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CIVIL
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Theory and
Practice

Sixth
Edition

ASPEN CASEBOOK SERIES

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CIVIL PROCEDURE

THEORY AND PRACTICE

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Civil Procedure

Theory and Practice

Sixth Edition

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To my father, Alfred Silberman (1914–1996), who made all things possible for me. I wish he could have seen this book.

—L. J. S.

To my father, Victor Stein, whose passion for justice and reverence for the rule of law drew all his children to follow his path.

—A. R. S.

To Samuel Emerson Wolff, with the hope that fairness and justice will expand and thrive in the world he has entered.

—T. B. W.

To my mother and father, Amy and Lee Simowitz, and to Emmeline, who daily reminds me to love learning, even (or especially) when it's hard.

—A. D. S.

Summary of Contents

Contents

Preface to the Sixth Edition

With the Sixth Edition, we are joined by Professor Aaron D. Simowitz of Willamette University College of Law as a co-author and full partner on the casebook. Professor Simowitz is a procedure scholar with particular expertise in personal jurisdiction and the enforcement of judgments in both domestic and transnational settings. We welcome him to the family. His arrival is timely, as our treatment of personal jurisdiction in Chapter 2 required a significant update following the Court's decisions in *Ford Motor Company v. Montana Eighth Judicial District Court* and *Bristol Myers Squibb v. Superior Court of California*. We provide a thorough analytical account of the Court's new "arises out of / relates to" doctrine in Chapter 2 and also endeavor to make sense of its ever-shifting references to federalism and sovereignty in the jurisprudence of *in personam* jurisdiction. We have reworked Chapter 5 in modest ways to make it easier for teachers either to use or not use the case study materials contained therein. Chapter 7 offers a new section on defense preclusion shaped around the Court's recent decision in *Lucky Brand Dungarees v. Marcel Fashions*. Chapter 8 expands its discussion of class action doctrine to include recent developments in the implied requirement of ascertainability under Federal Rule 23 and the statute of limitations tolling doctrine of *American Pipe & Construction Co. v. Utah*. Chapter 10 offers a revised and expanded treatment of the Court's jurisprudence under the Federal Arbitration Act. And, of course, we include recent caselaw from state courts and lower federal courts and other developments in notes and discussion throughout the book.

Acknowledgments

The first edition of this book was in development for more than a decade. Acknowledgment of everyone who contributed to that effort would run longer than the text. Several, however, stand out: Sam Estreicher at New York University and Pamela Karlan at Stanford University. Other colleagues provided invaluable feedback and advice: Steve Burbank, Perry Dane, Roger Dennis, Michael Dorf, Rochelle Dreyfuss, Jay Feinman, Larry Kramer, Leo Levin, Andy Lowenfeld, Burt Neuborne, Jack Sabatino, Beth Stephens, and Bob Williams. We are also grateful for the heroic efforts of scores of research assistants at NYU and Rutgers, without whom the book would not have been completed—in particular: Helena Almeida, Susan Ciallella, Vangie Cooper, Michael Jordan, Llen Oxman, Eric Posmantier, Tracy Siebold, Chris Svoboda, and Terry Wit. Richard Kelsey, secretary, was instrumental in ensuring that the work was converted into a formal manuscript.

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CIVIL PROCEDURE

THEORY AND PRACTICE

CHAPTER 1
INTRODUCTION

A. OUTLINE OF A LAWSUIT

1. What Is Civil Procedure?

The terms *civil* and *procedure* are broad designations that together describe the process of resolving private disputes in judicial proceedings. Here is what lawyers typically mean when they use each of these terms.

The term *civil* refers to the area of law that defines the rights and obligations that people owe to one another and that they enforce through privately initiated actions. The law that applies in a civil action stands in contrast to *criminal* law, which governs the rules of conduct that the state imposes upon people and enforces through state-initiated prosecutions. (Note, however, that the government is sometimes involved as a party in civil litigation as well.) The main difference between criminal and civil proceedings is the immediate objective of the suit: The object of a criminal proceeding is punishment through fine or imprisonment; the primary object of a civil proceeding is a remedy for an injury in the form of a *judgment*. A person's conduct can have both civil and criminal consequences. If I steal your television set, I can be criminally prosecuted by the state for theft, whereby the state exacts its punishment. I can also be sued by you for the *tort* of *conversion*, and you get your television back or money to buy a new one.

The term *procedure* refers to the system of resolving disputes, usually in a judicial forum. In the broadest sense, this course is about how the judicial machinery works in civil cases. We will focus on what tribunals are available to litigants when they wish to request a remedy and how the litigants present their claims and defenses once they are before the court.

Civil cases and criminal cases are typically governed by different sets of procedural rules. In federal courts, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) apply in civil cases, while the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) apply in criminal cases (though a common set of Federal Rules of Evidence applies in both settings). Moreover, the defendant in a criminal case has the right to have a jury hear the evidence and determine guilt (save for minor misdemeanors), whereas there are significant categories of civil case law where no jury is available. Burdens of proof also differ. The state in a criminal case has the burden of proving the wrongdoer's guilt "beyond a reasonable doubt." The typical burden of proof in

a civil case is the considerably less demanding standard of "a fair preponderance of the evidence"—or, in particular cases, a somewhat more demanding standard of "clear and convincing evidence."

2. Dispute Resolution by Courts Versus Other Agencies

Our principal focus here will be on formal adjudication in the courts. Courts often make important policy decisions in the course of resolving disputes. However, the principal sources of policy and law are found in the acts of legislatures and executives. Moreover, a great many civil disputes are resolved in our country in nonjudicial tribunals. These are typically administrative agencies staffed by nonjudicial personnel who are responsible for administering particular statutory schemes. For example, claims for government benefits, such as welfare or social security benefits, are resolved in the first instance by state welfare offices and the federal Social Security Administration, respectively. Initial determinations of both the facts and the applicable law are made by these administrative bodies, typically with an opportunity to appeal adverse rulings to the courts. These agency tribunals are the subject of the course in Administrative Law.

In the last chapter of this casebook, we also explore the increasing utilization of alternative methods of dispute resolution, such as mediation and arbitration, which seek to promote resolution of disputes outside the formal process of adjudication.

3. State Versus Federal Systems

Another important distinction to keep in mind is the difference between state courts and federal courts. Our country is based on a federal system of government in which power is shared between the 50 states of the union and the federal government. In theory, plenary regulatory authority is vested in the states, with the power of the federal government limited to the areas of responsibility set forth in the Constitution. Over the course of the twentieth century, however, the authority of the federal government expanded considerably—a process facilitated by an expansive interpretation of the legislative authority of Congress under the federal Constitution.

