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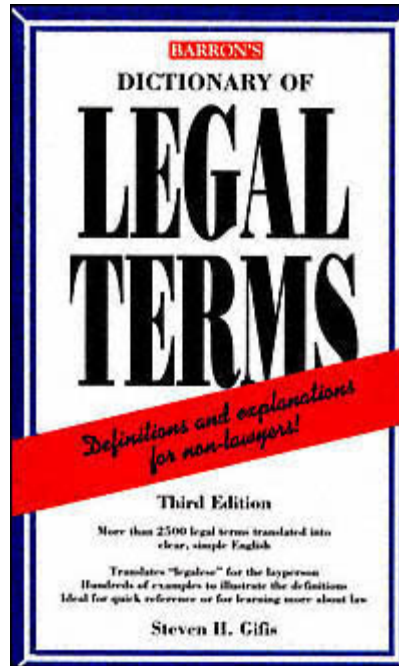
Dictionary of Legal Terms
A Simplified Guide to the Language of Law

Third Edition

by
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Dictionary of Legal Terms

1

Preface

Professions tend to insulate themselves from lay understanding by the development of specialized jargon. The legal profession has achieved this insulation so successfully that the uninitiated is overwhelmed by the incomprehensibility of his or her lawyer's prose. Despite the increasing pervasiveness of law into every facet of modern life, the special language of the law remains a barrier to nonlawyers. In recent years "plain language" statutes have been passed by several states, requiring that consumer contracts, such as residential leases, be written in plain, everyday language. Yet, even with these reforms, the language of the lawyer often remains a mystery to the client.

The lawyer's language is replete with words having particular meanings. Thus, a lawyer "moves" to "evict a holdover tenant" when his or her client wants to kick the tenant out. The lawyer seeks to "partition a co-tenancy" gone sour and to "compel an accounting" to the "aggrieved party." A client's home is destroyed by earthquake and the insurance company refuses to pay. An attorney asks if the "risk" of earthquake is included in the insured's policy and, if not, whether "representations" were made to the homeowner that would support an action to "reform" the policy or that might create an "estoppel" against the company's denial of "liability." A merchant finds an umbrella in a coat rack; the attorney asks whether it has been "abandoned" or "mislaid" and explains to the merchant the "duty" that the law imposes upon a "finder" of "lost property."

In 1975 I authored a paperback law dictionary primarily for law students who were trying to comprehend what I and their other law professors were saying. That book has been used by tens of thousands of law students. It is hoped they have found it of assistance in understanding the baffling new world of law. Paralegals, legal secretaries and other professionals who regularly interact with lawyers have also purchased the law dictionary. It occurred to me, however that the greatest need for communication existed between the lawyer and the client.

And, even for the general citizens, it seemed to me that comprehending the ordinary newspaper article had to be growing more and more difficult as the news of the day became more and more entangled with legal jargon. The available law dictionaries were either too sophisticated for the average lay person or too simplistic and incomplete to be helpful. The purpose of this book is to provide a ready, accessible and useful source of understanding of the language of law and law-related processes and concepts.

The text of the book has been drawn in large part from my companion publication *Law Dictionary*. The definitions have been re-drafted in lay terms and the citations to authority have been deleted. Users of this book who need a more detailed explanation of a term may find resort to the *Law Dictionary* appropriate. And, in addition to the greater readability of the text, many new terms were added that law students might not encounter in their studies and that might not be thought of as technically "legal terms" but that have special meaning and arise in legal contexts. Hundreds of definitions have been added from the fields of securities, finance and taxation, which will assist the average person in understanding the business section of a newspaper. Abbreviations such as "N.O.V." have been defined so that the user will not have to fumble through many other sources until he or she discovers that the phrase refers to non obstante verdicto.

Although the book is titled a *Dictionary of Legal Terms* and may be used as one would use any other dictionary, it is contemplated that the user may want to skim through the book from time to time, stopping to read definitions touching upon jargon that he or she has noticed but not comprehended. In this fashion the book will be a primer for the lay person and hopefully will bridge the communication gap between the reader and the law.

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Acknowledgements

A number of persons contributed to the first edition of this book. The financial and securities terms were drafted by Michael B. Perkins, C.F.A.; the taxation terms, by David Mills, Esq. The task of editing the Law Dictionary into a layman's version was handled very ably by Keith Roberts, Esq., and significant editorial assistance was rendered by Alan Dexter Bowman, Esq., and Joseph C. Mahon, Esq. The examples were drafted by Andrew Levine, Rutgers School of Law-Newark, Class of 1984. The overall editing of the entire manuscript was performed with great skill and precision by my wife, Susan Pollard Gifis, Esq. Finally, the entire manuscript was typed and retyped with great care and cheerfulness by my secretary, Angela Di Pierro.

I was most fortunate to persuade my wife once again to lend her considerable talents to the editing of the second edition. The cross-references were improved, new terms were added, the text was made more gender-neutral, and the examples and definitions sharpened and made more readable. This third edition incorporates much of the improvements in the fourth edition of the companion volume, *Law Dictionary*. The editors for this edition were Amira Rahman Scurato and her husband Michael. Without their efforts, this new edition would not have been possible. I am deeply indebted to them for their excellent work.

Pronunciation Guide

The decision as to which Latin words, maxims and expressions should be included in this dictionary, in view of the thousands that the user might encounter, was necessarily a somewhat arbitrary one; but an earnest effort has been made to translate and, where appropriate, to illuminate those terms and phrases considered likely to be crucial to a full understanding of important legal concepts. Hopefully, there are no significant omissions and we have erred only on the side of overinclusiveness.

Each of the Latin and French words and phrases at least those that continue to be recognized as such and have not become, functionally, a part of the English language includes a phonetic spelling designed to assist the user in the pronunciation of terms that are probably unfamiliar to her or him. The purpose in providing this pronunciation guide, however, has not been to indicate the "correct" mode of pronouncing the terms; rather, the goal has been to afford the user a guide to an acceptable pronunciation of them. In the case of Latin words, therefore, neither the classic nor the ecclesiastical pronunciation has been strictly followed; instead, the phonetic spellings provided herein reflect the often considerable extent to which pronunciation has been "Anglicized" and/or "Americanized," partly through widespread legal usage.

Of course, such a system is anything but uniform, and adoption of it is clearly hazardous from the standpoint of general acceptance as well as that of scholarship. Many, if not most, of these terms have alternative pronunciations in common usage throughout the English-speaking legal world, and there has been some deference to classical or ecclesiastical pronunciation and, hopefully, to consistency. Thus, the choices made here, while in most cases meant to reflect the most commonly

accepted pronunciation, inevitably have been the product of the author's personal preferences.

The phonetic symbols employed herein were drawn from what the author perceives as a commonly recognized and understood "system." The following guide should be of some assistance in interpreting them.

*Vowels**ǎ* as in *ǎt**ä* as in *ä*rmy*á* as in *á*rrive*ā* as in *ā*pe*au* as in *ou*t*ě* as in *ě*gg*ē* as in *ē*vil*é* as in *é*arn*ĭ* as in *ĭ*ll*ī* as in *ī*ce*ǒ* as in *ǒ*x*ô* as in *ô*rgy*ō* as in *ō*pen*ŭ* as in *ŭ*p*û* as in *û*rge*ū* as in *rū*de*Consonants**g* as in *g*as*j* as in *j*ump or asthe *g* in *rouge*or *bourgeois*

Key to Effective Use of This Dictionary

Alphabetization: The reader should note carefully that all entries have been alphabetized letter by letter rather than word by word. Thus *ab initio*, for example, is located between *abeyance* and *abortion*, rather than at the beginning of the listings. In the same manner, *actionable* appears before, not after *action ex delicto*.

Brackets: Material in brackets [thus] represents an alternate expression for the preceding phrase. For example, "Federal Bureau of Investigation [F.B.I.]" indicates that F.B.I. is another way of expressing the entry for Federal Bureau of Investigation. When the reader is referred to a different main entry for the definition of a particular word, brackets are also used to indicate that the word to be defined appears as a subentry of the main word to which the reader is referred. Thus, "COMPENSATORY DAMAGES See damages [ACTUAL DAMAGES]" indicates that the definition of compensatory damages appears under the subentry ACTUAL DAMAGES, which in turn is found under the heading DAMAGES.

Cross-References: Boldface type has been used within the text of the definitions and at the end of them, to call attention to terms that are defined in the dictionary as separate entries and that should be understood and, if necessary, referred to specifically, in order to assure the fullest possible comprehension of the word whose definition has been sought in the first instance.

Terms emphasized in this manner include many that appear in the dictionary only in a different form or as a different part of speech. For example, although the term "alienate" may appear in boldface in the text of a definition, it will not be found as a separate entry, since it is expected that the reader can readily draw the meaning of that term from the definition

given for the word "alienation"; likewise, the reader coming across the word "estop" printed in boldface should not despair upon discovering that it is not in fact an entry here, but should instead refer to the term "estoppel."

Also, the reader must not assume that the appearance of a word in regular type precludes the possibility of its having been included as a separate entry, for by no means has every such word been printed in boldface in every definition. Terms emphasized in this manner include primarily those an understanding of which was thought to be essential or very helpful in the reader's quest for adequate comprehension. Many terms that represent very basic and frequently used concepts, such as "property," "possession" and "crime," are often printed in regular type. Furthermore, boldface is used to emphasize a word only the first time that that word appears in a particular definition.

Examples: Examples have been included to clarify many terms. Where these appear, they are clearly marked "EXAMPLE:"

Gender: Where masculine nouns and pronouns have been used, they are intended to refer to both men and women and should be so read.

Subentries: Words printed in boldface SMALL CAPITALS include:

- (1) those whose significance as legal concepts was not deemed sufficiently substantial to warrant their inclusion in the dictionary as separate entries, though some explanation or illumination was thought desirable, and
- (2) those which, though important, are most logically and coherently defined in the context of related or broader terms.

Words emphasized in this manner either have been separately and individually defined in the manner of "subcategories" or have been defined or illustrated, implicitly or explicitly, within the text of the definition of that main entry.

A

A.B.A. see American Bar Association.

ABANDONED CHILD [SPOUSE]

person who has not been in contact with or received support from the parent or spouse. A court finding of child abandonment terminates parental rights and allows the child to be adopted without permission of the parents. See desertion.

ABANDONMENT

the intentional giving up of rights or property with no future intention to regain title or possession.

EXAMPLE: Paul finishes reading his newspaper while waiting for a doctor to see him. Upon leaving the doctor's office, Paul intentionally decides not to take the paper with him. Paul *abandons* the newspaper. Had he merely forgotten the paper and returned to the office to retrieve it, he would not be considered to have abandoned the property.

ABATABLE NUISANCE see nuisance.

ABATEMENT

generally, a lessening or reduction: also, either a termination or a temporary suspension of a lawsuit. An ABATEMENT OF A LEGACY means that the legacy to a beneficiary is either reduced or completely eliminated because of debts that must first be paid out of the decedent's estate. An ABATEMENT OF TAXES is a tax rebate or decrease.

ABDUCTION

the criminal or wrongful act of forcibly taking away another person through fraud, persuasion or violence. (Compare kidnapping.)

ABET see aid and abet.

ABEYANCE

an undetermined or incomplete state of affairs; in property law, the condition of a freehold or estate in fee when there is no existing person in whom the estate vests.

ABILITY TO STAND TRIAL see competent.

AB INITIO

(āb ĩn-ĭ'-shē-ō) Lat.: from the beginning. Commonly used in referring to the time when an action or instrument or interest in property becomes legally valid.

ABNORMALLY DANGEROUS ACTIVITY see ultrahazardous activity.

ABOLISH

to repeal, recall, or revoke; to cancel and eliminate entirely. This term refers especially to things of a permanent nature such as institutions, customs, and usages, as in the abolition of slavery by the Thirteenth Amendment to the United States Constitution.

ABORIGINAL TITLE see Indian law [INDIAN TITLE].

ABORTION

the premature termination of a pregnancy; may be either spontaneous (miscarriage) or induced. A woman enjoys a constitutional right to have an abortion during the first trimester of her pregnancy. During the second trimester, however, the state may regulate the abortion procedure, and during the third trimester the state may even proscribe abortion except where medically necessary to preserve the health of the mother.

ABRIDGE

to shorten, condense; to diminish.

ABROGATE

to annul, repeal, put an end to; to make a law void by legislative repeal.

ABSCOND

to travel secretly out of the jurisdiction of the courts, or to hide in order to avoid a legal process such as a lawsuit or arrest.

ABSENTIA see in absentia.

ABSOLUTE LIABILITY see strict liability.

ABSQUE HOC

(*äb'-skwā hōc*) Lat.: without this. If it had not been for this; a phrase used to introduce a denial in a pleading.

ABSTENTION [DOCTRINE]

the policy that a federal district court may decline to exercise its jurisdiction and may allow a state court to decide a federal constitutional question or questions of state law. Abstention is based on comity and is intended to restrict federal court interference in state proceedings. See federalism.

EXAMPLE: A prisoner in a state prison brings a lawsuit in federal district court claiming that under federal law he is entitled to have access to a law library. The state in which the prisoner is jailed may require by law that each state prison maintain an adequate law library. The federal court applies the *abstention doctrine* in refusing to hear the case, instructing the prisoner to raise the issue in a state court.

ABSTRACT OF RECORD

a condensed history of a case, taken from the trial court records and prepared for use by the appellate court.

ABSTRACT OF TITLE

a short history of title to land, noting all conveyances, transfers, grants, wills and judicial proceedings, and all encumbrances and liens, together with evidence of satisfaction and any other facts affecting title.

EXAMPLE: John wants to sell a parcel of land to Bill. In order to protect himself from claims by any other persons concerning that parcel, Bill insists that John provide an *abstract of title* before Bill purchases the land. Only with that abstract can Bill be satisfied that John is the rightful owner of the property. Bill can also purchase a policy of title insurance to protect himself from any problems that develop arising from ownership in the land. The insurance will be based on the abstract of title.

ABUSE OF DISCRETION

on appeal, the characterization by a reviewing court of a lower court or administrative agency decision or ruling as arbitrary and unreasonable, leading the reviewing court to overturn the decision. See discretion.

ABUSE OF PROCESS

improper use of a legal process; for example, serving a summons to frighten the recipient or to prompt a response from him or her, where no suit has been filed, or filing a lawsuit for an improper purpose.

EXAMPLE: Nick desperately needs information from Sam to aid Nick in preparing for a lucrative business deal. Sam refuses to provide that information because of its confidential nature. Nick files a lawsuit against Sam so he can acquire the information by claiming that he needs it in connection with the lawsuit. Nick has thus participated in an *abuse of process* because he used service of summons, which is a legal process, to institute a lawsuit, for the sole purpose of acquiring information not otherwise lawfully available to him.

ABUT

to adjoin, touch boundaries, border on.

ACCELERATION

1. the hastening of the time for enjoyment of a remainder interest due to the premature termination of a preceding estate; 2. the process by which, under the terms of a mortgage or similar obligation, an entire debt is to be regarded as due upon the borrower's failure to pay a single installment or to fulfill some other duty. See acceleration clause.

ACCELERATION CLAUSE

a provision in a contract or document that, upon the happening of a certain event, a person's expected interest in the property will become vested sooner than expected. Often found in installment contracts, this clause, if invoked, causes the entire debt to become due upon a party's failure to make payment on time.

EXAMPLE: David signs a loan agreement with the bank, promising to repay the bank in monthly payments over a three-year period. The agreement includes an *acceleration clause* which provides that if Dave fails to pay the required amount for any month or months, the bank can demand that Dave repay the remaining amount of the loan in one payment.

Although acceleration clauses are frequently found in loan or mortgage agreements, they are not generally resorted to until other methods of repayment are attempted.

ACCEPTANCE

the voluntary act of receiving something or of agreeing to certain terms. 1. In contract law, acceptance is consent to the terms of an offer, creating a binding contract.

EXAMPLE: A homeowner contracts with an aluminum siding company to cover the house with new siding. The homeowner is not happy with two of the clauses in the contract, but the company is unwilling to change the clauses. When the homeowner signs the contract with the clauses unchanged, his signature acts as an *acceptance* of those clauses as they are printed. The fact that he has questioned those clauses has no effect on their validity as part of the contract.

2. In real property law, acceptance is essential to completion of a gift inter vivos. 3. "Acceptance" by a bank of a check or other negotiable instrument is a formal procedure whereby the bank on which the check is drawn promises to honor the draft by paying the payee named on the check.

ACCESS

the opportunity to approach, communicate, or pass to and from without obstruction as with an easement. Also refers to the opportunity for sexual intercourse. A husband's nonaccess to his wife may be a defense to a paternity suit, as may "multiple access" be the defense of several lovers in a paternity suit. The absence of opportunity for copying may provide a nonaccess defense to a plagiarism action. The right of access to public records includes such laws as the Freedom of Information Act.

ACCESSION

something added; a right, derived from the civil law, to all that one's property produces, and to that which is united to it either naturally or artificially. The civil law required the thing to be changed completely, as grapes into wine, before the original owner could lose title. By common law the article in its altered form is still the property of the owner of the original material if the owner can prove the identity of the original material.

EXAMPLE: Cobbler John kills some of Farmer Bob's cows and turns the leather into shoes. Bob can take the shoes by *accession* if he can establish the leather came from his cows.

ACCESSORY

a person who aids or contributes to a crime as a subordinate. An accessory performs acts that aid others in committing a crime or in avoiding apprehension. In some jurisdictions an accessory is called an aider and abettor. See also accomplice; conspirator. Compare principal.

ACCESSORY AFTER THE FACT a person who harbors or assists a criminal knowing that he or she has committed a felony or is sought in connection with a crime.

ACCESSORY BEFORE THE FACT a person who incites, counsels or orders another to commit a crime, but who is not present when it is committed.

ACCIDENT

an unforeseen, unexpected event; an occurrence by chance and not by design. In the context of an automobile insurance policy, the term includes any event that occurs unintentionally, even if due to negligence rather than to forces beyond anyone's control. An **UNAVOIDABLE ACCIDENT** is one that is not the product or fault of another, such as one caused by an act of God.

ACCOMMODATION INDORSEMENT see indorsement.

ACCOMMODATION MAKER [OR PARTY]

one who, as a favor to another, signs a note as acceptor, maker or indorser, without receiving compensation or other benefit, and who thus guarantees the debt of the other person.

ACCOMPLICE

one who voluntarily joins another in committing a crime. An accomplice has the same degree of liability as the one who commits the crime. See also accessory; aid and abet; conspirator. Compare principal.

ACCORD

an agreement whereby one party takes, in settlement of a claim, something other than what he or she considers himself or herself entitled to. Satisfaction takes place when the accord is executed, after which there has been an accord and satisfaction. See novation; settlement.

ACCORD AND SATISFACTION

the payment of money or other valuable consideration (usually less than the amount owed) in exchange for extinguishment of a debt. There must be an express or implied agreement that accepting the smaller sum discharges the obligation to pay the larger sum.

ACCOUNT

a detailed statement of the nature of debt and credit between parties, arising out of contracts or some fiduciary relationship; in general business terminology, a particular client or customer. See joint account; open account.

ACCOUNT DEBTOR person who is obligated on an account.

ACCOUNT PAYABLE the amount owed by a business to its suppliers and other regular trading partners.

ACCOUNTS RECEIVABLE amounts owing on open account; running accounts that are usually disclosed in the creditor's account books, representing unsettled claims and transactions not reduced to writing.

ACCOUNTING, ACTION FOR

refers to an action, usually brought in equity, to secure a formal statement of account from one partner to others in order to obtain a judicial determination of the rights of the parties in a shared asset. If one or more partners feel another has been diverting funds or otherwise cheating them, they may bring an action for an accounting and ask for the appointment of a temporary receiver. Sometimes an equity judge will appoint a master to perform the accounting.

ACCOUNTING METHOD

the method used by a business (corporation, partnership, or sole proprietorship) in keeping its books and records for purposes of computing income and deductions and determining taxable income.

ACCRUAL METHOD an accounting method under which income is subject to tax when the right to receive such income becomes fixed, and deductions are allowed when the obligation to pay becomes fixed, regardless of when the income is actually received or when the obligation is actually paid. The accrual method must be utilized by any business taxpayer that has inventory.

CASH METHOD an accounting method under which income is subject to tax when received and deductions are allowed when paid.

ACCOUNTS PAYABLE

the list of moneys currently owed by the debtor to the creditor. This list is kept in the ordinary course of the debtor's business. See accounts receivable.

ACCOUNTS RECEIVABLE

a list of moneys owed on current accounts to a creditor, which is kept in the normal course of the creditor's business and represents unsettled claims and transactions. See accounts payable.

ACCREDITED INVESTOR

knowledgeable and sophisticated persons or institutions who qualify to purchase securities in transactions exempt from registration under the Securities Act of 1933. See private offering.

ACCRETION

1. the act of adding something to property, as when a co-heir or co-legatee dies or rejects his or her inheritance or legacy, thereby increasing the shares of the other heirs or legatees.

EXAMPLE: A father's will leaves equal amounts of a bank account to his son and daughter. If the son takes his share, the added tax burden on him will virtually eliminate all of his gains. He therefore decides to reject the legacy. The daughter benefits by the *accretion* in the amount of the bank account the father left her if the son's share goes to her.

2. the gradual, imperceptible addition of soil to the shore by the natural action of waters. Compare avulsion. 3. in situations involving a trust, any addition to principal or income that results from an extraordinary occurrence, that is, an event that, while foreseeable, rarely occurs.

ACCRUE

1. to accumulate, become due, as interest added to principal. ACCRUED INTEREST is the interest that has become due, whether or not it has been paid. 2. in a cause of action, to come into existence as an enforceable claim. For example, the pedestrian's cause of action against the driver accrues when the driver hits and injures the pedestrian.

ACCUSATION

a charge of wrongdoing against a person or corporation, in the form of an indictment, presentment, information, etc.

ACCUSATORY INSTRUMENT

refers to the initial pleading or other paper that forms the procedural basis for a criminal charge. It may take the form of an indictment, information, or accusation. If the accusatory instrument is defective, the entire proceeding will be rendered null and void.

ACCUSE

to institute legal proceedings charging someone with a crime.

ACCUSED

the person charged with a crime; the defendant.

ACKNOWLEDGMENT

affirmation, admission or declaration recognizing ownership, indicating authenticity, accepting responsibility, or undertaking an obligation to do something, such as pay a debt.

A.C.L.U. see American Civil Liberties Union.

ACQUIESCENCE

conduct that may imply consent; a tacit acceptance, often through silence when some objection ought to be forthcoming. Thus, if one makes a statement and another does not respond negatively, acquiescence may be inferred. An estoppel may be created in appropriate circumstances in this manner. Compare laches, which implies a neglect to do that which we would expect another to do for his or her own benefit.

ACQUIRE

to gain by any means; to obtain by any endeavor such as practice, purchase, or investment; in the law of contracts, to become

the owner of property; to make something one's own. This implies some positive action as opposed to a more passive obtaining such as by an accrual. See accrue.

ACQUIT

1. to set free from an accusation of guilt by a verdict of not guilty; 2. in older contract terminology, to release from a debt or other obligation.

ACQUITTAL

a legal finding that an individual charged with a crime is not guilty and is therefore set free.

ACT see overt act. See also wrongful act.

ACTIO

(äk'-tē-ō) Lat.: action. Used to refer to legal proceedings, lawsuit, process, action, permission for a suit.

ACTION

a court proceeding wherein one party prosecutes another party for a wrong done, or for protection of a right or prevention of a wrong.

ACTIONABLE

forming the legal basis for a civil action, such as wrongful conduct.

ACTIONABLE TORT

the existence of facts sufficient for legal filing requirements for a legitimate lawsuit by one injured. See cause of action.

ACTION EX CONTRACTU see ex contractu.

ACTION EX DELICTO

a cause of action based on a tort.

ACTION FOR ACCOUNTING see accounting, action for.

ACTION FOR POSSESSION see possessory action.

ACTION IN CASE see trespass [TRESSPASS ON THE CASE].

ACTIO NON

(äk'-tē-ō nõn) Lat.: no action. In pleading, a Latin term referring to a nonperformance, nonfeasance; also, a nonsuit.

ACTIONS IN PERSONAM see in personam; jurisdiction.

ACTIONS IN REM see in rem; jurisdiction.

ACTIONS QUASI IN REM see jurisdiction; quasi in rem.

ACTIVE EUTHANASIA see euthanasia [ACTIVE EUTHANASIA].

ACTIVISM see judicial activism.

ACT OF GOD

a violent and catastrophic event caused by forces of nature, which could not have been prevented or avoided by foresight or prudence. Proof that an injury was caused by an act of God

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demonstrates that negligence was not the cause; and an act of God that makes performance of a contractual duty impossible may excuse performance of that duty. See impossibility.

ACTUAL AUTHORITY see agency.

ACTUAL CASH VALUE see market value.

ACTUAL DAMAGES see damages [ACTUAL DAMAGES].

ACTUAL EVICTION see eviction [ACTUAL EVICTION].

ACTUAL NOTICE see notice [ACTUAL NOTICE].

ACTUAL POSSESSION see possession [ACTUAL POSSESSION].

ACTUAL VALUE see market value.

ACTUARY

one who calculates insurance and property costs, especially, the cost of life insurance risks and insurance premiums.

ACTUS REUS

(äkt'-űs rā'-űs) Lat.: the criminal act. More properly, the physical act that had been declared a crime. In murder, the actus reus is homicide; in burglary, it is breaking into another's home at night; in check forgery, it is presenting the forged check for payment.

AD DAMNUM

(äd dām'-nűm) Lat.: to the damage. The amount of damages demanded in a civil suit.

ADDENDUM

something added; a supplemental section of a document containing material added after the document was prepared. It may be executed Simultaneously or at a later time.

ADDITUR

(äd'-dű-tűr) Lat.: it is increased. An increase by the court in the amount of damages awarded by the jury, which is done with the defendant's consent in return for the plaintiff's agreeing not to seek a new trial.

ADEEM see ademption.

ADEMPMENTION

the extinction or withdrawal of a devise or bequest by some act of the decedent clearly indicating an intent to revoke it, e.g., by giving away during one's life the property to be devised or bequeathed.

ADHESION CONTRACT

a contract so heavily restrictive of one party, while so nonrestrictive of another, that doubts arise as to whether it is a voluntary agreement. The term signifies a grave inequality of bargaining power that may lead the contract to be

declared invalid. The concept often arises in standard-form printed contracts submitted by one party to the other on a take-it-or-leave-it basis. See also overreaching; unconscionable.

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AD HOC

(ǎd hŏk) Lat.: for this, for this particular purpose. An ad hoc committee is one commissioned for a special purpose; an ad hoc attorney is one designated for a particular client in a special situation.

ADJECTIVE LAW

the rules of legal practice and procedure that make substantive law effective. Adjective law determines the methods of enforcing the legal rights created and defined by substantive law. For instance, service of process is a matter of adjective law.

ADJOURN

to postpone; to delay briefly a court proceeding through recess. An adjournment for a longer duration is termed a continuance. A session postponed indefinitely is termed an ADJOURNMENT SINE DIE. See sine die.

The term has a special meaning in the rules of legislatures which adjourn between legislative sessions, but recess for periods, of whatever duration, within a single session.

ADJUDICATION

the determination of a controversy and pronouncement of judgment.

ADJUSTED BASIS see basis [ADJUSTED BASIS].

ADJUSTER

one who determines the amount of an insurance claim and then makes an agreement with the insured as to a settlement.

AD LITEM

(ǎd lĭ'-tĕm) Lat.: for the suit. For the purposes of the lawsuit being prosecuted. See guardian [GUARDIAN AD LITEM].

ADMINISTRATION FOR NATIVE AMERICANS see Indian law [ADMINISTRATION FOR NATIVE AMERICANS].

ADMINISTRATIVE AGENCY see regulatory agency.

ADMINISTRATIVE HEARING see hearing.

ADMINISTRATIVE LAW

law created by administrative agencies by way of rules, regulations, orders, and decisions.

ADMINISTRATIVE LAW JUDGE

the presiding officer at an administrative hearing, whose power is essentially one of recommendation. In the federal system, he can administer oaths, issue subpoenas, rule on evidence, take depositions and make or recommend decisions, which can be appealed first to the federal agency for which he or she hears cases and then to a court of law.

ADMINISTRATIVE PROCEDURE ACT [APA]

an act designed to create uniformity and provide guidelines regarding the rule-making and adjudicative proceedings of administrative agencies, intra-agency and judicial review, public access to agency rules and decisions, and personal information collected by an agency.

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ADMINISTRATOR

someone appointed to handle the affairs of a person who has died intestate, that is, without leaving a will. If the decedent left a will, an executor performs the same function.

ADMIRALTY AND MARITIME JURISDICTION

jurisdiction over all actions related to events occurring at sea, including transactions relating to commerce and navigation, to damages and injuries upon the sea, and to all maritime contracts, and torts. In most cases, admiralty and maritime jurisdiction in the U.S. is given to the federal courts.

ADMIRALTY COURTS

tribunals that hear cases involving maritime law, the law governing disputes arising on or in relation to seagoing ships.

ADMIRALTY LAW see maritime law.

ADMISSIBLE EVIDENCE

evidence that may be introduced in court to aid the trier of fact, i.e., the judge or jury in deciding the merits of a case. Each jurisdiction has established rules of evidence to determine what evidence is admissible. A judge may exclude otherwise admissible evidence when he or she determines that its probative value is outweighed by such factors as undue consumption of time, prejudice, confusion of issues or a danger that the jury will be misled. A lurid, gory photograph, for example, depicting the scene of the crime, the weapon used or the injury to the victim may have very high probative value as to several issues in a criminal trial, but since it may cause undue prejudice in the minds of the jurors, it will be excluded if there is any other way to prove the necessary facts.

ADMISSION

the voluntary acknowledgment that certain facts are true; a statement by the accused or by an adverse party that tends to support the charge or claim against him or her but is not necessarily sufficient to establish guilt or liability.

In civil procedure, an admission is a pretrial discovery device by which one party asks another for a positive affirmation or denial of a material fact or allegation at issue.

ADMISSION BY A PARTY-OPPONENT see declaration against interest.

ADMIT

to permit into evidence. A judicial determination to admit some evidence and to exclude other evidence is a function of the perceived usefulness such evidence will have on the outcome of the case. See relevancy. Admit can also mean *acknowledged*, as in the accused admitted being present at the scene of the crime. See admission.

ADMIT TO BAIL to permit an accused person to be released from custody until trial upon posting of sufficient surety (bail).

ADMIT TO PRACTICE to certify by a court that a lawyer possesses the required qualifications to practice law within that jurisdiction. An admission pro hac vice is for a limited purpose.

ADMIT TO THE BAR see ADMIT TO PRACTICE above.

ADOPT

to agree to, appropriate, borrow, derive from, make use of; the formal process terminating legal rights between a child and his or her natural parents and creating new rights between the child and the adopting parents. See adoption.

ADOPTION

the legal process by which the parent/child relationship is created between persons not so related by blood. The adopted child becomes the heir and is entitled to all other privileges belonging to a natural child of his adoptive parent.

ADR see alternative dispute resolution; American Depository Receipt.

AD TESTIFICANDUM

(*äd tēs-tĭ-fĭ-cän'-dūm*) Lat.: for testifying. A person sought ad testificandum is sought to appear as a witness. See subpoena [AD TESTIFICANDUM].

ADULT

a person who has reached the age of majority.

ADULTERY

voluntary sexual intercourse between a married person (or, under common law, a married woman) and someone other than his or her spouse. Adultery is grounds for divorce, in which case the person who committed the act with the estranged spouse is called a CORRESPONDENT; it is also a criminal offense.

AD VALOREM

(*äd vā-lō'-rēm*) Lat.: according to value. Commonly used to designate an assessment of taxes against property at a certain rate upon its value.

AD VALOREM TAX see tax [VALUE ADDED TAX].

ADVANCE

moneys paid before payment is legally due, such as to an author for a novel yet to be written.

ADVANCEMENT

a *gift* given by a parent to his or her child that is intended to represent all or part of the child's share of the estate in the event the parent dies intestate.

EXAMPLE: The mother's will provides that her son receive \$20,000 upon her death. During her life, the son

requires money to start up his new business. The mother gives him \$10,000 without requiring repayment but informs the son that the money reduces the amount

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to which he will be entitled upon her death. The \$10,000 constitutes an *advancement*.

ADVANCE SHEETS

printed judicial opinions published in paperback or loose-leaf form prior to being incorporated into a bound volume with other reported cases in a reporter series. The volume and page number of the advance sheet is usually the same as its future bound counterpart for ease in citation. Compare SLIP OPINION, which is an individual judicial decision published after its issuance by the court and prior to its incorporation into advance sheets.

ADVERSARY

opponent or litigant in a legal controversy or litigation. See adverse party.

ADVERSARY PROCEEDING

a hearing involving a controversy between two opposing parties, the outcome of which is expected to be favorable to only one of the parties.

ADVERSE INTEREST

an interest contrary to and inconsistent with that of some other person.

ADVERSE PARTY

the opposing party in a lawsuit. See adversary.

ADVERSE POSSESSION

a method of acquiring legal title to land through actual, continuous, open occupancy of the property, for a prescribed period of time, under claim of right, and in opposition to the rights of the true owner. See hostile possession; notorious possession.

EXAMPLE: Jim owned an empty piece of land next to his house. Paul, a neighbor, built an extension on his home which overlapped a considerable amount of Jim's land. For over 15 years, Jim never said anything to Paul about building on his property, but after a dispute arose, Jim told Paul to remove any part of the extension that was on Jim's land. A court would find that Paul's continuous use of the property, which Jim always knew about, meant that Paul had legal title to the land by *adverse possession*.

ADVERSE WITNESS see witness [ADVERSE [HOSTILE] WITNESS].

ADVICE AND CONSENT

term relating to the provision of the Constitution requiring the President to have approval (advice and consent) of two-thirds of the Senate before entering into treaties or before appointing federal judges or Supreme Court justices. See Treaty Clause.

ADVISORY OPINION

a formal opinion by a judge, court or law officer upon a question of law submitted by a legislative body or gov-

ernment official but not presented in an actual court case or adversary proceeding. Such an opinion has no binding force as law.

ADVOCACY

the active taking up of a legal cause; the art of persuasion. A legal advocate is a lawyer.

A.F.D.C. see social security [AID TO FAMILIES WITH DEPENDENT CHILDREN].

AFFECTED WITH A PUBLIC INTEREST see public interest [AFFECTED WITH A PUBLIC INTEREST].

AFFIANT

a person who makes and signs a written statement under oath [affidavit].

AFFIDAVIT

a written statement made under oath before an officer of the court, a notary public or other person legally authorized to certify the statement.

EXAMPLE: As part of the defendant's sentence, the judge intends to include a large dollar amount for restitution to the victim. Rather than conduct a trial to determine the defendant's ability to pay the fine, the judge permits the defendant to file an *affidavit* outlining his financial situation. The affidavit also includes the defendant's name, address, age and other technicalities required by law, and an acknowledgment of the truthfulness of the statements made. A legally authorized person is required to administer an oath to the signor (called the affiant) and witness his signature.

AFFINITY

attraction existing between persons; penchant. Also, a term used to describe a relationship created by marriage.

DIRECT AFFINITY would exist between a wife and her husband's brother.

SECONDARY AFFINITY would exist between a wife and her husband's brother's wife.

COLLATERAL AFFINITY would exist between a wife and her husband's collateral relatives such as uncles or cousins.

AFFIRM

to approve or confirm; refers to an appellate court decision that a lower court judgment is correct and should stand.

AFFIRMATION

a person's indication that one affirms the truth of one's statement. An *affirmation* serves the same purpose as an oath, in which a person swears the truth of the statement made. When persons object to making an oath on religious or ethical grounds, an affirmation is commonly accepted in the place of an oath. A person who makes an affirmation is subject to the same penalties for perjury as a person who makes an oath.

AFFIRMATIVE ACTION

a positive step taken to correct conditions resulting from past discrimination or from violations of a law.

AFFIRMATIVE ACTION PROGRAMS

hiring practices and other employment programs adopted to eliminate discrimination in the employment of minority persons. Such programs are required by federal law.

AFFIRMATIVE DEFENSE see defense.

AFFIRMATIVE EASEMENT see easement [AFFIRMATIVE EASEMENT].

AFFIRMATIVE RELIEF

that relief granted a defendant (D) in a situation in which the defendant might maintain an action entirely independent of plaintiff's (P's) claim, and which claim D might proceed to establish and recover even if P abandoned his or her cause of action, or failed to establish it. In other words, D's answer must be in the nature of a cross-claim, thereby rendering the action defendant's as well as plaintiff's.

AFFIX

1. to attach to. In real estate, to attach something permanently to the land (e.g., a tree or an addition to a building).
2. to inscribe (e.g., a signature is affixed to a document).

AFIS see fingerprint [AFIS].

AFORETHOUGHT see malice aforethought.

A FORTIORI

(ä fôr-shē-ô'-rē) Lat.: with stronger reason. An inference that because a certain conclusion or fact is true, then the same reasoning makes it even more certain that a second conclusion is true.

EXAMPLE: Dan is accused of aiding in a bank robbery in which all of the participants were over six feet tall. One suspect has already been cleared by police because he is only five feet six inches. Since Dan is only five feet two inches, *a fortiori* he could not have participated in the robbery and will also be cleared.

AFTER-ACQUIRED PROPERTY

1. in commercial law, property acquired by a debtor after he has entered into an agreement in which other property is put up as security for a loan. Commonly used in security agreements, such a clause subjects any additional property to the creditor's mortgage or other interest and makes it clear that improvements, repairs, and additions made after the agreement are included as part of the security. 2. in bankruptcy law, property acquired by the bankrupt after he or she has filed to be declared a bankrupt. This property is generally free of all claims of the bankrupt's creditors.

AFTER-ACQUIRED TITLE

a property law doctrine that says that if a person without good title to land sells it and then subsequently gets good title to it, the title will automatically go to the one who had bought the land.

AFTER-THE-FACT see accessory [ACCESSORY AFTER-THE-FACT].

AGAINST PUBLIC POLICY see public interest [AGAINST PUBLIC POLICY].

AGAINST THE [MANIFEST] [WEIGHT OF THE] EVIDENCE

a determination by the trial judge that the jury's verdict is against the clear weight of the evidence presented, is based upon false evidence, or will result in a miscarriage of justice, or that the jury has acted mistakenly or improperly, in which case it is his or her duty, upon motion, to set aside the verdict and grant a new trial. See n.o.v. Compare directed verdict.

AGE DISCRIMINATION

the denial of privileges as well as other unfair treatment of employees on the basis of age, which is prohibited by federal law under the Age Discrimination Unemployment Act of 1967. This act was amended in 1978 to protect employees up to 70 years of age.

AGENCY

a relationship in which one person (agent) acts on behalf of another (principal) with the authority of the latter. Compare partnership.

AGENT

one who is authorized by another person to act in that person's behalf. The acts of an agent are binding on his principal.

EXAMPLE: Kim, an artist, instructs Dan to sell her paintings to various art galleries and to private parties. Dan is considered Kim's *agent*, regardless of whom he sells to, since he will have apparent authority to act on her behalf.

