) only to the extent of the property. The plaintiff cannot enforce the judgment against any other property, and it is not binding on the defendant to any extent beyond determining its interests in that specific property. As the court in Pennoyer does, many courts have often used the shorthand term "in rem" to describe both true in rem and quasi in rem actions.

After our coverage of Pennoyer, our personal jurisdiction focus will be almost exclusively on in personam jurisdiction. We will return to in rem and quasi in rem jurisdiction in Section D of Chapter 2.

10. Now read the constitutional and statutory provisions contained in the assignment and prepare for class discussion of the assigned pages in the casebook. Read note number 11 below after you have read the first two paragraphs of Pennoyer v. Neff.

11. The underlying facts in Pennoyer's first two paragraphs are a bit cryptic. The first lawsuit (described in the second paragraph) was by Mitchell against Neff. The current lawsuit on appeal was by Neff against Pennoyer for possession of real property. (The title of the case is reversed because at the time of the decision, the first name in an appellate opinion was the name of the appealing party.) How did Pennoyer get the property? The first paragraph indicates he bought it at a sheriff's sale, enforcing Mitchell's judgment in the first suit. Pennoyer's basic contention was that he owned the land pursuant to the sheriff's sale. Neff's basic contention is that the judgment in Mitchell v. Neff was invalid because the court rendering that judgment had no jurisdiction. If the judgment in Mitchell v. Neff was invalid, then the sheriff's sale would have been invalid as well, as the sheriff would have no power to pass title to the property.

In addition to discussing the facts, holding, and reasoning of the case, our class discussion of Pennoyer will include the following two questions, the answers to which you should attempt to ascertain from the case.

(1) At the time of the decision, under what circumstances could a court permissibly assert in personam jurisdiction over a defendant?

(2) Under what circumstances could a court permissibly assert jurisdiction over a defendant's property?

(Note: The Supreme Court held that the requirements for neither type of jurisdiction were met in the case.)

12. (Read after you've finished the assigned pages in the casebook.) Some elaboration on the "special appearance." On page 34 in Hess, the opinion says the defendant ("plaintiff in error") "appeared specially." The online version of the casebook has some elaboration on the term, but the following is a bit more complete.

In some court systems in the United States, mostly longer ago, if the defendant answered a complaint on the merits, it was making a “general appearance,” which waived any objection to the court’s personal jurisdiction. Under such systems, the way one would challenge personal jurisdiction was to make a “special appearance,” appearing only for the purpose of challenging personal jurisdiction, and to have that issue resolved first.

If the court upheld the defense of no personal jurisdiction, the case was dismissed. States differed, however, if the trial court rejected the defense. In some states, the defendant had to choose between allowing a default judgment to be entered against it, hoping to obtain reversal of the jurisdictional ruling on appeal, or contesting the merits, thereby waiving the defense. Other states permitted an immediate appeal from the jurisdictional ruling, without requiring entry of a default judgment.

The “special appearance” is becoming a vestige of the past. Under the federal rules and those of most state courts today, there is no such thing as a “special appearance.” One can include lack of personal jurisdiction with any other defenses in the answer—one doesn’t waive the defense by contesting the merits of the complaint. (One can waive the defense under Rules 12(g) and (h), but those are for another day.)

Unit Number 3: Personal Jurisdiction–International Shoe and long-arm statutes

Assignment: Note 1 below, Casebook Pages 37-49, and note 2 below.

1. International Shoe (page 37) is thought of as a watershed case in the area of constitutional limitations on the exercise of personal jurisdiction. It is really the starting point for modern analysis of the issue. What is the Court's test? Imagine you are an attorney litigating a personal jurisdiction issue just after the case was decided. Does the opinion suggest any "factors" that the Court deems pertinent to whether its test is met, which you should take into account in arguing your jurisdictional issue?

2. A long arm statute hypothetical.

Assume the following case is brought in a court in New York (it was) and the defendant contends that the court lacks personal jurisdiction over him. Putting the constitutional due process issue aside for the moment, should the court find that jurisdiction is authorized by one or more of the provisions in New York's long arm statute (section 302(a) on page 47)?

Plaintiff and his deceased spouse lived in New York. This is a wrongful death suit against a Vermont physician, alleging medical malpractice, resulting in the death of the spouse. The alleged malpractice was that the Vermont physician failed to recognize the cancerous nature of a nodule in the deceased's left arm pit while it was still in a treatable stage.

The deceased was a patient of a New York HMO at a clinic in New York. Her primary physician there referred her to the defendant physician for consultation. The defendant physician saw the deceased at his office in Vermont on eight occasions during the course of a year. After each of these visits, the defendant physician contacted the deceased's New York primary physician by mail or telephone with recommendations regarding the deceased's medical treatment

Although he is licensed to practice medicine in New York, the defendant physician does not maintain an office in New York, nor does he solicit business in New York. His practice is limited to Vermont, where he treats patients in his office and at a Vermont medical center. His office and the Vermont medical center are six miles from the Vermont-New York border and twelve miles from the deceased's New York medical clinic.

The defendant physician frequently sees other New York patients referred to him by physicians at the deceased's New York clinic, but he has contractual arrangements with neither those physicians nor with the HMO. He sees all his patients on a "fee for service" basis, under which his patients are primarily responsible for payment for his services.