Each of the states and the federal government has its own system of courts. There are, typically, three tiers: a trial court, an intermediate court of appeals, and a supreme court. In the federal system, the trial courts are called *district courts*. The intermediate appeals courts are called *courts of appeals* and generally are responsible for a geographic region called a *circuit*. The high court is the Supreme Court of the United States. The Supreme Court functions as a final appellate authority not only over cases brought in the federal courts, but also over cases brought in the state courts raising questions governed by federal law.

The state courts are considered courts of plenary authority, able to hear cases involving any subject matter not exclusively reserved to the federal courts. The federal courts, by contrast, are courts of limited subject matter authority; they can hear

cases only if authorized to do so by federal statute and if the cases otherwise fall within the "judicial power" of the United States as set forth in Article III of the Constitution.

4. The Adversary System

In the Anglo-American legal tradition, the lawyers for each party have the primary responsibility for framing the legal issues and developing the factual foundation for their claim or defense. Lawyers make the necessary investigation, discover the pertinent documents, locate the necessary witnesses, and procure their attendance at trial. At the trial, lawyers formulate questions for the witnesses, including the parties, who give testimony orally before the trier of fact. Lawyers also make decisions about what documents and other evidence to present to the court at trial. Courts have no duty to make an independent investigation and have no facilities for doing so. This contrasts with some civil law systems (sometimes referred to as "inquisitorial" systems), where the court takes the leading role in compiling the dossier, investigating, and questioning witnesses.

Although rules of professional responsibility impose a duty on lawyers to be candid in their representations to the court and their adversaries, the lawyer's primary duty is to frame his or her own client's case in as favorable a light as possible. Neither side, generally, has any obligation to aid its adversary or weaken its own case. The theory of the adversary system is that each party will discover and present everything that will favor its own case and disclose the weakness of its adversary and that truth will be revealed to the impartial decision maker as the result of this bilateral presentation. Note, however, that the accuracy of adjudication depends at least in part on a parity of skill and resources among all counsel.

5. Stages of a Lawsuit

When people suffer injuries caused by the wrongful conduct of another, they can seek a remedy in the courts through the process of *civil litigation*. The aggrieved persons can *sue*; they initiate (through their attorney) a *lawsuit* seeking relief against the wrongdoer. The person or *party* initiating the lawsuit is called the *plaintiff*. The person against whom relief is sought is called the *defendant*.

a. Investigation

Litigation is initiated when the client first consults an attorney. Although the client may want to file a lawsuit immediately, attorneys have a responsibility to ascertain that the client has in fact suffered a wrong for which the courts can offer an effective remedy. The attorney interviews the client to find out his version of the facts, and then conducts legal research to determine whether the client has a viable claim. Professional codes of conduct set standards for lawyers' responsibility as officers of the court. These codes require a lawyer to ascertain that the client has a meritorious claim before initiating litigation. In addition, the rules in federal

courts — and some state courts — impose the obligation to certify that the lawyer has conducted an investigation into the facts and the law. *See, e.g.*, Fed. R. Civ. P. 11.

b. Fee Arrangements

If the lawyer determines that the client has a meritorious claim, the lawyer will make some arrangement for payment of the fee. In this country, the so-called American rule controls: Each side pays its own attorneys' fees, regardless of whether it wins or loses. By contrast, Great Britain and other countries follow the "English rule": Attorneys' fees can be recovered from the losing party. What are the pros and cons of the respective systems?

If clients have sufficient assets, they may agree to pay for the lawyer's time and expenses as they are incurred. In many civil cases, however, a *contingent fee* is typically agreed to, whereby the client agrees to pay the attorney a percentage of the recovery should the client win, but pays nothing if the client loses. (In some cases, a statute may provide for fee-shifting in order to encourage the bringing of certain claims. Federal and state civil rights laws, for example, typically authorize prevailing plaintiffs to recover their attorneys' fees from defendants. *See, e.g.*, 42 U.S.C. §1988.)

Over the last decade, litigants have increasingly turned to third parties for funding of litigation. This alternative litigation funding, or ALF, can take several forms: non-recourse loans, whereby the lender is repaid only in the event that plaintiff obtains a monetary award or settlement; the sale of claims to third parties; or lending by the attorney to the client. Arrangements such as these raise a bevy of ethical issues, including concerns over preservation of the attorney-client privilege, compromising control over the litigation, and historical constraints on financial support for litigation by attorneys and third parties. *See generally*, J. Burton LeBlanc & S. Ann Saucer, *All About Alternative Litigation Financing*, 49 Trial 16 (2013).

c. Subject Matter Jurisdiction — Federal Court or State Court?

Once the attorney has undertaken the necessary investigation, entered into a satisfactory retainer agreement, and explored without success the prospect of a settlement, she must determine whether to bring this suit in state court or federal court. This raises the question of subject matter jurisdiction. Does the court have authority to hear lawsuits of this type?

When a government creates a court, it may impose limitations on the types of cases the court is authorized to resolve. A familiar example is small claims court. By its statutory charter, a small claims court is authorized to hear claims only involving small amounts in controversy. Similarly, family courts may only have authority to resolve cases involving divorce, child custody, and other domestic relations matters. Bankruptcy courts may only hear claims related to a bankruptcy. These are all limitations on the courts' subject matter jurisdiction.

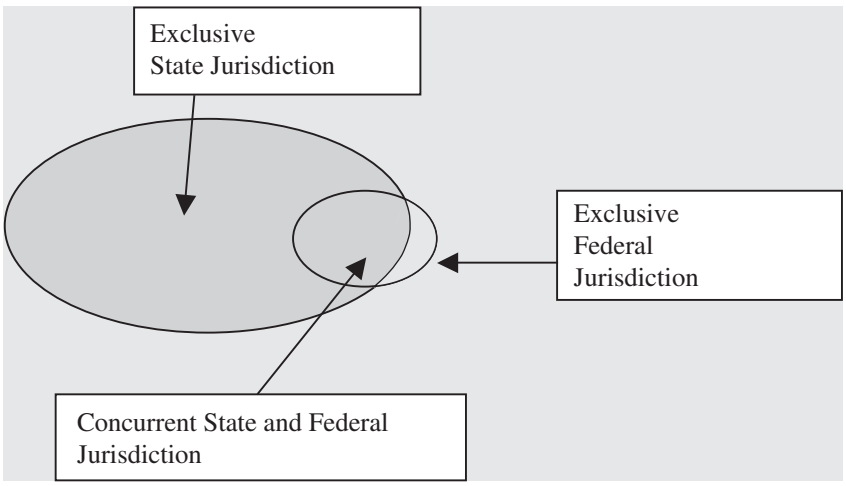
The state courts, as mentioned above, are courts of plenary (or *general*) subject matter jurisdiction. That is to say, somewhere within a state judicial system, there is generally some court with subject matter jurisdiction to hear every kind of case, except for a small category of claims that must be litigated in the federal courts.