AGE OF CONSENT

age set by statute at which persons may marry without parental consent. Also refers to age at which an actor may consent to sexual intercourse, and below which age another commits an offense such as statutory rape or sexual assault, even if the sexual conduct is engaged in voluntarily by both parties. An erroneous belief that another is at or above the age of consent is generally not a defense.

EXAMPLE: Ashley, 19, meets Lee, 14, and thinks Lee looks 18. They have consensual intercourse. Ashley is nonetheless guilty of statutory rape.

AGE OF MAJORITY see majority, age of.

AGGRAVATED ASSAULT see assault.

AGGRAVATING CIRCUMSTANCES

special circumstances tending to increase the severity of the crime charged (comparing sexual assault with aggravated sexual assault on a minor) or the severity of punishment. Enhanced punishment may be applied for offenses involving murder for hire or other crimes for profit such as arson; extreme cruelty or depravity; substantial prior criminal record; failure of rehabilitative efforts; particular vulnerability of the victim due to advanced age, extreme youth, or disability; and many other factors that may be considered by the court. Compare mitigating circumstances.

AGGREGATE

a total of all the parts; the whole, the complete amount; also, to combine, as to aggregate several causes of action in a single suit; similarly, to aggregate many persons whose causes of action are closely related to a class action. See joinder.

AGGRIEVED PARTY

one who has been injured or has suffered a loss. A person is aggrieved by a judgment, order or decree whenever it operates prejudicially and directly upon his or her property, monetary or personal rights.

AGREEMENT

mutual assent between two or more legally competent persons, ordinarily leading to a contract. In common usage, it is a broader term than contract, bargain or promise, since it includes executed sales, gifts and other transfers of property, as well as promises without legal obligation. While agreement is often used as a synonym for contract, some authorities narrow it to mean only mutual assent.

AID AND ABET

to knowingly encourage or assist another in the commission or attempted commission of a crime. See also accessory; accomplice; conspirator. Compare principal.

AID TO FAMILIES WITH DEPENDENT CHILDREN see social security [AID TO FAMILIES WITH DEPENDENT CHILDREN].

AIR PIRACY see hijacking.

AIR RIGHTS

the legal ownership of land includes the ownership of the airspace above the land. A tree that has branches extending over a neighbor's property may therefore interfere with the neighbor's air rights. The rights are not limitless since, for example, airplanes are allowed to fly at certain altitudes. Conversely, the rights do not allow an owner to pollute the air.

AIRSPACE see air rights.

A.J.

abbreviation for Associate Judge or Justice.

A.K.A. see alias.

ALEATORY

uncertain; risky. An ALEATORY CONTRACT is an agreement in which performance by one party depends upon an uncertain or contingent event for example, a fire insurance contract is aleatory because it is uncertain when or if benefits will be paid.

ALIAS

"otherwise known as"; an indication that a person is known by more than one name. "AKA" and "a/k/a" mean "also known as" and are used in indictments to introduce the listing of an alias.

ALIBI

an excuse that proves the physical impossibility that a suspected person could have committed the crime.

ALIEN

one who is not a citizen of the country in which he lives. A RESIDENT ALIEN is a person who has been admitted to permanent resident status but has not been granted citizenship. An ILLEGAL ALIEN is a noncitizen who has not been given permission by immigration authorities to reside in the country in which he is living.

ALIENATION

in real property law, the voluntary transfer of title and possession of real property to another person. The law recognizes the power to alienate (or transfer) property as an essential ingredient of fee simple ownership of property and generally prohibits unreasonable restraints on alienation.

ALIENATION OF AFFECTIONS

a tort based upon willful and malicious interference with the marriage relationship by a third party, causing mental anguish, loss of social position, disgrace, embarrassment or actual monetary loss. (Most states no longer recognize this as the basis for a lawsuit.) If the interference is in the nature of adultery, the tort is called CRIMINAL CONVERSATION. However, it may result from lesser acts which deprive the other spouse of affection from his marital partner. See consortium.

ALIENATION, ORDER OF see marshaling [marshalling].

ALIEN REGISTRATION see green card.

ALIMONY

court-ordered payment for the support of one's estranged spouse in the case of divorce or separation. For federal income tax purposes, alimony payments are deductions to the paying spouse and income to the receiving spouse if they are payable over an indefinite period, or over a definite period lasting more than ten years.

CHILD SUPPORT the amount of money the court requires one spouse to pay to the other who has custody of the children born of the marriage, may be imposed by the court with or without an award of alimony.

ALQUOT

(ä'-lē-kwō) Lat.: an even, fractional part of the whole. In a trust, it is a particular fraction of the whole property involved, as distinguished from a general interest.

ALI TEST see insanity [ALI TEST].

ALIUNDE

(äl-ē-ün'-dā) Lat.: from another source; from elsewhere; from outside. ALIUNDE RULE refers to the doctrine that a verdict may not be impeached by evidence offered by a juror unless the foundation for introducing the evidence is laid first by competent, admissible evidence from another source.

ALLEGATION

in a pleading, an assertion of fact; a statement of the issue that the contributing party expects to prove. See averment.

ALLEN CHARGE

an instruction by the court to a jury that is having difficulty reaching a verdict in a criminal case, to encourage the jury to make a renewed effort to arrive at a decision. Because it may have a coercive effect upon the jury, some jurisdictions no longer permit the instruction to be given after the jury reports a deadlock.

ALLOCATION

the requirement in common law that, following the verdict of conviction, the judge ask the defendant to show legal cause why sentence should not be pronounced. It continues to be part of the sentencing procedure in a majority of states and is a mandatory part of a valid sentencing in the federal system. The modern allocation does not ask the defendant why sentence should not be imposed but rather asks if he or she has anything to say in his or her own behalf in mitigation of punishment. See mitigating circumstances.

ALLODIAL

owned freely; not subject to the restriction on alienation that existed in feudal law.

ALLOWANCE see depletion [DEPLETION ALLOWANCE].

ALLUVION

a deposit of sedimentary material (earth, sand, gravel, etc.) that has accumulated gradually and imperceptibly along the bank of a river or the sea. Alluvion is the result of accretion and is considered part of the property to which it has become attached. See also avulsion.

ALTERATION see material alteration.

ALTER EGO

(äl'-tèr ē-gō) Lat: the other self. Under the doctrine of alter ego, the law will disregard the limited personal liability one enjoys when he or she acts in a corporate capacity and will regard the act as his or her personal responsibility. To invoke the doctrine, it must be shown that the corporation was a mere conduit for the

transaction of private business and that no separate identity of the individual and the corporation really existed.

ALTERNATIVE DISPUTE RESOLUTION [ADR]

alternatives to the slow and costly process of litigation. Includes arbitration, conciliation, mediation, and summary proceedings. Some of these processes, such as mediation and arbitration, are being used by court systems to attempt to resolve disputes before trial.

ALTERNATIVE PLEADING

in common law, a pleading that alleged facts so inconsistent that it was difficult to determine upon which set of facts the person pleading intended to rely. Alternative pleading is generally permitted under modern procedure.

EXAMPLE: Paul is accused of murder. At his trial, he *alternatively pleads* the insanity defense and self-defense. The two are alternatives: the insanity plea means that Paul admits the murder but claims that his mental state prevents him from being criminally responsible, while the plea of self-defense means that he was justified in using deadly force in the particular circumstance.

ALTERNATIVE WRIT OF MANDAMUS see preemptory writ.

AMELIORATING WASTE see waste [AMELIORATING WASTE].

AMEND

to alter. One amends a statute by changing (but not abolishing) an established law. One amends a pleading by adding to or subtracting from an already existing pleading.

EXAMPLE: Lisa sues a manufacturing company for injuries resulting from a defect in one of their products. After she files her papers with the court, she discovers new facts which indicate that the company was negligent in developing the product. Lisa seeks to *amend* her pleading to include these new facts, and, as is generally the case, she is permitted to amend.

AMENDMENTS see respective entries (e.g., First Amendment).

A MENSA ET THORO see divorce [SEPARATION].

AMERICAN BAR ASSOCIATION [A.B.A.]

a national organization of lawyers and law students that promotes improvements in the delivery of legal services and the administration of justice. Membership is open to any lawyer who is in good standing in any state or to any student attending an accredited law school. The AMERICAN BAR FOUNDATION is a subsidiary of the A.B.A. that sponsors and funds projects in legal research, education, and social studies.

AMERICAN BAR FOUNDATION see American Bar Association [AMERICAN BAR FOUNDATION].

AMERICAN CIVIL LIBERTIES UNION [ACLU]

a national organization, founded in 1920, that seeks to enforce and preserve the rights and civil liberties guaranteed by the federal and state constitutions. Its activities include handling cases, opposing allegedly repressive legislation and publishing reports and informational pamphlets.

AMERICAN DEPOSITORY RECEIPT [ADR]

a receipt issued by American banks to domestic buyers as a convenient substitute for direct ownership of stock in foreign companies. ADR's are traded on stock exchanges and in over-the-counter markets like stocks of domestic companies. Rights, offers, stock dividends and similar adjustments to the underlying shares are paid in cash or ADR dividends by the bank.

AMERICAN INDIAN LAW see Indian law.

AMERICAN STOCK EXCHANGE

the second largest United States stock exchange, after the New York Stock Exchange. It was formerly known as the NEW YORK CURB EXCHANGE or "Curb" and is abbreviated today as either AMEX or ASE.

AMEX see American Stock Exchange.

AMICUS CURIAE

(á-mē'-kūs kyū'-rē-ī) Lat.: friend of the court. A qualified person who is not a party to the action but gives information to the court on a question of law. The function of an amicus curiae is to call attention to some information that might escape the court's attention. An AMICUS CURIAE BRIEF (or AMICUS BRIEF) is one submitted by someone not a party to the lawsuit, to give the court information needed to make a proper decision, or to urge a particular result on behalf of the public interest or of a private interest of third parties who will be indirectly affected by the resolution of the dispute. Thus, a court might permit a group of retarded citizens to participate in a proceeding brought by a prisoner rights group to challenge a statute authorizing the expenditure of funds for the construction of prisons and mental health facilities, since invalidation of the statute would adversely affect the interests of retarded citizens.

AMNESTY

a pardon extended to a group of persons excusing them for offenses against the government. See also executive clemency.

EXAMPLE: In an attempt to end the dissension caused by the Vietnam War, President Carter granted *amnesty* to all draft evaders on certain conditions. Those individuals entitled to amnesty were absolved of liability for selective service violations.

AMORTIZATION

the reduction of a debt by periodic charges to assets or liabilities, such as payments on mortgages.

EXAMPLE: A landlord paves the parking lot for an apartment building. In charging each tenant rental for a parking space, the landlord *amortizes* the cost of the pavement so that, over a period of time, the tenant actually pays for the work. If the landlord had borrowed the money to fund the improvement, the landlord would amortize the loan by paying it back over a fixed period of time.

In accounting statements, the term usually refers to charges against investments in intangibles such as patents, copyrights, goodwill, organization, expenses, etc. Compare depreciation.

AMOUNT REALIZED see realization [GAIN OR LOSS REALIZED].

ANCIENT DEMESNE

manors that were in the actual possession of the Crown during the reign of William the Conqueror and that were recorded as such in the Domesday Book. This type of tenure was abolished in England by the Law of Property Act (1922). See demesne.

ANCILLARY JURISDICTION

the jurisdiction under which a federal court is permitted to decide an entire controversy (including matters which it would not have authority to consider were they raised independently) if the controversy contains other issues that the law specifically authorizes federal courts to decide. Thus, when the court has jurisdiction of the principal action, it may also hear any ancillary proceeding, regardless of any other factor that would normally determine jurisdiction. Compare pendent jurisdiction.

AND HIS HEIRS see heirs.

ANIMO

(*än'-ĭ-mō*) Lat.: intentionally.

AMINO TESTANDI (*těs-tän'-dē*) with the intention to make a will.

AMINO REVOCANDI (*rě-vō-kän'-dē*) with the intention to revoke.

AMINO REVERTENDI (*rě-věr-těn'-dē*) with the intention to return.

ANIMUS see animo.

ANNOTATION

a comment upon or collection of cases citing a particular case or statute. An annotated statute is one that has the relevant cases interpreting the statute appended to it. Thus, United States Code Annotated (U.S.C.A.) or New Jersey Statutes Annotated (N.J.S.A.) are annotated versions of the official statutes of those jurisdictions. American Law Reports (A.L.R.) is an annotated set of recent cases from the various state and federal courts. The current versions are A.L.R. 4th and A.L.R. Fed.

ANNUAL REPORT

a formal financial statement issued yearly. The annual report of publicly owned corporations must comply with SEC reporting requirements, which include balance sheet, income statement, and cash flow reports audited by an independent certified public accountant.

ANNUITANT

one who receives the benefits of an annuity.

ANNUITY

a fixed sum payable periodically, subject to the limitations imposed by the grantor generally, either for life or for a number of years.

ANNUL

to make void; to dissolve that which once existed, as to annul a marriage. Annulment wipes out or invalidates the entire marriage, whereas divorce only ends the marriage from that point on and does not affect the former validity of the marriage.

ANSWER

the defendant's principal pleading in response to the plaintiff's complaint. It must contain a denial of all the allegations the defendant wishes to dispute, as well as any affirmative defenses by the defendant and any counterclaim against the plaintiff.

ANTENUPTIAL AGREEMENT see prenuptial agreement.

ANTICIPATORY BREACH

breaking a contract before the actual time of required performance. It occurs when one person repudiates his contractual obligation before it is due, by indicating that he will not or cannot perform his contractual duties.

EXAMPLE: Steven contracted with a fuel oil company to supply heating oil to it. The contract called for twelve monthly deliveries over a year period. After three months, Steven realized the contract would be too costly for him to continue supplying the oil. He informed the company that he would not deliver the oil at the next delivery date. His action constitutes an *anticipatory breach* of his contract with the fuel oil company.

Where anticipatory repudiation is by conduct rather than by declaration, it may be called VOLUNTARY DISABLEMENT.

ANTI-DISCRIMINATION ACT see Robinson-Patman Act.

ANTI-DUMPING LAW see dumping.

ANTILAPSE STATUTES

statutes that allow the heirs of a devisee or legatee who predeceases the testator to inherit what the testator had bequeathed to the deceased devisee or legatee. Under common law, a bequest lapsed upon the death of the specified recipient, so that, in particular, when a parent died before the testator/ grandparent, the grandchildren were disinherited.

ANTITRUST LAWS

statutes that promote free competition by outlawing such things as monopolies, price discrimination, and collaboration, for the purpose of restraint of trade, between two or more business enterprises in the same market. The two major U.S. antitrust laws are the SHERMAN ACT and the CLAYTON ACT.

A POSTERIORI

(ä pŏs-tĕr-ĕ-ŏ'-rĕ) Lat.: from the most recent point of view. Relates to knowledge gained through actual experience or observation, rather than through logical conclusions. Compare a priori.

APPARENT AUTHORITY

a reference to the doctrine that a principal is responsible for the acts of his or her agent where the principal by words or conduct suggests to a third person that the agent may act in the principal's behalf, and where the third person believes in the authority of the agent.

EXAMPLE: A business organization that sells athletic equipment used Tim, a local sports star, to advertise and promote their products. His actions made it seem that he was part of the business, and the business did nothing to qualify that image. A manufacturer contracted with Tim to supply the business with various types of equipment under their belief that Tim was a part of that business. Although the business may not want that equipment, they are forced to purchase it. Tim's *apparent authority* as agent of the business organization was due to the organization's acquiescence, and this false impression obliges them to act in accordance with the contract.

APPEAL

a request to a higher court to review and reverse the decision of a lower court. On appeal, no new evidence is introduced; the higher court is limited to considering whether the lower court erred on a question of law or gave a decision plainly contrary to the evidence presented during trial. Unless special permission is granted by the higher court to hear an interlocutory appeal, an appeal cannot be made until the lower court renders a final judgment.

APPEARANCE

the required coming into court of a plaintiff or defendant in an action either by himself or herself (PRO SE) or through an attorney. An appearance involves a voluntary submission to the jurisdiction of the court.

EXAMPLE: Sue is arrested for possessing more than 25 grams of marijuana. Once she employs an attorney, the attorney files a notice of *appearance* with the court stating that he or she is Sue's attorney and will represent her in the forthcoming trial.

GENERAL APPEARANCE a party's appearance at a proceeding for any reason other than for questioning the court's jurisdiction.

SPECIAL APPEARANCE an appearance for the sole purpose of questioning the jurisdiction of the court over the defendant and the authority of the court to compel his appearance for any other purpose.

EXAMPLE: A seller agrees to provide a buyer with certain goods. One clause in the contract states that, if the goods are defective, the buyer can only sue in the seller's home state. The goods turn out to be defective, but the buyer files suit in a court in the buyer's home state. The seller makes a *special appearance* in the court only for the purpose of challenging that court's jurisdiction based on the clause in the contract. By such an appearance, the seller does not acknowledge the court's right to entertain the buyer's suit against him.

COMPULSORY APPEARANCE an appearance compelled by service of process.

VOLUNTARY APPEARANCE an appearance by one who has not been required to appear by service or process.

APPEARANCE DE BENE ESSE see *de bene esse*.

APPELLANT

the party to a lawsuit who appeals the decision to a higher court. See plaintiff [PLAINTIFF IN ERROR]. Compare appellee.

APPELLATE COURT [APPEALS COURT]

a court having authority to review the law applied by a lower court in the same case. In most instances, the trial court first decides a lawsuit, with review of its decision then available in an appellate court.

APPELLATE JURISDICTION see jurisdiction.

APPELLEE

the party prevailing in the lower court who argues, on appeal, against setting aside the lower court's judgment. In some state courts this party is referred to as the respondent. See defendant [DEFENDANT IN ERROR]. Compare appellant.

APPOINTED COUNSEL see public defender; right to counsel.

APPOINTMENT OF RECEIVER

the placing, by court order, of contested property in the hands of a receiver in order to protect someone's ownership or trust interests in said property or funds. For instance, the creditor of a bankrupt can have the bankrupt's assets placed in the custody of a receiver to stop the bankrupt from selling the assets for cash or to prevent other creditors from seizing the assets.

APPOINTMENT, POWER OF see power of appointment.

APPORTION

to divide fairly or proportionately, according to the parties' respective interests.

APPRAISAL RIGHTS

a statutory remedy available in many states to minority stockholders [SHAREHOLDERS] who object to an extraordinary action taken by the corporation (such as a merger). This remedy requires the corporation to repurchase the stock of dissenting stockholders at a price equivalent to its value immediately prior to the extraordinary corporate action.

APPRAISE

to estimate the value of property. Compare assess.

APPRECIATE

1. increase in value; 2. to understand the significance of something; in criminal law, used in some statutes as part of the insanity test, to signify that the defendant understands the wrongfulness of his or her conduct.

APPRECIATION

the excess of the fair market value of property over the taxpayer's basis in such property.

UNREALIZED APPRECIATION the amount of appreciation in property that has not yet been subject to tax. See realization.

APPROPRIATE

1. to set apart for, or assign to, a particular purpose or use; 2. to wrongfully use or take the property of another.

APPROPRIATION

the designation of funds for a specific government expenditure.

APPURTENANT

attached to something else. In property law, the term refers especially to the attachment of a restriction (e.g., an easement or covenant) to a piece of land, which benefits or restricts the owner of such land in his use and enjoyment. To illustrate: if A allows B the right-of-way over A's land so that B has access to the highway, this is an easement appurtenant to B's land. See easement [EASEMENT APPURTENANT].

A PRIORI

(ä prē-ô'-rē) Lat.: from the former, from the first. Modern usage has deviated significantly from the Latin. An a priori conclusion or judgment is one that is necessarily true, that is neither proved by nor capable of being disproved by experience, and that is known to be true by a process of reasoning independent of all factual evidence.

The term is commonly used to indicate a judgment that is widely believed to be certain, or that is introduced presumptively, without analysis or investigation. Thus to accuse someone of having assumed a fact or conclusion a priori is often to disparage him or her for having failed to support a judgment through evidence or analysis. Compare a posteriori.

ARBITER

(är'-bīt-ër) Lat.: referee. A person (other than a judicial officer) appointed by the court to decide a controversy according to

the law. Unlike an arbitrator, the arbiter needs the court's confirmation of his decision for it to be final.

ARBITRAGE

a financial transaction involving the simultaneous purchase of currency, securities or goods in one market and their sale in a different market with a profitable price or yield differential. True arbitrage positions are completely HEDGED that is, the performance of both sides of the transaction is guaranteed at the time the position is assumed and are thus without risk of loss.

ARBITRARY AND CAPRICIOUS see abuse of discretion.

ARBITRATION

submitting a controversy to an impartial person, the arbitrator, chosen by the two parties in the dispute to determine an equitable settlement. Where the parties agree to be bound by the determination of the arbitrator, the process is called BINDING ARBITRATION.

In labor law, arbitration has become an important means of settling disputes, and the majority of labor contracts provide for arbitration of disputes over the meaning of contract clauses.

COMPULSORY ARBITRATION, in which the parties are forced to agree, is generally not provided for in federal law. The states, however, have increasingly provided for compulsory arbitration in areas beyond the control of federal law, such as police and firefighters' contracts.

ARBITRATION CLAUSE

a clause in a contract providing for arbitration of disputes arising under the contract. Arbitration clauses are treated as separable parts of the contract so that the illegality of another part of the contract does not nullify such agreement and a breach or repudiation of the contract does not preclude the right to arbitrate.

ARBITRATOR

an impartial person chosen by the parties to solve a dispute between them, who is empowered to make a final determination concerning the issue(s) in controversy, who is bound only by his own discretion, and from whose decision there is no appeal.

ARGUENDO

(är-gyū-ěn'-dō) Lat.: for the sake of argument.

EXAMPLE: Ace Chemical Company is accused of dumping toxic wastes in a canal outside the city. Although the company does not want to admit that it polluted the canal, for public relations reasons it is willing to pay the cleanup costs. In approaching the city to determine the dollar figure for those costs, the company will state, "Assuming, *arguendo*, that we did pollute the canal, how much will the cleanup cost?" By "assuming *arguendo*," the company avoids admitting guilt and moves on to the more important questions of cleanup.

ARGUMENT

a course of reasoning intended to establish a position and to induce belief.

ARM'S LENGTH

a relatively equal bargaining position between contracting parties, in which the agreement reached is seen as free of one-sidedness, duress, unconscionability, or overreaching by either party.

ARRAIGN

to bring a defendant to court to answer the charge under which an indictment has been handed down.

ARRAIGNMENT

an initial step in the criminal process in which the defendant is formally charged with an offense, given a copy of the complaint, indictment, information, or other accusatory instrument, and informed of his or her constitutional rights, including the pleas he or she may enter. Where the appearance is shortly after the arrest, it may properly be called a presentment since often no plea is taken. Compare preliminary hearing.

ARRANGEMENTS see bankruptcy [CHAPTER 11 REORGANIZATION].

ARRAY see challenge [CHALLENGE TO JURY ARRAY].

ARREARS

that which is unpaid although due to be paid. A person in arrears is behind in payment.

ARREST

to deprive a person of liberty by legal authority; in the technical criminal law sense, to seize an alleged or suspected offender to answer for a crime.

ARREST OF JUDGMENT

the court's withholding of judgment because of some error in the record.

ARREST RECORD see criminal record.

ARSON

the willful and malicious burning of another's house; sometimes expanded by statute to include acts similar to burning (such as exploding) or the destruction of property other than dwellings.

ARTICLES OF IMPEACHMENT

a formal statement of the grounds upon which the removal of a public official is sought, similar to an indictment in an ordinary criminal proceeding. In the federal system, articles of impeachment are voted by the House of Representatives, with the trial occurring before the Senate.

ARTICLES OF INCORPORATION

the document that creates a private corporation, according to the general corporation laws of the state.

ARTIFICE

a fraud or a cunning device used to accomplish some wrong; usually implies craftiness or deceitfulness.

ARTIFICIAL PERSON see corporation.

ART, WORDS OF see words of art.

AS A MATTER OF LAW see operation of law.

ASE see American Stock Exchange.

AS IS

a commercial term denoting agreement that buyer shall accept delivery of goods in the condition in which they are found on inspection prior to purchase, even if they are damaged or defective.

ASPORTATION see caption; trespass [TRESPASS DE BONIS ASPORTATIS].

ASSAULT

an attempt or apparent attempt to inflict bodily injury upon another by using unlawful force, accompanied by the apparent ability to injure that person if not prevented. An assault need not result in a touching so as to constitute a battery. Thus, no physical injury need be proved to establish an assault. An assault may be either a civil or criminal offense. Some jurisdictions have defined criminal assault to include batterythe actual physical injuring.

AGGRAVATED ASSAULT an assault where serious bodily injury is inflicted on the person assaulted; an assault with a dangerous or deadly weapon.

ASSEMBLY, UNLAWFUL see unlawful assembly.

ASSESS

1. to determine the value of something; 2. to fix the value of property on the basis of which property taxes will be calculated. Compare appraise.

ASSESSMENT OF DEFICIENCY

in general, the amount of tax determined to be due after an appellate review within the Internal Revenue Service and a Tax Court adjudication (if requested).

JEOPARDY ASSESSMENT an immediate assessment of the deficiency by the Internal Revenue Service without appellate review and Tax Court hearing, which is permitted if, in the opinion of the Internal Revenue Service, the assessment and collection of a deficiency would be jeopardized by delay.

ASSET

anything owned that has monetary value; any interest in real property or personal property that can be used for payment of *debts*.

EXAMPLE: Jane wants to borrow a sizeable amount of money to build a summer house in the mountains. Although banks are generally

unwilling to lend money for such projects, they will lend to Jane because she has substantial *assets*, including ownership of several buildings and a large number of stocks. Such assets are generally pledged as collateral. With respect to real property, Jane might give the bank a mortgage as a form of collateral.

Assets appear as one of three major balance sheet categories and are counterbalanced by liabilities and net assets. In corporations, net assets are usually referred to as shareholder's equity or book value.

CURRENT ASSETSfor accounting purposes, property that can be easily converted into cash, such as marketable securities, accounts receivable (goods or services sold but not paid for) and inventories (raw materials, work in process and finished goods intended for future sale).

FIXED ASSETSin accounting, property used for production of goods and services, such as plant and machinery, buildings, land, mineral resources.

Other categories of assets include intangibles, such as goodwill, patent rights and acquisition costs in excess of fair market value, and tangibles, such as long-term investments in other companies, long-term receivables, insurance owned.

ASSET VALUE see net asset value.

ASSIGN

to transfer one's interest in property, contract or other rights to another.

ASSIGNED COUNSEL see public defender; right to counsel.

ASSIGNED RISK

in automobile insurance, a class of persons to whom insurance companies will not issue policies voluntarily, usually because their record of prior accidents has made them a high risk, and who therefore are assigned by state law to insurance companies and must pay higher rates. Many states have **FINANCIAL RESPONSIBILITY LAWS**that prohibit such persons from driving unless adequate insurance has been obtained.

ASSIGNMENT

the transfer to another of one's interest in a right or property.

ASSIGNMENT FOR BENEFIT OF CREDITORS a debtor's transfer of his property to another party to be held in trust and applied to the debts of the assignor (debtor).

ASSIGNMENT OF A LEASE the transfer of the lessee's entire interest in the lease, by which the assignee of the lease becomes primarily liable for any rent required to be paid under the lease, and the

assignor (original lessee) remains secondarily liable for the rent if the assignee does not pay it.

ASSIGNMENT OF ERROR

the appellant's declaration or complaint against the trial judge that he committed an error in the lower court proceedings. Assignments of error establish the issues to be argued on appeal.

ASSIGNMENT OF INCOME

a taxpayer's direction that income earned by him or her be paid to another person, so that it will be considered the other person's income for federal tax purposes. An effective assignment of income would be to transfer a share of dividend-paying stock *before* the dividend declaration date in such a case the dividend would be taxed to the transferee; an ineffective assignment of income would be to transfer the share *after* the dividend declaration date here the dividend would be taxed to the transferor.

ASSIGNS [ASSIGNEES]

all those who take from another by deed upon the transfer of real property, or under a will, or, in the absence of a valid will, those who inherit the property of the intestate by operation of law. See descent.

ASSISTED SUICIDE see euthanasia [ACTIVE EUTHANASIA].

ASSIZE

ancient writ issued from a court of assize to the sheriff for the recovery of property; actions of the special court that issues the writ. See Court of Assize and Nisi Prius.

ASSOCIATE JUSTICE

a member of the United States Supreme Court, other than the Chief Justice; the title held by a judge, other than the presiding judge, on the highest court of some states.

ASSOCIATION

a group of persons joined together for a certain object.

ASSUMPSIT

(*á-sŭmp'-sĭt*) Lat.: he promised; he undertook. In contract law, the term signifies an express or implied promise or undertaking, made either orally or in writing not under seal. The term refers especially to one of the old forms of action in common law comprising an action in equity and applicable to almost every case in which money had been received that in equity and good conscience ought to have been refunded.

ASSUMPTION OF MORTGAGE see mortgage.

ASSUMPTION OF RISK

1. in torts, an affirmative defense used by the defendant in a negligence suit, claiming that plaintiff had knowledge of an obviously dangerous condition or situation and

yet voluntarily exposed himself to the hazard, thereby relieving the defendant of legal responsibility for any resulting injury; 2. in contract law, the agreement by an employee to assume the risks of ordinary hazards arising out of his occupation.

Contributory negligence arises when plaintiff fails to exercise due care, while assumption of risk arises regardless of the care used and is based fundamentally on consent.

ASSURANCE see covenant [COVENANT OF FURTHER ASSURANCE].

ASSURED see insured.

ASYLUM

a shelter for the unfortunate or afflicted the insane, the crippled, the poor. A POLITICAL ASYLUM is a state that accepts a citizen of another state to shelter him from prosecution by that other state.

AT BAR see bar.

AT EQUITY see equity.

AT ISSUE see issue.

AT LAW

that which pertains to or is governed by the rules of law, as distinguished from the rules of equity; according to the rules of the common law. In England, and later in the United States, courts of law developed strict rules establishing the kinds of causes of action that could be maintained and the kinds of remedies that were available. Courts of equity established different rules and remedies, partly to mitigate the rigors of the law courts. "At law" and "in equity" thus refer to two different bodies of jurisprudence.

The term also may be used to mean by operation of law.

ATROCIOUS

outrageously wicked and vile. An atrocious act demonstrates depraved and insensitive brutality and exhibits a senselessly immoderate use of extreme violence for a criminal purpose.

ATTACHMENT

a legal proceeding by which a defendant's property is taken into custody and held for payment of a judgment in the event plaintiff's demand is later established and judgment is rendered in his favor.

ATTAINDER

in common law, the elimination of all civil rights and liberties, and the forfeiture of property, caused by one's conviction for a felony or capital offense. See bill of attainder.

ATTAINDER, BILL OF see bill of attainder.

ATTAINT

to pass sentence of attainder or to be under such a sentence; more generally to be stained or degraded by a conviction. In

early common law practice this referred to a writ used to challenge a jury verdict.

ATTEMPT

an overt act, beyond mere preparation, moving directly toward the actual commission of a criminal offense. The attempt to accomplish a criminal act is often made a crime itself, separate and distinct from the crime that is attempted. See inchoate. Compare conspiracy.

ATTENDANT CIRCUMSTANCES

loose facts surrounding an event. In criminal law the definitions of crimes often require the presence or absence of attendant circumstances. For example, statutory rape requires that the minor be under the age of consent, the age of the minor being the attendant circumstance.

ATTEST

to affirm as true; to sign one's name as a witness to the execution of a document; to bear witness to.

EXAMPLE: Where a person writes a will, that person must understand the nature of what he or she is doing when the will is signed and what the various provisions of the will mean. The laws of most states require that at least two persons *attest* to, or formally confirm, the writer's ability to meet these requirements. These persons are witnesses to the will.

ATTESTATION

the act of authentication by witnessing an instrument of writing, at the request of the party making the instrument, and subscribing it as a witness. Attestation entails witnessing and certification that the instrument exists.

ATTORNEY

may refer to an attorney in fact or attorney at law. An ATTORNEY IN FACT is one who is an agent or representative of another given authority to act in that person's place and name. The document giving the attorney authority is called a power of attorney.

The general reference to an attorney is usually intended to designate an ATTORNEY AT LAW. This is one of a class of persons admitted by the state's highest court or by a federal court to practice law in that jurisdiction. The attorney is regarded as an officer of the court and is always subject to the admitting court's jurisdiction as to his or her ethical and professional conduct. Violations of those standards of conduct may result in discipline of the attorney in the form of censure, suspension, or disbarment. See also counsel [COUNSELLOR]; district attorney; public defender.

ATTORNEY-CLIENT PRIVILEGE see privileged communication.

ATTORNEY GENERAL

the chief law enforcement officer of the federal government or of a state government.

ATTORNEY OF RECORD see of record [ATTORNEY OF RECORD].

ATTORNEY, POWER OF see power of attorney.

ATTORNEY'S FEE

the attorney's charge for services in representing a client; also, the additional award made by the court to the successful party in a lawsuit to compensate for the reasonable value of the services of the attorney.

ATTRACTIVE NUISANCE

the doctrine in tort law which holds that one who maintains something dangerous on his premises that is likely to attract children is required to reasonably protect the children against the dangers of that attraction. Thus, one has a duty to fence swimming pools, to remove doors from discarded refrigerators, to enclose partially constructed buildings and to be sensitive to other potentially dangerous conditions that attract curious children.

AUCTION see sale [AUCTION SALE].

AUDIT

an inspection of the accounting records and procedures of a business, government unit or other reporting entity by a trained accountant, for the purpose of verifying the accuracy and completeness of the records. It may be conducted by a member of the organization (internal audit) or by an outsider (independent audit).

EXAMPLE: Since its inception, the welfare agency has been criticized for mismanagement of federal money by the agency directors and for allowing people to file double and sometimes triple claims. The General Accounting Office, an agency of the federal government, agrees to conduct an *audit* to determine if these allegations are true and to trace where the money had been spent.

See audit of return.

AUDIT OF RETURN

a review by an agent of the Internal Revenue Service of the tax return filed by the taxpayer and of the books and records supporting the information contained on the tax return. See return, income tax.

AUDITOR

1. a public officer charged by law with the duty of examining and verifying the expenditure of public funds; 2. an accountant who performs a similar function for private parties.

AUTHENTICATE

certify; corroborate; to prove genuine. Authentication may be established by witness testimony or by an expert.

AUTHORITY

the permission or power delegated to another. This may be express or implied. See de facto [DE FACTO AUTHORITY]. If express, it is usually embraced in a document called a power of attorney. IMPLIED AUTHORITY stems from a relationship such as

that of principal and agent. If the agent does not have EXPRESS AUTHORITY by some writing, he or she nonetheless will have apparent authority. If the authority is given to the agent for a consideration, it is said to be an AUTHORITY COUPLED WITH AN INTEREST. Where not to infer an authority would result in an injustice, the law will imply an authority so as not to mislead another. In this circumstance the law speaks of an AUTHORITY BY ESTOPPEL. Where the principal intended the agent to have the right to act on the principal's behalf, the authority is called an ACTUAL AUTHORITY.

The term may also refer to the jurisdiction of a court such as "within the court's authority." It is also used to denote judicial or legislative precedent.

AUTHORIZED ISSUE

the total number of shares of capital stock that a corporation may issue under its charter.

AUTOMOBILE, DEATH BY see homicide; manslaughter [DEATH BY AUTOMOBILE].

AUTOMOBILE GUEST STATUTE see guest statute.

AUTOPSY

the dissection of a cadaver to determine the cause of death. It may involve the inspection of important organs in order to determine the nature of a disease or abnormality.

AVERMENT

a positive statement or allegation of facts in a pleading, as distinguished from one based on reasoning or on inference.

AVOID

to cancel or make void; to prevent a certain result.

AVOIDANCE see confession and avoidance.

AVOIDANCE OF TAX

the method by which a taxpayer reduces his tax liability without committing fraude.g., by investing in a tax shelter. Compare evasion of tax.

AVULSION

an abrupt change in the course or channel of a stream that forms the boundary between two parcels of land, resulting in an apparent loss of part of the land of one riparian landowner and an apparent increase in the land of the other. The sudden and perceptible nature of this change distinguishes avulsion from accretion: when the change is abrupt, as in avulsion, the boundary between the two properties remains unaltered. When the changes are brought about by accretion i.e., gradually, as a result of natural causes the changed boundaries are recognized, and ownership interests are affected.

AWOL see desertion [ABSENT WITHOUT LEAVE].

B**BAD CHECK**

a check that is dishonored on presentation because of nonsufficient funds [NSF], unavailable funds, or a closed bank account. Issuing a bad check is a form of larceny [theft] and is generally punished as a misdemeanor although in some jurisdictions it is a more serious offense if the amount of the check is substantial. An affirmative defense is usually provided if the maker of the check, upon notice of dishonor, promptly satisfies the payee. See also check kiting.

BAD DEBT

a debt that is not collectible and is therefore worthless to the creditor; a debt that becomes uncollectible because the debtor is insolvent. A nonbusiness bad debt is deductible from gross income as a short-term capital loss whereas a business bad debt is allowable as a deduction against ordinary income. See income [GROSS INCOME; ORDINARY INCOME]; capital gains or losses [SHORT-TERM CAPITAL GAINS OR LOSSES].

BAD DEBT RESERVE

rather than take deductions for specific debts that become worthless during the taxable year, a businessperson may deduct in each year a reasonable percentage of receivables, which percentage then becomes an addition to the reserve for bad debts. For example, if a taxpayer determines that on the average 3 percent of the person's accounts receivable becomes worthless during the taxable year, the taxpayer may deduct 3 percent and add it to the reserve for bad debts.

BAD FAITH

breach of faith; a willful failure to respond to plain, well-understood statutory or contractual obligations; dishonesty in fact in the conduct or transaction concerned.

BADGES OF FRAUD

facts or circumstances surrounding a transaction that indicate it may be fraudulent, especially in fraud of creditors. These badges include fictitious consideration, false statements as to consideration, transactions different from the usual method of doing business, transfer of all of a debtor's property, insolvency, confidential relationship of the parties, and transfers in anticipation of a lawsuit or an execution of judgment.

BAD TITLE

a purported title that is legally insufficient to convey property to the purchaser. A title that is not a marketable title is not

necessarily a bad title, but a title that is bad is not marketable and is one that a purchaser ordinarily may not be compelled to accept.

BAIL

a monetary or other security given to secure the release of a defendant until time of trial and to assure his or her appearance at every stage of the proceedings. Very often today an accused will be released "R.O.R." (release on recognizance) without bail so long as he promises to appear as required.

BAIL BOND

the document executed in order to secure the release of an individual in legal custody. The BAIL BONDSMAN, who acts as surety, generally forfeits his or her security in the event the defendant jumps bail that is, fails to appear as required for court dates.

BAILEE

a party who holds the personal property of another for a specific purpose agreed to between the parties. See bailment.

