



伊曼纽尔法律精要影印系列

Civil Procedure

[美] 史蒂文·L·伊曼纽尔/著  
(Steven L. Emanuel)

# 民事诉讼程序



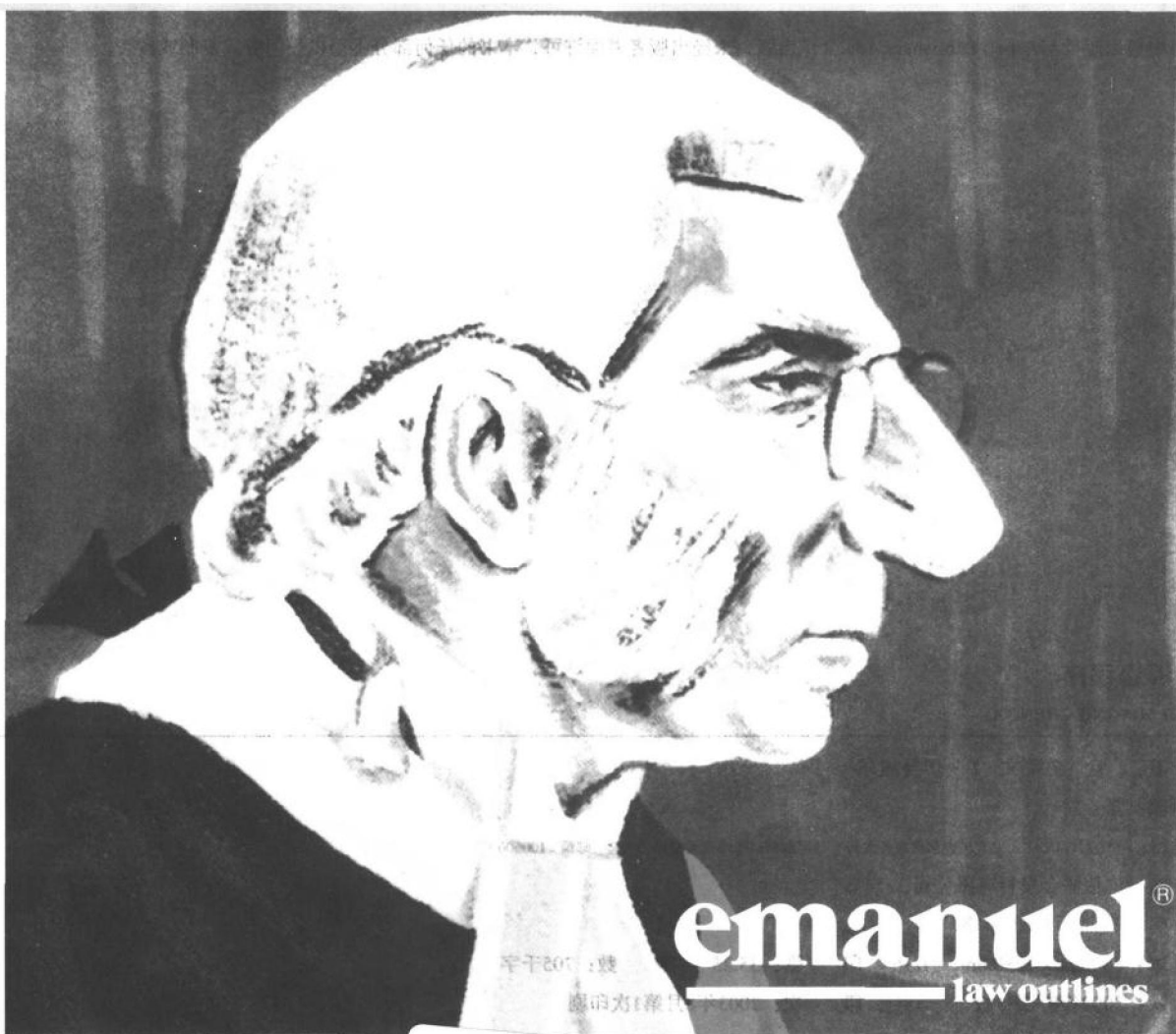
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## 民事诉讼程序

MINSHI SUSONG CHENGXU

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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%—10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

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## **About Aspen Law & Business Legal Education Division**

Aspen Law & Business is proud to welcome Emanuel Publishing Corporation's highly successful study aids to its list of law school publications. As part of the Aspen family, Steve and Lazar Emanuel will continue their work on these popular titles, widely purchased by students for more than a quarter century. With the addition of the Emanuel title, Aspen now offers the most comprehensive selection of outstanding publications for the discerning law student.