When suit is filed in state court, the attorney will need to review the law of the particular state to determine which court within the state judiciary is appropriate for this type of claim. State systems typically provide for a trial court of general subject matter jurisdiction (in New York, this court is called the Supreme Court of New York) plus courts of more specialized responsibility, such as small claims court, probate court (for the administration of estates), family court (for divorce and other domestic disputes), or court of claims (for claims against state and local governments).

The federal courts, in contrast, are courts of limited subject matter jurisdiction. Most cases cannot be brought in federal court. To bring the case in federal court, the attorney must determine that there is federal subject matter jurisdiction. There are two principal bases of federal subject matter jurisdiction. One is *"arising under" jurisdiction*, provided in 28 U.S.C. §1331. If federal law deems the defendant's conduct wrongful and gives the plaintiff the right to a judicial remedy, the federal courts will normally have arising-under jurisdiction over the plaintiff's claim.

The second basis of federal subject matter jurisdiction is *"diversity" jurisdiction*. The diversity of citizenship jurisdiction provision, 28 U.S.C. §1332, authorizes suit to be brought in federal court when the suit is between "citizens of different states" and the amount in controversy is in excess of $75,000. The statute has been interpreted to require *complete diversity*: All plaintiffs must be from different states than all defendants. Determining the citizenship of a party can be complex, particularly in the case of a business entity.

Most of the subject matter jurisdiction of the federal courts is "concurrent" with that of the state courts. That is to say, both the state and federal courts have authority to resolve such cases. There is a very small category of cases that must be resolved in the federal courts. This includes federal securities, antitrust, patent, and trademark litigation. The federal courts are said to have "exclusive" jurisdiction over these claims. There is a much larger category of cases that can only be brought in the state courts. A Venn diagram of the allocation of subject matter jurisdiction between the state and federal courts would look something like this:



Thus, even if we assume that a case can be brought in federal court, the attorney may also have the option to pursue the case in state court. She might be more familiar with state rules of practice than federal rules, or she might believe that state judges would be more sympathetic to her case. The local state court may be more convenient and might offer a more "localized" jury since a federal district court usually draws its jurors from a broader geographic area. The decision about whether to sue in state or federal court also can be affected by the caseload and backlog in the respective courts. However, some cases filed by a plaintiff in state court can be *removed* to federal court by the defendant under the *removal* procedure authorized by 28 U.S.C. §1441.

d. Personal Jurisdiction

Whether the case is brought in state or federal courts, plaintiffs often prefer to bring the case in their home state. However, they must determine whether the courts there have *personal jurisdiction* over the defendant; can the defendant be sued within the geographical territory over which the court has authority? This is easily established if the defendant resides in the state, but it can be quite complex in the case of out-of-state defendants.

What should be required in order to exercise judicial authority over a defendant and to force the defendant to defend an action? Should it depend on where the defendant is located at the time the lawsuit begins? Where the defendant acted in causing the alleged injury to the plaintiff? Where the plaintiff was injured or is now residing?

e. Service of Process

Once the plaintiff has selected the proper court, she must notify the defendant of the commencement of the lawsuit. This is done by what is known as *service of process*. Typically, this process will consist of service of a *summons*, an official document that is issued by the court in which the action has been filed and is then served on the defendants, advising that a lawsuit has been started.

Service of process can be accomplished by several methods. The traditional method is *personal service*: A marshal or sheriff—or, often, a private person authorized by law (in many jurisdictions, any adult who is not otherwise involved in the lawsuit will do)—will actually hand the defendant the summons and complaint. More recently, many states and the federal courts have permitted service through the mail: As long as the defendant returns a signed receipt acknowledging actual receipt of the summons and complaint, personal service is not required.

f. Pleadings

The summons may do no more than tell an adversary about the commencement of the suit. In some states, the summons will be somewhat more elaborate and give a short synopsis of the type of claim that the plaintiff is alleging against the defendant. Often, the plaintiff is required to serve an initial *pleading*, known as a *complaint*, along with the summons. The complaint informs the defendant of the allegations made against him. A complaint may vary from a simple assertion that the defendant owes the plaintiff a million dollars for injuries suffered to detailing a precise chain of events.

The complaint is the first of the *pleadings*, the documents that set out in writing the claims and defenses of the parties. These pleadings, which include a response by the defendant called an *answer* and perhaps a *reply* by the plaintiff, serve a variety of functions depending on the rules of the particular system. They may: (1) merely apprise the opponent of the general nature of the pleader's claims or defenses; (2) present a detailed account of the factual and legal grounds for the relief sought; or (3) state exactly what the party intends to prove at trial.

The level of detail required in the pleadings is a function of the purpose the particular system intends to further—whether to simply notify the other side or to narrow issues early on so as to facilitate disposition of the case without trial. The federal system generally follows a rule of *notice pleading*, requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief" and of the court's jurisdiction. *See* Fed. R. Civ. P. 8(a). In the federal system, the issue-narrowing function is thought to be better served by a process of pretrial discovery rather than a battle over pleadings. Notwithstanding this liberal pleading standard, the Supreme Court has required that the allegations in a plaintiff's complaint must contain enough factual context to render the claims "plausible" in the eyes of the court. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

After the summons and complaint have been served, the defendant in most systems has a choice of responses. The defendant may wish to make a dispositive motion (one that results in the dismissal of the lawsuit) in advance of filing and serving an answer. If the defendant wishes to object to the personal or subject matter jurisdiction of the court, the defendant will then file a *motion to dismiss* for lack of personal or subject matter jurisdiction. If the defendant believes that he cannot be held liable under the applicable law, he will file a *demurrer*, or what is today often called a motion to dismiss for *failure to state a claim. See, e.g.*, Fed. R. Civ. P. 12(b)(6). Such a motion tests the *legal sufficiency* of the complaint: It assumes the facts as alleged by the complaint and asserts "so what," because even on the alleged facts, there is no legal basis for relief. Pursuant to the *Twombly* case, a 12(b)(6) motion may also challenge the factual "plausibility" of the complaint. The court will have to resolve these motions before going ahead—before defendant has even taken a position on the facts of the case.

If such dispositive motions are denied, the defendant will then file and serve an *answer* containing responses that either admit or deny the allegations of the complaint. To preserve certain *affirmative defenses* to the plaintiff's claim, defendant may have to specify the nature of the defense in the answer. *See, e.g.*, Fed. R. Civ. P. 8(c).