EXAMPLE: Mike owns a considerable amount of bonds that are payable on a certain date to whoever holds the documents. As a security precaution, Mike delivers the bonds to his bank to hold for him in a custodial capacity. The bank acts as a *bailee* of the bonds; Mike is the bailor. If Mike had placed the bonds in a rented safety deposit box, no bailment would have been created.

BAILIFF

1. a court attendant; 2. a person to whom some care, guardianship or jurisdiction is entrusted: e.g., a steward who has charge of lands, goods and chattels to get the best benefit for the owner; a person appointed by private persons to collect rents and manage their estate; or a court-appointed guardian of an incompetent.

BAIL JUMPING see jump bail.

BAILMENT

a delivery of personal property to be held in trust; the relationship that arises where one person, the bailor, delivers property to another, the bailee, to hold, with control and possession of the property passing to the bailee.

CONSTRUCTIVE BAILMENT one that arises when the person having possession holds it under such circumstances that the law imposes an obligation to deliver to another, even where such person did not come into possession voluntarily, and where therefore no bailment was voluntarily established.

GRATUITOUS BAILMENT one that results when care and custody of the bailor's property is accepted by the bailee without charge and without any consideration or expectation of benefit. In a gratuitous bailment, the bailee is liable to the bailor for the loss of bailed property only if the loss is caused by bailee's gross negligence.

INVOLUNTARY BAILMENT one that arises when the owner accidentally and without negligence leaves personal property in the possession of any person. An involuntary bailment arises if an umbrella is left with the coat check at a restaurant. Compare abandonment.

BAILOR

a person who delivers personal property to another to be held in bailment. The bailor need not be the owner of the property involved.

EXAMPLE: A hotel maid finds a necklace in a hallway. She leaves it with the clerk responsible for locking up the guests' jewelry, who will hold it until the rightful owner claims the necklace. The maid is the *bailor* of the necklace. In this instance, the bailment is involuntary and gratuitous. In instances where one pays a fee for another to hold his property (as in a parking lot situation), the bailment is one "for hire."

BAIT AND SWITCH

a method of consumer deception practiced by retailers that involves advertising in such an attractive way as to bring the customer in, followed by disparagement of the advertised product (that the seller in truth does not desire to sell) to cause the customer to switch to a more expensive product. This device is also frequently termed **DISPARAGEMENT**. Statutes in many states prohibit this sort of advertising.

BALANCE SHEET

a financial statement that gives an accounting picture of property owned by a company and of claims against the property on a specific date. See assets, liabilities.

BALANCING (TEST)

principle basic to the justice system of weighing both sides of an issue; examining the pros and cons. The ultimate goal is to seek equality or evenhandedness (a perfect balance). Constitutionally, it involves individual rights guaranteed by the Constitution weighed against states rights in such areas as equal protection and freedom of speech and press.

BALANCING OF EQUITIES weighing of conveniences, hardships, and policies as would be done in a Court of Equity.

BALANCING OF INTERESTS involves constitutional principles; the individual versus the State. Often involved in issues of interstate commerce.

BALLOON NOTE

a promissory note repayable in periodic installments of a specified amount, usually representing interest, and a much larger final installment, usually of the entire principal amount.

BANC

bench. See en banc.

BANK

a corporation formed to maintain savings and checking accounts, issue loans and credit, and deal in negotiable securities issued by government agencies and by corporations. Banks are strictly regulated and fall into the following three categories according to the limitations upon their activities:

COMMERCIAL BANK the most common and most unrestricted type of bank, allowed the most latitude in its services and investments. Its major limitation: it must keep on reserve a larger percentage of its deposits than the other two types of banks.

SAVINGS BANK the least common type of bank, prevalent only on the East Coast and in the Midwest. Its major service traditionally has been the time-savings account, from which money could be withdrawn only after a set period or upon thirty days' notice. Its services, however, have been expanded in some instances. By law a savings bank's investments are usually limited to certain corporate and government bonds and securities. Its advantages: it can pay higher interest rates than commercial banks, has certain tax benefits and can keep on reserve a smaller percentage of deposits. Usually, the bank is owned by its depositors as creditors whose dividends are paid as interest on their accounts.

SAVINGS AND LOAN ASSOCIATION (or BUILDING AND LOAN ASSOCIATION) similar to a savings bank in history and operation, except that the savings and loan association's primary purpose has been to provide loans for purchasing and building homes. In 1981 these institutions were authorized to offer a variant on checking accounts called a negotiable order of withdrawal ("NOW" account), which allows depositors to write checks against their interest-bearing savings account.

BANKER'S LIEN

the authority enjoyed by a banker to appropriate a depositor's funds or securities that are in the banker's possession and are not dedicated to a special purpose (as a trust) in order to satisfy a debt owed by the depositor to the bank.

BANKRUPTCY

popularly defined as insolvency, the inability of a debtor to pay his or her debts as they become due. Technically, however, it is the legal process under the Federal Bankruptcy Act by which assets of the debtor are liquidated as quickly as possible to pay off creditors and to discharge the bankrupt, or free the debtor of his or her debts, so that he or she may start anew. In reorganization, on the other hand, liquidation may be avoided and the debtor may continue to function, pay creditors and carry on business. At the state level, **INSOLVENCY PRECEEDINGS** may be brought to obtain more limited relief. See trustee [TRUSTEE IN BANKRUPTCY]. Compare receivership.

VOLUNTARY PROCEEDING a proceeding under the Federal Bankruptcy Act whereby an insolvent debtor may file a petition to be declared a voluntary bankrupt.

INVOLUNTARY PROCEEDING a proceeding to seize all the insolvent debtor's nonexempt property, to distribute it equally among creditors and to release the debtor from liability. Additional qualified creditors have an absolute right to join in the original lawsuit at any time before judgment is entered.

CHAPTER 11 REORGANIZATION in addition to voluntary and involuntary proceedings in which a debtor is adjudged bankrupt, under Chapter 11 a debtor is permitted to postpone all payments on debts so that he or she can reorganize his or her business. While other bankruptcy proceedings seek to have the debtor's assets sold and to have all the creditors paid to the extent possible, Chapter 11 seeks to give the debtor a breathing spell with the hope that the business will recover and all the creditors will be fully repaid. The goal is a plan that specifies how much the creditors will be paid, in what form they will be paid, and other details. See insolvency; debt.

BANKRUPTCY COURT

a United States district court created specifically to carry out the Federal Bankruptcy Act.

BANKRUPTCY PETITION see petition in bankruptcy.

BAR

1. in procedure, a barrier to the relitigating of an issue. A bar operates to deny a party the right or privilege of rechallenging issues in subsequent litigation. The prevailing party in a lawsuit can use his or her favorable decision to bar retrial of the action. See collateral [COLLATERAL ESTOPPEL]; res judicata.

2. a particular position in the courtroom; hence, the defendant standing before the judge is sometimes called the prisoner AT BAR. The complete body of attorneys is called the bar because they are the persons privileged to enter beyond the bar that separates the general courtroom audience from the judge's bench. The CASE AT BAR refers to the particular action before the court.

BARGAIN

a mutual voluntary agreement between two parties for the exchange or purchase of some specified goods. The term also implies negotiation over the terms of an agreement.

EXAMPLE: As a favor to his neighbor, Bob agrees not to erect a swing set in his yard. Two years later, Bob's grandson moves in with him. Bob decides to build the swing set to keep the grandson happy. He is not prevented from building the set even though he had previously told his neighbor he would not erect one. The earlier agreement is not binding on Bob because it was not a bargained-for

exchange. The neighbor provided nothing in the agreement as consideration for Bob's promise; the promise was a gratuitous one.

BARGAIN AND SALE

a contract, or deed in the form of a contract, that conveys property and transfers title to the buyer but lacks any guarantee from the seller as to the validity of the title. It is commonly used to convey title to real estate today and in effect transfers to the new owner whatever interest the grantor had. It is often combined with a COVENANT AGAINST GRANTOR'S ACTS, an assurance that the grantor has not impaired the title by, for example, conveying the property, or part of it, to someone else. Compare quitclaim deed; warranty deed.

BARGAINING UNIT

the labor union or other group that represents employees in collective bargaining.

BARRATRY

in common law, the crime of stirring up suits and quarrels, either at law or otherwise. Generally, the statutory crime of barratry is restricted to the practice of instigating groundless lawsuit, to the lawyer's profit.

BARRISTER

in England, a legal practitioner whose function is similar to that of an American trial lawyer, although the barrister does not prepare the case from the start. His SOLICITOR assembles the materials necessary for presentation to the court and settles cases out of court.

BARTER

the exchange of goods or services without using money. See exchange.

BASIS

an amount usually representing the taxpayer's cost in acquiring an asset. It is used for a variety of tax purposes including computation of gain or loss on the sale or exchange of the asset and depreciation with respect to the asset.

ADJUSTED BASIS during the time that a taxpayer holds an asset, certain events require that the taxpayer adjust (either up or down) his or her original basis to reflect the event, thus resulting in an adjusted basis. In general, depreciation deductions allowable in a taxable year with respect to an asset reduce the taxpayer's basis in the asset. On the other hand, if the taxpayer made a CAPITAL EXPENDITURE (see capital) for the asset, the amount of the expenditure would increase the taxpayer's basis.

CARRYOVER OR SUBSTITUTED BASIS in certain cases a taxpayer's basis is computed by reference to the basis of the property when held by the previous owner or to the basis of the property exchanged for the assets. In both these situations, the taxpayer's basis is said to be a

carryover basis. For example, if a taxpayer received a gift of property, his basis in the property is the transferor's basis in the property. In other words, the transferor's basis carries over to the taxpayer.

RECOVERY OF BASIS the process by which a taxpayer recovers the basis through distributions or payments with respect to the property.

STEP-UP BASIS the process by which a taxpayer's basis is increased to a certain level (usually fair market value) as of a certain date. Such a basis is generally available for property received by an heir from a decedent.

BASTARD

an illegitimate child, one who is not born either in lawful wedlock or within a competent time after its termination; also, a child of a married woman conceived with one other than her husband.

BASTARDY PROCEEDING see paternity suit [bastardy proceeding].

BATTERY

the unlawful touching of or use of force on another person willfully or in anger. Battery may be considered either a tort, giving rise to civil liability for damages to the victim, or a crime. Compare assault.

BEARER

the person in possession of an instrument, document of title, or security payable to bearer or endorsed in blank. A note payable to "bearer" is payable to any person who successively holds the note bona fide, not by virtue of any assignment of promise, but by an original and direct promise moving from the maker to the "bearer."

BEARER BOND see bond [BEARER BOND].

BEARER PAPER

commercial paper that is negotiable upon delivery by any party or that does not designate a specific party by whom it is negotiable. Such commercial paper is said to be **PAYABLE TO BEARER**. The most popular domestic bearer instruments are government securities, such as treasury bills and municipal bonds. Foreign stocks and bonds are normally in bearer form. A major disadvantage of bearer instruments is that they offer little protection in the event of theft or loss.

EXAMPLE: A thief steals several notes that are payable to bearer and sells them to Tim, who does not know they are stolen. Because the notes are *bearer paper*, Tim can demand payment according to the terms of the notes. The fact that they are stolen has no effect on his ability to collect. Tim is the bearer. The notes are payable to whoever has possession and is therefore the bearer.

See negotiable instrument. Compare order paper.

BED AND BOARD see divorce.

BEFORE-THE-FACT see accessory [ACCESSORY BEFORE-THE-FACT].

BELIEF see information and belief.

BENCH

1. the court; the judges composing the court collectively; 2. the place where the trial judge sits.

BENCH TRIAL see trial [BENCH TRIAL].

BENCH WARRANT

a court order for the arrest of a person; commonly issued to compel a person's attendance before the court to answer a charge of contempt or if a witness or a defendant fails to attend after a subpoena has been duly served.

EXAMPLE: Wendy was arrested for a traffic violation and ordered to appear in court in two weeks. The order to appear notwithstanding, Wendy continued with her vacation plans and found herself in another state on the required date. As a result of her failure to appear, the court ordered a *bench warrant* for Wendy. On the basis of that order she will be arrested and brought before the court. The issuance of the warrant also subjects Wendy to a penalty for contempt of court.

BENEFICIAL INTEREST

the equitable interest in a trust held by the beneficiary of the trust, as distinguished from the interest of the trustee who holds legal title. Any person who under the terms of a trust instrument has the right to the income or principal of the trust fund has a beneficial interest in the trust.

BENEFICIAL USE

a right to the use and enjoyment of property that exists where legal title to that property is held by another, in trust.

BENEFICIARY

1. a person for whose benefit property is held in trust.

EXAMPLE: Grandfather wants to insure that his two granddaughters, Lisa and June, will have sufficient money to pursue a college education. In the trust that Grandfather establishes, the bank is named as trustee and Lisa and June are named as *beneficiaries*. As trustee, the bank holds the money until Lisa and June attend college, at which point the bank pays their education costs. The bank holds the money for the benefit of Lisa and June.

2. a person to whom another is in a fiduciary relation, whether the relation is one of agency, trust, guardianship, partnership or otherwise; 3. a person named to receive the proceeds or benefits of an insurance policy; 4. a person named in a will to receive certain property.

INCIDENTAL BENEFICIARY a person who may incidentally benefit from the creation of a trust. Such a person has no actual interest in the trust and cannot enforce any right to such incidental benefit.

BENEFIT

for tax purposes, a benefit is received by a taxpayer whenever anything occurs that results in an economic benefit to the taxpayer. However, not all benefits are included in gross income since many benefits are not realized in the taxable year or are not subject to tax under the Internal Revenue Code or judicially or administratively developed principles.

FRINGE BENEFITS benefits other than direct salary or compensation (such as parking, health insurance, tuition reimbursement, etc.) received by employees from employers as a result of their employment. Generally, fringe benefits are not subject to tax.

BENEFIT OF THE BARGAIN (RULE)

method of measuring damages in breach of contract or warranty cases or cases involving fraud or misrepresentation. Calculated as the difference between the real value and the represented or warranted value. Also known as **LOSS OF BARGAIN**. See bargain. Compare out-of-pocket (rule).

BEQUEATH

in a will, a gift of personal property, distinguishing it from a devise, a gift of real property. The term disposition encompasses both a bequest of personalty and a devise of realty.

BEQUEST

a gift of personal property by will. A devise ordinarily passes real estate, and a bequest passes personal property. See legacy.

CONDITIONAL BEQUEST a bequest that depends upon the occurrence or nonoccurrence of a particular event.

EXECUTORY BEQUEST a bequest of personalty or money that does not take effect until the happening of some future event, upon which it is contingent.

RESIDUARY BEQUEST a bequest consisting of the remainder of an estate after the payment of debts and of general legacies and other specific gifts.

SPECIFIC BEQUEST a bequest of particular items, or of a part of a testator's estate that can be distinguished from all others of the same kind, which may be satisfied only by delivery of the particular thing (given by the will) and not merely by a corresponding amount in value or similar property.

BEST EVIDENCE RULE

a rule of evidence requiring that the most reliable evidence available be used. Thus, where the original of a document is available, a copy will not be accepted as evidence.

BESTIALITY

sexual intercourse with an animal. Bestiality constitutes a crime against nature.

BEYOND A REASONABLE DOUBT see reasonable doubt.

B.F.O.Q. See bona fide occupational qualification [B.F.O.Q.].

B.F.P. see bona fide purchaser.

BIAS

preconception; prejudice; taint; partiality. Since most persons have various biases, the issue is whether the bias is such that impartiality cannot be achieved and a fair outcome cannot occur. Any predisposition that a judge or arbitrator may have may be grounds for recusal; any predisposition that a witness may have may be grounds for impeachment through cross-examination; any predisposition that a juror may have may be grounds for excusal determined through a process known as voir dire. Biases may exist for or against certain religious, racial, ethnic, or minority groups and they may exist for or against police officers, the very rich or the very poor, athletes, attorneys, immigrants, and virtually any recognizable group of persons.

EXAMPLE: Nicholas, an avid Red Sox fan, is called as a juror in a medical malpractice case. He agrees to set aside the fact that Dr. J is an avid Yankees fan and judge her strictly on her treatment of the patient.

BIAS CRIME

commission of an offense where the person acted, at least in part, with ill will, hatred, or bias toward, and with a purpose to intimidate, an individual or group because of race, color, religion, sexual orientation, or ethnicity. Offenses such as assault, harassment, intimidation, or criminal mischief may have enhanced sentences imposed upon the perpetrator if it is proved that the act was a bias crime. Examples of hate or bias crimes include defacing a Jewish cemetery with symbols of anti-Semitism; throwing rocks through the windows of Chinese restaurants; or attacking persons believed to be gay. The F.B.I. collects statistics relating to such crimes.

BID

an offer by an intending purchaser to buy goods or services at a stated price, or an offer by an intending seller to sell his or her goods or services for a stated price. Building contractors usually solicit bids based on building specifications from several subcontractors in order to complete a project. Government units are often required by law to construct highways and buildings, and to buy goods and services, through competitive bidding solicited by public advertisement, with the lowest competent bid winning the contract.

BID SHOPPING

the practice of a general contractor who, before the award of the prime contract, discloses to interested subcontractors the current low subbids on certain subcontracts in an effort to obtain lower subbids.

BIGAMY

the criminal offense of having two or more wives or husbands at the same time. A bigamous marriage is void.

BILATERAL CONTRACT see contract.

BILATERAL MISTAKE see mistake [MUTUAL (BILATERAL) MISTAKE].

BILL

1. an order drawn by one person on another to pay a certain sum of money; 2. in commercial law, an account for goods sold, services rendered and work done; 3. in the law of negotiable instruments, any form of paper money; 4. in legislation, a draft of a proposed statute submitted to the legislature for enactment; 5. in equity pleadings, the name of the pleading by which the complainant sets out his cause of action.

BILL FOR A NEW TRIALa bill submitted to a court of equity stating equitable grounds for suspending execution of a judgment rendered in a court of law and proposing a new suit in equity.

BILL OF CERTIORARIa petition for writ of certiorari.

BILL OF DISCOVERYsee discovery.

BILL OF EXCEPTIONSa writing submitted to a trial court stating for the record objections to rulings made and instructions given by the trial judge.

BILL OF EXCHANGEa written order directing another party to pay a certain sum to a third party. See draft.

BILL OF INTERPLEADERsee interpleader.

BILL OF REVIEWa form of equitable proceeding brought to secure an explanation, alteration or reversal of a final decree by the court that rendered it, because of errors on the face of the record, or new evidence or new matters that have appeared after entry of that decree.

BILL OF SALEa written agreement under which title to personal chattels is transferred.

CROSS BILLa pleading in a court of equity by the defendant against the plaintiff or against another defendant in the suit; similar to counterclaim and cross-claim at law.

TREASURY BILLa promissory note, having maturity of no longer than one year, issued by the Treasury Department of the U.S. government. See treasury bill.

BILL OF ATTAINDER

a legislative act that applied either to individuals or to members of a group in such a way as to pronounce sentence on them without a trial. Such acts are prohibited by the Constitution because they are, in effect, a legislative judgment of conviction without a hearing. See attainder.

BILL OF EXCHANGE see bill; draft.

BILL OF LADING

in commercial law, the receipt a carrier gives to a shipper for goods given to the carrier for transportation. The bill evidences the contract between the shipper and the carrier, and can also serve as a document of *title* creating in the person possessing the bill ownership of the goods shipped.

EXAMPLE: Worldwide Ski Company agrees to ship goods to Stanley's Sport Centers but wants to be sure that it is paid before Stanley's takes possession of the goods. When Worldwide leaves the goods with Carrier, the transportation company, Carrier issues Worldwide a *bill of lading*. Carrier will not release the goods to Stanley's unless he presents the bill of lading. Worldwide is therefore protected since it will not give Stanley's the document until Stanley's pays for the goods.

ORDER BILL OF LADING a negotiable bill of lading that can be negotiated like any other negotiable instrument, so that the shipper can sell it to anyone, not just the intended recipient of the goods. The bill not only states that the carrier is to deliver the goods to a specified person at a specified place, but also requires the carrier to release the goods only when the bill of lading is given him by the recipient. An order bill operates as a document of title and must be presented by the recipient before possession of goods will be delivered. Under this arrangement, the shipper can withhold the bill of lading, and thus the goods themselves, until the intended recipient pays for them.

STRAIGHT BILL OF LADING a nonnegotiable bill of lading, which merely states that the carrier is to deliver the goods to a specified person at a specified place.

BILL OF PARTICULARS

a detailed statement provided in a criminal case, as an amplification of the pleading to which it relates, in order to advise the court, and, more particularly, the defendant, of the specific facts or allegations he will be required to respond to.

BILL OF REVIEW

form of equitable proceedings brought to secure an explanation, alteration, or reversal of a final decree by the court that rendered it. Most commonly, only errors of law

appearing on the face of the record, new evidence not susceptible to use at the trial and coming to light after the decree is issued, and new matter arising after entry of the decree, could have been the basis for a successful bill of review. It is also appropriate where there is evidence of fraud impeaching the original transaction.

BILL OF RIGHTS

the first ten amendments to the United States

Constitution; that part of any constitution that sets forth the fundamental rights of citizenship. It is a declaration of rights that are substantially immune from government interference. See Fourteenth Amendment.

BIND

something that obligates or constrains the bound individual. To guaranty, to promise, to secure, to warrant, and to defend. A bind places one under legal duties and obligations. One can "bind" oneself as in a contract or one can be "bound" by a judgment.

BINDER

1. a written memorandum of the most important items of a preliminary contract; 2. an insurer's acknowledgment of its contract to protect the insured against accidents of a specified kind until a formal policy can be issued or until insurer gives notice of its election to terminate.

BINDER RECEIPT a memorandum that serves as evidence of an approved application for insurance and is intended to take the place of an ordinary policy until the policy can be issued.

BINDING

obligatory.

BINDING AGREEMENT a conclusive agreement.

BINDING INSTRUCTION an instruction that directs the jury how to determine an issue in the case if certain conditions stated in that instruction are shown to exist.

BIND OVER

to order that a defendant be placed in custody pending the outcome of a proceeding (usually criminal) against him or her. He or she may thereafter be released on bail or on other conditions of release.

BLACKACRE

a hypothetical piece of real estate used in teaching real property or future interests courses in law school.

BLACK LETTER LAW see hornbook law.

BLACKMAIL

the demanding of money either for performing an existing duty, or for preventing an injury or for exercising an influence; the extortion of things of value from a person by threats of personal injury, or by threatening to accuse that person of crime or immoral conduct, which, if true, would tend to disgrace him or her.

EXAMPLE: As a child, Evan had once been caught shoplifting. Now, Evan occupies a position of high standing in the community and enjoys an untarnished reputation. Tom wants Evan to lend him a considerable amount of money. To persuade Evan to advance the loan, Tom *blackmails* Evan by threatening to reveal the childhood incident, which would discredit Evan. The criminal nature of Tom's attempt to blackmail is not affected by the truthfulness underlying the threat.

BLACKMAIL SUITS see strike suits.

BLANK INDORSEMENT see indorsement.

BLASPHEMY

in common law, the misdemeanor of reviling or ridiculing the established religion (Christianity) and the existence of God.

BLIND TRUST see trust [BLIND TRUST].

BLOOD, CORRUPTION OF THE see corruption of blood.

BLUEBOOK see Uniform System of Citation [BLUE BOOK].

BLUE CHIP STOCK

the common stock of a company known nationally for the quality and wide acceptance of its products or services, and for its ability to generate consistent profits and pay increased dividends. The term probably evolved from its use in gambling casinos, where blue chips are valued at \$100, since common stocks of leading companies were offered at \$100 per share around the turn of the last century.

BLUE LAWS

strict statutes or local ordinances most frequently enacted to preserve observance of the Sabbath by prohibiting commercial activity on Sundays.

EXAMPLE: In Ewing Township, local *blue laws* prevent a merchant from selling automobile tires on Sunday but permit him to sell toothpaste and soap. The difference is rationalized by the belief that selling tires promotes working on a car instead of attending church. Toothpaste sales will have no such effect.

With increasing frequency, blue laws are being abolished so that people may freely choose activities without regard to societal notions as to appropriate Sunday conduct.

BLUE RIBBON JURY see jury [BLUE RIBBON JURY].

BLUE SKY LAWS

state laws regulating the sale of corporate securities through investment companies, enacted to prevent the sale of securities of fraudulent enterprises. See also Securities and Exchange Commission [SEC].

BOARD OF DIRECTORS

a group elected by shareholders to set company policy and appoint the chief executives and operating officers.

BOARD ROOM

a stockbroker's office where registered representatives (that is, securities salespersons registered with the SEC) work and where the public is allowed to visit and obtain stock price quotations throughout the market day. Offices are equipped with electronic machines that provide information on trading in listed stocks, and over-the-counter markets and also provide business news.

BOILERPLATE

1. any standardized or preprinted form for agreements.

EXAMPLE: Scott is a rental agent and rents apartments for many landlords throughout the city. Although both the apartments and the landlords' requirements differ greatly, each rental agreement includes, in addition to clauses related to each particular group of apartments, nineteen *boilerplate* provisions covering liability of the various parties, damage deposits, security arrangements and other matters common to such agreement.

2. also, standardized language, as on a printed form containing the terms of a lease or sales contract, often phrased to the advantage of the party furnishing the form, with the expectation that the contract will be signed without being carefully examined. See adhesion contract; unconscionable.

BOILER ROOM [OR SHOP]

a place devoted to high-pressure promotion by telephone of stocks, bonds, diamonds, commodities, contracts, etc., which are of very questionable value. Extensive fraud is usually involved, but successful prosecution may be difficult since operations often disband before detection and since little tangible evidence is obtainable.

BONA

(*bō'-ná*) Lat.: good, virtuous; also, goods, property.

BONA FIDE

(*bō'-ná fīd*) Lat.: in *good faith*. Without fraud or deceit; genuine.

BONA FIDE OCCUPATIONAL QUALIFICATION [B.F.O.Q.]

statutory provision that permits discriminatory practices in employment if a person's religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. It is also permissible for an educational institution with a particular religious orientation to hire only employees of that religion. Courts have placed the burden of proof of establishing a B.F.O.Q. on the defendant and the

exception provided by the B.F.O.Q. has been narrowly interpreted. In this manner it is more difficult to justify a B.F.O.Q. than to defend against a constitutionally based claim of sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. The B.F.O.Q. exception would only be permitted if, in the example of a woman working at a job requiring the frequent lifting of substantial amounts of weights, the defendant proved by a preponderance of the evidence that all or substantially all females would be unable to perform safely and efficiently the duties involved in the job. Sex has been found to be a B.F.O.Q. in terms of community standards of morality where, for example, a man works as an attendant in a men's washroom and a woman works as a fitter in a lingerie establishment.

BONA FIDE PURCHASER [B.F.P.]

one who pays a valuable consideration, has no notice of outstanding rights of others and acts in good faith concerning the purchase. In commercial law, the phrase holder in due course signifies the same thing. See buyer in ordinary course of business.

EXAMPLE: George owns a textile mill and stores his products in a warehouse. The owner of the warehouse sells several boxes of shirts to Jerry without George's permission. Jerry suspects no wrongdoing because he has frequently dealt with the warehouse in a similar manner without any trouble. Since George left the goods with the warehouse, the subsequent sale to Jerry for value makes Jerry a *bona fide purchaser* who is legally entitled to own the goods. Jerry even has superior claim to the goods over George, so that in order to be compensated for his loss, George must pursue his claim against the warehouse owner.

BOND

evidence of a long-term debt that is legally guaranteed as to the principal and interest specified on the face of the bond certificate. The rights of the holder are specified in the bond indenture, which contains the legal terms and conditions under which the bond was issued. Bond debt is secured or guaranteed primarily by the ability of the issuer (borrower) to pay the interest when due and to repay the principal at maturity.

Bonds are available in two forms. REGISTERED BONDS are recorded on the books of the issuer by the trustee, and interest is paid by mail to the holder of record. BEARER BONDS are negotiable instruments that must be safeguarded by the owner to prevent loss. Interest is paid by coupon redemptions.

BONDED DEBT that part of the entire indebtedness of a corporation or state that is represented by bonds it has issued; a debt contracted under the obligation of a bond.

BOND FOR DEED [TITLE] a document given by the owner of real estate to convey the property upon being paid money; an agreement to convey title in the future that, so long as it remains executory (not yet performed), allows title to remain vested in the original owner.

BOND DISCOUNT a reduction from the face amount of a bond that occurs where bonds are sold on the market for cash at a price less than the face amount. Since bonds mature (become due) years after issue, they are discounted to reflect present value.

BOND FOR GENERAL PURPOSES government bonds that are a charge against the taxpayers generally, as distinguished from bonds for improvements, the cost of which is charged to the property specially benefited.

BOND ISSUE the offering of bonds for sale to investors.

BOND PREMIUM the amount that the purchaser pays in buying a bond that exceeds the face or call value of the bond.

BOND YIELD see yield.

PERFORMANCE BOND a contractor's bond, guaranteeing that the contractor will perform the contract and providing that, in the event of a default, the surety may complete the contract or pay damages up to the bond limit.

SERIAL [SERIES] BONDS bonds issued in a series by a public entity that are payable at different times.

SURETY BOND a bond issued by one party, the surety, guaranteeing that he or she will perform certain acts promised by another or pay a stipulated sum, up to the bond limit, in lieu of performance, should the principal fail to perform. In a criminal case, the surety bond assures the appearance of the defendant or the repayment of bail forfeited upon the defendant's failure to appear in court.

BONDSMAN

a surety; one who serves as security for another; a person who obtains surety bonds for others for a fee; also, the individual who arranges for the defendant in a criminal case to be released from jail by posting a bail bond. Compare underwriter.

BONUS STOCK

common stock offered as an additional incentive to underwriters or buyers of a bond or preferred stock issue.

BOOK VALUE

the value of individual assets, calculated as actual cost less allowances for any amortization such as depreciation. It may be quite different from market value, giving rise to hidden assets. Book value on an overall balance sheet basis is net asset value; that is, total assets less all liabilities. In reports to shareholders

of publicly held corporations, common shareholders' per-share equity or book value is obtained by dividing book value less any liquidation price for preferred issues by the outstanding issue of common stock.

EXAMPLE: A corporation decides to close ten of its branch offices located throughout the country. As part of the closing, it makes a deal with another company to sell the buildings in which the offices were located. The original cost of the buildings was \$6 million, and their *book value* has been reduced to \$4 million through depreciation. The actual market value is \$8 million since in fact the buildings have appreciated in value.

Companies that invest in stock of other companies usually carry the investment at its original cost as book value. The true market value may be many times the cost if the stock has been held a long time.

BOOT

term referring to the taxable portion of a nontaxable exchange. The general rule for nonrecognition tax treatment in a likekind exchange applies only to qualifying property exchanged solely for other qualifying property. However, if an exchange that otherwise qualifies for nonrecognition treatment includes the transfer of cash or non-like-kind property (called "boot"), the transaction still qualifies for like-kind exchange treatment, but is also partially nontaxable.

BORDELLO see prostitution [BORDELLO].

BOROUGH ENGLISH see primogeniture.

BOYCOTT

to refrain from commercial dealing with someone by concerted effort; to persuade someone to refrain from doing business with another.

BRAIN DEATH

the irreversible cessation of brain function; statutory or case law definitions of death are being expanded in many jurisdictions to include this. Among the factors considered are the failure to respond to external stimuli, the absence of breathing or spontaneous movement, the absence of reflex movement, and a flat electroencephalograph reading following a 24-hour observation period.

BREACH

failure to perform some contracted-for or agreed-upon act, or to comply with a legal duty owed to another or to society.

ANTICIPATORY BREACH see anticipatory breach.

BREACH OF CONTRACT a wrongful nonperformance of any contractual duty of immediate performance; failing to perform acts promised, by hindering or preventing such performance or by repudiating the duty to perform.

BREACH OF THE PEACEconduct that destroys or menaces public order and tranquillity, including violent acts or acts and words likely to produce violence in others. In its broadest sense the term refers to any criminal offense.

BREACH OF PROMISEfailure to fulfill a promise; often used as a short form for breach of the promise of marriage.

BREACH OF TRUSTa trustee's violation, whether willful and fraudulent, or because of negligence, oversight or forgetfulness, of a duty that equity places upon him or her.

BREACH OF WARRANTYinfraction of an express or implied agreement as to the title, quality, content or condition of a thing sold.

MATERIAL BREACHsee material.

PARTIAL BREACHsee partial breach.

BREAKING A CLOSE

the common law trespass of unlawful entering upon the land of another.

BREAKING AND ENTERING

two of the elements necessary to constitute a burglary, consisting of the use of physical force, however slight, to remove an obstruction to an entrance. For example, pushing open a door that is ajar, followed by unauthorized entry into a building, is sufficient to constitute the breaking and entering elements of burglary.

BREAKING BULK

refers to a doctrine whereby a bailee could be charged with larceny by trespass if the person opened a chest, parcel, or case containing goods entrusted to his or her care and converted some to his or her own use; the trespass necessary for larceny was complete even if the goods were not in a container but were themselves delivered in bulk provided that the bailee separated only a portion of the goods entrusted to him or her. If he or she converted all of the goods, there was, however, no breaking bulk and hence no trespass and no larceny.

BREATHALYZER

a chemical test of a person's breath to determine whether he or she is intoxicated, usually when the person is suspected of drunken driving. The test is normally administered by a police officer trained in the use of the equipment, and the equipment must be calibrated on a regular basis. A person operating a motor vehicle is usually presumed to have consented to taking the test, and refusal to take the test may result in the automatic loss of one's driver's license. The results of the test are admissible as evidence in court.

BRETHREN

plural of brother, although its usage in wills can include sisters. Reference used among Justices of the United States

Supreme Court to refer to fellow Justices. Since the appointment of female Justices the term has fallen from usage or has been replaced with the awkward "brethren/sistern."

BRIBERY

the voluntary giving of something of value to influence the performance of an official duty.

EXAMPLE: Frank wants to build a shopping center in town, but for years his requests for building permits have been turned down. Another company is then granted the permits after one request. When Frank inquires why that company is treated differently, he is informed that they "make sure" their requests are granted. Frank understands that to mean he needs to pay money to town council members. If Frank pays the money, he is guilty of *bribery* even though payment is the only means to secure permits.

COMMERCIAL BRIBERY includes the breach of duty by an employee in accepting secret compensation from another in exchange for the exercise of some discretion conferred upon the employee by his employer, as in the approval of a contract.

BRIEF

a written argument concentrating upon legal points and authorities (i.e., precedents) used by the lawyer to convey to the court (trial or appellate) the essential facts of his or her client's case, a statement of the questions of law involved, the law that should be applied and the application that he or she desires made of that law by the court. The brief is submitted in connection with an application, motion, trial or appeal. Compare memorandum [MEMORANDUM OF LAW].

BROKER

one who for a commission or fee brings parties together and assists in negotiating contracts between them, a person whose business it is to bring buyer and seller together.

BRUTUM FULMEN

(brū'-tūm fūl'-mĕn) Lat.: inert thunder. An empty threat or charge, or a void judgment that is in legal effect no judgment at all. A brutum fulmen is any potentially powerful and effective order, document, decree or judgment that is powerless due to some imperfection causing it to be unenforceable.

BUGGERY see sodomy.

BUGGING see wiretap.

BUILDING AND LOAN ASSOCIATION see bank [SAVINGS AND LOAN ASSOCIATION].

BUILDING PERMIT see certificate of occupancy.

BULK SALES ACTS

statutes designed to prevent the defrauding of creditors by the secret sale in bulk of substantially all of a merchant's

goods. These laws generally require that notice be given to creditors before any sale of debtor's goods. See bulk transfer.

BULK TRANSFER

a type of commercial fraud in which a merchant (or the owner of a business) transfers the business or a major part of it for consideration and then fails to pay his creditors with the proceeds. Any transfer in bulk of a major part of the materials, supplies, merchandise or other inventory, not in the ordinary course of the retailer's business, is subject to the provisions of the Uniform Commercial Code [UCC].

BUNCHING

the concentration of gross income in one or more taxable years. This results in adverse tax consequences because, under the progressive tax rate structure, in the years that have the larger amount of income there is a higher effective rate of tax. These adverse effects are minimized by income averaging and by the preferential tax treatment afforded to capital gains.

BURDEN

anything that is grievous, wearisome or oppressive; in property law, any restriction on the use of land, such as a zoning ordinance or covenants running with the land.

BURDEN OF PROOF

1. the duty of a party to substantiate an allegation or issue, either to avoid dismissal of that issue early in the trial or to convince the court of the truth of that claim and hence to prevail in a civil or criminal suit.

EXAMPLE: Jean files a lawsuit claiming that Don fraudulently induced her to buy a vacuum cleaner. Don replies that he has never met Jean and that he has never sold vacuum cleaners in Jean's section of town. Jean has a *burden of proof* to show facts that Don sold her a vacuum cleaner and did so by fraudulent means.

2. the duty of a plaintiff, at the beginning of a trial, to make a prima facie showing of each fact necessary to establish the existence of a cause of action; referred to as the DUTY OF PRODUCING EVIDENCE(also BURDEN OF EVIDENCEor PRODUCTION BURDEN). 3. the obligation to plead each element of a cause of action or AFFIRMATIVE DEFENSE(see defense) or suffer a dismissal; referred to as the PLEADING BURDEN.

BUREAU OF INDIAN AFFAIRS see Indian law [BUREAU OF INDIAN AFFAIRS].

BURGLARY

in common law, an actual breaking into a dwelling, at night, with intent to commit a felony. Some statutes have expanded burglary to include any unlawful entry into or remaining in a building or vehicle with intent to commit a crime.

BUSINESS, COURSE OF see ordinary course of business.

BUSINESS CYCLE

the periodic expansion and contraction of economic activity. Economic researchers have identified three overlapping cycles of approximately 4 years', 10 to 20 years', and 45 to 60 years' duration. Causes of the short-term cycles (average duration: 52 months, as measured by the U.S. National Bureau of Economic Research) are believed to be a combination of money expansion and contraction (monetary theory), alternate savings and spending patterns of consumers (consumer confidence theory), and alternate expansion and contraction patterns of business inventory and business capital investment. It has also been suggested that the attitudes and perceptions of consumers and business managers guide their spending decisions and thus determine the business cycle (psychological theory). The longer-term economic cycles are dependent on more fundamental forces such as growth in labor force and productivity, capital investments, technological innovation, and long-term weather cycles.

BUSINESS GUEST see invitee.

BUSINESS INVITEE see invitee.

BUSINESS JUDGMENT RULE

deference given by courts to the good faith operations and transactions of a corporation by its executives. Reasonable decisions, even if not the most profitable, will not be disturbed by a court upon application by a disgruntled party such as a stockholder. The rationale behind the rule is that stockholders accept the risk that an informed business decision, honestly made and rationally thought to be in the corporation's best interests, may not be second-guessed. Therefore, courts afford business judgments special protection in order to limit litigation and avoid judicial intrusiveness in private sector business decision making.

BUSINESS RECORDS EXCEPTION see hearsay rule [BUSINESS RECORDS EXCEPTION].

BUSINESS TRUST see Massachusetts trust.

BUT FOR

in tort and in criminal law, a test of whether an individual's action caused a particular event. The test is applied by asking whether an accident or injury would have occurred "but for" (or in the absence of) the individual's act. See cause [PROXIMATE CAUSE]. See also causa [CAUSA SINE QUA NON].