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## **Dedication**

**To my beloved wife Marilyn,  
mother of my five (5!) children**



## Preface

Thank you for buying this book.

I intend for you to use this book both throughout the semester and for exam preparation.

Here are some suggestions about how to use it:<sup>1</sup>

1. During the semester, use the book in preparing each night for the next day's class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* at the front of the outline to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you all or part of two days. Also, review the Flow Charts and Tables (listed following the Table of Contents).
4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions, supplied at the end of most sub-chapters. You can find these quickly by looking for *Quiz Yourself* entries in the Table of Contents. When you do these questions: (1) record your short "answer" in the book after the question, but also: (2) try to write out a "mini essay" on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays. [At about the same time, do the Multistate-style multiple-choice questions at the back of the book.]
5. A couple of days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step (4), so that you use the *Tips* to help you spot the issues in the short-answer questions. You'll also probably want to follow up from many of the *Tips* to the main outline's discussion of the topic; the number references after some of the *Tips* (e.g., "[145]") point you to the main outline's discussion.
6. Some time during the week or so before the exam, do some or all of the full-scale essay exams at the back of the book. Write out a full essay answer under exam-like conditions (e.g., closed-book if your exam will be closed book.) If you can, exchange papers with a classmate and critique each other's answer.
7. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your writing juices flowing; and (2) re-read the various *Exam Tips* sections (you should be able to do this in 1-2 hours).

Good luck. Write to me with any comments, corrections or suggestions. Or, better still, you can reach me via E-mail at: [semanuel@pobox.com](mailto:semanuel@pobox.com)

If you'd like any other publication of Aspen Law & Business, you can find it at your bookstore or at [www.aspenpublishers.com](http://www.aspenpublishers.com)

Steve Emanuel

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1. The suggestions below relate only to this book. I don't talk here about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn't mean I don't think these other steps are important — it's just that in this Preface, I've chosen to focus on how I think you can use this outline.



## Abbreviations Used in Text

### CASEBOOKS

- C,F,M&S — Cound, Friedenthal, Miller and Sexton, *Civil Procedure* (7th Ed. 1997)
- F,K&C — Field, Kaplan and Clermont, *Materials for a Basic Course in Civil Procedure* (7th Ed. 1997)
- M,R&S — Marcus, Reddish & Sherman, *Civil Procedure: A Modern Approach* (3d Ed. 2000)
- R,S&D — Rosenberg, Smit and Dreyfuss, *Elements of Civil Procedure* (5th Ed. 1990)
- Y — Yeazell, *Civil Procedure* (4th Ed. 1996)

### HORNBOOKS & NUTSHELLS

- F,K&M — Friedenthal, Kane and Miller, *Civil Procedure* (2nd Ed. 1993)
- James & Hazard — James, Hazard & Leubsdorf, *Civil Procedure* (4th Ed. 1992)
- James (1st Ed.) — Fleming James, Jr., *Civil Procedure* (1965)
- J & H (3d Ed.) — James and Hazard, *Civil Procedure* (3rd Ed. 1985)
- Jurisdiction Nutshell — Ehrenzweig, Louisell, and Hazard, *Jurisdiction in a Nutshell* (4th Ed. 1980)
- Moore's Manual — Moore, Vestal and Kurland, *Moore's Manual — Federal Practice and Procedure* (2 Vols. 1980)
- Res Judicata Nutshell — Robert C. Casad, *Res Judicata in a Nutshell* (1976)
- Study... — American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts*
- W&M — Wright and Miller, *Federal Practice and Procedure* (multi-volume treatise, with annual supplementation)
- Wr. — Charles A. Wright, *Law of Federal Courts* (5th Ed. 1994)

# CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart. NC = not directly covered by this casebook.)

Any updates to this chart can be found at our web site — <http://www.emanuel.com>