The defendant may also assert a *counterclaim* against the plaintiff, alleging that the plaintiff's wrongful conduct injured the defendant. In the federal system, some counterclaims, if closely related to the "transaction" giving rise to the complaint, must be asserted or they are waived. *See* Fed. R. Civ. P. 13(a). Some states do not require assertion of any counterclaims and permit the defendant to press those claims in a separate suit.

g. Remedies

In the pleadings, the plaintiff may request several different forms of relief. The most common is a request for money *damages*. The plaintiff may also seek an *injunction*, a judicial directive that the defendant act, or refrain from acting, in a

particular way. In other circumstances, a party may be able to request a declaration of rights, status, or other legal relationship—for example, that a party is not under an obligation to another party—a remedy known as *declaratory relief*.

In addition to these "final" remedies, a plaintiff may be able to seek certain types of "interim" relief. For example, if it appears that a defendant is likely to remove or dissipate assets, a plaintiff may impose a restraint on those assets prior to commencement of or during the proceedings. Or if the alleged harm is imminent and/or the object of the litigation depends on immediate action, the plaintiff may seek a *temporary restraining order* or a *preliminary injunction*. A temporary restraining order is really "emergency" relief, and as such, may even be granted "*ex parte*" (without consulting the other side). However, it has a limited duration—usually about ten days—during which time a further hearing may be held. A preliminary injunction is the more typical form of interim relief, granted after a hearing. The court directs a party to perform specified acts or refrain from certain action until the court decides the full merits of the action.

h. Pretrial Discovery

In the federal system and in many states the parties may engage in expansive *discovery*—a process of obtaining information from the opposing party and witnesses. The court will assist the parties in obtaining any information that might be useful at trial.

Methods of discovery include *depositions* (recorded examinations of witnesses under oath), *requests for production of documents*, and *interrogatories* (written questions). *See* Fed. R. Civ. P. 26–37. Discovery directed at nonparties may require issuance of a *subpoena* to compel responses. *See, e.g.*, Fed. R. Civ. P. 45.

The theory of expansive discovery is that "trial by surprise" is unfair, and that full exchange of information helps narrow the issues and makes the ultimate trial more manageable. It is also possible that fully informed adversaries are more likely to pursue serious settlement discussions in order to avoid the costs of trial.

There are also disadvantages to discovery. Sometimes little is achieved in discovery other than wasteful expenditure of time and resources for the benefit of attorneys alone. The availability of discovery, standing alone, creates some nuisance value for virtually every lawsuit, irrespective of the merits.

i. Summary Judgment

Sometimes it is possible to avoid trial by showing that there is no genuine material issue for trial—for instance, because one of the parties will not be able to produce any evidence at the trial in support of his position. A party (either a plaintiff or defendant) might then file a pretrial motion for *summary judgment*—judgment without trial. *See* Fed. R. Civ. P. 56. It permits the moving party to go behind the pleadings and test the *factual sufficiency* of the opposing party's position. Often the moving party will employ the fruits of pretrial discovery in support of the motion as well as affidavits of persons having personal knowledge of the facts to show that allegations made in the pleadings have no factual foundation. If the opposing party either by counter-affidavit or other appropriate supporting material can show that there are material factual issues requiring trial, the judge will deny the motion, and the case will proceed to trial.

j. Trial

If the case is not resolved by summary judgment, it will be calendared for trial. The fact finder will be a judge or a jury. In federal courts, the Seventh Amendment of the Constitution assures a right to trial by jury in certain cases to the extent such cases were tried before a jury "at common law." The phrase *at common law* refers to the historical distinction between cases heard in the English law courts and those heard in the Courts of Chancery. As originally constituted, the English law courts were limited to providing relief only in cases falling within the scope of specific "writs" or "forms of action." The Chancery or "Equity" courts developed in order to provide additional remedies in cases not covered by existing writs. The equity courts alone had the power to issue injunctions and other unusual relief. No jury was available in equity proceedings. Thus, most federal cases seeking damages give rise to a right to a jury trial. Many state constitutions contain similar provisions. (By contrast, Great Britain has dispensed with juries in most civil actions.)

Either party may demand a jury trial. In the federal courts, if a seasonable demand is not made, the right to a jury is waived. *See* Fed. R. Civ. P. 38.

The federal civil jury once required 12 members and a unanimous verdict. The Supreme Court has held that the Seventh Amendment permits fewer than 12 jurors in federal civil cases but still requires unanimous verdicts. (The rules governing juries in state courts may be different, and nonunanimous verdicts may be permitted.) If a jury has been demanded, a panel of prospective jurors will be selected. *Voir dire* of the prospective jurors is conducted to determine the juror's bias, prior knowledge of the case, and familiarity with the parties. If the court finds reason to believe that a juror will be unable to hear and decide the case impartially, the juror will be excused for cause. Parties are also permitted a limited number of *peremptory challenges* to strike jurors even without cause. In federal courts, the judge normally conducts the *voir dire*; in many states, this is done by the attorneys for the parties.

At the commencement of the trial, the plaintiff usually makes the *opening statement*, followed by an opening statement by the defendant.

The plaintiff is typically the party with the *burden of persuasion*—the burden of persuading the trier of fact by the requisite degree of certainty. In most civil cases, the burden is one of convincing the trier of fact that "a fair preponderance of the evidence" supports the party's position. The allocation of the burden of persuasion is determined by the applicable substantive law and always remains with the party to whom it is initially assigned.

After the exchange of opening statements, the plaintiff puts on his or her case. The plaintiff's lawyer calls witnesses to testify in open court by *direct examination*. The lawyer for the other side then conducts *cross-examination* of each witness. This is often followed by *redirect* and *re-cross*. The primary responsibility for introducing evidence either through witnesses or documents is with the lawyers. The lawyers are also responsible for *objecting* to evidence that is not permissible under the applicable rules of evidence. For example, an attempt to introduce an out-of-court statement for the purpose of establishing the truth of the statement will often be met with a hearsay objection. A failure to make a timely objection constitutes a waiver. In the federal system, these matters are governed by the Federal Rules of Evidence.

After the plaintiff has called its witnesses, and even before the defendant has put on its case, the defendant may assert that the plaintiff has failed to establish a

case for relief and ask for a *judgment as a matter of law* (previously called a *directed verdict*). *See* Fed. R. Civ. P. 50(a). The theory of the judgment as a matter of law is that the function of the jury is to find the facts only when the state of the evidence is such that reasonable persons might differ. If, however, the state of the evidence is such that a reasonable jury could come out only one way, the court should not allow the case to go to the jury. Usually, the court will want to hear the other side's evidence even if it is inclined to grant the motion. The defendant then puts on its case, after which a renewed motion for a judgment as a matter of law might be made.