BUYER IN ORDINARY COURSE OF BUSINESS

a person who, in good faith and without knowledge that the sale to him or her violates a third party's ownership rights or security interest in

the goods, buys in the usual manner from a person in the business of selling goods of that kind. The buyer acquires the goods free of any security interest created by the seller. See bona fide purchaser; holder in due course.

EXAMPLE: Rich, a truck driver, fraudulently obtains a truckload of computer parts from a manufacturing company and sells them to a parts supplier. Unless the supplier frequently buys large amounts of new parts from truck drivers, the supplier cannot be a *buyer in the ordinary course of business* and therefore cannot claim ownership of the parts over the manufacturing company. If the supplier had bought the parts from a normal dealer in computer parts, the supplier would have ownership rights superior to the manufacturing company. The buyer should have suspected that the truck driver was not in legitimate possession of the goods. In purchasing goods from him, the buyer assumed the risk that the truck driver might later be exposed as a thief.

BUY-SELL AGREEMENT

an arrangement entered into between owners of a business providing for the disposition of the respective interest of each in the event one or more owners withdraws from the business at some future time. Under such an agreement, the withdrawing owner agrees to sell, and the remaining owner(s) agree to buy, his or her proportionate share of the business upon his or her departure for a predetermined price, fixed, either as to the amount or the method of computing that amount, at the time the agreement is entered into.

BYLAWS

rules adopted for the regulation of an association's or corporation's own actions. In corporation law, bylaws are self-imposed rules that constitute an agreement or contract between a corporation and its members to conduct the corporate business in a particular way. In the absence of law to the contrary, under common law the power to make bylaws resides in the members or shareholders of the corporation. When used by corporations, the term bylaws deals with matters of corporate structure and machinery as distinguished from regulations, which are imposed by a board of directors to deal with problems relating to the day-to-day management.

BY OPERATION OF LAW see operation of law.

BY THE ENTIRETY see tenancy [TENANCY BY THE ENTIRETY].

C

CAB see Civil Aeronautics Board [CAB].

CADAVER

the body of a deceased person.

CALENDAR CALL

a hearing in court in a pending cause to ascertain the status of the matter and to establish a date for trial.

CALL

1. a demand by a corporation on a shareholder to pay an additional sum to the corporation proportionate to his or her share of stock; also, an obligation of a corporation to issue stock at a certain price on demand, in which case the privilege of calling for the stock belongs to the buyer; 2. in property law, an identifiable natural object designated in a deed or other instrument of conveyance as a landmark, to mark the boundary of the land conveyed.

CALLABLE BOND

a bond that the issuer may retire at any time before its maturity. Usually the issuer must pay a premium (an amount more than the face value of the bond) to call the bond.

CALL OPTION see stock option [CALL OPTION].

CALUMNY

slander, defamation; false prosecution or accusation.

CAMERA see in camera.

CANNABIS see controlled substances [CANNABIS].

CANON

1. a rule of ecclesiastical law, primarily concerning the clergy, but also at times embracing lay members of a congregation. 2. a rule of construction. One of a body of rules to guide the interpretation of statutes, ordinances, etc. A PROFESSIONAL CANON is a rule or standard of conduct adopted by a professional group to guide the professional conduct of its members.

CAPACITY

mental ability to make a rational decision, which includes the ability to perceive and appreciate all relevant facts. Capacity is not necessarily synonymous with sanity. No one can be guilty of a crime who lacks the legal capacity to commit it. To render a contract binding, the parties involved must have the capacity to contract. Testamentary capacity with respect to personalty is governed by the law of the testator's domicile, and, with respect to realty, by the law of the place where the realty is situated. The objection

of "lack of capacity to sue" refers to a general legal disability to maintain the action.

CAPACITY TO SUE see legal capacity to sue.

CAPIAS

(kā'-pē-ās) Lat.: that you take. In common law, a writ executed by seizing either the property or the person of the defendant to compel his answering a particular charge in court. The term describes several types of judicial writs or process, by which actions in a court of law were commenced. The writs have been largely replaced by service of process.

CAPIAS AD AUDIENDUM JUDICIUM *(ăd ô-dē-ĕn'-dŭm jŭ-dŭ'-shē- ŭm)* Lat.: that you take to hear judgment. A writ to bring to court a defendant who has appeared and been found guilty of a misdemeanor, to receive the court's judgment.

CAPIAS AD RESPONDENDUM *(ăd rĕs-pŏn-dĕn'-dŭm)* Lat.: that you take to answer. A writ directing the arrest and production of a defendant before judgment. It not only notifies a defendant to defend suit, like a summons, but also enables his or her arrest as security for the plaintiff's claim.

CAPIAS AD SATISFACIENDUM *(ăd sâ-tĭs-fâ-shē-ĕn'-dŭm)* Lat.: that you take to satisfy. A writ for the arrest of a judgment debtor until the debt claim is satisfied. See also service of process.

CAPITA see per capita.

CAPITAL

the money and other property of a corporation or other enterprise used in transacting its business. Compare capitalization.

CAPITAL ASSETS property with a relatively long life, or the fixed assets in a trade or business. In U.S. tax law, the term refers to property held for investment by the taxpayer that when sold is subject to special tax treatment (as capital gains and losses). Property that is part of one's stock in trade does not qualify as a capital asset.

CAPITAL EXPENDITURE expenditure made for the acquisition, repair or improvement of a capital asset.

EXAMPLE: Aerospace Corporation, a thriving industry, wants to expand its production capabilities to meet the increase in demand for its products. Its minimum needs are two new plants and four new office buildings in various parts of the country. Regardless of where Aerospace obtains the money for the new construction, whether from a bank or from profits the corporation has retained, the money spent to acquire these buildings represents a *capital expenditure*.

CAPITAL INVESTMENT(money paid out to acquire something for permanent use or value in a business or home; also, moneys paid out for an interest in a business, as in a stock purchase.

CAPITAL STOCKthe amount of money or property contributed by shareholders to be used as the financial foundation for the corporation. The total of a corporation's capital stock is divided into shares.

CAPITAL ACCOUNT

the group of accounting records that involves transactions in the equity or ownership of the business.

CAPITAL ASSET see capital [CAPITAL ASSETS].

CAPITAL EXPENDITURE see capital [CAPITAL EXPENDITURE].

CAPITAL GAINS OR LOSSES

gains or losses realized from the sale or exchange of **CAPITAL ASSETS**(see capital) and calculated as the difference between the amount realized on the sale or exchange and the taxpayer's basis in the assets.

LONG-TERM CAPITAL GAIN OR LOSSa capital gain or loss from the sale or exchange of capital assets held for the required holding period (generally, one year for the taxable years beginning after 1977).

SHORT-TERM CAPITAL GAIN OR LOSSa gain or loss from the sale or exchange of capital assets held for a period shorter than the required holding period.

CAPITAL INTENSIVE

an industry or economic sector that requires a large amount of machinery, equipment, etc., relative to the quantity of labor or land required. The energy industriesoil production and refining, coal mining and electric power generationrequire large amounts of capital equipment per unit of output. Historically, coal mining was a labor intensive industry requiring a large labor force to dig the product using hand tools. Today, however, this is no longer the case, as modern strip-mining machinery can dig more coal per hour than fifty miners using hand tools could dig in a shift.

CAPITAL INVESTMENT see capital [CAPITAL INVESTMENT].

CAPITALIZATION

1. for accounting purposes, the process of converting expected earnings or an expense item into an asset; 2. the total of long-term capital, such as long-term loans and notes, bonds, mortgages, and stock, used by a business to purchase assets.

CAPITALIZED VALUE

the current worth of money expected to be earned or received in the future, calculated by using an appropriate discount rate to accurately express current value.

CAPITAL MARKET

the organized buying and selling of long-term fixed-income securities such as bonds or mortgages, proceeds from

the sale of which are used to finance capital expenditures. In contrast to the capital market, the money market is used to raise short-term funds and the EQUITY MARKET(see equity) is used to obtain permanent capital through the sale of stock.

CAPITAL OFFENSE

a criminal offense punishable by death, for which bail is generally unavailable to the defendant.

CAPITAL PUNISHMENT

imposition of the death penalty.

CAPITAL STOCK see capital [CAPITAL STOCK].

CAPITAL SURPLUS see surplus [CAPITAL SURPLUS].

CAPITE see in capite.

CAPTION

1. the heading of a legal document containing the names of the parties, the court, the index or docket number of the case, etc.; 2. the act of seizing, which, together with ASPORTATION(the act of carrying away), was a necessary element of common law larceny.

CAPTURE

acquiring ownership where no prior ownership existed, as with wild animals, mining, and water. Also refers to taking by a military group.

CARE

attention, charge, or management implying responsibility for safety; also custody, temporary charge. In the law of negligence, the care owed by a defendant to those who may be injured by his or her actions is measured by the risks that those actions create. Occasionally, statutes fix the duty of care owed and an unexplained violation of that statutory standard renders the defendant negligent as a matter of law. Generally, degrees of care set a relative standard by which conduct is tested to determine whether it constitutes negligence. See due care; duty [DUTY OF CARE]. See also utmost care.

GREAT CAREdegree of care usually exercised in similar circumstances by the most competent, prudent, and careful class of persons engaged in similar conduct. Care greater than that usually bestowed by persons of ordinary prudence in similar circumstances. For example, the great care expected of an airplane pilot is the care that would be exercised by the most competent, conscientious, prudent, and careful pilot in similar circumstances.

ORDINARY CAREreasonable diligence and exercise of good judgment; care a reasonably careful person would use under similar circumstances.

REASONABLE CAREdegree of care that, under the circumstances, would usually be exercised by or might be reasonably expected from an ordinary, prudent person. Often viewed as the only true

measure of care. Reasonable care is synonymous with ordinary and due care.

SLIGHT CARE such as persons of ordinary prudence usually exercise about their own affairs of slight importance. Includes such care as careless or inattentive persons usually exercise.

CA. RESP. see *capias* [CAPIAS AD RESPONDENDUM].

CARJACKING see hijacking [CARJACKING].

CARNAL KNOWLEDGE

sexual intercourse; the slightest penetration of the female sexual organ by the male sexual organ; does not require rupture of the hymen. Popularly known as "statutory rape" when conducted with a female child under the age of consent. See rape.

CARRIER [COMMON CARRIER]

one who is in the business of transporting goods or persons for hire, as a public utility. A private carrier, in contrast, is not in the business of transporting as public employment, but hires out to deliver goods in particular cases.

CARRYBACK

a process by which the deductions or credits of one taxable year that cannot be used to reduce tax liability in that year are applied against tax liability in an earlier year or years. Carrybacks are available, for example, with respect to operating losses of businesses, charitable deductions and investment tax credits. Compare carryover.

CARRYOVER

a process by which the deductions and credits of one taxable year that cannot be used to reduce tax liability in that year are applied against tax liability in subsequent years. Compare carryback.

CARRYOVER BASIS see basis [CARRYOVER SUBSTITUTED BASIS].

CARTEL

a group of independent industrial corporations, usually operating internationally, which agree to restrict trade to their mutual benefit.

CARVE OUT

the process by which a taxpayer separates the present income stream of property from the property itself. For example, if an owner of mineral property sells for a certain number of years a portion of the future mineral production from such property, the sale of such future production is a "carved out" interest in the mineral property.

CA. SA see *capias* [CAPIAS AD SATISFACIENDUM].

CASE

an action, cause, suit, or controversy, at law or in equity.

CASE AT BAR see Bar

CASE LAW see common law.

CASE OF FIRST IMPRESSION see first impression.

CASE, ON THE see trespass [TRESPASS ON THE CASE].

CASE OR CONTROVERSY see controversy.

CASE REPORTS see advance sheets; reports.

CASH EQUIVALENT DOCTRINE see income [CASH EQUIVALENT DOCTRINE].

CASHIER'S CHECK see check.

CASH SALE

if a contract for the sale of goods does not specify the manner of payment, the law requires that the purchase price be paid in cash. Under the CASH SALE DOCTRINE a seller who sells to a middleman under "cash sale" terms has priority over other secured creditors to that middleman's assets if he or she goes bankrupt.

CASH SURRENDER VALUE

the amount the insurance company will pay on a given life insurance policy if the policy is canceled prior to the death of the insured.

CASH VALUE see market value. Compare book value.

CASUALTY LOSS

a loss of property due to fire, storm, shipwreck or other casualty, which is allowable as a deduction in computing TAXABLE INCOME (see income). For a loss to qualify as a casualty loss it must be due to a sudden, unexpected or unusual event. Thus, while property damage due to a storm would normally qualify as a casualty loss, gradual erosion by wind or water would not.

CAUSA

(*käw'-zá*) Lat.: cause, motive, reason. A lawsuit or case.

CAUSA MORTIS (*môr'-fîs*) Lat.: in anticipation of approaching death.

CAUSA PROXIMA (*prök'-sî-mâ*) Lat.: proximate cause; most closely related cause. A cause sufficiently related to the result to justify imposing legal liability on the actor who produces the cause. See cause [PROXIMATE CAUSE]; see also cause [DIRECT CAUSE].

CAUSA SINE QUA NON (*se'-ná kwä nõn*) Lat.: a cause without which it would not have occurred. Used most often in connection with the "but for" test of causation. See cause.

CAUSE

that which effects a result.

DIRECT CAUSE the active cause that sets in motion a chain of events that brings about a result without the intervention of any other source; often used interchangeably with **PROXIMATE CAUSE**.

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IMMEDIATE CAUSEthe nearest cause in time and space.

INTERVENING [SUPERVENING] CAUSEthe cause that actively produces the result *after* the negligence or breach or culpable act of the defendant.

PROXIMATE CAUSEthat which in natural and continuous sequence, unbroken by any new independent cause, produces an event, and without which the injury would not have occurred.

SUPERSEDING CAUSEan intervening cause so substantially responsible for the ultimate injury that it cuts off the liability of preceding actors regardless of whether their prior negligence was a substantial factor in bringing about the injury.

EXAMPLE: June pulls into a gasoline station and asks the attendant to fill up her car. In the process, the attendant accidentally squeezes the handle, and gas spills on the pavement, something that is not uncommon. Sal, who is near the car and is unaware of what happened, lights a cigarette and tosses the match in the puddle of gas. June's car is destroyed. Courts would find that, although the attendant may have been negligent in spilling gasoline, Sal's action is the superseding cause of the fire. The gas on the pavement would not have created a problem had Sal never lighted a cigarette near the pumps.

SUPERVENING CAUSEsee INTERVENING CAUSE.

CAUSE OF ACTION

a claim in law and fact sufficient to form the basis of a valid lawsuit, as a **BREACH OF CONTRACT**. A **RIGHT OF ACTION**is the legal right to sue; a cause of action is the composite of facts that gives rise to a right of action.

CAUTIONARY INSTRUCTION

that part of a judge's charge (instruction) to a jury telling them not to allow any extraneous or outside matter to influence their verdict, not to consider certain rulings of the court as an intimation of opinion, and not to discuss their deliberation process with anyone. The giving of cautionary instructions is within the discretion of the court and is not improper if it does not prejudice either party, but there is authority holding that such instructions should not be given if unnecessary.

CAVEAT

(kă'-vĕ-ât) Lat.: let him beware. 1. A warning or caution; a suggestion to a judicial officer that he or she ought to take care how he or she acts in a particular matter and should suspend the proceeding until the merits of the issue thus raised (the caveat) are determined; 2. an in rem proceeding attacking the validity of an instrument purporting to be a will, or a remedy given to prevent a patent from being issued in cases where the directions of the law have been violated.

CAVEAT EMPTOR

(*kä'-vē-ät ěmp'-tör*) Lat.: let the buyer beware. This phrase expresses the rule of law that the purchaser buys at his or her own risk.

CD see certificate of deposit.

CEASE AND DESIST ORDER

an order of a court or other body having judicial authority prohibiting the person or entity to which it is directed from undertaking or continuing a particular activity or course of conduct. Such an order may be issued upon a showing, to a degree of certainty or probability, that the conduct is unlawful or likely to be found unlawful.

EXAMPLE: Timber Company had received permission from the Interior Department to cut wood in a section of one of California's giant redwood forests. Several environmental groups brought a court action to stop Timber, claiming that any lumbering activities in the forests would violate the express purpose of Congress in establishing the forests and would result in irreparable harm. The court agreed and issued a *cease and desist order* requiring Timber to stop cutting wood.

CELL PAROLE see sentence [CELL PAROLE].

CENSURE

1. a reproach or reprimand, especially when delivered by a judicial or other official body; 2. the act of pronouncing such a reproach or reprimand.

CENTER OF GRAVITY see conflict of laws.

CERTIFICATE OF DEPOSIT

an acknowledgment by a bank of receipt of money with an agreement to repay within a specified time.

CERTIFICATE OF INCORPORATION

similar to articles of incorporation. In some states the certificate is issued by a state agency after the articles of incorporation have been properly filed; the corporation's existence begins upon the issuance of the certificate.

CERTIFICATE OF OCCUPANCY

a document by a local government agency signifying that a building or dwelling conforms to local building code regulations. Generally, entry or transfer of title requires a valid certificate of occupancy.

CERTIFICATE OF TITLE

a document indicating ownership, similar to a BILL OF SALE(see bill) and usually associated with the sale of new motor vehicles.

CERTIFICATION see certiorari.

CERTIFIED CHECK see check.

CERTIORARI

(*sēr-shē-ô-rä'-rē*) Lat.: to be informed of. A means of gaining appellate review; a common law writ, issued by a superior court to a lower court, commanding the latter to certify and return to the former a particular case record so that the higher court may inspect the proceedings for irregularities or errors.

CESTUI QUE

(*sēs'-tī kā* or *sēs'-twē kā*; pl.: CESTUIS QUE) Old Fr.: the one who; the person who. Used only in the following phrases:

CESTUI QUE TRUST (*trūst*) Old Fr.: the one who trusts. The beneficiary. See *trust*.

CESTUI QUE USE (*ūz*) Old Fr.: the one who has the use. The person for whose use the property is held by another. *Cestui que use* enjoys the equitable and beneficial rights to the profits and income of the estate, while the legal title and obligations remain in the trustee.

CESTUI QUE VIE (*vē*) Old Fr.: the one who lives. The person by whose life the duration of an estate is measured.

C.F.I. see C.I.F.

CHAIN OF TITLE

the succession of conveyances of title to property, commencing with the patent from the government (or other original source) down to and including the conveyance to the present holder. The recorded chain of title consists only of the documents affecting title that have been recorded in a manner that makes their existence readily discoverable by a bona fide purchaser. Of the two systems for recording such documents, the TRACT INDEX records in the same place all instruments relating to a particular property, while the GRANTOR-GRANTEE INDEX indexes all such instruments under the names of the various grantors or grantees of the property. See title search; recording acts.

CHALLENGE

in general, to call one out to answer for something; an objection or exception calling into question the existence of a right, the validity or sufficiency of an instrument, or the capability of a person for a specific function. Also, an objection by a party (or lawyer) to the inclusion of a particular prospective juror as a member of the jury that is to hear that party's cause or trial, with the result that the prospective juror is disqualified from the case.

CHALLENGE FOR CAUSE a challenge based upon a particular reason (such as bias) specified by law or procedure as a reason that a party (or his lawyer) may use to disqualify a prospective juror.

PEREMPTORY CHALLENGE a right given to attorneys at trial to dismiss a prospective juror for no particular reason; the number of times an attorney can invoke this right is usually limited. If a specific reason exists why a particular juror may not fairly decide a matter, the

juror may be CHALLENGED FOR CAUSE. This conserves the peremptory challenges. Even the government can use these challenges.

CHAMBERS see in camera.

CHAMPERTY

in common law, an unlawful agreement between an attorney and his or her client that the attorney will sue and pay the costs of the client's suit in return for a portion of the damages rewarded. Today the prohibition against champerty survives only in a few jurisdictions and only in modified form. See also criminal maintenance. Compare barratry.

CHANCELLOR

1. in early English law, the King's minister who would dispense justice in the King's name by extraordinary equitable relief where the remedy at law was inadequate; later, the name of the chief judge of the court of chancery.
2. in American law, a judge in a court of chancery.

CHANCERY

the jurisprudence that is exercised in a court of equity; synonymous with equity or equitable jurisdiction.

CHAPTER 11 see bankruptcy [CHAPTER 11 REORGANIZATION].

CHARACTER WITNESS see witness.

CHARGE

1. in criminal law, a description of the underlying offense in an accusation or indictment; 2. in trial practice, an address delivered by the court to the jury at the close of the case, telling them the principles of law they are to apply in reaching a decision.

EXAMPLE: At the end of the trial for assault and robbery, the judge *charged* the jury with (i.e., explained to them) the necessary elements of law that must be proved in order to convict the defendant. As in all criminal trials, the judge also charged the jury that they are the sole deciders (triers) of fact and should not be influenced by impressions from the judge or any attorney. Finally, the jurors were instructed to apply the law only as charged by the judge and not to base their decision on their own conception of the law.

The charge may also include instructions given during the trial for the jury's guidance.

See also *complaint*.

CHARITABLE CONTRIBUTION

a contribution for the use of a state, the United States, or a corporation organized and operated exclusively for religious, charitable, scientific, literary, educational, or like purposes. Charitable contributions are deductible under the federal income tax laws.

CHARITABLE DEDUCTION see charitable contribution.

CHARITY

a nonprofit institution organized and operated exclusively for charitable, religious, scientific, literary, educational or like purposes, whose income is exempt from federal income tax. Contributions to such organizations are allowable, with limitations, as a deduction in computing one's TAXABLE INCOME (see income).

PUBLIC CHARITY a charity that, under certain tests, is deemed to receive the major portion of its support from the public rather than from a small group of individuals.

PRIVATE FOUNDATIONS organizations that, although charities, are deemed to receive a substantial portion of their support from nonpublic sources, usually from small groups of individuals. A private foundation is subject to additional restrictions on its activities and its financial dealings, including accumulation of income.

CHARTER

a document issued by the government establishing a corporate entity. See articles of incorporation; certificate of incorporation.

CHATTEL

any tangible, movable thing; personal property as opposed to real property; goods.

CHATTEL MORTGAGE

a mortgage on personal property created to secure the payment of moneys owed or the performance of some other obligation. This security device has for the most part been replaced by the security agreements available under the Uniform Commercial Code.

CHATTEL PAPER

a document that shows both a debt and a security interest in or a lease of specific goods.

CHECK

a draft upon a bank, payable on demand, and by the maker or drawer, containing a promise to pay an amount of money to the payee.

CASHIER'S CHECK a check issued by an officer of a bank to another person, authorizing the payee to receive upon demand the amount of the check. It is drawn on the bank's own account, not that of a private person, and is therefore accepted for many transactions where a personal check would not be.

CERTIFIED CHECK a check containing a certification that the drawer of the check has sufficient funds in the bank to cover payment.

MEMORANDUM CHECK a bank check with the word "memorandum" written across its face, which is not intended for immediate presentation, but simply as evidence of an indebtedness by the drawer to the holder.

CHECK KITING

an illegal scheme that establishes a false line of credit by the exchange of worthless checks between two banks. For instance, a check kiter might have empty checking accounts at two different banks, *A* and *B*. The kiter writes a check for \$50,000 on the Bank *A* account and deposits it in the Bank *B* account. If the kiter has good credit at Bank *B*, he will be able to draw funds against the deposited check before it clears (i.e., is forwarded to Bank *A* for payment and paid by Bank *A*.) Since the clearing process usually takes a few days, the kiter can use the \$50,000 for a few days, and then deposit it in the Bank *A* account before the \$50,000 check drawn on that account clears.

CHECKS AND BALANCES see separation of power.

CHIEF JUSTICE

the presiding member of certain courts with more than one judge; especially, the presiding member of the U.S. Supreme Court, who is the principal administrative officer of the federal judiciary.

CHILD AND DEPENDENT CARE CREDIT

a tax credit allowed for 20 percent of the expenses incurred for household services or for care of a child or other dependent where a taxpayer maintains a household that includes one or more dependents who are under 15 years of age or mentally or physically incapacitated.

CHILD CUSTODY see custody of children.

CHILD SUPPORT see alimony.

CHILL [CHILLING EFFECT]

limitations on the exercise of First Amendment rights imposed not by law but by individuals who, fearful of the possible application of laws and sanctions, choose not to exercise their legitimate rights rather than risk prosecution.

EXAMPLE: A protest group schedules a weekend march to show support for that group's position. Even though the group has a permit, word is spread that the police plan to use tear gas and arrest marchers. The rumor has a *chilling effect* and keeps some people home who would otherwise have joined the protest.

CHOATE

(*kō'-āt*) completed or perfected; a right in regard to which no additional events need occur for it to be operative. Compare inchoate.

CHOICE OF LAW see conflict of law [CHOICE OF LAW].

CHOSE

(*shōz*) Fr.: a thing.

CHOSE IN ACTION a claim or debt upon which recovery may be made in a lawsuit; not a present possession, but merely a right to

sue, becoming a possessory thing only upon successful completion of a lawsuit.

CHOSE IN POSSESSION a thing actually possessed or possessable.

CHURNING

excessive trading in a stock investment account. If the pattern of activity is inappropriate for the customer and if the prime result is excessive brokerage commissions for the registered representative, then the practice is unethical and recovery of damages by the customer is possible.

C.I.F.

cost, insurance and freight; also written C.F.I. In a contract of sale it means that the cost of the goods, the insurance and the freight to the destination is included in the contract price, and unless there is something in a C.I.F. contract to indicate to the contrary, the seller completes the contract when he or she delivers the merchandise to the shipper, pays the freight to point of destination and forwards to the buyer the bill of lading, invoice, insurance policy and receipt showing payment of freight.

CIRCUIT

judicial divisions of a state or the United States; originally so called because judges traveled from place to place within the circuit, holding court in various locations. There are now thirteen federal judicial circuits wherein the United States Courts of Appeal are allocated the appellate jurisdiction of the United States.

CIRCUIT COURT

one of several courts in a given jurisdiction; a part of a system of federal courts extending over one or more counties or districts; formerly applied to the U. S. courts of appeals. Compare district court.

CIRCUMSTANTIAL EVIDENCE

indirect evidence; secondary facts by which a principal fact may be reasonably inferred.

EXAMPLE: There are no eyewitnesses to place Steve at the site of the car accident, but there is a variety of *circumstantial evidence* to suggest that Steve was involved. The prints at the scene of the accident match the tires on his car, the color of several scratches on the other person's car is the same as the color of Steve's car, and his car is dented precisely where the other driver said it would be. That evidence could be used to implicate Steve in the collision.

CITATION

1. a reference to a legal authority for example, a citation to a statute or case; 2. a writ similar to a summons, in that it commands the appearance of a party in a proceeding. The object of a citation is to give the court proper jurisdiction and to notify the defendant that a suit has been filed.

CITE

1. to summon; to order to appear, as before a tribunal; 2. to make reference to a text, statute, case or other legal authority in support of a proposition or argument; also the reference thus made.

CITIZEN

as a member of a nation or political community, one who owes allegiance to, and may claim protection from its government. Under the Constitution, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. See Fourteenth Amendment. Citizenship is the status of being a citizen.

Generally in the United States one may acquire citizenship by birth in the United States or by naturalization therein. A child of alien parents who is born in the United States is a citizen of the United States. A foreign-born child of citizens of the United States, subject to certain qualifications and limitations, is a citizen of the United States. A child born in the United States of a diplomatic representative such as an ambassador or minister, takes the nationality of such representative.

For purposes of diversity jurisdiction: a municipality may be considered a citizen; a corporation is deemed a citizen of the state in which it maintains its principal place of business; and counties are citizens; however, the United States is not a citizen, and states are not citizens.

CITIZEN, NATURALIZED see naturalized citizen.

CIVIL

1. the branch of law that pertains to suits other than criminal practice and is concerned with the rights and duties of persons in contract, tort, etc.; 2. civil law as opposed to common law.

CIVIL ACTION

an action to protect a private right or to compel a civil remedy in a dispute between private parties, as distinguished from a criminal prosecution.

CIVIL AERONAUTICS BOARD [CAB]

an independent federal agency established by Congress in 1938 to regulate commercial aviation and provide public air safety and navigation facilities. In 1958, Congress transferred all the functions except economic regulation of air carriers, aircraft registration, pilot licensing, and accident investigation to the Federal Aviation Administration [FAA].

CIVIL CONTEMPT see contempt of court.

CIVIL DAMAGE ACTS see dram shop act.

CIVIL DEATH

at common law, civil death was the status given to a person who, though alive, had been convicted of a felony and sentenced to life imprisonment. It referred to the fact that the convicted

person had lost all civil rights and was thus thought to be dead as regards his or her participation in society. The convict could not, for example, sue or inherit since in contemplation of law he or she did not exist; in fact, a next friend was often designated to represent the interests of a civilly dead person. Some states still apply civil death to persons serving life sentences; however, there is no general agreement as to the scope of the civil rights lost. Most states deny specific rights to convicted felons such as the right to vote or to hold public office.

CIVIL DISOBEDIENCE

the refusal to obey a law for the purpose of demonstrating its unfairness or social undesirability; generally does not apply to violent efforts to oppose laws.

EXAMPLE: Katie leads a group of protestors who sit down in a roadway to prevent vehicles from entering a nuclear weapons site and thus disrupt the activities at that site. The group may be forcibly removed by the police and/or charged with various offenses such as trespassing or obstructing a passageway, yet they feel they have achieved their goal of calling attention to their concern.

CIVIL DISORDER

any public disturbance involving acts of violence by a group of three or more persons causing immediate danger, damage, or injury to the property or person of another individual.

CIVIL LAW

1. Roman law embodied in the Justinian Code and presently prevailing in most Western European states; it is also the foundation of the law of Louisiana. 2. the law concerned with noncriminal matters. 3. the body of laws established by a state or nation, as distinguished from natural law.

CIVIL LIABILITY

amenability to civil action as distinguished from criminal action; a liability to actions seeking private remedies or the enforcement of personal rights, based on contract, tort, etc.

CIVIL LIBERTIES see civil rights.

CIVIL PENALTIES

finer or money damages imposed by a regulatory scheme. Civil penalties are imposed as punishment for a certain activity and act as a criminal sanction, while civil remedies redress wrongs between private parties.

CIVIL PROCEDURE

the body of rules of practice to be adhered to in adjudicating a controversy before a court of civil, as opposed to criminal, jurisdiction. The term refers to matters of form rather than to the principles of substantive law that must be applied to determine the rights of the parties.

CIVIL RIGHTS

the nonpolitical rights of all citizens, especially those rights relating to personal liberty. Civil rights differ from CIVIL

LIBERTIES In that civil rights are positive in nature, and civil liberties, negative; that is, civil liberties are immunities from governmental interference or limitations on governmental action (as in the First Amendment) that have the effect of reserving rights to individuals.

EXAMPLE: Neal is harassed as he enters a building designated as a polling place. The purpose is to prevent Neal from voting. The harassment violates Neal's *civil rights*, since he is guaranteed his right to vote.

CIVIL RIGHTS ACT OF 1964

federal act passed to amend statutes passed after the Civil War to provide stronger protection for individual rights guaranteed by the Constitution.

CIVIL SERVICE COMMISSIONS see patronage [CIVIL SERVICE COMMISSIONS].

CIVITAS

(*sī'-vī-tās*) Lat: in the Roman Law, any body of people living under the same laws; citizenship, state, commonwealth, community.

C.J.

abbreviation for Chief Justice or Chief Judge.

CLA see National Association of Legal Assistants [CLA].

CLAIM

1. the assertion of a right to money or property; 2. in pleading, the facts giving rise to a right enforceable in the courts, which must show the existence of a right, an injury and damages. One who makes a claim is the claimant.

CLAIMANT

the party who asserts a right to money or property. See claim.

CLAIM FOR REFUND

a claim by a taxpayer to the Internal Revenue Service that he or she is entitled to a refund of all or part of the taxes paid by him or her in earlier years; such a claim must be made in writing within a specified time from the filing date of the return to which it relates and is a necessary prerequisite to any allowance of a refund by the IRS or to any suit by the taxpayer against the IRS for disallowance of a claimed refund.

CLAIM OF RIGHT

a doctrine that requires taxpayers to include in their gross income all amounts received by them under claim that they are entitled to the amounts, whether or not they are legally entitled to keep them and whether they are required to repay them in a subsequent year. When repayment occurs, a deduction is allowed under a special section of the Internal Revenue Code designed to minimize the tax distortion caused by the inclusion of such amounts in the wrong tax years.

CLASS ACTION

a suit brought by one or more members of a large group of persons on behalf of all members of the group. If the court permits the class action, all members must receive notice of the action and must be given an opportunity to exclude themselves. Members who do not exclude themselves are bound by the judgment, whether favorable or not.

EXAMPLE: In accordance with securities law, a corporation files a registration statement with the Securities and Exchange Commission concerning a stock sale. After investors buy several million shares of stock and a few years pass, the corporation files for bankruptcy. At that point, a few of the investors realize the statement was false and misleading. Those investors, on behalf of all investors of the corporation, file a *class action* lawsuit seeking to recover the money they originally paid for the stock.

CLASS GIFT

a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal, or other definite proportions, the share of each being dependent for its amount upon the ultimate number.

CLASSIFIED STOCK

common stock divided into two or more classes. A typical approach is for a company to issue Class A stock to raise the bulk of equity capital while vesting voting rights in Class B stock, which is retained by management and/or founders. The practice is usually confined to promotional ventures, and very few publicly held companies have classified stock as part of their capitalization.

CLAUSE

see respective entries, e.g., escalator clause.

CLAYTON ACT

a federal statute amending the Sherman Antitrust Act. The Act prohibits certain types of price and other discriminations, now covered by the Robinson-Patman Act; tying, exclusive dealing, and total requirements agreements; mergers or acquisitions tending substantially to lessen competition in any line of commerce, and interlocking directorates. See antitrust laws.

CLEAN HANDS

the concept in equity that a claimant who seeks equitable relief must not himself or herself have acted unfairly or unjustly in the transaction in which relief is sought.

CLEAR see free and clear.

CLEAR AND CONVINCING

as a standard of proof, the amount of evidence that is beyond mere preponderance but is not "beyond reasonable doubt," which will convince the trier of fact (fact finder) as to the facts sought to be established.

CLEAR AND PRESENT DANGER

in constitutional law, a standard used to determine if one's First Amendment right to speak may be curtailed or punished. If the words are spoken in such circumstances and are of such a nature as to create a clear and present danger that they will bring about certain evils that government has a right to prevent, the government may prohibit or punish the use of those words.

CLEARINGHOUSE

1. an association, usually formed voluntarily by banks, to exchange checks, drafts or other forms of indebtedness held by one member and owed to another. Its object is to effect at one time and place the daily settlement of balances between the banks of a city or region with a minimum of inconvenience and labor. 2. in a stock or commodities exchange, an organization to facilitate settlement of the debits and credits of its members with each other. In essence, it operates on the same principles of centrality and convenience as does the clearinghouse association for banks. For example, if broker *A* is obligated to deliver 5,000 shares of *XYZ* stock and is entitled to receive 4,500 such shares from brokers *B*, *C*, and *D*, at the end of the day he would deliver to the clearinghouse only 500 shares.

CLEAR TITLE

title free from any encumbrance, obstruction, burden or limitation that presents a doubtful or even a reasonable question of law or fact as to its validity. See good title; marketable title.

CLEMENCY see executive clemency.

CLERGYMEN'S PRIVILEGE see priest-penitent privilege.

CLERICAL ERROR

a mistake made while copying or transmitting legal documents as distinguished from a JUDICIAL ERROR, which is an error made in the exercise of judgment or discretion.

CLERIC'S PRIVILEGE see priest-penitent privilege.

CLERK

an assistant or a subordinate. A COURT CLERK is an officer whose duties include keeping records, issuing process and entering judgment. A LAW CLERK is an assistant to a lawyer or a judge, whose primary job is to aid in the research and writing of briefs or opinions and the handling of cases.

CLOSE see enclosure.

CLOSE CORPORATION see corporation.

CLOSED END FUNDS see investment company [TRUST].

CLOSED-END MANAGEMENT COMPANY

a management investment company that issues a fixed number of shares. The

shares are redeemable through secondary market transactions rather than directly from the investment management company as in an open-end management investment company [MUTUAL FUND]. The shares of a closed-end management company are generally listed for trading on a stock exchange.

CLOSED SHOP

an enterprise in which, because it is required by the terms of a collective bargaining agreement between a labor union and the owners/managers of the enterprise, all workers must be union members, as a condition of their employment.

CLOSELY HELD CORPORATION see corporation [CLOSE CORPORATIONS].

CLOSING

the consummation of a transaction involving the sale of real estate or of an interest in real estate, usually by payment of the purchase price (or some agreed portion), delivery of the deed or other instrument of title, and finalizing of collateral matters.

CLOSING AGREEMENT

a written agreement between a taxpayer and the Internal Revenue Service that conclusively settles his or her tax liability for the taxable year ending prior to the agreement date or settles one or more issues affecting his or her tax liability. The agreement is binding on both the taxpayer and the IRS unless fraud or misrepresentation of a material fact is demonstrated.

CLOSING LAWS see blue laws; Sunday closing laws.

CLOSING STATEMENT see statement [CLOSING STATEMENT].

CLOTURE

in legislative assemblies that permit unlimited debate (FILIBUSTER), a procedure or rule by which debate is ended so that a vote may be taken on the matter. In the U.S. Senate, a two-thirds majority vote of the body is required to invoke cloture and terminate debate.

CLOUD ON TITLE

any matter appearing in the record of a title to real estate that on its face appears to reflect the existence of an outstanding claim or encumbrance that, if valid, would defeat or impair title, but that might be proven invalid by evidence outside the title record.

EXAMPLE: Julie locates a house she wants to buy but demands an abstract of title to be sure that no one else may have a claim to the land or house. The abstract shows a *cloud on the title* from about 60 years ago concerning a transfer of the land wherein a joint owner did not sign the deed transferring title. Julie may not want to purchase the house, or she may want title insurance to cover a problem if one arises. Where a cloud on a title exists, the seller ordinarily

gives the purchaser a quitclaim deed, which transfers all of the interest the seller owns and no more. Title companies usually will not insure a clouded title or will insure it subject to that cloud which is listed in the policy as an exception.

CODE

a systematic compilation of laws, for example, the Criminal Code (referring to penal laws) and the Motor Vehicle Code (referring to laws relating to motor vehicles).

CODEFENDANT

a defendant who is joined together with one or more other defendants in a single action. See joinder.

CODE OF MILITARY JUSTICE see military law [CODE OF MILITARY JUSTICE].

CODE OF PROFESSIONAL RESPONSIBILITY

a set of rules based on ethical considerations that govern the conduct of lawyers; passed by the American Bar Association and adopted by most states; enforced by state disciplinary boards. Some states require lawyers to prove their knowledge of the Code by passage of a course or test before being allowed to practice in that state.

CODE PLEADING

the term applied to the system of pleading, now abandoned, which was developed in this country through practice codes enacted in a majority of the states, to consolidate and improve the common law and equity systems of pleading previously used.