Emanuel's Civil Procedure Outline <i>(by chapter and section heading)</i>	Cound, Friedenthal, Miller, & Sexton Civil Procedure (7th Ed. 1997)	Yeazell Civil Procedure (4th Ed. 1996)	Field, Kaplan, & Clermont Materials for a Basic Course in Civil Procedure (7th Ed. 1997)	Rosenberg, Smit, & Dreyfuss Elements of Civil Procedure (5th Ed. 1990)	Marcus, Redish & Sherman Civil Procedure: A Modern Approach (3rd Ed. 2000)	Hazard, Tait & Fletcher Pleading and Procedure (8th Ed. 1999)
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## CASEBOOK CORRELATION CHART (continued)

Emanuel's Civil Procedure Outline (by chapter and section heading)	Cound, Friedenthal, Miller, & Sexton Civil Procedure (7th Ed. 1997)	Yeazell Civil Procedure (4th Ed. 1996)	Field, Kaplan, & Clermont Materials for a Basic Course in Civil Procedure (7th Ed. 1997)	Rosenberg, Smit, & Dreyfuss Elements of Civil Procedure (5th Ed. 1990)	Marcus, Redish & Sherman Civil Procedure: A Modern Approach (3rd Ed. 2000)	Hazard, Tait & Fletcher Pleading and Procedure (8th Ed. 1999)
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## CASEBOOK CORRELATION CHART (continued)

Emanuel's Civil Procedure Outline (by chapter and section heading)	Cound, Friedenthal, Miller, & Sexton Civil Procedure (7th Ed. 1997)	Yeazell Civil Procedure (4th Ed. 1996)	Field, Kaplan, & Clermont Materials for a Basic Course in Civil Procedure (7th Ed. 1997)	Rosenberg, Smit, & Dreyfuss Elements of Civil Procedure (5th Ed. 1990)	Marcus, Redish & Sherman Civil Procedure: A Modern Approach (3rd Ed. 2000)	Hazard, Tait & Fletcher Pleading and Procedure (8th Ed. 1999)
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## CASEBOOK CORRELATION CHART (continued)

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# CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

## CHAPTER 1

# INTRODUCTION

## CIVIL PROCEDURE GENERALLY

A. **A road map:** Here is a “*road map*” for analyzing a Civil Procedure problem:

1. **Personal jurisdiction:** First, make sure that the court has “*personal jurisdiction*” or “*jurisdiction over the parties.*” You must check to make sure that: (1) D had *minimum contacts* with the forum state (whether the court is a state or federal court); and (2) D received such *notice and opportunity to be heard* as to satisfy the constitutional requirement of due process. [7-85]
2. **Venue:** Then, check whether *venue* was correct. In federal court suits, the venue requirement describes what judicial *district* the case may be heard in. Essentially, the case must be heard either: (1) in any district where the *defendant resides* (with special rules for multi-defendant cases; or (2) in any district in which a *substantial part of the events* giving rise to the claim occurred. See 28 U.S.C. §1391. [86-97]
3. **Subject matter jurisdiction:** If the case is a federal case, you must then ask whether the court has *subject matter* jurisdiction. Essentially, this means that one of the following two things must be true: [100-146]
  - a. **Diversity:** Either the case is between *citizens of different states* (with “complete diversity” required, so that no plaintiff is a citizen of the same state as any defendant) and at least \$50,000 is at stake; or
  - b. **Federal question:** The case raises a “*federal question.*” Essentially, this means that plaintiff’s right to recover stems from the U.S. Constitution, a federal treaty, or an act of Congress. (There is no minimum amount required to be at stake in federal question cases.)
4. **Pleading:** Next, you must examine whether the *pleadings* are proper. [149-179]
5. **Discovery:** Next, you may have a complex of issues relating to pre-trial *discovery*. [181-231]
6. **Ascertaining applicable law:** Now, figure out *what jurisdiction’s law* should be used in the case. The most important problem of this type is: In a diversity case, may the federal court apply its own concepts of “federal common law”, or must the court apply the law of the state where the federal court sits? If the state has a *substantive law* (whether a statute or a judge-made principle) that is on point, *the federal court sitting in diversity must apply that law*. This is the “rule” of *Erie v. Tompkins*. (Example: In a diversity case concerning negligence, the federal court must normally apply the negligence law of the state where the court sits.) [234-256]