Usually, the judge errs on the side of allowing the case to go to the jury. This permits the possibility of a verdict in favor of the movant's position and thus may moot the need for the court to rule on the motion. It also helps to preserve a verdict and obviate a retrial should the appeals court reverse the trial court's grant of a post-verdict motion for judgment as a matter of law (previously called a *judgment notwithstanding the verdict (JNOV)*). *See* Fed. R. Civ. P. 50(b).

Before the case goes to the jury, counsel will make closing arguments. The judge and lawyers will also confer with regard to the content of the judge's instructions to the jury. Typically, the lawyers will submit proposed *jury instructions*. The judge instructs the jury on the applicable law. The judge may offer alternative views of the facts and instruct the jury of the legal consequences that attach to those alternative views.

Verdicts can be *general*, merely declaring who won and how much they have been awarded. Alternatively, *special verdicts* require the jury to answer certain questions, e.g., "Was the defendant driving at an excessive speed at the time of the accident?" The judge then must determine how to apply the law to the jury's answers.

After the jury returns with its decision, *post-verdict motions* are entertained. These include (1) a renewed motion for judgment as a matter of law—i.e., the case should not have gone to the jury in the first place; and (2) a *motion for a new trial*—i.e., the judge made some error requiring a new trial or the verdict was against the clear weight of the evidence.

k. Appeal

Every legal system in the United States provides for review by an appellate court of the decisions of a trial court. In the federal system, the general rule is that appeals are available only from "final decisions" of the district courts. *See* 28 U.S.C. §1291. The upshot of the federal system's finality requirement is that a great many trial court decisions are effectively immune from appellate review. This is true, for example, of a trial court's ruling on discovery motions, which may be quite important to the progress of the litigation but are not likely to dispose of the case. They are thus not considered final decisions.

Once a final judgment is entered, the parties may file their appeal. The appellate court decides the case on the basis of the written *record* of the trial proceeding. It does not hear any witnesses. The record on appeal will contain the pleadings and at least a portion of the transcript of the trial (the court reporter's verbatim record). The parties present their arguments by written briefs supplemented by oral argument. In some appeals courts, oral argument is not available as a matter of right. Appellate courts are typically multi-member tribunals, with appeals heard before panels of the court. In the federal system, appeals are governed by the Federal Rules of Appellate Procedure.

The level of deference that the appeals court gives the trial court's ruling is called the "*standard of review*." The appellate court reviews most questions of law on a *plenary* basis; the appeals court generally evaluates such questions "*de novo*" (anew) and gives no weight to the trial court's legal conclusions. (However, some legal questions are said to be within the trial court's discretion and hence are treated quite deferentially.) On questions of fact, appeals courts have a more limited role. The trial judge's findings of fact cannot be overturned unless "*clearly erroneous*" (Fed. R. Civ. P. 52(a)(6)), and courts are even more deferential to jury determinations. It is sometimes unclear whether a particular question should be characterized as a question of law or a question of fact for purposes of the standard of review.

An appellate court has power to *affirm*, *reverse*, *vacate*, or *modify* the judgment of the trial court. If it reverses, the court may enter judgment accordingly or it may *remand* the case to the trial court for further proceedings.

Decisions are often accompanied by written *opinions* written by one of the judges of the panel hearing the appeal. In some systems, provision is made for summary dispositions of appeals without published opinion.

l. Enforcement of Judgments

The typical civil judgment for money damages requires an *enforcement proceeding* against the assets of the losing party. State law governs this process, often termed *execution*, and may exempt certain assets of the losing party from execution. As discussed above, state and federal courts owe an obligation to give full faith and credit to the judgment of other American courts.

m. Finality

A critical characteristic of any dispute-resolution mechanism is finality: Once a court establishes the relative rights of the litigants, the parties will not be permitted to relitigate their claims or defenses. This principle is enforced through the doctrine of *res judicata* (the thing has been decided). *Res judicata*, sometimes referred to as *claim preclusion*, bars claims between the same parties that were, or should have been, asserted in a judicial proceeding that was resolved *on the merits*.

A closely related doctrine of *collateral estoppel* or *issue preclusion* also prevents a party from relitigating particular factual or legal assertions that were decided against that party in a prior proceeding. Unlike *res judicata*, collateral estoppel only precludes assertions that were actually litigated and decided in the earlier proceeding. In many jurisdictions, collateral estoppel may be asserted against a former party by a new litigant who did not participate in the earlier adjudication.

B. ILLUSTRATION OF THE STAGES OF A LAWSUIT—NEW YORK TIMES v. SULLIVAN

In this section, we offer an illustration of the procedural system by tracking the litigation of a single case: a lawsuit in which one of the city commissioners of Montgomery, Alabama claimed that a newspaper advertisement made false and damaging allegations about him. In some ways, *New York Times v. Sullivan*, as the

case ultimately came to be known, is one of the most extraordinary cases in modern constitutional law. (Anthony Lewis's book, *Make No Law: The* Sullivan *Case and the First Amendment* (1991), provides a sophisticated but accessible account.) In other ways, the case involved many of the mundane procedural issues that crop up in literally thousands of cases every year. Tracing the case from its beginnings through the judicial system to its final resolution gives us an opportunity to think about a variety of procedural issues that will occupy the remainder of this course. Moreover, by watching the litigation evolve, we try to avoid the sense of inevitability that too often overcomes law students who read nothing but Supreme Court and other appellate opinions. Litigation is a tactical, risky, contingent process, in which the lawyer plays a creative role at almost every turn.

In what follows, we weave together actual documents from the record in *Sullivan*, judicial opinions, narrative information about procedural issues, and questions designed to get you to think about the legal and tactical issues that confronted the lawyers. All of the issues raised in this material will be reconsidered in depth in the course of the book. Don't worry if you do not fully grasp everything now.

1. The Context of the Lawsuit

The decade following the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which held racial segregation in public education unconstitutional, was a time of tremendous legal and political ferment. The Montgomery, Alabama, bus boycott galvanized black communities across the country into direct action to break down barriers in transportation, public facilities such as parks and libraries, schools, and restaurants.

These actions included sit-ins, in which black college students demanded to be served by restaurants that were traditionally restricted to whites; "Freedom Rides," in which black and white activists boarded interstate buses and refused to sit in separate seats or to use separate bus waiting rooms; and massive efforts to register black voters, who had been essentially disenfranchised throughout the South.