CODICIL

a supplement to a will, whose purpose is to add to, subtract from, or qualify, modify or revoke the provisions of a prior will.

EXAMPLE: Larry executed his will at a time when his relationship with his brother was at a low point. As the relationship improves, Larry writes a *codicil* to his will providing that a certain amount of money pass to the brother. The codicil also revokes any statement in the will that specifically denies the brother anything.

COERCION

any form of compulsion or constraint that compels or induces a person to act otherwise than freely. It may be physical force but is more often used to describe any pressure that is brought to bear on another's free will. In testamentary law, if undue influence is exerted upon the testator, the coercion will vitiate the effect of the instrument. In criminal law, improper conduct that coerces the defendant into making an incriminatory statement will void the confession. See also criminal coercion; duress.

COGENT

appealing forcibly to the mind or reason; compelling; convincing. The word is frequently used to describe the quality of a particular legal argument. It is derived from the Latin *cogo*, *cogere*, which means "to bind, drive, or compress into a mass."

COGNIZABLE

within the jurisdiction of the court. An interest is cognizable in a court of law when that court has the power to decide the controversy.

COGNOVIT JUDGMENT see confession of judgment.

COGNOVIT NOTE

a promissory note in which the debtor authorizes an attorney to enter a confession of judgment against him or her in the event of nonpayment.

COHABITATION

1. the act of living together; often statutorily expanded to include living together publicly, as husband and wife; 2. having sexual intercourse.

COHEIR

one who inherits a property with another.

COIF

headdress formerly worn by English sergeants at law. "Order of the Coif " is an honorary legal fraternity in the United States.

COINSURANCE

an insurance plan in which the insurer provides indemnity for only a certain percentage of the insured's loss, reflecting the relative division of risk between insurer and insured.

COLLATERAL

1. secondary; on the side; 2. in commercial transactions, the property offered as security, usually as an inducement to another party to lend money or extend credit.

COLLATERAL AFFINITY see affinity [COLLATERAL AFFINITY].

COLLATERAL ATTACK

a challenge to the integrity of a prior judgment, brought in a special proceeding intended for that express purpose. A direct attack, on the other hand, is an attempt to impeach a judgment within the same action in which the judgment was rendered, through an appeal, request for new trial, etc. Lack of proper jurisdiction and constitutional infirmities in the original judgment are often grounds for collateral attack. Habeas corpus is a "collateral attack" remedy.

COLLATERAL CONSANGUINITY [LINE] see consanguinity [COLLATERAL CONSANGUINITY]; lineal [COLLATERAL LINE].

COLLATERAL ESTOPPEL

the doctrine recognizing that the determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings against each other; also known as issue preclusion. In a subsequent action between the parties on a different claim, the judgment is conclusive as to the issues raised in the subsequent action,

if these issues were actually litigated and determined in the prior action. The constitutional prohibition against double jeopardy includes within it the right of the defendant (but not the state) to plead "collateral estoppel" and

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thereby preclude proof of some essential element of the state's case found in the defendant's favor at an earlier trial. See estoppel. See also bar; merger; res judicata.

EXAMPLE: Damien is charged with robbing six persons at a poker game and his defense in the first trial involving the alleged robbery of only one of the victims is that he wasn't there [ALIBI], and if he is acquitted at that trial due to the jury's specific acceptance of his alibi, the state will be estopped to relitigate the alibi question with respect to the other related robberies.

COLLATERAL FRAUD see fraud [EXTRINSIC [COLLATERAL] FRAUD].

COLLATERAL SOURCE RULE

benefits or compensation received by an injured person from a separate source such as insurance do not serve to reduce the damages owed by a tortfeasor.

COLLATION

the preparation of an estimate of the value of advancements made by an intestate [person who dies without a will] to his or her children, in order that the whole of the estate may be divided in accordance with law.

COLLECTIVE BARGAINING

the process of settling labor disputes by negotiation between the employer and representatives of employees. Compare arbitration.

COLLOQUIUM

allegation in a declaration or complaint of libel under common law pleadings, which purport to connect the libelous words with the plaintiff by setting forth extrinsic facts showing that they applied to the plaintiff and were so intended by the defendant.

COLLUSION

1. the making of a secret agreement with another to commit fraud or engage in other illegal activity, or in legal activity with an illegal end in mind; 2. an agreement between husband and wife to suppress facts or to make up evidence important to the existence of lawful grounds for divorce.

COLLUSIVE ACTION

an action brought by parties not actually adversaries to determine a hypothetical point of law or to produce a desired legal precedent. Because such a suit does not involve a genuine controversy, it will not be entertained by a court.

COLOR

deceptive appearance or disguise; designates hiding a set of facts behind a false, but technically proper, legal theory. See color of law; color of title.

COLORABLE

that which presents an appearance that does not correspond with the reality, or an appearance intended to conceal or to deceive.

COLOR OF LAW

the semblance of legal right. An action under color of law has the apparent authority of law but is actually contrary to law.

COLOR OF TITLE

an instrument that appears to pass title, and on which one relies as passing title, but that is not valid, either because title is lacking in the person conveying or because the conveyance itself is defective.

COMITY [COMITAS]

a rule of courtesy by which one court defers to the concomitant jurisdiction of another; most often used in reference to the long-standing public policy against federal court interference with state criminal proceedings.

EXAMPLE: Jack kidnaps a young girl and takes her across state lines, a crime that violates both federal and state laws. Although Jack could be prosecuted by both jurisdictions or either of them, under principles of *comity* the federal prosecutor allows the state to proceed first, because of the anger of the community and their desire to try Jack in a local setting.

COMMENT

statements made by a judge or counsel concerning a defendant, where such statements are not based on fact, but rather on alleged facts.

COMMERCE CLAUSE

Art. I, Sec. 8, Cl. 3 of the Constitution providing ". . . Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." Federal regulations regarding business such as the Occupational Safety and Health Act have their roots in the commerce clause. See interstate commerce.

COMMERCE POWER see power, constitutional [COMMERCE POWER].

COMMERCIAL BANK see bank [COMMERCIAL BANK].

COMMERCIAL BRIBERY see bribery.

COMMERCIAL FRUSTRATION see frustration of purpose.

COMMERCIAL LAW

the body of law that concerns the rights and obligations of persons in their commercial dealings with one another (such as the Uniform Commercial Code, laws prohibiting unfair trade practices, etc.). See law merchant; mercantile law; Uniform Commercial Code.

COMMERCIAL NAME see trade name.

COMMERCIAL PAPER

a negotiable instrument, that is, a writing indorsed by the maker or drawer, containing an unconditional

promise or order to pay a certain sum on demand or at a specified time, and payable to order or to bearer. See also order paper.

COMMERCIAL PREFERENCE see preference.

COMMERCIAL UNIT

a unit considered by trade or usage to be a whole that cannot be divided without materially impairing its value, character or use; for example, a machine or a suite of furniture. Since acceptance of any part of a commercial unit constitutes acceptance of the whole, the term becomes significant when a buyer attempts to reject part of a contract for nonconformance. If the item rejected is part of a commercial unit, the rejection will not be allowed.

COMMINGLING OF FUNDS

the act of a fiduciary or trustee, including a lawyer, in mixing his or her own funds with those belonging to a client or customer; generally prohibited unless the fiduciary maintains an exact accounting of the client's funds and how they have been used.

EXAMPLE: The bank trustee felt he had an excellent tip on a stock, so he *commingled the funds* of one of the bank trusts with his own funds. The investment is successful, but the trustee is still disciplined because he never made an exact accounting of the stock purchased with trust money.

COMMISSION

a fee paid to an employee or agent for services performed especially, a percentage of a total amount received in a transaction as distinguished from salary, which is a fixed amount payable periodically.

COMMISSION, MILITARY see military law [MILITARY COMMISSION].

COMMITMENT

1. a judge's order directing that a person be taken to prison or jail, either to await trial or following an imposition of sentence; 2. an order mandating a person to confinement in a medical institution.

COMMITTEE

1. in legislative practice, a group appointed to investigate some special matter or area of interest and report its findings and recommendations to the legislative body; 2. a person appointed by the court to manage the affairs of a legally incompetent person. See guardian; ward.

COMMODITY

any tangible good; a product that is the subject of sale or barter. See also futures.

COMMON AREA

in landlord-tenant law, portions of premises used in common by all tenants. A large number of cases have imposed

liability on the landlord on the basis of "retained control" with injuries sustained when the landlord has failed to maintain common areas in reasonably safe condition. Implicit in these decisions is the notion that since no individual tenant controls the common area, control remains with the landlord. Common areas to which the landlord's obligation has been extended include stairways, porches, hallways and entrance areas, elevators, yards, and basements.

COMMON CARRIER see carrier [COMMON CARRIER].

COMMON LAW

the system of jurisprudence, which originated in England and was later applied in the United States, that is based on judicial precedent (court decisions) rather than legislative enactment (statutes) and is therefore derived from principles rather than rules.

In the absence of statutory law regarding a particular subject, the judge-made rules of common law are the law on that subject. Thus the traditional phrase "at common law" refers to the state of the law in a particular field prior to the enactment of legislation in that field.

COMMON-LAWCOPYRIGHT see copyright.

COMMON-LAW MARRIAGE

one based not upon ceremony and compliance with legal formalities, but upon the agreement of two persons, legally competent to marry, to cohabit with the intention of being husband and wife, usually for a minimum period of seven years.

COMMON-LAWTRUST see Massachusetts trust.

COMMON NUISANCE see nuisance [PUBLIC [COMMON] NUISANCE].

COMMON PROPERTY see property.

COMMONS

1. land set aside for public use, for example, public parks; 2. the untitled class of Great Britain, represented in Parliament by the House of Commons.

COMMON STOCK

a security representing an ownership interest in a corporation. Ownership may also be shared with preferred stock, which has prior claim on any dividends to be paid and, in the event of liquidation, prior claim to the distribution of the corporation's assets. As owners of the corporation, common stockholders (shareholders) assume the primary risk if business is poor, realize the greater return in the event of success and elect the board of directors that controls the company.

COMMUNITY NOTIFICATION see registration of offenders [COMMUNITY NOTIFICATION].

COMMUNITY PROPERTY

all property that a husband and wife acquire by joint effort during marriage. Property owned prior to marriage or acquired by gift or inheritance is considered SEPARATE PROPERTY.

EXAMPLE: As a result of hard work and prudent investing, a wife has acquired a great deal of property during her marriage. If the marriage fails, her husband is entitled to one-half of whatever property she has acquired in her work if the couple reside in a state that follows *community property* law. That law applies regardless of the fact that the wife's efforts alone resulted in accumulation of the property.

Currently, eight states have adopted the community property doctrine. Other states have instead adopted EQUITABLE DISTRIBUTION statutes to achieve a similar distribution of the marital estate upon dissolution of a marriage.

Community property is similar to, but should be distinguished from, TENANCY BY THE ENTIRETY and JOINT TENANCY (see tenancy).

COMMUTATION

change; in criminal law, substituting a lesser punishment for a greater one, such as life imprisonment for a death sentence, a shorter term for a longer one. Commutation is the prerogative of the chief executive (president or governor), who possess the power of executive clemency. A commutation can be granted only after a conviction, whereas other forms of clemency, such as a pardon, can be granted at any time. Also, a commutation merely lessens punishment, while a pardon removes all legal disabilities of a conviction. Compare reprieve.

EXAMPLE: Several years ago, eight persons were sentenced to fifteen years' imprisonment for possession of a small quantity of marijuana. In light of the new attitude towards personal use of the drug and the recent decriminalization of many marijuana laws, the governor *commuted* (reduced) the prisoners' sentences to time already served, allowing the prisoners to be released immediately.

COMPACT CLAUSE

Art. I, Sec. 10, Cl. 3 of the Constitution providing "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." INTERSTATE COMPACTS that have been congressionally approved include those relating to boundaries and ports, conservation and flood control, and educational and correctional interests.

COMPANY

a group of people organized to perform an activity, business or industrial enterprise.

HOLDING COMPANY see holding company.

JOINT STOCK COMPANY a company or association, usually unincorporated, that has the capital of its members pooled in a common fund; the **CAPITAL STOCK** (see capital) is divided into shares and distributed to represent ownership interest in the company. A form of partnership, it is distinguished from a partnership in that the membership of a joint stock company is changeable, its shares are transferable, its members can be many and not necessarily known to each other, and its members cannot act or speak for the company.

COMPARATIVE NEGLIGENCE see negligence.

COMPELLING INTEREST see equal protection of the laws.

COMPENSATION

payment for work done or for an injury.

COMPENSATORY DAMAGES see damages [ACTUAL DAMAGES].

COMPETENT

properly or legally qualified; able; capable of understanding or of acting reasonably. **COMPETENT EVIDENCE** is both relevant and proper to the issue being litigated. A **COMPETENT COURT** has proper jurisdiction over the person or property at issue. A criminal defendant is competent to stand trial if he or she is able to consult with his or her lawyer with a reasonable degree of rational understanding and has a rational as well as a factual understanding of the proceedings against him or her. An individual is competent to make a will if he or she understands the extent of his or her property, the identity of the natural objects of his or her bounty, and the consequences of making a will.

EXAMPLE: Upon their father's death, his children learned that his will left all his property to his mistress. The children brought a lawsuit to invalidate the will, claiming the father was not *competent* to understand what he was signing or to whom he was leaving his property. The children's evidence included examples of frequent outbursts of rage and depression by the father, as well as occasional stays at a nearby sanitarium.

COMPLAINANT

the party who initiates the complaint in an action or proceeding; practically synonymous with petitioner and plaintiff. The appropriate term to use is determined by the nature of the proceeding and the court in which it is instituted. Compare accused; defendant; respondent.

COMPLAINT

1. in a civil action, the first pleading of the plaintiff setting out the facts on which the claim is based; the purpose is to give notice to the adversary of the nature and basis of the claim asserted. 2. in criminal law, the preliminary charge or accusation made by one person against another to the appropriate court or officer, usually a

magistrate. However, court proceedings, such as a trial, cannot be instituted until an indictment or information has been handed down against the defendant.

COMPOS MENTIS

(kŏm'-pŏs mĕn'-ĭs) Lat.: mentally competent. Compare non compos mentis.

COMPOUND CONCLUSION see question of law [COMPOUND CONCLUSION].

COMPOUNDING A FELONY

the refusal by one injured by a felony to prosecute the felon, in exchange for which the injured party receives a bribe or reparation.

COMPOUND INTEREST see interest.

COMPROMISE VERDICT see verdict [COMPROMISE VERDICT].

COMPULSORY ARBITRATION see arbitration [COMPULSORY ARBITRATION].

COMPULSORY APPEARANCE see appearance [COMPULSORY APPEARANCE].

COMPULSORY COUNTERCLAIM see counterclaim [COMPULSORY COUNTERCLAIM].

COMPULSORY JOINDER see joinder [COMPULSORY JOINDER].

COMPULSORY PROCESS

the right of a defendant to have the subpoena power of the court used on his or her behalf to compel the appearance of witnesses. In civil actions, the right to compulsory process is often secured through state constitutional or statutory provisions. In a criminal proceeding, this right is guaranteed to the defendant by the Sixth Amendment to the United States Constitution. The right extends only to competent, material witnesses who are subject to the court's process and whose expected testimony will be admissible.

COMPURAGATOR

in early English law, one of a group of neighbors called by a person accused of a crime to swear that the accused was testifying truthfully. See wager of law.

CONCEALMENT

an act making more difficult the discovery of that which one is legally obligated to reveal or not to withhold, such as the failure of a bankrupt to schedule all his or her assets, or the failure of an applicant for an insurance policy to disclose information relevant to the insurer's decision to insure the risk.

CONCERTED ACTION [CONCERT OF ACTION]

1. action that has been arranged and agreed upon between parties, in pursuit

of some common design or in accordance with some scheme. In criminal law, concerted action is found only where there has been a conspiracy to commit an illegal act that is, all share the criminal intent of the actual perpetrator. 2. The term also applies to joint tortfeasors where there is tort liability for conspiracy.

CONCILIATION

amicable agreement between parties that resolves a dispute. Usually arrived at with the assistance of a CONCILIATOR (similar to a mediator) but it is the parties themselves who resolve the dispute. Compare arbitration where an arbitrator renders a decision that binds the parties.

CONCILIATOR see conciliation [CONCILIATOR].

CONCLUSION OF FACT

a conclusion as to a factual matter, reached solely through the use of facts and natural reasoning, rather than rules of law.

EXAMPLE: The legal issue before the judge is simple; if the manufacturer does not provide necessary safeguards, he is liable for the workman's injury. The only issue is a question of fact: Did the manufacturer provide the safeguards which the workman subsequently disregarded or were the safeguards never provided? After hearing the evidence, the judge ruled as a *conclusion of fact* that the safeguards had been disregarded by the workman.

CONCLUSION OF LAW

a conclusion as to a legal issue, reached by applying the rules of law.

EXAMPLE: In a particular case, the facts were not in question; but the defense counsel had never called a witness who might have been crucial to the defendant's case. A few years later, when the defendant attempts to have the conviction reversed, the legal issue concerns the standard to be used when a lawyer's incompetent advice results in a conviction. As a *conclusion of law*, the judge finds that, in his particular state, the law requires a stronger showing of incompetence than the one made in this case and therefore refuses to reverse the conviction.

CONCLUSIVE EVIDENCE

evidence that is incontrovertible; not open or not able to be questioned. Where a thing is conclusively proved, it means that such result follows from the facts shown as the only possibility. The term contemplates the degree of proof, and its meaning in a particular statute depends largely on its context and the intention of the legislature.

CONCLUSIVE PRESUMPTION see presumption.

CONCUR

to agree. A concurring opinion agrees with the conclusion of the majority but may state different reasons why such a conclusion is reached.

CONCURRENT

existing together; in conjunction with. In criminal law, **CONCURRENT SENTENCE** describes multiple sentences that a convicted defendant is to serve at the same time.

CONCURRENT CONDITION see condition [**CONCURRENT CONDITION**].

CONCURRENT COVENANTS see covenant [**CONCURRENT COVENANTS**].

CONCURRENT JURISDICTION see jurisdiction [**CONCURRENT JURISDICTION**].

CONCURRENT NEGLIGENCE see negligence [**CONCURRENT NEGLIGENCE**].

CONCURRENT SENTENCES see sentence [**CONCURRENT SENTENCES**].

CONCURRING OPINION see opinion [**CONCURRING OPINION**].

CONDEMN

1. to take private property for public use, such as the building of a highway, with or without consent but for just compensation; 2. to declare legally useless or unfit for habitation, as an unsafe building; . . . to sentence to death a person convicted of a capital offense.

CONDITION

1. a prerequisite or requirement; 2. a possible future event, which will trigger the duty to perform a legal obligation or will cause a real property interest to arise, vest or be extinguished.

CONDITION PRECEDENT an act or event that must occur before a duty of immediate performance of a promise arises, or before a real property interest will arise or vest.

CONDITION SUBSEQUENT a fact that will extinguish a duty to make compensation for **BREACH OF CONTRACT** after the breach has occurred, or whose occurrence will result in the extinguishment of an interest in real property.

CONCURRENT CONDITION a condition precedent that exists only when parties to a contract are obligated to perform at the same time.

CONDITIONAL

dependent upon the happening or nonhappening of the condition; implies a type of incumbrance.

CONDITIONAL BEQUEST see bequest [**CONDITIONAL BEQUEST**].

CONDITIONAL CONTRACT see contract [CONDITIONAL CONTRACT].

CONDITIONAL DISCHARGE see sentence [SUSPENDED SENTENCE].

CONDITIONAL FEE [OR ESTATE]

a limited fee simple that must eventually pass from the donee to certain heirs or to the issue (children) of the donee (heirs of the body). Should the designated heir fail to be alive at the time of the donee's death, the property reverts to the donor or the donor's estate. However, the entire estate remains with the donee until his or her death, the donor having the mere possibility of a reverter.

EXAMPLE: The mother gave Kim, her daughter, title to a home and instructed Kim to pass the home to Kim's daughter or, if she did not have a daughter, to Kim's son, upon Kim's death. This gift to Kim was a *conditional fee*, since if Kim died without a daughter or son, title to the home returned to the mother. If the mother predeceased Kim, the home would return to the mother's estate and pass under the mother's will.

CONDITION PRECEDENT see condition [CONDITION PRECEDENT].

CONDITION SUBSEQUENT see condition [CONDITION SUBSEQUENT].

CONDOMINIUM

a type of ownership associated with multiunit projects, which consists of individual ownership (in fee) of a single unit and shared ownership (tenancy in common) of the common areas (such as elevators, grounds, etc.). A condominium is distinguished from a COOPERATIVE, in which a corporate or business trust entity holds title to the premises and grants rights of occupancy to apartments through proprietary leases or similar arrangements.

CONFERENCE, PRE-TRIAL see pre-trial conference.

CONFESSION

an admission of guilt or other incriminating statement by the accused; not admissible at trial unless voluntarily made. See Miranda Rule.

CONFESSION AND AVOIDANCE

a pleading by which a party admits the allegations against him or her, either expressly or by implication, but presents new matter that avoids or annuls the effect of his or her admitting those allegations. See defense [AFFIRMATIVE DEFENSE].

CONFESSION OF JUDGMENT

the entry of a judgment upon the written admission or confession of a debtor, without a legal proceeding. It is accomplished through an advance, voluntary submission to the jurisdiction of the court, as when a buyer of goods on credit agrees in the purchase contract that if he or she fails to pay on time the amounts due he or she will consent to the entry of a judgment against him or her for the amount outstanding (and, often, reasonable attorney's fees not exceeding a fixed percentage).

CONFIDENCE GAME

a scheme by which a swindler wins the confidence of his or her victim and then cheats the victim of his or her money by taking advantage of the confidence reposed in him or her.

CONFIDENTIAL COMMUNICATION see privileged communication.

CONFIRMATION see arbitrator [CONFIRMATION].

CONFISCATE

1. with regard to acts by a government entity, to take private property without just compensation; 2. to seize goods or property and divest the owner of his proprietary rights, usually as a result of some violation of the law involving the goods or property seized. Compare condemn.

CONFLICT OF INTERESTS

a situation in which regard for one duty results in disregard for another, as when one attorney seeks to represent two persons whose interests are adverse potentially or in fact; an inconsistency between the public interest and the personal interest of a public official which arises in connection with the performance of official duties.

CONFLICT OF LAW [CHOICE OF LAW]

the body of law that contains the rules by which the court in which an action is brought chooses between the applicable law of the court's state (the "forum state") and the differing applicable law of another jurisdiction connected with the controversy.

EXAMPLE: Mary died intestate (i.e., without a will). At her death, she lived and owned property in Florida but had set up a trust in Delaware for her children and grandchildren. Florida claims that, because Mary was a resident of Florida, that state's intestate laws should apply to all of Mary's property. Delaware feels that its intestate laws should apply to the trust accounts since she purposefully set up the account in Delaware. A court will consider the rules concerning *conflict of laws* to determine which state's law applies to the trust.

CONFORMED COPY

an exact copy of a document, often certified to be so by a clerk of a court, with handwritten notations duplicating

those on the original document. Thus, an order may have the date, precise terms, and signature of the judge (s/Judge) written by hand on another copy of a proposed order that had not been signed. This then becomes a conformed copy of the order that was completed and signed by the court.

EXAMPLE: Court Clerk Bailey conforms a copy of Judge Davis' order by writing "s/Judge Davis" on the copy.

CONFORMING USE see nonconforming use.

CONFRONTATION CLAUSE

under the Sixth Amendment of the Constitution, the accused in a criminal prosecution is entitled "to be confronted with the witnesses against him." This right entitles the accused to be present at the trial, and to hear and cross-examine all witnesses against him or her. Evidence that is not subject to confrontation, such as the confession of a codefendant who is not subject to cross-examination, may not be used against the accused.

CONFUSION OF GOODS

a mixing together of personal property belonging to two or more owners so the property of any of them no longer can be identified except as part of a mass of like goods.

CONGLOMERATE

a group of corporations engaged in unrelated businesses and controlled by a single corporate entity.

CONGRESS

1. a formal body of delegates or representatives; 2. in the United States, the national legislative body consisting of the Senate and the House of Representatives. The lawmaking power of the United States vests in this body.

CONGRESSIONAL REFERENCE CASES see Court of Claims.

CONJECTURE

a tenuous inference based upon facts within a person's knowledge. A witness may only testify as to facts within his or her knowledge and may not present conjecture to the jury. A jury cannot render a verdict on the basis of conjecture, but must find its verdict based upon the evidence admitted in the trial of the matter.

CONJUGAL RIGHTS

the rights of married persons, which include companionship, domestic happiness, the comforts of dwelling together, joint property rights, and the intimacies of domestic relations. In prison, a CONJUGAL VISITATION permits an opportunity for sexual intimacy between the inmate and his or her spouse.

CONJUNCTIVE DENIAL see denial [CONJUNCTIVE DENIAL].

CONSANGUINITY

the familial relationship of persons united by one or more common ancestors. LINEAL CONSANGUINITY refers to persons who are descended in a direct line from a common ancestor

such as grandparents, parents, children, grandchildren. COLLATERAL CONSANGUINITY refers to persons who are descended from a common ancestor but not in a direct line such as aunts and nephews, uncles and grandnieces. Degrees of collateral consanguinity are determined by counting generations up to the common ancestor, and then down to the related party. Degrees of consanguinity sometimes control inheritance. See descent and distribution; heirs; lineal.

CONSCIENCE OF THE COURT

refers to the power of the court of equity to resolve a controversy by applying common standards of decency and fairness. The term does not refer to the private opinion of a particular judge but to uniformly held judgment of the community. The proper application of the doctrine rests upon general principles of equitable law and to established precedent. Conduct that shocks the conscience of the court will lead to the invalidation in part or in whole of an unconscionable contract, or to the suppression of evidence as violative of due process of law.

CONSCIENTIOUS OBJECTOR

a status recognized by U.S. Selective Service ("draft") laws and accorded to one who, in good conscience, because of religious belief, is opposed to war. Such a person may be excused from participation in military service otherwise required by law and may be permitted to substitute community service.

CONSCIOUS PARALLELISM

in antitrust law, an independent decision by one party, aware that a particular course of conduct has been followed by a competitor, to follow the same course; distinguished from conspiracy, which requires an agreement, either implied or express, between the parties engaged in the parallel conduct.

EXAMPLE: Shopper Supermarkets decides to end its three-month promotion of offering double coupons. Because of Shopper's action, other area supermarkets end similar promotions. When complaints arise against the supermarkets for acting together to raise prices by ending the discounts, in violation of antitrust laws, the supermarkets reply that their action was not unlawful but represented *conscious parallelism* when Shopper ended the discounts, the other supermarkets felt they could do the same without losing business but they did not act together in an anticompetitive and illegal way.

CONSECUTIVE SENTENCE see sentence [CONSECUTIVE [CUMULATIVE] SENTENCE].

CONSENT

voluntary agreement; an act of reason, not based on fraud, duress or mistake. Consent is implied in every agreement.

CONSENT DECREE see consent judgment.

CONSENT, INFORMED see informed consent.

CONSENT JUDGMENT

recorded agreement of parties to a lawsuit concerning the form the judgment should take. Such a contract cannot be nullified without consent of the parties, except for fraud or mistake. Consent judgments have the same force as any other judgment. Because the agreement of the parties waives exception to irregularities before agreement, appeal from a consent judgment is limited to attack for mistake, fraud or lack of jurisdiction.

CONSENT ORDER any court order to which the opposing party agrees; in antitrust law, an agreement between the Federal Trade Commission and a party being investigated; the party consents to cease activities that could be subject of antitrust action and the FTC refrains from initiating suit.

CONSENT DECREE the counterpart of a consent judgment issued in a court of equity; only as binding as any other equitable remedy. For instance, in antitrust cases, the court can modify a consent decree according to changed circumstances.

CONSENT ORDER see consent judgment [CONSENT ORDER].

CONSENT SEARCH

a search made by an authorized person after the subject of the search has voluntarily consented. The constitutional immunity from unreasonable searches and seizures may be waived by consent to a search or seizure. Once an individual has consented to a search he or she cannot later challenge the search. In order to constitute a lawful waiver the consent must be given intelligently and voluntarily.

CONSEQUENTIAL DAMAGES see damages.

CONSERVATOR

temporary court-appointed guardian or custodian of property.

CONSIDERATION

something of value given in return for performance or promise of performance for the purpose of forming a contract; generally required to make a promise binding and to make agreement of the parties enforceable as a contract. Consideration distinguishes a contract from a gift.

FAILURE OF CONSIDERATION or WANT OF CONSIDERATION refers to the circumstance in which consideration was bargained for but either has become worthless, has ceased to exist or has not been provided as promised.

EXAMPLE: Although Paula ran a prosperous business on the West Coast and was enjoying life as a "single," she agreed to return East to care for her aging mother. As a demonstration of her gratitude,

the mother promised Paula the money located in a bank account. Nothing was ever signed, and upon the mother's death, the other children contested Paula's claim to the whole account. They felt that there was no contract between the mother and Paula because Paula gave no *consideration* in return for the money in the account. A court would probably find that Paula's care for the mother at the mother's request, as well as the giving up of a prosperous business, constituted consideration and hence the promise is enforceable.

CONSIDERED DICTUM see dictum [CONSIDERED DICTUM].

CONSIGNMENT

bailment for care or sale. A delivery of goods, without sale, to a dealer, who must sell the goods and remit the price to the person making delivery; or if the goods are not sold, the dealer must return them to the owner.

CONSIGNEE 1. a person to whom goods are shipped for sale under a consignment contract; 2. the person named in a bill of lading to whom the bill promises delivery; 3. one to whom a carrier may lawfully make delivery in accordance with his or her contract of carriage. See carrier [COMMON CARRIER].

CONSIGNOR one who sends a consignment; a shipper of goods; the person calling upon a common carrier for transportation service, who is not necessarily the person in whose name a bill of lading is made.

CONSOLIDATED APPEAL

if two or more persons are entitled to appeal from a judgment or order of a district court, and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties of the several appeals.

CONSOLIDATION see merger.

CONSORTIUM

the conjugal fellowship of husband and wife, and the right of each to the aid of the other in every conjugal relation. A person willfully interfering with this relation, depriving one spouse of the consortium of the other, is liable in damages and may give rise to action for alienation of affection. Loss of consortium can figure in action for injury or wrongful death of a spouse. See also conjugal rights.

CONSPIRACY

a combination of two or more persons to commit an unlawful act, or to commit a lawful act by unlawful means. A conspiracy to injure another is an actionable tort; it may also be a criminal offense. Compare accomplice.

CONSPIRATOR [COCONSPIRATOR]

one involved in a conspiracy; one who acts with another, or others, in furtherance of an unlawful transaction. See also accessory. Compare principal.

CONSTITUTION

the fundamental principles of law by which a government is created and a country is administered. In Western democratic theory, a mandate from the people in their sovereign capacity, concerning how they shall be governed. Distinguished from a statute, which is a rule decided by legislative representatives and is subject to limitations of the Constitution.

CONSTITUTIONAL RIGHTS

individual liberties granted by the State or Federal Constitutions and protected from governmental interference.

CONSTRUCTION

an interpretation of something not totally clear. To determine construction of a statute or constitution is to decide the meaning of an ambiguous part of it.

STRICT CONSTRUCTION a conservative or literal interpretation of statutes, stressing rigid adherence to terms specified.

CONSTRUCTIVE

not actual, but accepted in law as a substitute for whatever is otherwise required. Thus, anything the law finds to exist constructively will be treated by the law as though it were actually so.

CONSTRUCTIVE BAILMENT see bailment [CONSTRUCTIVE BAILMENT].

CONSTRUCTIVE CONTEMPT see contempt [CONSTRUCTIVE CONTEMPT].

CONSTRUCTIVE DELIVERY see delivery [CONSTRUCTIVE DELIVERY].

CONSTRUCTIVE EVICTION see eviction [CONSTRUCTIVE EVICTION].

CONSTRUCTIVE FRAUD see fraud [CONSTRUCTIVE FRAUD].

CONSTRUCTIVE NOTICE see notice [CONSTRUCTIVE NOTICE].

CONSTRUCTIVE POSSESSION see possession [CONSTRUCTIVE POSSESSION].

CONSTRUCTIVE SERVICE see service.

CONSTRUCTIVE TRUST see trust [CONSTRUCTIVE [INVOLUNTARY]TRUST].

CONSTRUE

to interpret a statute, case, regulation, treaty, or other legal authority.

CONSUMER

in economics, an individual who buys goods and services for personal use rather than for manufacture. It has been said that the consumer is the last person to whom property passes in the course of ownership and that this is the test of a retail transaction.

CONSUMER GOODS

goods that are used or bought for use primarily for personal, family, or household purposes. "Consumer goods" is one of four categories of goods distinguished by the Uniform Commercial Code. The classifications are important for such purposes as determining the rights of persons who buy goods subject to a security interest, rights after a default, and rights among those with conflicting security interests in the same collateral. Thus, consumer goods are to be distinguished from EQUIPMENT, which are goods used or bought for use primarily in business; from FARM PRODUCTS, which are goods in the possession of one engaged in a farming operation if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states and from INVENTORY, which are goods held for sale. The classification of goods is determined by its primary use.

CONSUMER PROTECTION

refers to laws designed to aid retail consumers of goods and services that have been improperly manufactured, delivered, performed, handled, or described. Such laws provide the retail consumer with additional protections and remedies not generally provided to merchants and others who engage in business transactions, on the premise that consumers do not enjoy an "arm's-length" bargaining position with respect to the businesspeople with whom they deal and therefore should not be strictly limited by the legal rules that govern recovery for damages among businesspeople.

EXAMPLE: John contracted with a company to put aluminum siding on his house. The company transfers the contract to a finance agency and receives the amount John had agreed to pay the company, less a small discount so that the finance agency can make a profit on the transfer. Under basic commercial law, if the company does not perform the work satisfactorily, John will still have to pay the finance agency, because that area of law protects the agency [as a holder in due course] from claims against the company once the agency assumes the contract. But under some states' *consumer protection* laws, the finance agency must take responsibility for the company work in most instances.

CONTACTS APPROACH see conflict of laws.

CONTEMPLATION OF DEATH see causa [CAUSA MORTIS].

CONTEMPT OF COURT

an act or omission tending to interfere with orderly administration of justice, or to impair the dignity of the court or respect for its authority. **DIRECT CONTEMPT** takes place openly and in the presence of the court.

CONSTRUCTIVE CONTEMPT occurs outside the court; an example is failure to comply with court orders.

CIVIL CONTEMPT consists of failure to do something ordered by the court for the benefit of another party to the proceedings (sometimes called **RELIEF TO LITIGANTS**); **CRIMINAL CONTEMPT** includes acts disrespectful of the court or its processes that obstruct administration of justice.

EXAMPLE: A judge orders a litigant to disclose several important documents to his adversary. The litigant refuses because he feels that the documents will give away trade secrets. The court has certain formulas and designs deleted, and orders that the documents be relinquished. If the litigant still refuses, he can be held in *contempt of court*, resulting in a jail sentence and/or a fine. The nature of the sanction is within the trial judge's discretion. As a general legal proposition, an order of a court must be obeyed or appealed. It may not be disregarded.

CONTIGUOUS

adjacent, connected.

CONTINGENT BENEFICIARY

one who will receive the benefit or proceeds of an estate, trust, life insurance policy or the like but only if some particular event or circumstance, whose happening or outcome is not presently known or assured, does in fact occur.

EXAMPLE: A husband establishes a trust to take effect at his death and names his wife as beneficiary. The trust instrument also provides that if the wife should remarry, the husband's son and daughter become the beneficiaries and the wife is no longer eligible to take under the trust. Since there is no assurance that the wife will ever remarry, the son and daughter are considered *contingent beneficiaries*.

CONTINGENT ESTATE [OR INTEREST]

an interest or estate in land that might or might not begin in the future, depending upon occurrence of a specific but uncertain event or depending on the determination or existence of the person[s] to whom the estate is limited. Compare conditional fee; future interest.

EXAMPLE: The brother grants land to Jane until she dies and then provides that the land go to Paul's children. Paul has no children at

this time, so the grant of the land to them following Jane's death is a *contingent estate*. If Paul has no children when Jane dies, the title to the land reverts back to the brother (who first granted it).

CONTINGENT FEE

a charge made by an attorney for services rendered to his or her client, recovery of which depends upon a successful outcome of the case. The amount is often agreed to be a percentage of the client's recovery. Such fee arrangements are often used in negligence cases, but it is unethical for an attorney to charge a criminal defendant a fee contingent upon the result.

CONTINGENT LIABILITY

a liability that will not accrue unless facts or circumstances that are not certain to occur do in fact occur at some future time. For instance, in a contract to sell a business, the seller will incur a contingent liability if he or she agrees to refund some or all of the purchase price in the event that the purchaser is sued for the seller's negligent acts in operating the business.

CONTINUANCE

the adjournment or postponement, to a specified subsequent date, of an action pending in a court.

CONTRA

(*kôn'-tră*) Lat.: against. In opposition to; in violation of; the reverse of.

CONTRABAND

any property, the possession or transportation of which is illegal. For instance, narcotic drugs, firearms, counterfeit money, or untaxed cigarettes that an individual intends to illegally distribute or use are contraband.

CONTRA BONOS MORES

(*kôn'-tră bō'-nōs mô'-rāz*) Lat.: against good morals. Refers to conduct that offends the average conscience and commonly accepted standards.

CONTRACT

a promise, for the breach of which the law provides a remedy, or the performance of which the law recognizes as a duty; a transaction involving two or more individuals whereby each has reciprocal rights to demand performance of what is promised.

BILATERAL CONTRACT one in which there are mutual promises between two parties, each being both a promisor and a promisee.

CONDITIONAL CONTRACT a contract whose performance depends upon a future event; e.g., a contract to purchase a car if it passes a motor vehicle inspection.

EXAMPLE: Glen wants to purchase a large tract of land from seller to build a manufacturing plant but is unsure whether he can get a loan from the bank to finance the construction costs. Therefore, he signs a *conditional contract* with the seller that he will purchase the land only if he obtains a construction loan from the bank.

COST-PLUS CONTRACT one providing that the contractor receives payment of his or her total costs, plus a stated percentage or profit.

ORAL CONTRACT one that is not in writing or that is not signed by the parties.

OUTPUT CONTRACT one whereby a party promises to deliver his or her entire output to another and the other promises to accept the entire output supplied.

QUASI CONTRACT see quasi [QUASI CONTRACT].

REQUIREMENTS CONTRACT one whereby a party agrees to purchase all his or her requirements of a particular product from another, and the other agrees to supply the need.

UNILATERAL CONTRACT agreement whereby one makes a promise to do, or refrain from doing, something in return for an actual performance by the other, rather than a mere promise of performance.

CONTRACT OF ADHESION see adhesion contract.

CONTRACT OF HAZARD see sale [SALE IN GROSS].

CONTRACTOR

1. a party to a contract; 2. one who contracts to do work for another. An **INDEPENDENT CONTRACTOR** makes an agreement to do a specific piece of work, retaining control of the means and method of doing the job; neither party has the right to terminate the contract at will. A **GENERAL BUILDING CONTRACTOR** contracts directly with the owner of the property upon which the construction occurs, as distinguished from a **SUBCONTRACTOR**, who would deal only with one of the general contractors.