7. **Trial procedure:** Next, you may face a series of issues relating to *trial procedure*. [260-302]
8. **Multi-party and multi-claim litigation:** If there is more than one claim in the case, or more than the basic two parties (a single plaintiff and a single defendant), you will face a whole host of issues related to the *multi-party* or *multi-claim* nature of the litigation. You must be prepared to deal with the various methods of bringing multiple parties and multiple claims into a case. In federal courts: [305-376]
- a. **Counterclaim:** D may make a claim against P, by use of the *counterclaim*. See FRCP 13. Check whether the counterclaim is “*permissive*” or “*compulsory*.” (Also, remember that third parties, who are neither the original plaintiff nor the original defendant, may make a counterclaim.) [309]
  - b. **Joinder of claims:** Once a party has made a claim against some other party, she may then make *any other claim* she wishes against that party. This is “*joinder of claims*.” See Rule 18(a). [315]
  - c. **Joinder of parties:** Multiple parties may *join* their actions together. Check to see whether either “*permissive* joinder” or “*compulsory* joinder” is applicable. Also, remember that each of these two types of joinder can apply to *either multiple plaintiffs* or *multiple defendants*. See FRCP 19 and 20. [316]
  - d. **Class actions:** Check whether a *class action* is available as a device to handle the claims of many similarly-situated plaintiffs, or claims against many similarly-situated defendants. See FRCP 23. Look for the possibility of a class action wherever there are 25 or more similarly-situated plaintiffs or similarly-situated defendants. [330]
  - e. **Intervention:** A person who is not initially part of a lawsuit may be able to enter the suit on his own initiative, under the doctrine of *intervention*. See FRCP 24. Check whether the intervention is “of right” or “permissive.” [356]
  - f. **Interpleader:** Where a party owes something to two or more other persons, but isn’t sure which, that party may want to use the device of *interpleader* to prevent being made to pay the same claim twice. After checking whether interpleader might be desirable, decide whether the stakeholder should use “*statutory* interpleader” or “*Rule* interpleader.” See 28 U.S.C. §1335 (statutory interpleader) and FRCP 22 (Rule interpleader). [360]
  - g. **Third-party practice (impleader):** Anytime D has a potential claim against some *third person* who is not already in the lawsuit, by which that third person will be liable to D for some or all of P’s recovery against D, D should be able to “*implead*” the third person. (*Example:* Employee, while working for Employer, hits Victim with a company car. Victim sues Employer in diversity, under the doctrine of *respondeat superior*. Under traditional concepts of indemnity, Employer will be able to recover from Employee for any amount that Employer is forced to pay Victim. Therefore, Employer should “implead” Employee as a “third party defendant” to the Victim-Employer action.) See FRCP 14(a). Once a third-party defendant is brought into the case, consider what other claims might now be available (e.g., a counterclaim by the third-party defendant against the third-party plaintiff, a cross-claim against some other third-party defendant, a counterclaim against the original plaintiff, etc.). [368]
  - h. **Cross-claims:** Check to see whether any party has made, or should make, a claim against a *co-party*. This is a *cross-claim*. See FRCP 13(g). [374]



- i. **Jurisdiction:** For any of these multi-party or multi-claim devices, check to see whether the requirements of *personal jurisdiction* and *subject matter jurisdiction* have been satisfied. To do this, you will need to know whether the doctrine of “*supplemental*” jurisdiction applies to the particular device in question. If it does not, the new claim, or the new party, will typically have to *independently* meet the requirements of federal subject matter jurisdiction. (*Example:* P, from Massachusetts, sues D, from Connecticut, in diversity. X, from Massachusetts, wants to intervene in the case on the side of D. Because supplemental jurisdiction does not apply to intervention, X must independently satisfy the requirement of diversity, which he cannot do because he is a citizen of the same state as P. Therefore, X cannot intervene.)
9. **Former adjudication:** Lastly, check whether the results in some *prior litigation* are *binding* in the current suit. Distinguish between situations in which the *judgment* in the prior suit is binding on an entire cause of action in the present suit (under the doctrines of *merger* and *bar*), and the situation where a *finding of fact* is binding on the current suit, even though the judgment itself is not binding (the “*collateral estoppel*” situation).
- a. **Non-mutual collateral estoppel:** Where a “*stranger*” to the first action (one not a party to that first action) now seeks to take advantage of a finding of fact in that first suit, consider whether this “*non-mutual*” collateral estoppel should be allowed. [392]
- b. **Full Faith and Credit:** Lastly, if the two suits have taken place in *different jurisdictions*, consider to what extent the principles of *Full Faith and Credit* limit the second court’s freedom to ignore what happened in the first suit. [410]