Courts and state legislatures were as important an arena as streets or lunch counters. On one side, civil rights groups, such as the NAACP Legal Defense and Educational Fund, led by Thurgood Marshall (who later sat as the first African-American member of the Supreme Court), challenged policies that kept blacks from participating fully in civic and political life. On the other side, defenders of segregation engaged in "Massive Resistance." They used the legal system for both defensive and offensive purposes. Defensively, they engaged in protracted litigation designed to delay implementation of *Brown*'s central holding. Offensively, they used criminal prosecutions to impose heavy burdens on civil rights activists.

On February 29, 1960, the State of Alabama charged Dr. Martin Luther King, Jr., the head of the Southern Christian Leadership Conference and a key civil rights leader, with two counts of perjury in connection with the filing of his Alabama state income tax return. King faced ten years in prison if he were convicted of both counts. It was the first felony tax-evasion charge in state history, and it seemed a blatant attempt to incapacitate one of the civil rights movement's most dynamic figures and to intimidate other individuals who might be inclined to challenge segregation's iron hold.

A number of nationally known figures, including Eleanor Roosevelt, Nat King Cole, and Jackie Robinson, formed the Committee to Defend Martin Luther King and the Struggle for Freedom in the South to raise money to aid in King's defense. The Committee's Executive Director, Bayard Rustin, decided to compose and publish an advertisement to solicit contributions. Ultimately, a month after King's indictment, on March 29, 1960, the advertisement, excerpted below, appeared on page 25 of the *New York Times*:

> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . .
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years.

The Committee paid the Times $4,600 to run the ad. The *Times*'s circulation was 650,000 copies. Fewer than 400 papers went to subscribers in Alabama. One of the subscribers, though, was the company that put out Montgomery, Alabama's two newspapers, the *Montgomery Advertiser* and the *Alabama Journal*.

The *Journal*'s city editor noticed the advertisement and ran a brief story about it on April 5. The story identified some of the Committee members, listed some of the charges in the advertisement, and mentioned some inaccuracies, particularly that students at Alabama State College (an entirely black school) had been expelled for singing "My Country 'Tis of Thee" on the steps of the State Capitol and that college authorities had tried to starve them into submission by padlocking the dining hall.

The *Advertiser's* editor was outraged by what he viewed as the ad's biased treatment of the South, and on April 7, 1960, he ran an editorial denouncing the advertisement as presenting "crude slanders against Montgomery. . . ." One of Montgomery's City Commissioners (the city commission was the three-person board that ran the city) was L. B. Sullivan. Sullivan, who was in charge of the city police force, read that editorial and decided to bring a lawsuit against the Times and four ministers from Alabama whose names appeared on the advertisement.

2. The Lawsuit Begins

Lawsuits normally begin when the plaintiff (the person or entity seeking some form of relief) files a complaint and serves the complaint and a summons, telling the defendant where and when he or she must respond to the complaint.

We reprint below the summons, complaint, and affidavit (a sworn statement) regarding how service was to be accomplished that were used in the *Sullivan* case.

L. B. SULLIVAN

vs.

THE NEW YORK TIMES CO., A CORP., RALPH D. ABERNATHY, FRED L. SHUTTLESWORTH, S.S. SEAY, SR. AND J.E. LOWERY.

SUMMONS AND COMPLAINT

The State of Alabama Montgomery County

To Any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon The New York Times Company, a Corporation, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery to appear before the Circuit Court of Montgomery County . . . within thirty days from the service of this summons and complaint, then and there to demur or plead to the complaint of L. B. Sullivan. . . .

Witness my hand this 19 day of April, 1960. John R. Matthews, Clerk.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

[Title omitted]

COMPLAINT—Filed April 19, 1960

Count I

Plaintiff claims of the defendants the sum of Five Hundred Thousand Dollars ($500,000.00) as damages, for that plaintiff avers that defendants falsely and maliciously published in the City of New York, State of New York, and in the City of Montgomery, Alabama, and throughout the State of Alabama of and concerning the plaintiff, in a publication entitled *The New York Times*, in the issue of March 29, 1960, on page 25, in an advertisement entitled, "Heed Their Rising Voices" (a copy of said advertisement being attached hereto and made a part hereof as Exhibit "A"), false and defamatory matter of charges reflecting upon the conduct of the plaintiff as a member of the Board of Commissioners of the City of Montgomery, Alabama, and imputing improper conduct to him, and subjecting him to public contempt, ridicule and shame, and prejudicing the . . . plaintiff in his office, profession, trade, or business, with an intent to defame the plaintiff. . . .

And plaintiff further avers that more than five days before the bringing of this action plaintiff made a written demand for a full and fair public retraction of the aforesaid false and defamatory matter or charges upon defendants and each of them; and defendants, and each of them, have failed or refused to publish a full and fair retraction of such charges or matter in as prominent and public a place or manner as the aforesaid charges or matter occupied as aforesaid;

And plaintiff further avers that he has suffered damage, and embarrassment to his character and reputation, personally and as a public official of the City of Montgomery, Alabama; that he has been subjected to public ridicule and shame; that he has been injured and damaged in the lawful pursuit of his office, profession, trade or business, as a proximate result of the aforesaid false and defamatory publication by the defendants; and plaintiff further claims punitive damages; hence this suit. . . .

Scott, Whitesell & Scott, By: Calvin Whitesell; Steiner, Crum and Baker, By: M. R. Nachman, Jr.; Attorneys for Plaintiff.

Plaintiff demands trial by jury in this cause.

Steiner, Crum & Baker, By: M. R. Nachman, Jr.,

Attorneys for Plaintiff.

AFFIDAVIT

State of Alabama Montgomery County

Before me, Bernice S. Osgoode, a Notary Public in and for said County, in said State, personally appeared M. R. Nachman, Jr., who is known to me, and who, being first duly sworn, deposes and says as follows.

That defendant The New York Times Company, a corporation, is a nonresident of the State of Alabama; that it is not qualified under the Constitution and laws of the State of Alabama as to doing business in the State of Alabama; that it has actually done and is now doing business or performing work or services in the State of Alabama; that this cause of action has arisen out of the doing of such business or as an incident thereof by the said defendant in the State of Alabama, and that by the doing of such business or the performing of such work or services this defendant, in accordance with the Constitution and laws of the State of Alabama, is deemed to have appointed the Secretary of State of Alabama, or her successor or successors in office, to be the true and lawful attorney or agent of this nonresident defendant, upon whom process may be served in this action which has accrued from the performing of such work or services, or as an incident thereof, by this nonresident defendant, acting through its agents, servants, or employees.

And affiant further avers that process should be served upon this defendant, to-wit, The New York Times Company, in the manner prescribed by the laws of Alabama, and particularly in the manner prescribed by Title 7; Sec. 199(1), Code of Alabama 1940 as amended.