CONTRACTUAL BREACH see breach of contract.

CONTRACT UNDER SEAL see sealed instrument.

CONTRA PACEM

(kõn'-trá pä'-kěm) Lat.: against the peace. Used in Latin forms of indictments, and also in actions for trespass, to signify that the alleged offense was committed against the public peace.

CONTRIBUTION

1. sharing, by another person jointly responsible for injury to a third person, of the amount required to compensate the victim. One who is partly responsible for an injury is often entitled to demand contribution from another who is also responsible. The duty generally involves equal sharing of the penalty, but in some jurisdictions it may be apportioned among the joint tortfeasors according to degree of fault. Compare indemnity. 2. In tax law, a tax deductible contribution is a **DONATION**.

CHARITABLE CONTRIBUTION A contribution for the use of a state, the United States, or a NOT-FOR-PROFIT CORPORATION (see corporation) organized exclusively for religious, charitable, scientific, literary, or educational purposes.

CONTRIBUTORY NEGLIGENCE see negligence.

CONTROLLED SUBSTANCE

a drug whose general availability is restricted; any substance that is strictly regulated or outlawed because of its potential for abuse or addiction. Controlled substances include narcotics, stimulants, depressants, hallucinogens, and cannabis.

CONTROVERSY

a dispute. In constitutional law, in order to constitute a "case or controversy" sufficient to permit an adjudication by the court, a controversy must be real, not one inquiring what the law would be in a hypothetical situation. See standing. Compare declaratory judgment; advisory opinion.

CONTUMACY

willful disobedience to the summons or orders of a court; overt defiance of authority. Contumacious conduct may result in a finding of contempt of court.

CONVERSATION, CRIMINAL see alienation of affections.

CONVERSION

a tort consisting of deprivation of another's property without authorization and without justification.

EXAMPLE: Ralph steals a check made payable to Overland Corporation and cashes it at his bank. Ralph is guilty of theft, which by definition includes *conversion*. But, in most instances, the bank is also guilty of conversion. It has contributed to the unauthorized taking of the check by giving Ralph cash even though the check was not made out to him. Absent complicity in the theft, the bank is not criminally liable unlike Ralph. The bank is, however, monetarily liable to Overland Corporation.

CONVERTIBLE SECURITIES

bonds and preferred stock that can be exchanged for common stock or other lesser security usually of the same corporation. Terms of the exchange specify the exchange ratio and expiration of the right to exchange.

CONVEY

in real property law, to transfer property from one to another, by means of a written instrument and other formalities. Compare alienation; grant.

CONVEYANCE see convey.

CONVICT

1. one who has been determined by the court to be guilty of the crime charged; 2. to determine such guilt.

CONVICTION

the result of a legal proceeding in which the guilt of a party is ascertained and upon which sentence or judgment is founded. The confession of an accused in open court or a verdict that ascertains and publishes the fact of guilt are both sufficient to constitute a conviction. See guilty.

COOPERATIVE see condominium.

COOPERATIVE ASSOCIATION

a union of individuals, commonly laborers, farmers, or small capitalists, formed for the pursuit in common of a productive enterprise, the profits being shared in proportion to the capital or labor contributed by each.

COORDINATE JURISDICTION see jurisdiction [CONCURRENT JURISDICTION].

COPARCENARY

at common law, the estate of two or more females inherited from a common ancestor in default of male heirs. The rights of coparceners were in the nature of a joint tenancy in that they could sue and be sued jointly in regards to the property, but were in the nature of a tenancy in common in that no right of survivorship existed.

COPARCENERS

persons who, by virtue of descent, have become concurrent owners. See parcener.

EXAMPLE: Seth and Nathan were left a summer home by their father. As a result of that devise, the two are coparceners.

COPARTNER see partner.

COPY, CONFORMED see conformed copy.

COPYHOLD

a medieval form of land tenure in England. A copyhold was a parcel of land granted to a peasant by a lord in return for agricultural services. The transaction was recorded on the rolls of the manor by the steward, who gave the tenant an authenticated copy of the recordation. Transfer of lands held by copyhold was achieved by surrender and admittance; that is, the copyholder surrendered his land to the baronial court and the steward admitted the person designated by the previous holder to the land by recording the transfer on the rolls and issuing a copy to the new tenant. Tenure was at the will of the lord, but in time the custom of the manor arising over many years gave the tenant a degree of security against arbitrary action by the lord. Thus, copyhold, though not originally entitling the holder to the absolute ownership characteristic of a freehold estate, came to represent a form of permanent tenure with rights of descent and alienability, while money rents or symbolic consideration were substituted for agricultural services. Copyhold was abolished in England in 1926.

Also used to refer generally to any form of land tenure other than a freehold.

COPYRIGHT

protection by statute or by the common law, giving authors and artists exclusive right to publish their works or to determine who may so publish. When by statute, copyright is exclusively a matter of federal law.

COMMON-LAW COPYRIGHT a protection that exists before a work is published or otherwise placed in the public domain; protects against unauthorized publication of the unpublished work; also called **RIGHT OF FIRST PUBLICATION**.

COPYRIGHT INFRINGEMENT the offense of unauthorized use of a work protected by copyright. See plagiarism.

CORAM NOBIS, WRIT OF see writ of coram nobis.

CORRESPONDENT see adultery.

CORONER

a public official who investigates the causes and circumstances of suspicious deaths that occur within his or her jurisdiction and makes a finding in a coroner's inquest. See also post mortem.

CORPORAL PUNISHMENT

punishment inflicted upon the body. The term may or may not include imprisonment; often serves simply to distinguish physical punishment from nonphysical punishment, such as a fine.

CORPORATE OPPORTUNITY

the legal doctrine that directors or others invested with a fiduciary duty toward a corporation may not appropriate for their own benefit a business opportunity properly belonging to the corporation. Persons found guilty of this practice are deemed to hold the property or profits thus obtained in **CONSTRUCTIVE TRUST**(see trust) for the benefit of the corporation, and injunctive relief as well as money damages may be available to the victimized shareholders. See conflict of interests; insider.

CORPORATE POWER see power, corporate.

CORPORATION

an association of shareholders (or a single shareholder) created under law as an **ARTIFICIAL PERSON**, having a legal entity separate from the individuals who compose it, with the capacity of continuous existence or succession, and the capacity of taking, holding, and conveying property, suing and being sued, and exercising, like a natural person, other powers that are conferred on it by law. A corporation's liability is normally limited to its assets; the shareholders are thus protected against personal liability for the corporation. The corporation is taxed at special tax rates, and

the stockholders must pay an additional tax upon dividends or other profits from the corporation. Corporations are subject to regulation by the state of incorporation and by the jurisdictions in which they carry on their business.

Special statutes have been enacted in many jurisdictions to permit single individuals or closely knit small groups of individuals to form CLOSE CORPORATIONS to limit their personal liability but to carry on business without the formality of annual meetings and action by boards of directors.

EXAMPLE: Bob runs several clothing shops as a sole proprietor. After speaking with other businesspeople, he decides to form a *close corporation*. Under that arrangement, Bob still controls the company, although there may be others, such as a wife and siblings, who hold a number of shares of stock in the corporation. He also enjoys the limited liability aspect of a corporation in that, if the corporation owes money, a creditor will be limited to the assets of the corporation.

A small corporation with limited earnings may elect to be taxed as an ordinary partnership; its stockholders thus enjoy limited personal liability and only individual (not also corporate) taxation. A corporation electing this federal income tax option is a SUBCHAPTER S CORPORATION.

DE FACTO CORPORATION None existing in fact, but without actual authority of law.

EXAMPLE: Flange Brothers, a partnership, decides to incorporate. After filing what they believe are the necessary papers, the partnership changes its name to Flange Corporation and continues to carry on its business. Several years later, a creditor sues both the corporation and the partners who run it claiming that the partners are not protected from personal liability because they failed to file certain papers for incorporation and a corporation, therefore, was never legally formed. Unless the omission was intentional or under other rare circumstances, a court will generally find that the error was inadvertent, a *de facto corporation* was formed, and the persons running the corporation are protected from liability.

NOT-FOR-PROFIT CORPORATION None organized for some charitable, civil, social or other purpose that does not entail the generating of profit or the distribution of its income to members, principals, shareholders, officers or others affiliated with it. Such corporations are accorded special treatment under the law for some purposes, including federal income taxation.

PUBLIC [OR POLITICAL] CORPORATIONS those created by the state to fulfill certain purposes, such as to form lesser governmental bodies (towns, cities), organize school districts, operate water districts.

PRIVATE CORPORATION the common corporation, created by and for private individuals for nongovernmental purposes.

QUASI CORPORATION a body that exercises certain functions of a corporate character, but that has not been established as a corporation by any statute.

CORPOREAL

having material reality; opposite of INCORPOREAL, intangible.

CORPOREAL HEREDITAMENT see hereditaments.

CORPUS

(kôr'-pūs) Lat.: body. The main substance of a thing. 1. The principal or res of an estate, trust, devise or bequest from which income is derived; can consist of funds, real estate or other tangible or intangible property.

EXAMPLE: Sean creates a trust naming his children as beneficiaries. An office building is stated to be the trust *corpus* in the trust instrument. The rents collected from the [building's] tenants constitute the income that is distributed to the children.

2. In civil law, corpus refers to a positive fact as distinguished from a possibility. See corpus delicti.

CORPUS DELICTI

(kôr'-pūs dě-lĭk'-tĭ) Lat.: body of the crime. The objective proof that a crime has been committed; sometimes refers to the body of the victim of a homicide, but the term has a broader meaning. For the state to introduce a confession or convict the accused it must prove a corpus delicti; i.e., the occurrence of specific injury or loss and a criminal act as the source of the loss. See moral certainty.

EXAMPLE: At his trial for murder, Jack asks the court to dismiss his prosecution because no body was ever found. He does not prevail on that theory alone. Although there is no body, the state can still prove a *corpus delicti*. It is possible to prove a murder by showing that the person has not been seen for several years, that items of particular importance which had belonged to the person were found in Jack's house, and that a knife with bloodstains matching the blood type of the person was found in Jack's car. It should be observed that corpus delicti is not related exclusively to homicide. The corpus delicti of a robbery is the stolen money.

CORPUS JURIS

(kôr'-pūs jūr'-is) Lat.: body of law. A series of texts containing much of the civil and canon [ecclesiastical] law.

CORRECTIONAL INSTITUTION

a general term used to describe a jail, prison, reformatory or other government-maintained detention facility.

CORRESPONDENT see adultery.

CORROBORATING EVIDENCE

evidence complementary to evidence already given and tending to strengthen or confirm it; additional evidence of a different character on the same point.

CORRUPTION OF THE BLOOD

incapacity to inherit or pass property, usually because of attainder, such as for treason. A doctrine of feudal origin stated that the blood of the attained person was deemed to be corrupt, so that neither could he or she transmit his or her estate to heirs, nor could the heirs take by descent from their ancestors. This doctrine has been constitutionally abolished in the United States.

COSIGN

the act of affixing one's signature in addition to the principal signature of another in order to verify the authenticity of the principal signature.

COST, INSURANCE, AND FREIGHT see C.I.F.

COST OF COMPLETION

in a breach of contract situation, a measure of damages representing the total amount of additional expense, over and above the contract price, that the injured party would have to incur in order to obtain a substituted performance that would place that party in the same position he or she would have been in if the contract had not been breached. Often used as a measure of damages for breaches of construction contracts. Compare diminution in value; expectation damages; specific performance.

COST OF LIVING CLAUSE

in a long-term contract, a clause that adjusts the price paid for the goods or services received in an amount equal to the change in the cost of living. For instance, in a lease of commercial property, the contract often provides that the rent will be increased once a year in an amount equal to the rise in the consumer price index for the area, published by the Bureau of Labor Statistics.

COST-PLUS CONTRACT see contract.

COST OF COMPLETION

in breach of contract, a measure of damages representing the additional expense above the contract price that the injured party would incur to obtain substitute performance that would place him in the position he would have achieved if the contract had not been breached. This is often the measure of damages for breaches of construction contracts.

COSTS

court expenses of the victorious party in a lawsuit and that may be reimbursed by the losing party as part of recovery. Such an

allowance is therefore incidental to judgment and compensates for the expense of asserting one's rights in court. Costs may be allowed to the plaintiff if the default of a defendant made it necessary to sue, and to a defendant if the plaintiff sued without cause. Generally, costs of litigation are recoverable as of right if provided by statute. If there is no applicable statute, court rules may provide for allowance of costs to be at the discretion of the trial court. However, pursuant to the American rule, the prevailing practice in most jurisdictions is that each party bears his or her own costs.

COSTS TO ABIDE THE EVENT

court order requiring the losing party to pay legal expenses of the prevailing party up to and including the decision of the court of appeals (see appellate court) and sometimes on retrial.

CO-TENANCY

possession of and the holding of rights in a unit of property by two or more persons simultaneously. The term does not describe the estate, but the relationship between persons who share the property. It encompasses TENANCY IN COMMON, JOINT TENANCY, and TENANCY BY THE ENTIRETY (see tenancy).

COUNSEL

1. attorney or legal adviser; 2. the advice or aid given with respect to a legal matter. 3. In criminal law, the term may refer to the advising or encouraging of another to commit a crime.

COUNT

a distinct statement of plaintiff's cause of action. In indictments, a count, like a charge, is an allegation of a distinct offense. A complaint or indictment may contain one or more counts.

COUNTERCLAIM

a counterdemand by defendant against the plaintiff; it is not a mere answer or denial of plaintiff's allegation, but asserts an independent cause of action in favor of defendant.

EXAMPLE: A retail store owner sues a manufacturer for a shipment of defective clocks. Regardless of the validity of that suit, the manufacturer could *counterclaim* against the store owner if, for example, the owner owed the manufacturer money for past shipments. Both the storeowner's and the manufacturer's claims would then be decided by the courts.

In federal practice, a **COMPULSORY COUNTERCLAIM** arises out of the subject matter of the opposing party's claims, and unless the defendant makes such a counterclaim in the suit that has been brought against him or her, he or she may be barred from ever raising that claim again. A **PERMISSIVE COUNTERCLAIM** is any other counterclaim and may be made by the defendant in the action that has been brought against him or her or in a subsequent suit. See setoff. Compare cross-claim.

COUNTERFEIT

forged; fabricated without right; made in imitation of something else to defraud by passing the false copy for genuine.

COUPLED WITH AN INTEREST see authority [AUTHORITY COUPLED WITH AN INTEREST].

COUPONS

certificates, usually attached to an instrument evidencing a loan, which may be presented separately for payment of a specific sum representing interest on the main instrument. See bond [BEARER BOND].

COURSE OF BUSINESS see ordinary course of business.

COURSE OF DEALING see trade usage [COURSE OF DEALING].

COURT

the branch of government responsible for the resolution of disputes arising under the laws of government. A court system is usually divided into various parts that specialize in hearing different types of cases. Trial courts receive evidence and make initial determinations of fact and law that may then be reviewed by appellate courts. Trial courts may further specialize in civil, criminal, or family law matters. Federal courts hear cases arising under federal laws. All states have a separate court system to decide cases arising under state laws. See federal courts, court of claims, court of equity, court of law, appellate court.

COURT CALENDAR

a schedule of cases awaiting disposition in a given court, also referred to as the TRIAL LIST or the COURT DOCKET.

COURT EN BANC see en banc.

COURT-MARTIAL

1. a military or naval tribunal with jurisdiction over offenses against the law of the service in which the offender is engaged; 2. a proceeding in such a court.

GENERAL COURT-MARTIAL one presided over by a law officer and not fewer than five members, having jurisdiction over all members of the armed services of which it is a part, and authorized to try defendants for all military offenses and to prescribe any permitted sanctions.

SPECIAL COURT-MARTIAL one presided over by three members, that may try all noncapital offenses and that is limited in its authority to prescribe sanctions such as dismissal, hard labor and extended confinement, but may not authorize execution.

SUMMARY COURT-MARTIAL one presided over by a single commissioned officer, and limited in respect to the military personnel over whom it has jurisdiction and the sanctions it may prescribe.

The accused may refuse trial by a summary court-martial, but the charges may then be referred to a higher level court-martial.

COURT OF APPEALS see appellate court.

COURT OF ASSIZE AND NISI PRIUS

an English law court composed of two or more commissioners, who were sent twice in every year by the king's special commission all around the kingdom to try by jury cases under their jurisdiction.

COURT OF CLAIMS

the court of the United States, created to determine all presented claims founded upon any law of Congress, upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and also all claims that may be referred to the court by either house of Congress. It has no power over matters in equity.

COURT OF CUSTOMS AND PATENT APPEALS see federal courts.

COURT OF EQUITY

a court having jurisdiction in cases where an adequate and complete remedy cannot be had at law. Courts of equity in common law developed their own principles and unique remedies (e.g., injunction, specific performance). Actions were brought either equitably in chancery or legally at law. Today, courts that are guided primarily by equitable doctrine are still said to be courts of equity. Thus, a bankruptcy court is a court of equity. Courts of equity, which arose independent of courts of law in England, have merged with the latter in most jurisdictions of the United States. See equity.

COURT OF EXCHEQUER

(ěks'-chěk-ěr) an ancient English court of record. It was established by William the Conqueror to recover the king's debts and duties. It was inferior to both the court of the King's Bench and the court of common pleas, but served as both a court of law and equity. It took its name from the chequered cloth that covered its table and was marked and scored when the king's accounts were prepared. It consisted of two divisions, one that handled the royal revenue and the court, which was subdivided into courts of equity and common law.

THE COURT OF EXCHEQUER CHAMBER

a court of appeal established to determine causes upon writs of error from the common law side of the court of exchequer.

COURT OF INQUIRY see military law [MILITARY COURT OF INQUIRY].

COURT OF KING'S [QUEEN'S] BENCH see King's Bench.

COURT OF LAW

a tribunal with jurisdiction over cases at law.

The term applies to courts that administer justice according to federal or state law or common law, as distinguished from courts that follow the principles of equity and are called chancery courts. Law courts and equity courts, however, are generally no longer distinguished, and a court of law is any tribunal administering the law.

COURT OF MILITARY APPEAL see military law [COURT OF MILITARY APPEAL].

COURT OF MILITARY REVIEW see military law [COURT OF MILITARY REVIEW].

COURT OF RECORD

a court that, like most modern courts, is required by law to keep a record of its proceedings, including the orders and judgments it enters, and that has the authority to imprison and to levy fines.

COURT OF STAR CHAMBER see star chamber.

COURT REPORTERS

persons certified to operate tape-recording devices or to use shorthand or stenographic means to record that which is said in court or at a deposition. The recording is later turned into a transcript and forms the official record of the proceeding. Contemporaneous transcripts made by computer systems and that are viewable by persons in the courtroom are known as REAL TIME or LIVE VIEW transcripts.

COURT REPORTS see advance sheets; reports.

COVENANT

1. to enter a formal agreement; to bind oneself in contract; to make a stipulation; 2. an agreement to do or not to do a particular thing; 3. a promise incidental to a deed or contract, either express or implied.

EXAMPLE: Rita wants to sell a large tract of land adjacent to her home. As an inducement to Jim, the buyer, Rita is willing to *covenant* with (i.e., promise) him that he has access to and use of her driveway so that he will not have to build one.

CONCURRENT COVENANTS those that require the performance by one party of his or her obligation, when the other party is ready and offers performance.

COVENANT NOT TO COMPETE see covenant not to compete.

DEPENDENT COVENANTS those in which the obligation to perform one covenant arises only upon the prior performance of another; therefore, until the prior condition of performance has been met, the other party is not liable in an action on his covenant.

INDEPENDENT [OR MUTUAL] COVENANTSthose that must be performed by one party without reference to the obligations of the other party.

In deeds, the usual **COVENANTS OF TITLE**, which may be deemed by law to be a part of certain kinds of real property conveyances, include:

COVENANT AGAINST ACTS OF THE GRANTORone often inserted into a bargain and sale deed to assure that the grantor has not done, nor caused to be done, any act by means of which the premises or any part thereof may be encumbered in any way.

COVENANT AGAINST ENCUMBRANCESa guarantee given to the grantee of an estate that the estate is without encumbrances. Compare run with the land.

COVENANT OF FURTHER ASSURANCEone that obligates the covenantor to perform whatever acts are reasonably demanded by the covenantee for the purpose of perfecting or assuring the title that is conveyed. This type of covenant is no longer in general use.

COVENANT OF QUIET ENJOYMENTsee quiet enjoyment.

COVENANT OF SEISIN AND RIGHT TO CONVEYcovenant that the grantor has an estate, or the right to convey an estate, of the quality and quantity that he or she purports to convey (which, in the case of a covenant of seisin, is a fee simple)

COVENANT OF WARRANTY AND QUIET ENJOYMENTone that obligates the covenantor to protect the estate against the existence of lawful claims of ownership by third parties. A cause of action arises only when there is eviction, actual or constructive.

RESTRICTIVE COVENANTsee restrictive covenant.

COVENANTEE

one who receives the covenant, or for whom it is made.

COVENANT NOT TO COMPETE

a contractual promise to refrain from conducting business or professional activities similar to those of another party. These covenants are encountered principally in contracts of employment, partnership, or sale of a business.

EXAMPLE: A chain of discount appliance stores is bought by a large corporation. The corporation offers to hire Frank, the owner of the chain, and to allow him to organize a separate business if he wants. The only condition on the offer is that Frank sign a *covenant not to compete*, which would prohibit Frank from organizing another chain of discount appliance stores or selling any other merchandise this corporation distributes. Ordinarily, such covenants have geo-

graphic and duration limits, i.e., that for a period of three years Frank may not open a competitive store within 50 miles of the chain he sold.

The protection of trade secrets, customer lists, business methods specific to a particular employer, and the unique qualifications of the employee have been held to constitute legitimate interests for protection by covenants not to compete.

COVENANTOR

one who makes a covenant.

COVER

in commercial law, refers to a buyer's purchase on the open market of goods similar or identical to the goods contracted for after a seller has breached a contract of sale by failure to deliver the goods contracted for. Under the Uniform Commercial Code, after a seller breaches and the buyer covers, the buyer is entitled to the difference between the cost of the substitute goods and the original contract price, provided the buyer has acted in good faith and without unreasonable delay in effecting such cover.

EXAMPLE: Phil contracts with the Prime Leather Company to supply him with raw leather hides at a certain price. By the delivery date, the cost of hides has risen so sharply that Prime would lose a considerable amount of money if it ships the hides to Phil. Prime decides to breach the contract. If Phil *covers* on this contract by purchasing the hides from another company, he can sue Prime for the difference between his purchase price with the new company and the price agreed to in the contract with Prime.

COVERTURE

in common law, the state of a married woman whereby the existence of the wife was for many civil purposes merged with that of her husband, particularly with regard to ownership of property.

CREDIBILITY

whether or not a witness is being truthful. The primary measure of credibility is whether the testimony is probable or improbable when judged by common experience.

CREDIT

1. a privilege of delayed payment extended to a buyer or borrower on the seller's or lender's belief that what is given will be repaid; 2. in accounting, a credit represents money due.

CREDIT CARD

an indication to sellers of commodities that the person who received the card from the issuer has a satisfactory credit rating and that if credit is extended, the issuer of the card will pay (or see to it that seller receives payment) for the merchandise delivered.

CREDITOR

one to whom money is owed by the debtor; one to whom an obligation exists. In its strict legal sense, a creditor is one

who voluntarily gives credit to another for money or other property; in its more general sense it is one who has a right by law to demand and recover of another a sum of money on any account.

CREDITOR BENEFICIARY see third party beneficiary [CREDITOR BENEFICIARY].

CREDITOR'S BILL [OR SUIT]

a proceeding in equity in which a judgment creditor (a creditor who has secured judgment against a debtor and whose claim has not been satisfied) attempts to gain a discovery, accounting and delivery of property owed to him or her by the judgment debtor, which property cannot be reached by execution (seizure and forced sale) at law.

CRIME

a wrong that the government has determined is injurious to the public and that may therefore be prosecuted in a criminal proceeding. Crimes include felonies and misdemeanors. A common law crime was one declared to be an offense by the developed case law of the common law courts. Today all criminal offenses are exclusively statutory in nearly every American jurisdiction. See infamous crime.

CRIME AGAINST NATURE

sexual deviation, including sodomy and bestiality, considered a crime in common law and carried over into statutory law.

CRIMEN FALSI

(*krĭ'-mĕn fäl'-sē*) Lat.: a crime of deceit. In common law a crime involving falsehood and fraud. Having committed such a crime generally disqualified a person as a witness in a judicial proceeding. Examples of *crimen falsi* include forgery, perjury, subornation of perjury, suppression of testimony, conspiracy in the absence of a witness and fraudulent making or alteration of a document.

CRIME OF PASSION

a crime committed under the influence of sudden or extreme passion. That an act was committed in the heat of passion may provide a defense to a charge of murder, since it negates the element of premeditation, a necessary element of murder. See manslaughter.

EXAMPLE: Nancy comes home and finds her husband in bed with another lover. In a fit of rage she shoots both of them. Although Nancy is charged with murder, she claims that the shootings were a *crime of passion*. As part of her proof, she states that her act resulted from seeing her husband in bed with someone else and not from a rational or premeditated plan to kill, which would be required to support a first degree murder conviction.

CRIME, ORGANIZED see organized crime; racketeering.

CRIMINAL

1. done with malicious intent, with a disposition to injure persons or property; 2. one who has been convicted of a violation of the criminal laws. A **HABITUAL OFFENDER** has been repeatedly convicted of crimes and therefore is subject to extended imprisonment under the habitual offender laws of many jurisdictions.

CRIMINAL CODE see code.

CRIMINAL COERCION

the common law offense of extortion has been broadened by modern statutes to encompass any person who, acting with purpose to restrict unlawfully another's freedom of action to his or her detriment, threatens to commit any criminal offense, accuse anyone of a criminal offense, expose any secret tending to subject any person to hatred, contempt, or ridicule, impair his or her credit or business repute, or threatens to take or withhold action as an official, or cause an official to take or withhold action. Common law extortion was limited to the corrupt collection of an unlawful fee by an officer acting under color of office with no proof of threat, force, or duress required. If property is obtained as the result of criminal coercion, the conduct then constitutes theft by extortion since that form of theft encompasses today any conduct that is now proscribed by the criminal coercion statute. See coercion.

CRIMINAL CONTEMPT see contempt of court.

CRIMINAL CONVERSATION see alienation of affections.

CRIMINAL MAINTENANCE

unauthorized interference in a lawsuit by helping one party, with money or otherwise, to prosecute or defend a cause of action so as to obstruct justice, promote unnecessary litigation or unsettle community peace. Unlike champerty, criminal maintenance does not necessarily involve personal profit. See also barratry.

CRIMINAL MISCHIEF

a crime against property; the willful damaging of the property of another. Punishable in a criminal court but may also be dealt with as a civil tort. Such offenses may include throwing rocks through windows, spray painting graffiti, slashing car tires, or other acts of vandalism. Adding the element of personal ill will or hatred such as defacing a Jewish cemetery with symbols of anti-Semitism raises the act to a hate or bias crime, which has significantly higher levels of punishment.

CRIMINAL NEGLIGENCE see negligence.

CRIMINAL POSSESSION see possession.

CRIMINAL PROCEDURE see procedure [**CRIMINAL PROCEDURE**].

CRIMINAL RECORD

a summary of an individual's contacts with law enforcement generally computerized in the NCIC. All arrests are noted with an explanation of the result including convictions (and sentences received), dismissals, not guilty verdicts, or bench warrant status. Parole or probation violations and escapes are noted as well as alias names, different dates of birth or social security numbers used, fingerprint classification, race, and state and federal identification numbers, Height, weight, eye and hair color, and identifying marks such as scars or tattoos are included, but some of these factors are subject to change. Also known as a RAP SHEET, the information is used by courts in determining the appropriate punishment or bail, and by prison authorities in determining minimum custody or job status.

CROSS-BILL see bill [CROSS-BILL].

CROSS-CLAIM

a claim litigated by codefendants or coplaintiffs against each other, and not against a party on the opposite side of the litigation. Compare counterclaim.

CROSS-EXAMINATION

the questioning of a witness, by a party or lawyer other than the one who called the witness, concerning matters about which the witness has testified during DIRECT EXAMINATION. The purpose is to discredit or clarify testimony already given so as to neutralize damaging testimony or present facts in a light more favorable to the party against whom the direct testimony was offered.

DIRECT EXAMINATION the initial questioning of a witness by the party who called the witness. The purpose is to present testimony containing the factual argument the party is making.

REDIRECT EXAMINATION the questioning of a witness by a party who called the witness, which occurs after that witness has been subjected to cross-examination. The purpose of redirect examination is to rebut or to clarify any damaging testimony elicited on cross-examination.

CRUEL AND UNUSUAL PUNISHMENT

a penalty tantamount to torture, or excessive in proportion to the offense for which it is imposed, or inherently unfair, or by contemporary standards shocking to people of reasonable sensitivity. A punishment not inherently cruel and unusual may become so by the manner in which it is inflicted. Such punishment is prohibited by the Eighth Amendment to the U.S. Constitution.

CTA see letters of administration [CTA].

CUCKOLD

a man whose wife is unfaithful; the husband of an adulteress. It is explained that the word alludes to the habit of the

female cuckold, which lays her eggs in the nests of other birds to be hatched by them. To make a cuckold of a man is to seduce his wife.

CULPA

(*kůl'-pǎ*) Lat: a term from the civil law meaning fault, neglect, or negligence. Compare DOLUS, also from the civil law meaning fraud, guile, or deceit.

CULPABLE

deserving of moral blame or punishment; at fault; having acted with indifference to consequences and to the rights of others.

CULPABLE MENTAL STATE

the state of mind necessary to commit a crime. In common law, both intent to commit a crime, called mens rea, and the acts that constitute the crime were required to establish guilt.

EXAMPLE: After a long night drinking, Rod stumbles into what he believes is his car and attempts to start the car with his own set of keys. As it turns out, the car is not his, and the rightful owner, who comes out seconds later, sees Rod and has him arrested for attempting to steal a car. Rod argues that he did not have the *culpable mental state* required for theft since he had no intention to steal the car.

See also negligence [CRIMINAL [CULPABLE] NEGLIGENCE].

CUM TESTAMENTO ANNEXO see letters of administration [CUM TESTAMENTO ANNEXO].

CUMULATIVE DIVIDEND see dividend [CUMULATIVE DIVIDEND].

CUMULATIVE SENTENCE see sentence [CONSECUTIVE [CUMULATIVE] SENTENCE].

CUMULATIVE VOTING

a system of shareholder voting for a board of directors, that allows all the votes an individual is eligible to cast to be cast for a single candidate. The system is designed to give minority shareholders representation on the board. For example, the owner of a single share of stock voting in an election for five directors would be able to cast one vote for each position under a straight voting system, but would be able to cast all five votes for a single position or distribute them in any manner desired under a cumulative voting system.

CURATIVE

correcting a legal error or defect. A judge will give a curative instruction to the jury to negate the effect of an erroneous instruction or of tainted evidence. A curative statute is enacted to remedy a defect in previously enacted legislation.

CURIA REGIS

(*kū'-rē-à rā'-gĭs*) Lat.: the king's court. See King's Bench.

CURRENT ASSETS see asset; balance sheet.

CURRENT LIABILITIES

debts incurred by the reporting entity as part of normal operations and that are expected to be repaid during the following twelve months. Examples are accounts payable, short-term loans and that portion of long-term loans due in one year. See balance sheet.

CURTESY

the husband's right in common law, upon the death of his wife, to a life estate in all lands of which his wife was seised in fee simple or in fee tail at any time during the marriage, provided that there was issue born of the marriage capable of inheriting the estate. Compare dower.

CURTILAGE

in common law the land around the dwelling house.

CUSTODY

1. as applied to property, the condition of holding a thing within one's personal care and control; 2. as applied to persons, such control over a person as will insure his or her presence at a hearing, or the actual imprisonment of a person resulting from a criminal conviction. 3. Custody of children is legal guardianship.

CUSTODY OF CHILDREN

the care and control of minor children awarded by the court to one parent in a divorce proceeding. Where parents both make application for JOINT CUSTODY, and circumstances render the arrangement feasible, some courts have awarded custody to both parents so that responsibility for the children is shared. Under a joint custody order, each parent would assume custody of the children for a fixed period, such as for six months or for the school year or for the summer vacation.

CUSTOM DUTIES

taxes imposed on the importation of foreign goods into the United States. Customs duties and other restrictions are imposed in order to regulate trade between the United States and other countries.

CUSTOMS COURT see federal courts.

CY-PRÈS

(*sī'-prĕ*) Fr.: so near, as near. In the law of trusts and wills, the principle that a court of equity will, when a charity bequest is illegal or becomes impossible or impracticable, substitute another charitable object that is believed to approach closely the original purpose of the testator or settlor.

EXAMPLE: In her will, Ruth provided that \$10,000 go to the Animal Humanitarian Society for their work in placing lost or abandoned pets and for running an animal hospital. At her death, the society no longer existed. Under the doctrine of *cyprès*, the court awarded the \$10,000 to the American Society for the Prevention of Cruelty to Animals.

D

D.A. abbreviation for District Attorney.

DAILY see per diem.

DAMAGE see injury; irreparable injury [DAMAGE, HARM].

DAMAGES

monetary compensation that the law awards to one who has been injured by the action of another; monetary recompense for a legal wrong such as a breach of contract or a tortious act.

ACTUAL DAMAGES losses directly referable to the breach or tortious act; losses that can readily be proven to have been sustained, and for which the injured party should be compensated as a matter of right.

CONSEQUENTIAL [SPECIAL] DAMAGES indirect loss or injury. In contract law, consequential damages are recoverable if it was reasonably foreseeable at the time of contract that the injury would probably result if the contract were broken. The availability of award of such damages depends upon the defaulting party's actual or constructive knowledge of conditions that make likely some special injury upon default.

EXAMPLE: Crystal Lighting contracts with a construction company to install light fixtures throughout a new building. On the basis of that contract, Crystal also contracts with one of its suppliers to have several hundred fixtures delivered to Crystal. Since this is not a normal order for Crystal, Crystal explains what all the fixtures are for. The supplier then breaches his contract. Any damages in the contract between Crystal and the construction company that result from the breach are the direct foreseeable result of the supplier's breach. As such, those damages are called *consequential damages*.

DOUBLE [TREBLE] DAMAGES twice [or three times] the amount of damages that a court or jury would normally award, recoverable for certain kinds of injuries pursuant to a statute authorizing the double [or treble] recovery. These damages are intended in certain instances as punishment for improper behavior. Treble damages is a statutory remedy most often awarded in antitrust violations.

EXEMPLARY [PUNITIVE] DAMAGES compensation in excess of actual damages that is a form of punishment to the wrongdoer and

reparation to the injured. Exemplary damages are awarded only in rare instances of malicious and willful misconduct.

EXAMPLE: Several corporations are found guilty of fixing the price of milk over a nine-year period. In addition to assessing a fine on the corporations, a judge awards an additional amount as *punitive damages*. Since all purchases of milk were affected by the price-fixing, the judge might order that the amount of the punitive damages be repaid to consumers by a coupon offering.

EXPECTATION DAMAGES a measure of the money damages available to plaintiff in an action for breach of contract, based on the value of the benefit he would have received from the contract if the defendant had not breached, but had completed performance as agreed. The amount is generally the monetary value of full performance of the contract to the plaintiff minus costs plaintiff avoided by not performing his own part of the contract.

INCIDENTAL DAMAGES losses reasonably incident to conduct giving rise to a claim for actual damages.

LIQUIDATED DAMAGES see liquidated damage.

NOMINAL DAMAGES a trivial sum awarded as recognition that a legal injury was sustained, though slight. Nominal damages will be awarded for a breach of contract or for an intentional tort to vindicate the plaintiff's claim where no recoverable loss can be established.

DAMNUM ABSQUE INJURIA

(dām'nūm äb'-skwā ĩn-jū'-rē-ä) Lat.: harm without injury. Refers to damage without violation of law, or to damage caused by nature, where the law provides no cause of action to recover for the loss. Compare compensation.

DANGEROUS WEAPON [OR INSTRUMENTALITY]

almost any device that has the potential to cause serious bodily injury or endanger life.

DAY IN COURT

refers broadly to the opportunity afforded a party to a lawsuit to be heard by the court. See also appearance; due process of law.

D.B.A. [D/B/A]

abbreviation for "doing business as." Trade name.

EXAMPLE: William and Lorna Scott are doing business under the name of Scott's Hockey Supplies and a lawsuit is brought. Its caption might read *Robert Michael v. William and Lorna Scott D.B.A. Scott's Hockey Supplies*.

DBN see letters of administration [DBN].

DEAD HAND see mortmain.

DEADLY FORCE see force [DEADLY FORCE].

DEADLY WEAPON

any device capable of causing death or serious bodily injury. An instrument may be intrinsically deadly, as a knife or pistol, or deadly because of the way it is used, as a wrench or hammer.

DEALER

one who produces or acquires something in order to sell it. One is a dealer if he or she has structured his or her business so that he or she can, upon reasonable notice, deliver his or her commodity once a sale has been made.

DEATH

the point at which life ceases; permanent and irreversible termination of vital signs. Several states have adopted statutes defining death to include brain criteria. See brain death.

DEATH BY AUTOMOBILE see homicide; manslaughter [DEATH BY AUTOMOBILE].

DEATH PENALTY

the ultimate punishment imposed for murder or other capital offenses. The U.S. Supreme Court has determined that the death penalty is not in every instance to be considered unconstitutional, as cruel and unusual punishment.

DEBAUCHERY

overindulgences in sensual pleasures; sexual immorality; as used in the Mann Act [prohibiting travel across state lines for immoral purposes]. It is a broad term and includes all sexual immoralities, whether for hire or not for hire, or for cohabitation.

DE BENE ESSE

(dě bě'-ně ěs'-sě) Lat.: conditionally; provisionally.

APPEARANCE DE BENE ESSE a conditional appearance, by which one appearing in the jurisdiction intends not to thereby subject himself or herself to the authority of the court for all purposes.

DEPOSITIONS DE BENE ESSE conditional depositions that cannot be introduced in evidence if the witness is available at the trial.

EVIDENCE DE BENE ESSE evidence whose admissibility is conditioned upon a subsequent showing of facts necessary to support its admission.

DEBENTURE

written acknowledgment of a debt secured only by the general credit or promise to pay of the issuer. Debentures are the common type of bond issued by large, well-established corporations with adequate credit ratings. The written agreement under which the debentures are sold, the indenture, is specific as to maturity date, interest rate, call features and convertibility. Holders of debentures representing corporate indebtedness are creditors of the corporation and entitled to payment before shareholders upon dissolution of the corporation.

DEBIT

a sum charged as due or owing. In bookkeeping, a term used to denote an entry on the left, or asset side of a ledger or account indicating the creation of or addition to an asset or an expense, or the reduction or elimination of a liability. Also, the balance of an account where it is shown that something remains due to the person keeping the account. Compare credit.