## CHAPTER 2

## JURISDICTION OVER THE PARTIES

## I. GENERAL PRINCIPLES

- A. **Two kinds of jurisdiction:** Before a court can decide a case, it must have jurisdiction over the *parties* as well as over the *subject matter*. [7]
1. **Subject matter jurisdiction:** *Subject matter* jurisdiction refers to the court’s power to decide the *kind* of case before it. (*Examples of subject matter jurisdiction issues:* (1) Does the federal court for the District of New Jersey have the power to decide cases in which the two parties are citizens of different states? (2) Does the Binghamton Municipal Court have the power to decide cases involving more than \$1,000?)
2. **Jurisdiction over the parties:** Jurisdiction over the *parties* refers to whether the court has jurisdiction to decide a case *between the particular parties*, or *concerning the property*, before it. (*Examples of issues concerning jurisdiction over the parties:* (1) Does Court X have jurisdiction over D, who is a citizen of State X, but who is temporarily out of the state? (2) Does Court Y have jurisdiction over property in State Y where the action is one by P to register title to the land in his name?)
- B. **Jurisdiction over the parties:** There are two distinct requirements which must be met before a court has jurisdiction over the *parties*: [8]
1. **Substantive due process:** The court must have *power* to act, either upon given property, or on a given person so as to subject her to personal liability. The Constitution’s Fourteenth

Amendment Due Process Clause imposes this requirement of power to act, as a matter of “*substantive due process*.”

2. **Procedural due process:** Also, the court must have given the defendant *adequate notice* of the action against him, and an *opportunity to be heard*. These, taken together, are requirements of *procedural due process*, also imposed by the Fourteenth Amendment’s Due Process Clause.
- C. **Three kinds of jurisdiction over the parties:** There are *three different kinds* of jurisdiction which a court may exercise over the parties — one of these three *must be present* for the case to go forward. [8]
1. **In personam:** *In personam* jurisdiction, or jurisdiction over the defendant’s “person,” gives the court power to issue a judgment against her *personally*. Thus *all* of the person’s *assets* may be seized to satisfy the judgment, and the judgment can be sued upon in other states as well. [8]
  2. **In rem:** *In rem* jurisdiction, or jurisdiction over a *thing*, gives the court power to adjudicate a claim made about a *piece of property* or about a *status*. (Examples: An action to quiet title to real estate, or an action to pronounce a marriage dissolved.) [8]
  3. **Quasi in rem jurisdiction:** In *quasi in rem* jurisdiction, the action is begun by seizing property owned by (*attachment*), or a debt owed to (*garnishment*) the defendant, within the forum state. The thing seized is a pretext for the court to decide the case without having jurisdiction over the defendant’s person. Any judgment affects only the property seized, and the judgment cannot be sued upon in any other court. [8]
  4. **Minimum contacts requirement:** If jurisdiction in the case is *in personam* or *quasi in rem*, the court may not exercise that jurisdiction unless D has “*minimum contacts*” with the state in which the court sits. In brief, the requirement of minimum contacts means that D has to have taken *actions* that were *purposefully directed* towards the forum state. (Examples of the *required action*: D sold goods in the state, or incorporated in the state, or visited the state, or bought property in the state, etc.) Without such minimum contacts, exercise of jurisdiction would violate D’s Fourteenth Amendment federal constitutional right to due process. [8]
    - a. **Unreasonable exercise:** Even if D has the requisite “minimum contacts” with the forum state, the court will not exercise jurisdiction if considerations of “*fair play* and substantial justice” would require making D defend in the forum state so *unreasonable* as to constitute a due process violation. But in most cases, if D has the required minimum contacts with the forum state, it will not be unreasonable for the case to be tried there.
- D. **Long-arm statute:** Most states have “*long-arm statutes*.” A long-arm statute is a statute which permits the court of a state to obtain jurisdiction over *persons not physically present within the state at the time of service*. (Example: A long-arm might allow jurisdiction over an out-of-stater who has committed a tort in the state.) [9]
1. **Substitute service:** Long-arms typically provide for “substitute” means of *service*, since in-state personal service is not possible. (Example: A long-arm statute might allow the plaintiff to cause the defendant to be served out of state by registered mail.)
- E. **Flow Chart:** For an overview of how to analyze state-court jurisdiction problems, see the Flow Chart printed as Figure 2-1 [38].