Affiant further avers that the residence and the last known address of this defendant is as follows: The New York Times Company, Times Building, 229 West 43d Street, New York, New York.

M. R. Nachman, Jr. . . .

NOTES AND QUESTIONS

1. *The Question of Jurisdiction*

a. *Subject Matter Jurisdiction.* Sullivan chose to file suit in Alabama state court. Could he have filed in federal court? Libel law is state law: Each state decides for itself whether to recognize the tort of defamation, and there is no federal law that gives private individuals a right to seek damages for statements made about them in the press. Thus, Sullivan's suit did not "arise under" federal law for purposes of federal subject matter jurisdiction. (In determining whether a case can be heard in federal court on the theory that it arises under federal law, it is not enough that the defendant has some issue of federal law that it wants to assert, so

the fact that the Times might—and ultimately did—argue by way of defense that the First Amendment's guarantee of a free press should limit Sullivan's right to recover does not create "arising under" jurisdiction.)

If Sullivan had sued only the *New York Times*, there would have been diversity jurisdiction. Sullivan was a citizen of Alabama and the Times was a New York corporation and, therefore, for diversity purposes a citizen of New York. But Sullivan chose also to sue four ministers who lived in Alabama and therefore were citizens of the same state as the plaintiff. Why do you think he added these ministers who, after all, were unlikely to have anything near the $500,000 he was seeking in damages?

The answer is a tactical one. Under the federal removal statute, 28 U.S.C. §1441, defendants can *remove* to the federal court system from the state court system cases that the plaintiff could have filed originally in federal court. Think about what the Times could have done if Sullivan had sued it alone. Why might Sullivan have wanted to keep the case in state court? *See* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (discussing the very different responses of federal and state courts to certain kinds of cases and claims).

The Montgomery County Circuit Court clearly had subject matter jurisdiction over Sullivan's claim. Each state has courts "of general jurisdiction" that can hear cases involving virtually any subject matter.

The New York State Supreme Court, New York's court of general jurisdiction, would also have had subject matter jurisdiction over Sullivan's suit against the Times. So, too, would the California Superior Court, for that matter, since it has the authority to hear tort cases involving significant damages.

b. *Personal Jurisdiction.* But you probably have the intuitive sense that there would be something wrong with Sullivan filing his case in California. Why? Although the subject matter of his case may be the kind of issue California courts deal with all the time, there seems to be something wrong with forcing these defendants to go to California to defend themselves. Thus, we arrive at the second jurisdictional issue in the *Sullivan* case: personal jurisdiction.

A court has *personal jurisdiction* if the parties fall within the geographic reach of the court's authority. The personal jurisdiction of state courts is controlled both by state law and by the United States Constitution. In the first instance, a state decides the reach of its personal jurisdiction. But individuals or entities that think a state's assertion of jurisdiction over them is unfair can argue that, whatever the state's desire, the federal Constitution prevents such an exercise of authority as a matter of "due process of law" under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

In a moment, you will be presented with a variety of documents and opinions involving whether the Montgomery County Circuit Court had personal jurisdiction over the *New York Times*. But before you begin reading the documents, put yourself in the positions of the litigants and ask why this matters. Why did Sullivan file his lawsuit in Alabama, rather than New York? Conversely, why might the Times not want to defend itself in Alabama?

2. *Issues of Service and Notice.* Personal service of a summons can provide both notice of the pendency of the litigation, as well as a basis for personal jurisdiction if the process is served within the borders of the state in which the suit was filed. In order for service of process to play this dual role in the *Sullivan* litigation, the

Times or its agent had to have been served in Alabama. In order to facilitate service and provide a basis for personal jurisdiction, many states resort to a legal fiction: Persons or organizations that have engaged in certain activities within the state are deemed to have appointed the Secretary of State (or some other official) as their agent for in-state service of process. The notice function is served as long as the Secretary forwards the summons and complaint to the defendant.

Reread the affidavit filed by M. R. Nachman. How is that affidavit related to the service of process?

In addition to arranging for substituted service of process on the Secretary of State, on April 21, 1960, the Montgomery County Sheriff handed a copy of the summons and complaint to Don McKee "as agent for the *New York Times*." Don McKee was an Alabama newspaperman who served as the Times's "stringer" in Montgomery; he would occasionally submit stories to the Times about local news. Under Ala. Code §7-188 (1960), "[w]hen an action at law is against a corporation the summons may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent or any other agent thereof." Under what circumstances would service on McKee be adequate service of process? For purposes of notice? Personal jurisdiction?

3. *State Versus Federal Practice.* Note that Sullivan in his complaint demands a trial by jury. In most civil actions seeking money damages, federal or state constitutions guarantee that either party may demand a trial before a jury rather than a trial before the judge (called a *bench trial*), as long as they make a timely demand. *See, e.g.*, Fed. R. Civ. P. 38; Ala. R. Civ. P. 38. It is important to remember that every state has its own rules of procedure that may differ significantly from the federal rules (although some states, such as New Jersey, closely track the federal rules).

3. The Defendant's First Response

Usually, when there is no doubt that the court has personal and subject matter jurisdiction and that the defendant has been properly served with process, the defendant responds to the plaintiff's complaint with an answer. The answer will address the facts alleged in the complaint and may also raise various defenses to the plaintiff's suit.

One of the defendants in the *Sullivan* case was Rev. Ralph D. Abernathy, an Alabama minister. Abernathy was served personally with process and, within the time given under Alabama law, he responded to Sullivan's complaint. (His response was called a *demurrer*, in accordance with Alabama's practice, but you should not worry about such nomenclature at this point in the semester.)

DEMURRER OF RALPH D. ABERNATHY

Now comes Ralph D. Abernathy, one of the defendants in the above entitled cause and demurs to the Complaint filed in the above entitled cause, and separately and severally demurs to each count there, and as grounds of demurrer assigns the following separately and severally:

1. That it does not state a cause of action.

2. That no facts alleged upon which relief sought can be granted. . . .

5. No facts are alleged to show that this defendant published in the City of New York, State of New York, or any place, the advertisement referred to in said Complaint.

6. No facts are alleged to show that this defendant caused to be published in the City of New York, State of New York, or any other place, the advertisement referred to in said Complaint. . . .

. . .