DE BONIS NON see letters of administration [DE BONIS NON].

DEBT

any obligation of one person to pay or compensate another.

DEBT CAPITAL see security [DEBT CAPITAL].

DEBTOR

one who owes another anything, or is under obligation, arising from express agreement, implication of law, or principles of natural justice, to pay money or to fulfill some other obligation; in bankruptcy or similar proceedings, the person who is the subject of the proceeding.

DECEASED

one who has died. In property law, the alternate term DECEDENT is generally used. In criminal law, "the deceased" refers to the victim of a homicide.

DECEDENT see deceased.

DECEIT

the tort or fraudulent representation of a material fact made with knowledge of its falsity, or recklessly, or without reasonable grounds for believing its truth and with intent to induce reliance on it; the plaintiff justifiably relies on the deception, to his injury.

DECISION

act of determining; forming a definite opinion; or coming to a conclusion. A resort to a choice of possibilities is "guesswork," not a "decision." A final determination arrived at after consideration, an opinion formed, or a course of action decided upon. A decision necessarily involves a dispute, actual or potential. See also judgment; opinion.

DECISION ON THE MERITS see judgment [JUDGMENT ON THE MERITS].

DECLARANT

person making a statement. See deponent; witness. See also declaration.

DECLARATION

in common law, the formal document specifying plaintiff's cause of action, including the facts necessary to sustain a proper cause of action and to advise defendant of the grounds upon which he or she is being sued. See complaint.

DECLARATION AGAINST INTEREST

a statement that *at the time of its making* was so contrary to the declarant's pecuniary, pro-

proprietary, or penal interest that a reasonable person would not have made the statement unless he or she believed it to be true. Further, the declarant must have personal knowledge and, in some jurisdictions, must be unavailable at the time of trial. Because of its special trustworthiness, a declaration against interest is an exception to the hearsay rule.

EXAMPLE: A statement by a juvenile that he had thrown a bicycle frame out an eighth floor stairwell window of the defendant's building is admissible hearsay in an action against the defendant housing authority for failure to repair the stairwell window.

ADMISSIONS BY A PARTY-OPPONENT distinguishable from declarations against interest in that admissions of a party-opponent are per se admissible and thus do not have to satisfy the above requirements for a declaration against interest and they do not have to, although they may, be against interest when made. Further, the party making the admission need not be unavailable and need not have personal knowledge.

EXAMPLE: A statement by a defendant, questioned in Nebraska about a homicide committed in New Jersey, that he had never been to New Jersey is admissible as an admission by a party (along with proof of his ten-year residency in New Jersey) to show that the defendant lied to throw off the investigation.

DECLARATION OF ESTIMATED TAX see return [DECLARATION OF ESTIMATED TAX].

DECLARATION OF TRUST see trust [DECLARATION OF TRUST].

DECLARATORY JUDGMENT

a judgment of the court to establish the rights of the parties or express the opinion of the court on a question of law, without ordering anything to be done or granting any remedy.

EXAMPLE: A state legislature passes a taxing measure that will have a widespread effect on corporations doing interstate business within that state. A payment of the tax with a subsequent refund if the tax is found invalid would result in administrative difficulties. Therefore, one of the affected corporations asks a court for a *declaratory judgment* on the validity of the tax.

Compare advisory opinion; injunction.

DECLARATORY STATUTE

a statute that merely declares the existing law without proposing changes, for the purpose of resolving conflicts concerning the meaning of a previous statute or portion of the common law.

DECREE

1. the judicial decision in a litigated cause rendered by a court of equity; 2. the determination of a cause in courts of admiralty and probate. It is accurate to use the word judgment for a decision of a court of law, and decree from a court of equity, although the former term now includes both.

CONSENT DECREEan agreement of the parties made under sanction of the court, not the result of a judicial determination, but merely agreement to be bound by certain stipulated facts.

DECREE NISIin English law, a provisional decree of divorce, which becomes absolute only after a specified interval, usually six months, during which parties have the opportunity to show cause why the decree should not become absolute.

FINAL DECREEone that ultimately disposes of every matter of contention between the parties and constitutes a bar to another action on the same subject matter between the same parties.

INTERLOCUTORY DECREEone made upon some point arising during the progress of the suit that does not determine finally the merits of the entire suit.

DECREE NISI see decree [DECREE NISI]; nisi [DECREE NISI].

DECRIMINALIZATION

the adoption or repeal of legislation, the effect of which is that acts or omissions formerly considered criminal are no longer so characterized, and penal sanctions for such acts or omissions are removed.

DEDICATION

a conveyance of land as a grant to the public by a private owner and an acceptance of that land on behalf of the public.

EXAMPLE: A company buys a large area of land, on which it plans to locate its national headquarters. To promote goodwill between the company and the surrounding communities, the company *dedicates* a portion of land to the county parks committee, who accept permanent ownership of the land.

DEDUCTIONS

amounts allowed to taxpayers under the Internal Revenue Code as offsets against **GROSS INCOME** or **ADJUSTED GROSS INCOME** (see income).

ITEMIZED DEDUCTIONS specific individualized deductions, allowed under provisions of the Code for specific expenses incurred by the taxpayer during the taxable year. These deductions are allowed in computing **TAXABLE INCOME** (see income) to the extent they exceed the **ZERO BRACKET AMOUNT**.

MARITAL DEDUCTION a deductible amount under the unified estate and gift tax for certain interests in property transferred to a spouse.

PERSONAL EXPENSES DEDUCTIONpersonal expenses as opposed to expenses for income-producing or business expenses. Personal expenses are not allowed as deductions except as specifically enumerated in the Internal Revenue Code

STANDARD DEDUCTION a provision allowing a taxpayer to deduct, in lieu of itemized deductions, a percentage of gross income up to certain specified amounts, repealed and replaced by the ZERO BRACKET AMOUNT.

ZERO BRACKET AMOUNT DEDUCTION an amount of income below the amounts at which, according to the tax tables, income taxes must be paid.

DEED

an instrument in writing that conveys an interest in land (realty) from the grantor to the grantee. Its main function is to pass title to land. See bargain and sale; quitclaim deed; warranty.

DEED OF TRUST

a transfer of legal title to property from owner to a trustee, so that the trustee may hold the title as security for the performance of certain obligations, monetary or otherwise, by the owner of a third party. Compare mortgage.

DEED POLL

a deed made by and obligatory upon one party alone.

DEEP ROCK DOCTRINE

a doctrine that makes available a remedy for improper conduct in connection with a loan to a corporation by a controlling shareholder. Though generally loans to a corporation by a shareholder are entitled to equal priority with loans made by outside creditors, the doctrine allows, when there are bankruptcy proceedings involving the corporation, subordination of the shareholder loans to the claims of other creditors where it would be manifestly unfair to permit a controlling shareholder to participate equally with these other creditors.

The unfairness occurs most commonly where the corporation is undercapitalized and frequently involves a parent corporation as the controlling shareholder of a subsidiary.

DE FACTO

(dē fāk'-tō) Lat.: in fact. By virtue of the deed or accomplishment; actually. Used to refer to a situation in which a condition or institution is operating as though it were official or pursuant to law, but that is not legally authorized. Such situations may arise where, for example, an authorizing law is declared invalid, or because required legal formalities have not been satisfied.

EXAMPLE: Nursing homes were established throughout a particular state under the authority of a newly enacted state law. Now, two years later, portions of the law are found to be unconstitutional. Instead of closing all the homes that were set up, the state permits

them to continue to operate under its *de facto* authority until the law is amended and legal.

The de facto acts of a person or entity may for some purposes be regarded as legally binding. Compare de jure.

DEFALCATION

failure of one entrusted with money to pay over the money when it is due to another. The term is like misappropriation and embezzlement, but is wider in scope because it does not imply criminal fraud.

DEFAMATION

the publication of anything injurious to the reputation of another. Defamation designed to be read is libel; oral defamation is slander.

EXAMPLE: A reporter publishes an article that Ryan is being investigated for misapplication of public funds. The article has no basis in fact, but, as a result of it, Ryan is forced to temporarily leave his position as director. Ryan has been libeled and probably has a *defamation* action against the reporter.

DEFAULT

failure to discharge a duty. The term is often used in the context of mortgages to describe failure of the mortgagor to pay installments when due, and in the context of judicial proceedings to describe failure of one of the parties to take procedural steps to prevent entry of a judgment against him (called a default judgment). See delict.

DEFAULT JUDGMENT

1. a judgment against defendant who has failed to respond to plaintiff's action or to appear at the trial or hearing.

EXAMPLE: A carpenter files a suit against a homeowner, claiming that the homeowner failed to pay the carpenter for work performed six months ago. Under the state's court rules, the homeowner has twenty days to file an answer to the carpenter's claim. If the homeowner fails to do so within twenty days, the court will enter a *default judgment* against him declaring that the homeowner must pay the carpenter what is claimed.

2. judgment given without the defendant being heard in his own defense. Compare confession of judgment; ex parte.

DEFEASANCE

an instrument that negates the effectiveness of a deed or of a will; a collateral deed that defeats the force of another deed upon the performance of certain conditions.

DEFEASIBLE

subject to revocation if certain conditions are not met; capable of being avoided or annulled, or liable to such avoidance or annulment.

DEFEASIBLE FEE see determinable fee.

DEFECT see latent defect; patent defect.

DEFECTIVE

1. incomplete, faulty; 2. not reasonably safe for a use that can be reasonably anticipated. See also products liability; warranty.

DEFECTIVE PLEADING

any pleading [complaint, answer, cross-claim, etc.] which fails to conform in form or substance to minimum standards of accuracy or sufficiency. Under strict common law pleading rules, a defective pleading was often fatal to the lawsuit. Under modern relaxed standards, such occurrences are rare and are curable by amendment.

DEFECTIVE TITLE

unmarketable right of ownership. 1. With reference to land, it means that the title held by the person making the conveyance, claiming to own good title, is or might be subject to partial or complete ownership by someone else.

EXAMPLE: Ruth wants to sell her house to a friend who is moving into the state. Prior to purchasing the house, the friend has a title search done to determine if anyone else has claimed ownership of the house besides Ruth. That search discloses a bank note that has never been paid but that the bank has never acted upon. Still, the outstanding bank note gives rise to a *defective title*, which now makes the friend reluctant to buy the house.

2. As to negotiable instruments, the term denotes title obtained through fraud or other illegal means.

DEFENDANT

1. in civil proceedings, the party responding to the complaint; one who is sued and called upon to make satisfaction for a wrong complained of by another; 2. in criminal proceedings, the accused. See also respondent.

DEFENDENT IN ERROR the prevailing party in the lower court who is the adverse party in the appellate proceeding where review has been sought on a writ of error. The person who brings the action at the appellate level is called the PLAINTIFF IN ERROR. See also appellee.

DEFENSE

a denial, answer or plea disputing the validity of plaintiff's case, or making some further contention that renders the defendant not liable upon the facts alleged by the plaintiff.

AFFIRMATIVE DEFENSE one that serves as a basis for proving some new fact, whereby defendant does not simply deny a charge but offers new evidence to avoid judgment against him or her.

EQUITABLE DEFENSE a defense that is recognized by courts of equity acting solely upon rules of equity. Such defenses can now be asserted in courts of law as well.

DEFERMENT

postponing or putting off to a future time. May apply to the vesting or enjoyment of an estate, or to the calling of a person to serve in the armed forces. To defer does not mean to abolish or omit.

DEFERRED COMPENSATION see retirement plans [DEFERRED COMPENSATION].

DEFERRED PAYMENTS

payments extended over a period of time or put off to a future date.

DEFICIENCY

the excess of a taxpayer's correct tax liability for the taxable year over the amount of taxes previously paid for such year. The Internal Revenue Service is authorized to assess deficiencies during an audit of the taxpayer's return, and a deficiency may be used to assess penalties for the underpayment of tax, such as for negligence or fraud in filing the return.

DEFICIT

insufficiency in an account or number, whether as the result of defaults and misappropriations or of mistake or shrinkage in value.

DEFINITE FAILURE OF ISSUE see failure of issue.

DEFRAUD

to deprive a person of property or interest, estate or right by fraud or deceit.

DEGREE

a measure. Also, the certificate of achievement that a school, college, or university gives to a student who completes a specified course of study or curriculum.

DEGREE OF CONSANGUINITY [KINSHIP] see consanguinity.

DEGREE OF CRIME

the measure of the seriousness of a criminal act that determines the range of criminal sanctions that may be imposed for the crime. For instance, under the Model Penal Code, assault can be classified into any of four degrees depending upon the victim or the manner of commission. A simple assault could be a petty misdemeanor carrying a sentence of not more than 30 days, or a misdemeanor carrying a sentence of not more than one year; an aggravated assault could be a crime of the third degree exposing the defendant to five years, or a crime of the second degree carrying a maximum sentence of ten years.

DEGREE OF NEGLIGENCE

the measure of negligence necessary for liability to result. Parties under an obligation to exercise great care, such as common carriers, may be liable for slight negligence,

whereas parties only required to exercise slight care, such as the driver of an automobile in a state that has a guest statute, will be liable to a passenger only for gross negligence.

DEGREE OF PROOF

the measure of probability necessary in order for a court or other fact finder to render a decision or a verdict with regard to the evidence presented to it. See preponderance of the evidence; clear and convincing; reasonable doubt.

DE JURE

(*dě ju'-rā*) Lat.: by right; lawful; legitimate.

EXAMPLE: a new corporation is set up exactly according to both state and federal incorporation laws. The corporation is therefore a *de jure* (i.e., legal) corporation.

Generally used in contrast to *de facto*; *de jure* connotes "as a matter of law," whereas *de facto* connotes "as a matter of practice not founded upon law."

DELEGABLE DUTY

a duty that an obligor is able to transfer to another. The term does not imply a giving up of authority but, rather, the conferring of authority to another to do things that otherwise must be done by the obligor. When delegation occurs, it does not free the obligor from his or her duty to see to it that performance is properly complied with. Only by novation may the original obligor totally discharge his or her responsibilities and liabilities.

Where performance by the delegate would vary materially from the performance of the obligor, the duty is **NONDELEGABLE**. Thus, under a contract to paint a portrait or where a contract is premised on the unique abilities of the obligor, the duties are nondelegable. Construction contracts, however, are generally held to be delegable because it is contemplated by the parties that the work will be performed by persons other than the obligor.

DELEGATE

1. to appoint, authorize or commission; the transfer of authority by one person to another. 2. a person commissioned to act instead of another.

DELEGATED POWER power conferred by one person on another who will act for his or her benefit.

DELIBERATE

to consider all of the evidence and arguments presented in regard to a particular matter. For instance, after the evidence has been presented, the parties to a lawsuit have made their closing arguments, and the judge has given the jury its instructions, the jury will retire to deliberate and render its verdict.

DELIBERATE SPEED

forthwith, immediate. In certain instances, such as the desegregation of public facilities, the term implies that

desegregation should occur as quickly as the maintenance of law and order and the welfare of all citizens will allow.

DELIBERATION

the process by which the reasons for and against a verdict are weighed by jurors. While such verdict should be the consensus of the judgments of each juror, the purpose of deliberation is to allow opinions to be changed by conference in the jury room.

DELICT

a tort; a wrong or injury; any statutory violation; sometimes used in the sense of a default on a monetary obligation.

DELICTUM Latin for tort. An action **EX DELICTO** is an action in tort as distinguished from one **EX CONTRACTU**, in contract.

DELICTUM

Latin for tort. An **ACTION EX DELICTO** is an action in tort as opposed to one **EX CONTRACTU**, in contract. This distinction was significant when the early forms of code pleading were very strict. If, for example, one alleged a cause of action *ex delicto* for fraud but the proof established a breach of warranty (an action *ex contractu*) the case would be dismissed for variance.

DELINQUENT

in a monetary context, payable but overdue and unpaid. See default. See also juvenile delinquent.

DELISTING

removal of an issue from trading on an organized exchange such as the New York Stock Exchange. Organized exchanges have minimum listing requirements that must be met before listed trading is allowed. If the issuer fails to maintain the minimum requirements, trading in its listed securities can be suspended or eliminated.

DELIVERY

a voluntary transfer of title or possession from one party to another; a legally recognized handing over to another one's possessory rights. Where actual delivery is cumbersome or impossible, the courts may find constructive delivery sufficient if the intention is clearly to transfer title. Thus, one may deliver the contents of a safety deposit box by handing over the key together with any necessary authorization. Such action is also called **SYMBOLIC DELIVERY**. Compare bailment.

DELUSION

a false belief that is produced by a mental disorder and that people of the same age, class, and education would find incredible. A delusion can be the basis for the insanity defense to a crime.

DEMAND see on demand.

DEMAND NOTE

1. an instrument that by its express terms is payable immediately on an agreed-upon date of maturity without

further demand for payment; 2. an instrument payable at sight, or upon presentation, or one in which no time for payment is stated.

DEMESNE

(*de-mēn'*) Fr: domain. Something owned; held in one's own right, and not of a superior; not allotted to tenants. In the language of pleading, own, proper, or original. See ancient demesne.

DE MINIMIS

(*dě mī'-nī-mīs*) Lat.: trifling. Of insufficient significance to warrant judicial attention.

DE MINIMIS NON CURAT LEX Lat.: the law does not care for small things; the law does not bother with trifles.

EXAMPLE: Tom is arrested for possession of one marijuana cigarette. Although marijuana possession has not been decriminalized in the state where Tom is arrested, the prosecutor decides not to prosecute Tom for the possession since it is only a *de minimis* infraction.

DEMISE

term used to describe a conveyance of an estate in real property; to let, especially pursuant to a lease for a term of years.

DEMONSTRATIVE EVIDENCE

evidence consisting of an object or thing, such as a weapon used in a crime, a stolen item, or a photograph or X-ray, that may aid the jury in understanding the crime before it but has no effect on the question of guilt; evidence other than a person's oral testimony but that may help to explain that testimony.

DEMUR

to present a demurrer. More broadly, to take an exception to a point of law or an allegation of facts on the basis that even if it is so it does not advance the interests of the party making the statement.

DEMURRER

formal allegation that facts as stated in the pleadings, even if true, are not legally sufficient for the case to proceed further. It does not admit anything but tests whether the complaint is sufficient to state a cause of action. In modern procedure, a motion to dismiss for failure to state a claim upon which relief may be granted replaces the demurrer. Compare summary judgment.

DENIAL

a contradiction or traverse; in practice, a refutation of affirmative allegations contained in the pleading of an adversary. A defendant's answer must admit, deny, or state there is insufficient information upon which to admit or deny the plaintiff's allegations. Any allegation in a complaint to which a responsive pleading is required, other than for amount of damages, is admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. See also confession and avoidance; negative pregnant.

CONJUNCTIVE DENIAL A denial that denies all of the allegations as wholly untrue.

DISJUNCTIVE DENIAL A denial that denies the allegations as untrue in the alternative.

GENERAL DENIAL A denial of all of the plaintiff's allegations.

SPECIFIC DENIAL A denial of one or several, but not all, of the plaintiff's allegations.

DE NOVO

(dĕ nō'-vō) Lat.: anew. A second time, as though the first had never taken place.

DE NOVO HEARING A new hearing, in which the judgment of the first hearing is suspended and the case proceeds as if it had originated in the reviewing tribunal.

EXAMPLE: A state statute gives a defendant convicted in a municipal court the right to appeal that conviction *de novo* in a higher court. That right means that the defendant will have a new trial in which the facts and issues will be retried as though the first trial never took place.

DEODAND see forfeiture.

DEPENDENCY

a territory or possession not within the boundaries of the country that has jurisdiction to govern it. Dependencies of the United States include Puerto Rico, the Virgin Islands, Guam, and various other islands located in the Pacific Ocean.

DEPENDENT

any person with respect to whom a taxpayer can claim a dependency exemption; defined by the Internal Revenue Code as any individual supported by the taxpayer who is related to the taxpayer in specified ways or who makes his principal abode in the taxpayer's household.

DEPENDENT CARE see child and dependent care credit.

DEPENDENT COVENANTS see covenant [DEPENDENT COVENANTS].

DEPENDENT RELATIVE REVOCATION

the doctrine that provides that when a will revokes an earlier will executed by the same person, the earlier will is only revoked if the latter will is effective; otherwise, the earlier will remains in full effect and force.

DEPLETION

the exhaustion of a natural resource, the amount of the original deposit being hidden and thus necessarily unknown. Depletion is most often referred to in federal income tax deduction provisions that deal with exhaustion of natural resources.

The DEPLETION ALLOWANCE is a formula for computing and excluding from the proceeds of natural resource operations that part of the operations' proceeds that is in effect a return of capital.

EXAMPLE: Petro Corporation purchases several leases of land on which it plans to drill oil. If oil is extracted from any of those leased lands, the value of the lease is reduced. The *depletion allowance* determines a figure based on that reduction in value. Petro then uses that figure to reduce its tax obligation.

Depletion allowance should be contrasted with depreciation deduction provisions that deal with deterioration of tangible physical property incident to its use that shortens its period of service.

DEPONENT

a witness; especially one who gives information under oath, in a deposition concerning facts known to him or her.

DEPORTATION

the transfer of an alien to a foreign country because the deporting government refuses to harbor a person whose presence is deemed inconsistent with the public welfare. Compare extradition.

DEPOSE

1. to give evidence or testimony, especially in response to interrogation during a deposition. 2. the act of interrogating and eliciting testimony during a deposition, typically conducted by a lawyer.

DEPOSITION

a method of pretrial discovery that consists of a stenographically transcribed statement of a witness under oath, in response to an attorney's questions, with opportunity for the opposing party or his or her attorney to be present and to cross-examine. Such a statement is the most common form of discovery and may be taken of any witness (whether or not a party to the action). When taken in the form described, it is called an oral deposition. Depositions may also be taken upon written interrogatories, where the questions are read to the witness by the officer who is taking the deposition.

DEPOSITION DE BENE ESSE see de bene esse.

DEPRECIATION

a deduction allowed to a taxpayer representing a reasonable allowance for the exhaustion of property used in a trade or business, or property held for the production of income. The purpose of charging depreciation against equipment is to generate a tax-free stream of income equal to the portion of the asset that has been "used up" and to distinguish the portion of income that is a return of capital. Compare depletion.

ACCELERATED DEPRECIATION any one of a number of allowed methods of calculating depreciation that permit greater amounts of

deductions in earlier years than are permitted under the straight line method, which assumes equal depreciation during each year of the asset's useful life.

STRAIGHT LINE DEPRECIATION a method that calculates the depreciation deduction available by subtracting the asset's **SALVAGE VALUE** from its total value and dividing the difference by the number of years of the asset's useful life.

SALVAGE VALUE the estimated value of the property when the taxpayer completes his or her use of the property. In determining the amount of depreciation allowable, salvage value must be subtracted from basis.

USEFUL LIFE the reasonable estimate of the term of an asset's usefulness to the taxpayer in his or her business.

DEPRECIATION RESERVE [ACCUMULATED DEPRECIATION]

the total depreciation charged against all productive assets as stated on the balance sheet. The charge is made to allow realistic reduction in the value of productive assets and to allow tax-free recovery of the original investment in assets.

DEPREDACTION see piracy.

DEPRESSANTS see controlled substances.

DERELICTION

a recession of waters of the sea, a navigable river or other stream, by which land that had been covered with water is left dry. If the alteration is sudden and noticeable, ownership remains according to former bounds; but if recession is gradual and imperceptible, the derelict or dry land belongs to the riparian owner from whose shore the water has so receded. The term may also refer to the land that is thus left uncovered. For contiguous landowners to gain ownership of the newly uncovered land, the withdrawal of the water must appear permanent, not merely seasonal. Compare accretion; avulsion.

DERIVATIVE ACTION

1. an action based upon a primary right of a corporation, but asserted on its behalf by the shareholder because of the corporation's failure, deliberate or otherwise, to assert the right; 2. a cause of action founded upon an injury to another, as when a husband sues for loss of consortium or services of his wife on account of injury to her by the defendant, or when a father sues for loss of services of children. See stockholders' derivative action.

DERIVATIVE TORT

an action in tort based on the criminal conduct of defendant that resulted in injury to plaintiff for which he

seeks compensation. The action is distinct from any criminal prosecution that may result from the same conduct by defendant.

DEROGATION

partial taking away of the effectiveness of a law; partially repealing or abolishing a law.

DESCENT

a method of acquiring property, usually real property, through the laws of descent and distribution from a decedent without the use of a will; generally applied to inheritance only by intestate succession. Compare devise. See worthier title, doctrine of.

DESCENT AND DISTRIBUTION

the transmission of an intestate's property to his heirs.

DESEGREGATION see segregation.

DESERTION

act of abandonment of a relation or service in which one owes duties. In matrimonial law, an unjustified cessation from cohabitation, with intent not to resume it and without the consent of the other spouse, is desertion and is grounds for divorce. In military law, ABSENT WITHOUT LEAVE [AWOL] signifies an intention by a member of the armed forces not to return to service. It is punishable under the Code of Military Justice.

DESIST see cease and desist order.

DESTINATION CONTRACT see tender [TENDER OF DELIVERY].

DESTRUCTIBILITY

refers to a common-law rule that when a contingent remainder does not vest at or before the termination of the preceding freehold estate, the remainder interest is destroyed. Thus, the termination of the preceding estate, because of its inherent limitation, or as a result of forfeiture or merger, destroys the nonvested contingent remainder.

DESUETUDE

a term applied to obsolete laws and practices that may therefore be regarded as no longer in effect.

DETAINER

1. keeping a person from goods or land to which he or she has a legal right; 2. a writ or instrument, issued by a competent officer, authorizing a prison warden to keep in his or her custody a person therein named. See also detention.

UNLAWFUL DETAINER refusal to deliver on demand, as where the tenant, after termination of the lease, refuses to deliver possession to the landlord. Compare tenancy [TENANCY AT SUFFERANCE].

DETENTION

holding of a person charged with crime following the person's arrest on that charge.

DETERMINABLE FEE [FEE SIMPLE DETERMINABLE]

an interest in property that may last forever, but that will automatically terminate upon the happening or nonhappening of a specified event. Also called a **DEFEASIBLE FEE** or a **FEE SIMPLE DEFEASIBLE**.

EXAMPLE: A brother conveys a large office building to his sister provided she remains unmarried. If she is unmarried at her death, she can dispose of it as she pleases in her will. But once she marries, the ownership of the building reverts to the brother. The sister's interest in the building after the brother's conveyance is a *determinable fee*.

DETERMINATION

a decision by a court or other adjudicative body. See holding; judgment; verdict.

DETINUE

in common law, an action for the wrongful detention of personal property; a legal claim provided for the recovery of a specific thing, and for obtaining damages for its detention. Compare detainer [**UNLAWFUL DETAINER**].

DEVISE

a gift of real property made by will. In modern usage, the term may also embrace testamentary gifts of personal property. Compare bequest; legacy.

DEVOLVE

to pass property from one person to another by operation of law, without any voluntary act of the previous owner.

DICTA

plural form of dictum.

DICTUM

a statement in a judicial opinion not necessary for the decision of the case. Dictum differs from the holding in that it does not establish a rule binding on the courts in subsequent cases.

EXAMPLE: Sandy claims that the issue of his liability for damage on his sidewalk resulting in injury to another was settled in a previous case. The judge reminds Sandy that the previous case concerned the city's obligation to keep the sidewalks in good repair and the city's liability for injury to a person. The part of the case addressed to a private citizen's liability was not necessary to the decision and hence was only *dictum* and is not binding on this judge.

CONSIDERED DICTUM refers to a discussion of a point of law that, although it is dictum, is nevertheless so well developed that it is later incorporated into an opinion of a court as though it were authority.

DIE WITHOUT ISSUE see failure of issue.

DILATORY PLEA [PLEA IN ABATEMENT]

in common law, a plea not responsive to the merits of a controversy, but a defense that

simply delays or defeats the present action, leaving the cause of action unsettled. If a defendant, by establishing the facts, can defeat the plaintiff's cause of action in whole or in part, or can obtain substantial relief against the plaintiff, the plea is not dilatory, but on the merits. This kind of plea has largely disappeared under modern practice. Instead these defenses are now raised by motion or in an answer.

DILIGENCE

attention to the matter at hand. DUE DILIGENCE or REASONABLE DILIGENCE is that level of attention required by the circumstances in order to avoid liability in negligence.

DILUTING THE SHARES see watered stock.

DIMINISHED CAPACITY

in criminal law, the inability to have the state of mind, or mens rea, required for the commission of a particular crime. A successful defense of diminished capacity will usually result in conviction of a lesser offense, not an acquittal. Compare insanity

DIMINISHED RESPONSIBILITY see diminished capacity.

DIMINUTION IN VALUE

a measure of damages for breach of contract that reflects a decrease, occasioned by the breach, in the value of property with which the contract was concerned. In a building contract, for example, it is the difference between the value of the building as constructed and its value had it been constructed in conformance with the contract. Compare cost of completion; damages [EXPECTATION DAMAGES].

DIRECT AFFINITY see affinity [DIRECT AFFINITY].

DIRECT ATTACK

a proceeding instituted to amend, vacate or enjoin execution of a judgment; an attempt by appellants to avoid or correct a judgment in a manner provided by law, as by an appeal. Compare collateral [COLLATERAL ATTACK].

DIRECT CAUSE see cause [DIRECT CAUSE].

DIRECT CONTEMPT see contempt of court.

DIRECTED VERDICT

a verdict returned by the jury at the direction of the trial judge, by whose direction the jury is bound. In civil proceedings either party may receive a directed verdict in its favor if the opposing party fails to present a prima facie case or a necessary defense. In criminal proceedings, there may be a directed verdict of acquittal, but not a directed verdict of conviction, which would violate the defendant's constitutional right to a jury determination of his guilt or innocence.

DIRECT ESTOPPEL see estoppel [DIRECT ESTOPPEL].

DIRECT EXAMINATION see cross-examination [DIRECT EXAMINATION].

DIRECTOR

a member of a board of directors of a company or corporation, who shares with others directors the legal responsibility of control over the officers and affairs of the company or corporation. A director has a fiduciary duty to the corporation and to its shareholders to manage the corporation in a manner consistent with their interests.

DIRECT ORDER OF ALIENATION see marshaling [marshalling] [DIRECT ORDER OF ALIENATION].

DISABILITY

tate of being not fully capable of performing all functions, whether mental or physical; want of legal capacity such as infancy, insanity or past criminal conviction that renders a person legally incompetent; one person's inability to alter a given legal relation with another person. Compare Durham Rule.

DISBAR

to rescind an attorney's license to practice law because of illegal or unethical conduct.

DISCHARGE

1. to satisfy or dismiss the obligations of contract or debt; 2. the method by which a legal duty is extinguished. Compare performance; rescission.

DISCHARGE IN BANKRUPTCY the release of the bankrupt from all his or her provable debts, whether then payable or not, and debts founded on a contract, express or implied; but not a release from debts specifically excepted from discharge by the bankruptcy statute.

3. to release from custody, acquit. See sentence [SUSPENDED SENTENCE; CONDITIONAL DISCHARGE; UNCONDITIONAL DISCHARGE]. Compare reprieve.

DISCLAIMER

1. denial of a person's claim to a thing, though previously that person insisted on such a claim or right; 2. renunciation of the right to possess and of claim of title; 3. denial of a right of another, e.g., where an insurer disclaims an allegation of liability against its insured and thereby refuses to indemnify or defend the insured in a lawsuit [DISCLAIMER OF LIABILITY].

DISCONTINUANCE

cessation of proceedings in an action where the plaintiff voluntarily puts an end to it, with or without judicial approval. Judicial approval may be required, depending upon each jurisdiction's rules of practice. Compare dismissal; nonsuit.

DISCOUNT

a deduction from a specified sum; often used with transactions in negotiable commercial paper in which the instrument is

bought at a price below its face amount to reflect the fact that the debt it represents is not due until a future date.

EXAMPLE: Sidney regularly enters into contracts where he is not to be paid until the work is completed. But Sidney needs the money before he starts the work to purchase work materials and pay other debts. Because the contracts represent obligations to pay by other parties, a bank is willing to give Sidney the money that the contracts call for less a *discount*. That discount mainly covers the difference in the value of the money given to Sidney now versus what the money will be worth when the bank is paid by the other parties, as well as a small profit margin for the bank. The discount will also factor in that percentage of the contracts which are not likely to be collected.

DISCOUNT BOND see bond [BOND DISCOUNT].

DISCOUNTED CASH FLOW

measure of the present value of a future income stream generated by a capital investment.

DISCOVERY

modern pretrial procedure by which one party gains information held by the adverse party, concerning the case; the disclosure by the adverse party of facts, deeds and documents that are exclusively within his or her possession or knowledge and that are necessary to support the other party's position. Common types of discovery are depositions, interrogatories, production of documents and requests for admissions.

EXAMPLE: Sally gets into an accident when her rear wheels stop for no reason, causing the car to skid into a highway divider. In her lawsuit against the car manufacturer, Sally uses the *discovery* procedure to obtain memos and test-run results that the manufacturer used in designing the car. Without discovery, Sally may not be able to acquire that information.

DISCRETION

the freedom of a public officer to make choices, within the limits of his or her authority, among possible courses of action.

ABUSE OF DISCRETION see abuse of discretion.

JUDICIAL DISCRETION the reasonable use of judicial power, i.e., the court's freedom to decide within the bounds of law and fact.

EXAMPLE: Jason, a juvenile, is charged with an assault upon another teenager. In Jason's state, the law provides the juvenile judge with the judicial discretion to have the case heard in the juvenile court or to transfer the case to an adult court. Previous cases and the law itself establish certain standards to use in determining whether a transfer is appropriate, but the judge has the discretion to decide which court shall hear the matter. The decision, though, may be appealed to a higher court.

LEGAL DISCRETIONthe use of one of several equally satisfactory provisions of law.

PROSECUTORIAL DISCRETIONthe wide range of alternatives for a prosecutor in criminal cases, including decision to prosecute, particular charges to be brought, bargaining, mode of trial conduct, recommendations for sentencing, parole, etc.

DISCRETIONARY ACCOUNTin the securities trade, one in which the customer gives the broker or a third party complete or partial discretion to buy and sell securities. Such discretion typically extends to selection, price, timing, and amount purchased.

DISCRIMINATION

the unequal treatment of parties who are similarly situated. Federal law prohibits discrimination on the basis of race, sex, nationality, religion, and age in matters of employment, housing, education, voting rights, and access to public facilities.

DISHONOR

to refuse, rightly or wrongly, to make payment on a negotiable instrument when such an instrument is duly presented for payment.

DISINHERITANCE

the act by the donor that dissolves the right of a person to inherit that property to which he or she previously had such right.

DISINTERMEDIATION

movement of savings from banks and savings and loan associations into money market instruments, such as treasury bills and notes.

DISJUNCTIVE ALLEGATIONS

those that charge the defendant with either one act or another. The word "or" may not leave the averment uncertain as to which of two or more things is meant. An allegation that charges the commission of a crime by one act "or" another is defective if it does not clearly inform the defendant of the charge so that a defense can be prepared to meet it. The same standard is applied to pleadings in civil cases, where both disjunctive allegations and disjunctive denials generally constitute defective pleadings and are therefore inadmissible.

DISMISS

to terminate a case or some part of it. Before or during the trial of a civil action, the suit may be dismissed voluntarily by the plaintiff, or involuntarily by the court upon defendant's motion to dismiss the complaint or any count thereof. See demurrer.

DISMISSAL

a cancellation. Dismissal of a motion is a denial of the motion. Dismissal of a complaint or a related count terminates proceedings on the claim asserted in the complaint. Dismissal of an

appeal places the parties in the condition as if there had been no appeal, confirming the judgment of the lower court.

DISMISSAL WITH PREJUDICE usually an adjudication upon the merits that operates as a bar to future action by preventing plaintiff from making further attempts at a claim based upon the same facts.

EXAMPLE: George brings a lawsuit against a company, claiming that it never refunded his money for an item he returned. The company shows the judge a check made payable to George and cashed by him, with a large notation on the check that it was payment for the return of the item. George then tries to make an additional claim that the company owes him more money for other reasons. The judge will usually dismiss with prejudice George's claim for the refund price alone and instruct him to file a separate claim if he is seeking more money. The "with prejudice" aspect of the court's decision means that George can never again sue on the same claim unless he successfully appeals the decision.

DISMISSAL WITHOUT PREJUDICE such a dismissal is not on the merits and does not bar a subsequent suit on the same cause of action, nor affect any right or remedy of the parties.

DISORDERLY CONDUCT

generic term embracing minor offenses that are generally below the grade of misdemeanor, but that nevertheless are somewhat criminal; broadly signifies conduct that tends to breach the peace or endanger the morals, safety or health of the community.

DISPARAGEMENT see bait and switch.

DISPOSITION

1. the giving up of anything; often used in reference to a testamentary proceeding, as in "the disposition of the estate." 2. courts "dispose of " cases, i.e., determine the rights of the parties or otherwise terminate the proceedings. 3. In criminal law, the sentence of the defendant is the disposition.

DISPOSSESS

to oust, eject or exclude another from the possession of lands or premises, whether by legal process (as where a landlord lawfully evicts a tenant) or wrongfully. Compare disseisin.

DISPUTABLE PRESUMPTION see presumption [REBUTTABLE PRESUMPTION].

DISQUALIFICATION

the inability to perform some act due to the existence of factors rendering the performance improper or inappropriate. For instance, a judge may be disqualified from hearing a particular case because of having previously represented one of the parties involved.

DISSEISIN

1. the act of wrongfully depriving a person of seisin of land; the taking of possession of land under claim or color of title; 2. any act, with or without the owner's consent, the necessary effect of which is to divest him of the estate.

DISSENT

1. to disagree; 2. a reasoned opinion that differs from that of the majority of the court.

DISSENTING OPINION see opinion [DISSENTING OPINION].

DISSOLUTION

in corporation law, the end of the legal existence of a corporation, whether by expiration of charter, decree of court, act of legislature, vote of shareholders, or other means.

DISTINGUISH

to demonstrate that an apparently similar case is so sufficiently different from the case at hand that it is of limited value as precedent.

DISTRAINT see distress.

DISTRESS

the act or process of **DISTRAINT**, by which a person (the **DISTRAINER**), without prior court approval, seizes the personal property of another in satisfaction of a claim, as a pledge for performance of a duty or in reparation of an injury. Where goods are seized in satisfaction of a claim, the distrainer may hold the goods until the claim is paid and, failing payment, may sell them in satisfaction. The person whose goods are distrained has recourse against the wrongful distrainer in replevin.

EXAMPLE: A warehouseman stores goods for a farmer. When the farmer fails to pay the storage costs for over a year, the warehouseman seizes in *distress* whatever goods the farmer presently has in the warehouse. If the farmer does not then pay for the storage charges that are past due, the warehouseman can sell the goods, take out what he is owed and refund the amount remaining to the farmer.

Originally, distress was a landlord's remedy; see lien [LANDLORD' S LIEN], distinguishable from attachment, which is a court-ordered seizure of property. See also impounding; garnishment.

DISTRESS, EMOTIONAL see emotional distress.

DISTRIBUTION

a payment of yield in cash or in property to one entitled to such payment.