The Times, however, decided not to respond to the merits of Sullivan's complaint. Instead, the Times filed the following document:

MOTION TO QUASH SERVICE OF PROCESS

Comes the New York Times Company, . . . by its attorneys, and appearing solely and specially for the purpose of filing this its motion to quash attempted service of process in this cause and for no other purpose . . . and without making a general appearance . . . alleges the following, separately and severally:

1. On . . . April 26, 1960, The New York Times Company, . . . received by registered mail in New York City, New York, a summons and complaint and affidavit of the Honorable Bettye Frink, Secretary of State of the State of Alabama. . . .

2. . . . a summons and complaint in that cause . . . was (also) served upon one Don McKee by the Sheriff of Montgomery, Alabama, . . . "as agent for the New York Times. . . ."

3. The New York Times Company . . . is a . . . corporation, organized and existing under the laws of the State of New York, with its principal place of business at The Times Building, 229 West 43rd Street, New York, New York, and said corporation . . . has no office or place of business situated in, or employee, agent or servant, in the State of Alabama, and did not have at the time of the service of process as is described in the preceding paragraphs 1 and 2 herein; is not doing business in Alabama or in Montgomery County, Alabama, and was not doing business in Alabama or in Montgomery County at the time of the service of process as described in preceding paragraphs 1 and 2 herein. . . .

6. The New York Times Company, a corporation, is not amenable to service of process in the State of Alabama, and was not at any time pertinent to the alleged cause of action or the purported service in this cause and has not waived service of due process herein by voluntary appearance or otherwise.

7. The cause of action alleged in plaintiff's complaint did not accrue from the doing of any business or the performing of any work or service or as an incident thereto by the defendant, The New York Times Company, a corporation, or its agent, servant or employee in the State of Alabama. . . .

13. Don McKee, upon whom service of process was made, as is described in paragraph 2 herein was not an officer, agent, servant or employee of The New York Times Company . . . at the time of service of process upon him as described in paragraph 2 herein, nor at the time of the accrual of any alleged cause of action set forth in the complaint in this cause nor at the time of the filing of the summons and complaint in this cause. . . .

17. The New York Times Company, a corporation, is not subject to the jurisdiction of this Honorable Court in this cause for this court to assume jurisdiction of

said defendant in this cause would deny to defendant due process of law in contravention of the 14th Amendment to the Constitution of the United States.

Wherefore, The New York Times Company, a corporation, appearing specially for this purpose and no other moves the Court as Follows:

1. That service of process as described in preceding paragraph 1 of this motion be quashed as to the New York Times Company. . . .

2. That service of process as described in preceding paragraph 2 of this motion be quashed as to The New York Times Company. . . .

5. That this court dismiss this action as to The New York Times Company . . . for lack of jurisdiction of the person. . . .

6. That this Court dismiss this action as to The New York Times Company . . . for lack of jurisdiction of the subject matter of said action.

NOTES AND QUESTIONS

1. *Motion to Quash Versus Defense on the Merits.* Notice that the Times does not make any claims in its motion to quash regarding the truth or falsity of the story it published or the story's effect on Sullivan. Would it be inappropriate for the Times both to move to quash the service of process and to argue about the merits of Sullivan's claim?

2. *Special Appearance.* The Times's lawyers were careful to stress that they were appearing "specially for the purpose of filing this its motion . . . and without making a general appearance. . . ." Through this "special appearance" procedure, the newspaper stated it was appearing for the sole purpose of contesting the circuit court's jurisdiction and that such appearance could not be treated as an admission that it was properly served or that the court in fact had jurisdiction. If the Times had entered a general appearance, it would be acknowledging that the circuit court had the authority to dispose of all the issues in the case.

What is the difference between what the Times is asking the court to do in concluding paragraphs 1 and 2 of its prayer for relief and in paragraph 5? What is the difference between what it is asking for in paragraph 5 and what it is asking for in paragraph 6? As we shall see in a moment, paragraph 6 is very significant.

4. The Discovery Process

When a defendant challenges the court's jurisdiction, the merits of the complaint are put to the side while the parties and court deal with the question of jurisdiction.

In response to the Times's motion, Sullivan needed to develop and present to the court sufficient facts to justify the exercise of jurisdiction over the Times. Obviously, many of the relevant facts—whether the Times in fact was doing the kind of business in Alabama that would permit Alabama's exercise of personal jurisdiction and whether Don McKee was in fact the Times's agent—are more within the Times's control than Sullivan's. Accordingly, Sullivan sought discovery of information from the Times that would support the court's exercise of jurisdiction.

Following are some examples of Sullivan's discovery regarding the jurisdictional issues.

MOTION TO PRODUCE

Comes the plaintiff in the above entitled cause and moves this Court for an order requiring the defendant, The New York Times Company . . . to produce the following books, documents, and writings in its possession, custody, control or power, which contain evidence pertinent to the issues in the above styled cause, and which more specifically relate to questions raised and to be presented to this Court by the said defendant's motion to quash . . . :

(1) All issues of the *New York Times* for the following dates: [Here plaintiffs listed several hundred issues during the period Feb. 11, 1956, to April 13, 1960]. . . .

(3) All writings or other documents constituting applications for employment, or contracts of employment, or any business arrangement with the individuals specified in the preceding paragraph as so-called "string-correspondents," or with any other persons who are residents of the State of Alabama and who have been so-called "string correspondents" for the Times since 1956.

(4) All documents or other writings, constituting a statement of rules and regulations from the Times to any "string correspondents" in the State of Alabama during the last four years, regarding the nature of the duties of these "string correspondents". . . .

(6) Copies of all checks, vouchers, and receipts, and any other papers or documents in connection with the payment by the Times to any of the persons named in paragraph 2 of this motion, or any other so-called "string correspondents," resident in Alabama, since January 1, 1956.

(7) All documents and writings constituting expense accounts or statements of expenses submitted for or in behalf of [Times correspondents] . . . relating to expense incurred by them in the State of Alabama since January 1, 1956. . . .

(11) Copies of all writings or other documents evidencing the total receipts by the Times from the sale of its newspaper in Alabama for the year 1959 and the first five months of 1960.

NOTES AND QUESTIONS

What did Sullivan hope to prove with this material? Try to frame how the material sought was relevant to the issue of jurisdiction. At this stage in the lawsuit, how strong a showing of relevancy should be required? Rule 26(b)(1) of the Fed. R. Civ. P. permits discovery of "any nonprivileged matter that is relevant to any party's claim or defense," even if the information sought will be inadmissible at trial.

Sullivan's lawyers also took several *depositions*. Depositions resemble courtroom proceedings in that a court stenographer makes a transcript, and the witnesses are under oath, but they normally take place in private, without a judge being present.

Consider the following excerpts from the deposition of Claude Sitton. (M. Roland Nachman and Sam Rice Baker are Sullivan's attorneys; T. Eric Embry and Thomas Daly are the Times's lawyers.)