EXAMPLE: At the end of every three months, a corporation distributes dividends to all of its shareholders. A *distribution* takes place whether the dividends represent checks, an increase in the number of shares each shareholder has, or any other method of payment.

DISTRICT ATTORNEY

an officer of the governmental body under which he or she is operating, such as a state, county, or municipality, with the duty to prosecute all those accused of crimes. A district attorney will frequently have assistants who are similarly empowered. In the federal government, district attorneys are called UNITED STATES ATTORNEYS.

DISTRICT COURT

1. a court, established by the U.S. Constitution, having territorial jurisdiction over a district that may include a whole state or part of it. A district court has original jurisdiction, exclusive of courts of the individual states, over all offenses against laws of the United States, and is a court of general jurisdiction for suits between litigants of different states. See diversity of citizenship; federal question jurisdiction. 2. an inferior court in several states having limited jurisdiction to try certain minor cases.

DISTURBANCE OF THE PEACE

any public act that molests inhabitants or that excites fear among normal persons.

DIVERS

many, several, sundry; a grouping of unspecified persons, things, acts, etc.

DIVERSIONARY PROGRAMS see pre-trial intervention [P.T.I.] [DIVERSIONARY PROGRAMS].

DIVERSITY JURISDICTION see diversity of citizenship.

DIVERSITY OF CITIZENSHIP

the circumstance that grants to federal courts original jurisdiction over cases and controversies between citizens of different states or between a citizen of a state and an alien, subject to a minimum jurisdictional amount (the value in controversy) of \$10,000.

DIVESTITURE

1. loss or surrender of a right or title or interest; 2. a remedy by which the court orders the offending party to rid itself of assets before the party would normally have done so. Divestiture, like restitution, has the purpose of depriving a defendant of the gains of wrongful conduct. It is a remedy sometimes used in the enforcement of the antitrust laws.

EXAMPLE: One of the top three oil companies purchases the sixth largest oil company. After a long investigation, the government determines that the purchase will remove gasoline price competition in many states. If a court agrees with the government's position, it will order the larger company to *divest* itself of the smaller company.

DIVIDEND

a corporation's profits or earnings appropriated for distribution among shareholders.

CUMULATIVE DIVIDEND a dividend whose unpaid residue is added to the following distribution.

DIVIDEND ADDITION life insurance in addition to the face value of the policy, purchased with dividends of the policy.

EXTRAORDINARY DIVIDENDS dividends of unusual form and amount, paid at unscheduled times from accumulated surplus.

LIQUIDATION DIVIDEND dividend resulting from *winding up* affairs of a business, settling with its debtors and creditors, and appropriating and distributing to its shareholders a residue proportionate to the profit and loss.

PREFERRED DIVIDEND fund paid to owners of preferred stock in priority over that to be paid to another class of shareholders.

SCRIP DIVIDEND a dividend payable not in cash, but in certificates of indebtedness that give the holder certain rights against the corporation.

STOCK DIVIDEND a dividend paid not in cash, but in stock.

DIVISIBLE CONTRACT see severable contract.

DIVORCE

dissolution of the bonds of marriage. Compare annul.

NO-FAULT DIVORCE a divorce granted without the necessity of a spouse guilty of marital misconduct. The most common no-fault ground is voluntary separation for a period of time, which creates a statutory presumption of incompatibility or irreconcilable differences. See community property; equitable distribution.

SEPARATION [OR DIVORCE A MENSA ET THORO] (*à mĕn'-sà ět thō'-rō*) Lat.: from table and bed. A partial divorce decree, usually entered in the course of divorce proceedings, which directs the parties to live separately indeed, forbids them to cohabit but does not dissolve the marriage.

DNA TESTING

scientific evidence used in criminal cases and in paternity suits. DNA (deoxyribonucleic acid) molecules contain hereditary (genetic) information. The theory on which DNA testing is based consists of the following: all cells in the human body (except red blood cells) contain DNA; the structure of the DNA of a person is identical throughout a person's body; the DNA structure is constant from a person's infancy through their death; and, finally, that no two people (except identical twins) have the same DNA. DNA can be extracted from blood (white blood cells and plasma), skin, tissue, sperm, saliva, vaginal swabs, mouth scrapings, bones, and hair. The technique is widely accepted as scientifically reliable. While also known as "DNA fingerprinting," the process has nothing to do with fingerprints themselves but rather with the concept of uniqueness and

the ability to link an individual to a crime (or establish paternity). It is a test of exclusion (proving that this could not have been the person) as well as a test that can include a person as one of a percentage of a population that could be the source. In the first case of a person convicted of a crime by DNA evidence (through semen recovered from a rape victim), bands from the defendant's blood and the semen "matched" and the probability of such a match occurring at random was 0.0000002 (or the chance that it did not belong to the defendant was 1 in 833,333,333). It is this last areathe probability calculationthat has received the most criticism. Some courts exclude such calculations.

At the risk of oversimplification, the following terms frequently are used when discussing DNA testing. The two main methods of DNA analysis are RFLP and PCR. RFLP (restriction fragment length polymorphism) is a process that breaks DNA into small fragments at specific points on the DNA chain that are then measured. A newer method called PCR (polymerase chain reaction) can analyze as little as one-tenth of the biological material that is needed for RFLP. PCR is also able to give quicker results; however, the results are less discriminating. The PCR technique consists of extraction of the biological material, amplification (replication), and then typing. It is an in vitro process through which repeated cycling of the reaction reproduces a specific region of DNA, yielding millions of copies from the original. HLA DQ ALPHA (more commonly know as DQ Alpha) refers to the PCR method. HLA stands for human leukocyte antigen and DQ Alpha refers to the locus of the antigens. States are increasingly requiring mandatory submission of blood samples from certain convicted persons for DNA identification and placement in an information bank that can then be used in the event that future crimes are committed.

DOB

date of birth.

DOCKET

1. a list of cases on a court's calendar; 2. in procedure, a formal record of the proceedings in the court whose decision is being appealed.

DOCTOR-PATIENT PRIVILEGE see physician-patient privilege.

DOCTRINE OF WORTHIER TITLE see worthier title, doctrine of.

DOCUMENT

any writing, recording, computer tape, blueprint, Xray, photograph, or other physical object upon which information is set forth by means of letters, numbers, or other symbols.

DOCUMENTARY EVIDENCE

a document having legal effect that is offered as evidence. Prior to being admitted as evidence, the

authenticity of the document must be established by testimony as to how the writing was produced or the circumstances under which it has been kept.

DOCUMENT OF TITLE

a bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document that in the regular course of business or financing is treated as adequate evidence that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers.

DOCUMENT, ORIGINAL see best evidence rule.

DOLUS see culpa.

DOMAIN

land of which one is absolute owner.

DOMESDAY BOOK

a record made in the time of William the Conqueror (1081-1086) consisting of accurate and detailed surveys of the lands in England and the means by which the alleged owners obtained title.

DOMICILE

an individual's permanent home or principal establishment. Residence is not the same as domicile, since a person can have many transient residences but only one legal domicile, which is the home address to which he or she always intends to return for prolonged periods.

EXAMPLE: As the result of a long and prosperous business career, Richard has bought houses in Florida, New Jersey, Colorado and California. But Richard spends most of his time at his house in New Jersey because that is only fifteen minutes from his corporation's headquarters. Richard's *domicile* is New Jersey and would remain so even if in one particular year he spent more time at one of his other homes. Should he sell his business and leave New Jersey to permanently live in California, his domicile would then change.

The domicile of a business is the address where the establishment is maintained or where the governing power of the enterprise is exercised. For purposes of taxation, it is often a principal place of business.

DOMICILIARY

an individual who is domiciled in a particular state or country is a domiciliary of that state or country. See domicile.

DOMINANT ESTATE [OR TENEMENT]

property retained by an original grantor when a particular tract is subdivided and a portion is conveyed, and to which there attaches a right to some beneficial use of the conveyed or servient estate or a portion of it. The owner of the retained land (dominant estate) is said to have a right of easement in the servient estate.

DOMINION

having both title to and possession of property; having control of both ownership and use.

DONATED SURPLUS see unearned surplus [DONATED SURPLUS].

DONATIO

(dō-nä'-shē-ō) Lat.: a gift; donation.

DONATION see contribution.

DONATIVE INTENT

voluntary intent on the part of a donor to make a gift.

DONEE

the recipient of a gift or trust; one who takes without first giving consideration; one who is given a power, right or interest. Compare bailee; trustee.

DONEE BENEFICIARY see third party beneficiary [DONEE BENEFICIARY].

DONOR

one who gives a gift; creator of a trust; the party conferring a power, right, or interest.

DOUBLE DAMAGES see damages [DOUBLE [TREBLE] DAMAGES].

DOUBLE JEOPARDY

prosecution or punishment twice for the same offense, which is prohibited by the U.S. Constitution and by many state constitutions.

EXAMPLE: Ray is charged with destroying government property. After a long trial, a jury finds Ray not guilty. Immediately after the trial, new evidence is discovered that unquestionably links Ray to the destruction. Under principles of *double jeopardy*, the prosecutor cannot retry Ray for the crime even with the new evidence.

See also collateral [COLLATERAL ESTOPPEL].

DOUBT see reasonable doubt.

DOWAGER

generally, a widow supported by the property of her deceased husband. In real property, a widow who has a life estate in the real property of her husband by her right of dower.

DOWER

a life estate to which a wife is entitled upon the death of her husband. At common law, the widow was entitled to one-third of all the property in which her husband was seized in fee at any time during the marriage [coverture]. Her dower is a freehold estate, and cannot derive from an estate for years. Compare homestead rights. See curtesy; inchoate dower.

Dower rights have been abrogated in many jurisdictions or limited to interests that the husband holds at his death. Where they still exist, a wife can join in a conveyance and thereby give up her dower rights. See widow's election.

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DOWRY

the money and personal property that a wife brings to her husband in marriage.

DQ ALPHA see DNA testing [HLA DQ ALPHA].

DRAFT

1. an order in writing directing a person other than the maker to pay a specified sum to a named person. Drafts may or may not be negotiable instruments, depending upon whether the elements of negotiability are satisfied. Draft is synonymous with BILL OF EXCHANGE. 2. the preliminary form of a legal document (e.g., the draft of a contract often called "rough draft"); 3. the process of preparing or DRAWING a legal document (e.g., drafting a will) or piece of proposed legislation; 4. in a military context, conscription of citizens into the military service.

SIGHT DRAFT one that is payable on demand; a bill of exchange for immediate collection.

DRAM SHOPACT

a legislative enactment imposing strict liability upon the seller of intoxicating beverages when the sale results in the harm of a third party's person, property or means of support.

EXAMPLE: Jake left a tavern after consuming an excessive amount of alcohol. His drinking caused an accident. The victim of the accident sues the tavern owner under that state's *Dram Shop Act*. Since the act imposes strict liability on the owner, he is liable even if he did not realize or had no way of realizing that Jake was drunk.

DRAW

1. to withdraw money from an account in a bank or other depository; 2. to execute a check or draft for the withdrawal of money; 3. to prepare a draft of a legal document, such as a complaint, a deed or a will.

DRAWEE

one whom a BILL OF EXCHANGE (see bill; draft) or a check directs to pay to another a specified sum of money. In the typical checking account situation, the bank is the drawee, the person writing the check is the maker or drawer, and the person to whom the check is written is the payee.

DRAWER

person by whom a check or BILL OF EXCHANGE (see bill) is drawn; person directing payment by another by way of a draft.

DRIVING WHILE INTOXICATED [D.W.I.]

the criminal offense of operating a motor vehicle while under the influence of alcohol or drugs. State law controls both the definition of "operating," such as whether it includes the actual driving of the car or merely sitting in the car, and the level of intoxication needed in order to be found in violation of the law.

DROIT

(*drwäh*) Fr.: a right; law; the whole body of the law.

DRUG ABUSE

the repeated or uncontrolled use of controlled substances. While possession or use of controlled substances may be a crime, addiction to drugs is a disease that cannot be made a crime under the due process clause of the Constitution. Drug abuse or addiction is a ground for divorce in some states.

DRUG LAW see generic [GENERIC DRUG LAW].

DRUGS see controlled substances; driving while intoxicated.

DUAL CITIZENSHIP

concept whereby two different sovereigns within their respective territorial confines may lawfully claim citizenship of the same person and the person may claim citizenship to each of the sovereignties. For an American citizen to be deprived of United States citizenship the government must show the commission of an expatriating act as defined by statute done voluntarily and with intent to relinquish citizenship. Also refers to the fact that an American citizen is a citizen of the United States and of the state in which the citizen resides.

DUCES TECUM

(*dū'-chēs tā'-kūm*) Lat.: bring with you. See subpoena [SUBPOENA DUCES TECUM].

DUE CARE

the degree of care that a person of ordinary prudence and reason (a reasonable man) would exercise under given circumstances. The concept is used in tort law to indicate the standard of care or the legal duty one normally owes to others. Negligence is the failure to use due care.

EXAMPLE: Basic construction trade usage mandates that a certain size beam be used to support a certain amount of weight. In its hurry, a construction company uses a smaller beam because it is all that is available. The floor supported by that beam collapses, and three workers are injured. The use of the smaller beam represents a failure on the part of the company to use *due care*.

DUE COURSE see payment in due course.

DUE DATE

time fixed for payment of debt, tax, interest, etc.

DUE PROCESS OF LAW

a phrase introduced into American jurisprudence in the Fifth and Fourteenth Amendments to the U.S. Constitution; the principle that the government may not deprive an individual of life, liberty or property unless certain rules and procedures required by law are followed. The phrase does not have a fixed meaning, but embodies society's fundamental notions of legal fairness. Specifically, the constitutional safeguard of SUBSTANTIVE

DUE PROCESS requires that all legislation, state or federal, must be reasonably related to a legitimate government objective. The concept of PROCEDURAL DUE PROCESS guarantees procedural fairness where the government attempts to deprive one of his or her property or liberty; this requires notice and a fair hearing prior to a deprivation of life, liberty or property.

EXAMPLE: Police in a municipality devise a scheme to produce a confession from Randy, who was accused of murder. The trial judge permits the prosecution to use the confession, and Randy is convicted. On appeal, a judge could find that the scheme violates *procedural due process of law*, based on the nature of the police scheme and the general nature of the American judicial system, which looks to produce convictions based on evidence acquired from sources other than the accused. In essence, due process is that level of process which is deemed fair based on a balancing of all interests.

D.U.I.

driving under the influence of alcohol or drugs. See driving while intoxicated [D.W.I.].

DUMMY

a strawman, a sham.

DUMMY CORPORATION a corporation that has no business purpose other than to provide protection from liability or the disclosure of the principal behind its activities.

DUMMY DIRECTOR a director who serves in name only and has no real control over the corporation's activities.

DUMMY SHAREHOLDER a shareholder who owns stock in name only and has no financial interest in the corporation.

DUMPING

the sale of manufactured goods for a price lower than its fair value; sale of commodities in foreign market at a price that is lower than the price or value of comparable commodities in the country of their origins. Under the ANTIDUMPING LAW, the United States may impose special custom duties on foreign manufacturers that attempt to import goods into this country for less than their fair value if an industry in the United States is or may be materially injured. Also, discharge of waste material into the environment.

DUPLICITOUS

refers to a pleading that joins in the same count two or more distinct grounds of action to enforce a single right. To allege more than one distinct claim in the same indictment is *duplicitous*.

DUPLICITY

the technical invalidity resulting from uniting two or more causes of action in one count of a pleading, or multiple defenses in one plea, or multiple crimes in one count of an indictment, or two or more incongruous subjects in one legislative act, all contrary to

proper procedural or constitutional requirements. See also joinder; misjoinder.

DURESS

refers to conduct that has the effect of compelling another person to do what he need not otherwise do. It is a recognized defense to any act, such as a crime, contractual breach or tort, all of which must be voluntary to create liability. See involuntary.

EXAMPLE: Marcy is held at gunpoint until she agrees to help some people rob a bank. At her trial for the robbery, Marcy pleads *duress* and explains what happened. If her version of the facts is accepted, her defense of duress prevents a finding of guilty against her.

DURHAM RULE

a test of criminal responsibility that states that an accused is not criminally responsible if his unlawful act was the product of mental defect. The Durham Rule was the first major modification of the common law M'Naghten Rule but is no longer in force in the District of Columbia (where it was adopted), having been superseded by the American Law Institute's Model Penal Code test. This new test asks whether the defendant lacks substantial capacity to conform his conduct to the requirements of law, and is now used by a number of jurisdictions. See insanity.

DUTY

1. obligation of one person to another. 2. In tort law, duty is a legally sanctioned obligation the breach of which results in the liability of the actor. Thus, an individual owes a DUTY OF CARE to conduct himself to avoid negligent injury to others. See due care. 3. In tax law, a duty is a levy [tax] on imports and exports.

DELEGABLE DUTY a duty that the person under legal obligation is able to transfer to another.

DUTY, LEGAL see legal duty.

DUTY OF PRODUCING EVIDENCE see burden of proof.

DUTY TO MITIGATE DAMAGES see mitigation of damages.

DWELLING HOUSE

one's residence; a structure or apartment used as a home for a family unit; a house in which the occupier and his family usually reside. In the law of real property, it includes everything attached to or considered an accessory to the main building, such as a garage or barn, and may consist of a cluster of buildings.

D.W.I. see driving while intoxicated.

DYING DECLARATIONS see hearsay rule [DYING DECLARATIONS].

E

EARNEST

in civil law, something of value given by one party to another to bind a contract, usually a sales agreement; serves both as part payment or performance and as a method of predetermining liquidated damages for breach of the contract. On breach by buyer, seller retains the earnest, while in seller's breach, buyer is entitled to twice the value of the earnest.

In common law, earnest often denotes a down payment, but unlike a down payment, earnest is by definition forfeited on breach of contract.

EARNINGS AND PROFITS

a tax term referring to the income of the corporation that, if distributed to its shareholders, would constitute a dividend to each shareholder.

ACCUMULATED EARNINGS AND PROFITS the amount of earnings and profits from prior years earned by a corporation but not yet distributed to its shareholders.

CURRENT EARNINGS AND PROFITS the earnings and profits of a corporation earned during the current taxable year. For dividend purposes, distributions to shareholders are deemed paid first out of current earnings and profits.

EARNINGS REPORT see income statement.

EASEMENT

a right, created by an express or implied agreement, to make lawful and beneficial use of the land of another. Such use must not be inconsistent with any other uses already being made of the land. An easement is a privilege connected with the land and is therefore not a possessory interest or fee.

EASEMENT APPURTENANT a pure easement, or easement proper, that is, one that belongs to whomever owns the dominant estate to which the benefit of the easement attaches. In contrast to an **EASEMENT IN GROSS** (definition follows), an easement appurtenant passes with the dominant estate to all subsequent grantees and is inheritable. See appurtenant.

EASEMENT IN GROSS a personal privilege to make use of another's land. It is not appurtenant to a dominant estate and is therefore not assignable or inheritable. See license.

EASEMENT OF NECESSITY one necessary for the continued use of the land when a larger tract of land has been subdivided. If without the easement either the grantee or grantor cannot make use of his or her property, the existence of an easement of necessity is implied by operation of law.

IMPLIED EASEMENT one created by operation of law from the particular circumstances involved rather than by a written instrument. A **QUASI EASEMENT** will be implied where at the time of the grant there existed an apparent, permanent, continuous and necessary use of the land from which it can be inferred that an easement permitting its continuation was intended, as, for example, where a lot containing a driveway is severed from the lot containing the house.

NEGATIVE EASEMENT an easement that restricts a landowner from doing certain acts he or she would normally be permitted to do in connection with his or her own land. See restrictive covenant.

PRESCRIPTIVE EASEMENT [EASEMENT BY PRESCRIPTION] an easement that is acquired through the uninterrupted use of another's land for a period of time that would be sufficient to acquire title to the land by adverse possession.

PUBLIC EASEMENT see public easement.

RECIPROCAL NEGATIVE EASEMENTS an implied restriction upon the use of property that can arise where a common grantor of several adjoining parcels (especially a subdivision) has failed to insert the restrictions from prior deeds into deeds to parcels conveyed later. See license. Compare run with the land.

EXAMPLE: When Sunbelt Housing Cooperative sold the first half of a housing complex, they included a provision that no commercial establishments would be allowed on any property owned by Sunbelt. The contracts for sale on the second half of the complex included no such provision. Still, a purchaser of a lot on the second half cannot set up a psychologist's clinic in his home. A court will usually imply a *reciprocal negative easement* based on the sales contracts of the first half of the complex, thereby limiting all structures throughout Sunbelt to residential use.

EAVESDROPPING

the monitoring of communications by a third party without the knowledge of the communicating parties. See invasion of privacy, wiretapping.

ECCLESIASTICAL LAW

English law pertaining to matters concerning the church. This law was administered by ecclesiastical courts and is considered a branch of English common law. It was intended to vindicate the dignity and peace of the church by reforming the

ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offenses, contempts and enormities. Today, in equity and divorce cases, courts still rely on the principles and doctrines established by ecclesiastical law insofar as these principles are consistent with relevant constitutional and statutory law. American law specifically adopted the practice of granting alimony, as incident to divorce, from English ecclesiastical law.

Historically, the ecclesiastical courts had undisturbed jurisdiction over rights of marriage, actions for divorce, restitution of conjugal rights, and testamentary and intestacy cases. There is, however, a conflict of opinion as to whether ecclesiastical law has been adopted as part of the common law of this country. Some courts hold that this code of laws cannot be considered part of the common law since it is based on a union of church and state that has no place in our legal system. Other courts consider some of this law part of the common law, especially if these laws afford a good rule of construction for a particular American law. See canon, corpus juris.

ECU see Eurodollar.

E.E.O.C. see equal opportunity.

EFFECTS, PERSONAL see personal effects.

EGRESS see ingress and egress.

EIGHTH AMENDMENT

one of the Bill of Rights passed in 1791 prohibiting cruel and unusual punishment and excessive bail and fines. The ban against cruel and unusual punishment has been applied against a state's imposition of a penalty for the status of being addicted to the use of narcotics, but the Supreme Court has given the state courts great deference in determining what constitutes cruel and unusual punishment in terms of sentencing for various crimes. However, the amendment does limit the kinds of punishment that can be imposed, proscribes punishment grossly disproportionate to the severity of the crime, and imposes substantive limits on what can be made criminal and punished as such.

EIS [EIR] see environmental impact statement [report].

EJECTMENT

a legal action brought by one claiming a right to possess real property against another who has adverse possession of the premises or who is a holdover (tenant who remains beyond the termination of a lease). In common law the action was originally commenced by a lessee against an intruder. Later it became a possessory action brought by the holder of legal title to recover possession from one holding under an invalid title. Compare eviction.

EJUSDEM GENERIS

(*ě-yūs'-dēm jěn'-ěr-ĭs*) Lat.: of the same class. A rule of statutory construction, generally accepted by both state and federal courts, providing that where general words follow enumerations of particular classes of persons or things, the general words shall be construed as applicable only to persons or things of the same general kind as those enumerated.

EXAMPLE: A state law forbids concealing on one's person "pistols, revolvers, derringers, or other dangerous weapons." Jed is arrested under that law for concealing a long-blade knife. Under the rule of *ejusdem generis*, the law will probably not apply to Jed since "other dangerous weapons" as used here implies firearms or, perhaps even more narrowly, handguns.

Compare *sui generis*.

ELECTION

the selection of a public official by the citizens of a country, state, or other political body; the choice between two or more legal rights, whether they arise under a statute, by contract, or otherwise.

ELECTION OF REMEDIES

a choice of possible remedies permitted by law for an injury suffered; a rule of procedure that requires the party to make a choice among alternative and inconsistent remedies all of which are allowed by law on the same facts. Once a choice is made, the alternatives not chosen are waived. Thus, while the plaintiff may seek the alternative remedies of specific performance or damages for a breach of contract, he or she may not ask for alternative inconsistent remedies such as rescission and damages, since rescission elects to treat the contract as void and the request for damages seeks to enforce a valid contract. Many jurisdictions do not require election of remedies until late in the proceedings.

ELECTION UNDER THE WILL

the principle that to take under a will is to submit to all its provisions. Specifically, it consists of the choice of accepting the benefit given under the will and relinquishing a claim, such as dower, that one may have to a portion of the estate of another, or retaining that claim and rejecting the request provided by the will.

ELECTION, WIDOW'S see widow's election.

ELECTIVE FRANCHISE see franchise [ELECTIVE FRANCHISE].

ELECTIVE SHARE see right of election.

ELEGIT see fieri facias [ELEGIT].

ELEMENT

an ingredient or factor, as the elements of an offense.

ELEMENTS

the forces of nature: fire, air, earth, and water. References to "caused by the elements" is used synonymously with "caused by an Act of God."

ELEVENTH AMENDMENT

an amendment to the U.S. Constitution effectively prohibiting the federal courts from hearing cases against a state by citizens of that state or of another state unless the state consents to be sued. The amendment is rooted in the doctrine of sovereign immunity.

EMANCIPATION

1. freeing of someone from control of another; 2. express or implied relinquishing by a parent of rights in, or authority and control over, a minor child.

EMBEZZLEMENT

fraudulent appropriation for one's own use of property lawfully in his possession, a type of larceny that did not exist in common law because it does not involve a trespassory taking; thus it is a crime created by statute. Embezzlement is often associated with bank employees, public officials or officers of organizations, who may in the course of their lawful activities come into possession of property, such as money, actually owned by others.

EXAMPLE: A bank teller is short of cash one month and takes some money out of the deposits received with the full intention of returning it in a few weeks. The intent to return the money, though, has no relevance to the fact that the money was embezzled. The only defense in this instance would be that the teller thought the money belonged to him or that he had the owner's consent to borrow the money.

Compare defalcation; misapplication [misappropriation] of property.

EMBLEMENTS

1. the right of a tenant of agricultural land to remove crops that he or she has planted, even if the tenancy has expired before harvest; 2. vegetable chattels such as corn, produced annually as the result of one's labor and deemed personal property in the event of the death of the farmer before the harvest.

EMBRACERY

the common-law misdemeanor of attempting to bribe or corruptly influence a juror; also called JURY TAMPERING. See obstruction of justice.

EMINENT DOMAIN

the inherent right of the state to take private property for public use, without the individual property owner's consent; but just compensation must be paid to the property owner. See expropriation. Compare public domain; public easement.

EMOLUMENT

profit derived from office, rank, employment, or labor, including salary, fees and other compensation.

EMOTIONAL DISTRESS

extreme personal suffering caused by the intentional or negligent actions of another. Physical injury (or even physical contact) is no longer a required element for the recovery of damages. Monetary awards have been issued in cases of harassment, sexual harassment, libel, and slander. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS and NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS involve those two respective states of mind. Examples might include a lab technician calling and deliberately falsely stating, "Your lab results show that you have HIV" (intentional) versus the loss of a coffin and its contents by an airline (negligent).

EMPLOYEE SHARE OWNERSHIP PLAN [ESOP]

a plan designed to provide a retirement benefit and a stake in the corporation for the employee. Such plans are also used by employees to purchase plants that are being closed.

EMPLOYEE STOCK OPTION see stock option [employee stock option].

EMPLOYER'S LIABILITY ACTS

statutes specifying the extent to which employers shall be liable to make compensation for injuries sustained by their employees in the course of employment. Unlike in workers' compensation laws, which have replaced these acts in many states, the employer is made liable only for injuries resulting from his breach of a duty owed the employee, i.e., his negligence. See assumption of risk; fellow servants.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974 see ERISA [Employment Retirement Income Security Act of 1974].

ENABLING CLAUSE

a provision in most new laws or statutes that gives appropriate officials the power to implement and enforce the law.

EXAMPLE: A statute that provides extra money for public housing is passed. The statute will include an *enabling clause* permitting the Department of Housing and Urban Development to spend the money accordingly.

ENACTING CLAUSE

generally, the preamble of a statute, or the part that identifies the statute as a legislative act and authorizes it as law. Thus, "Be it enacted by the Senate and House of Representatives of the United States in Congress assembled," etc., is the enacting clause used in Congressional legislation.

EN BANC

(*än bänk*) Fr.: by the full court. Many appellate courts sit in divisions of three or more judges from among a larger

number on the full court. Sometimes either on the court's motion or at the request of a litigant the court will consider a case by the full court rather than by only a part of it. A matter reconsidered by the whole court after a part of it has rendered its decision is called a REHEARING EN BANC, sometimes spelled "en bank."

ENCLOSURE

land enclosed by something other than an imaginary boundary line, i.e., a wall, hedge, fence, ditch or other actual obstruction; also called a CLOSE.

ENCROACH

to intrude gradually upon the rights or property of another. An encroachment is any infringement on the property or authority of another.

ENCUMBRANCE

any right to, interest in or legal liability upon real property that does not prohibit passing title to the land but that diminishes its value. Encumbrances include easements, licenses, leases, timber privileges, homestead privileges, mortgages, judgment liens, etc.

EXAMPLE: A piece of land Seth wants is *encumbered* by a mortgage that is greater than the stated value of the land. He purchases the property anyway, believing that the value is understated and that one day he will be able to sell the land at a great profit.

ENDORSEMENT see indorsement.

ENDOWMENT

a permanent fund of property or money bestowed upon an institution or a person, the income from which is used to serve the specific purpose for which the gift was intended.

ENFEOFF

to create a feoffment. The term refers to an early common law means of conveying freehold estates and has been used in some modern deeds to signify a conveyance of title.

EN GROS

(*än grō*) Fr.: in gross (large) amount; total; by wholesale.

ENJOIN

to command or instruct with authority; to suspend or restrain. One may be enjoined or commanded by a court either to do a specific act or to refrain from doing a certain act. See injunction.

EXAMPLE: Southwest Plastics has been disposing of its waste products in an adjacent river for over a decade. Environmentalists finally determine that some of the liquid waste contains a deadly carcinogen. A court *enjoins* (i.e., forbids) Southwest from using the river for disposal based on the environmentalists' proofs.

ENJOYMENT

substantial present economic benefit; beneficial use and purpose to which real or personal property may be put; implies right to use and to profits and income from use, rather than

mere technical ownership. In common usage, synonymous with use and occupancy; usually infers possession.

COVENANT OF QUIET ENJOYMENT see quiet enjoyment.

ENLARGEMENT

a rule of civil procedure permitting a court to extend the expiration period for any act required or allowed to be done at or within a specified time. Once cause is shown, the court may act in its discretion with or without motion or notice if the period has not expired. If the period has expired, the court can only act upon motion where the failure to act was the result of excusable neglect. Certain of the time periods found in specific rules may not be enlarged by this general rule, but can only be enlarged by conditions within those rules themselves.

ENRICHMENT see unjust enrichment.

ENTAIL

to create a fee tail; to create a fee tail from a fee simple.

ENTIRETY see tenancy [TENANCY BY THE ENTIRETY].

ENTITY

a being that exists for tax, accounting or other particular purpose, such as a corporation, governmental body or an estate. A legal entity is one that, while not a person, can sue, be sued and make decisions as an individual could, e.g., a corporation.

ENTRAPMENT

in criminal law, an AFFIRMATIVE DEFENSE (see defense) created either by statute or by court decision in the given jurisdiction that excuses a defendant from criminal liability for crimes induced by trickery on the part of law enforcement officers or other agents of the government. To sustain the defense, the defendant must demonstrate that but for the objectionable police conduct, he or she would not have committed the crime, or that an ordinary, law-abiding citizen would have been persuaded, under the same circumstances, to commit the crime.

EXAMPLE: Larry does not touch or go near anything related to drugs since his conviction for drug dealing six years ago. One day, an undercover police officer asks Larry to buy some drugs. He refuses, but the officer continues his request over several days and even offers to provide the narcotics to Larry on credit. Low on cash, Larry accepts, acquires the drugs and is then arrested. The officer's conduct in continually pressing Larry after he refused on several occasions may constitute *entrapment*.

ENTRY, FORCIBLE see forcible entry.

ENTRY, UNLAWFUL see unlawful entry.

ENUMERATED POWERS

express powers specifically granted by the Constitution such as the taxing power and the spending power granted to Congress. See inherent powers. Compare implied powers.

ENURE see inure.

EN VENTRE SA MERE

in gestation; in the womb of one's mother. In the law of property, a person who is en ventre sa mere has the same rights as, and is entitled to the same protections as, a person who has been born.

ENVIRONMENTAL IMPACT STATEMENT [REPORT]

requirement under federal and state laws for developers to file documents and receive approval where projects may affect the environment. Such documents must detail efforts to minimize adverse pollution, disruption to wildlife or traffic, or use of protected areas such as wetlands.

ENVIRONMENTAL PROTECTION AGENCY [EPA]

an agency of the federal government charged with a variety of responsibilities relating to protection of the quality of the natural environment, including research and monitoring, promulgation of standards for air and water quality, control of the introduction of pesticides and other hazardous materials into the environment, and the like. See police power.

EO INSTANTI

immediately; instantly.

EPA see Environmental Protection Agency.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION [EEOC] see equal opportunity.

EQUALITY

possessing the same rights under the same circumstances. Achieving a balance; uniformity. See equal protection of the laws.

EQUAL OPPORTUNITY

a term to signify an employer's adoption of employment practices that do not discriminate on the basis of race, color, religion, sex or national origin. Such discrimination was outlawed by Title VII of the Civil Rights Act of 1964.

Title VII also created the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION [EEOC] to implement equal opportunity policy by working with local agencies.

EQUAL PROTECTION OF THE LAWS

constitutional guarantee embodied in the Fourteenth Amendment to the U.S. Constitution, which states in relevant part that "No State shall . . . deny to any person

within its jurisdiction the equal protection of the laws." The essential purpose of this constitutional doctrine is to ensure that the laws and the government treat all persons alike, unless there is some substantial reason why certain persons or classes of persons should be treated differently.

EXAMPLE: Women and men who perform equal tasks in their jobs for the state receive unequal pay. In a lawsuit seeking equal pay, the fact that a question based on gender is raised forces the state to demonstrate a compelling government interest to justify the distinction.

EQUAL RIGHTS AMENDMENT [E.R.A.]

a proposed amendment hoping to eliminate sex as a basis for any decisions made by a state of the United States. This amendment was never ratified by a sufficient number of states to qualify as a constitutional amendment, but the basic premise underlying the proposal has become an accepted standard in many statutes and court decisions.

EQUAL TIME ACT [RULE]

broadcast requirement that if a candidate for public office is permitted air time, the station must afford equal opportunities to all other candidates for that office. Compare fairness doctrine.

EQUITABLE

according to natural right or natural justice; marked by due consideration for what is fair and impartial, unhampered by technical rules the law may have devised that limit recovery or defense.

EQUITABLE DISTRIBUTION see equitable distribution.

See equity.

EQUITABLE DEFENSE see defense.

EQUITABLE DISTRIBUTION

1. a just division of property among interested parties; 2. the process by which, as part of a dissolution of marriage proceeding under a no-fault divorce statute, the court apportions between husband and wife all assets acquired by either or both of them, whether owned jointly or individually, during the marriage See alimony, community property.

EQUITABLE EASEMENT see equitable servitude.

EQUITABLE ESTATE see estate.

EQUITABLE ESTOPPEL see estoppel [ESTOPPEL IN PAIS].

EQUITABLE RECOUPMENT

in certain situations in which a taxpayer erroneously pays taxes in one taxable year when they are properly payable in a later year, this doctrine allows the taxpayer to

recoup the additional taxes paid by reducing his or her taxes payable in the later year.

EQUITABLE RELIEF see relief.

EQUITABLE SEISIN see seisin.

EQUITABLE SERVITUDE

a covenant that is enforceable only in equity. For a covenant to be valid at law, as to remote grantees of the affected property there must exist PRIVACY OF ESTATE(see privity) between the covenantor and covenantee, but such a relationship is not necessary to create an enforceable equitable servitude so long as the subsequent grantee has either actual or CONSTRUCTIVE NOTICE(see notice) of the covenant.

EQUITABLE TITLE see title.

EQUITY

generally, justice or fairness Historically, equity refers to a separate body of law developed in England in reaction to the inability of the common law courts, in their strict adherence to rigid writs and forms of action, to consider or provide a remedy for every injury. The king therefore established the court of chancery, to do justice between parties in cases where the common law would give inadequate redress. The principle of this jurisprudence is that equity will find a way to achieve a lawful result when legal procedure is inadequate. Equity and law courts are now merged in most jurisdictions, though equity jurisprudence and equitable doctrines are still independently viable.

Equity also refers to the value of property minus liens or other encumbrances. For example, one's equity in a home with a mortgage is the value of the property beyond the amount of the mortgage debt.

In accounting, equity refers to the ownership interest in a company as determined by subtracting liabilities from assets. See balance sheet. For incorporated business enterprises, equity is owned by the common and preferred shareholders. If the corporation is publicly held, the shares will be traded on a stock exchange or over-the-counter market which together comprise the EQUITY MARKET.

EQUITY CAPITAL see security.

EQUITY OF REDEMPTION

right of mortgagor to redeem his or her property (save it from foreclosure) after default in the payment of the mortgage debt, by subsequent payment of all costs and interest, in addition to the mortgage debt, to the mortgagee.

E.R.A. see Equal Rights Amendment [E.R.A.].

ERGO

(*ěr'-gō*) Lat.: therefore; consequently; hence; because.

ERISA [EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974]

a Congressional attempt to attack a multitude of problems that were affecting employee benefit plans, especially the lack of employee information and adequate safeguards concerning their operation. Through various statutes and regulations, the act creates minimum standards to assure the equitable character and financial soundness of these plans.

ERRONEOUS

involving a mistake; signifies a deviation from the requirements of the law, but it does not connote a lack of legal authority, and is thus distinguished from illegal. If, while having the power to act, one commits error in the exercise of that power, he acts erroneously.

ERRONEOUS JUDGMENT one rendered according to practice of court, but contrary to law, upon a mistaken view of law, or upon erroneous application of legal principles.

ERROR

a mistake; an act involving a departure from truth or accuracy. In a legal proceeding such as a trial, an **ERROR OF LAW** furnishes grounds for the appellate court to reverse a judgment.

ESCALATOR CLAUSE

that part of a lease or contract that provides for an increase in the rent or contract price upon the occurrence of certain conditions beyond the parties' control, such as an increase in the cost of labor or of a necessary commodity, or the fixing of maximum prices by a government agency. Escalator clauses in leases may permit an increase in rent whenever real estate taxes or interest rates rise. In a divorce decree one's alimony payments may increase as the cost of living rises or when the ex-spouse who is paying alimony has a higher income.

ESCAPE CLAUSE

a clause in a contract permitting a party to renege on its obligations under certain conditions without incurring a penalty or other liability.

EXAMPLE: Stilton Harvest Corporation agrees to provide a bread company with all the wheat it needs for one year. The agreement includes a provision that, if the annual harvest for a group of states falls below an established level, Stilton is relieved of its obligation.

ESCHEAT

assignment of property to the state because there is no verifiable legal owner.

ESCROW

a written instrument, such as a deed, temporarily deposited with a neutral third party (the **ESCROW AGENT**), by the agreement of two parties to a valid contract. The escrow agent will

deliver the document to the benefited party when the conditions of the contract have been met. The depositor has no control over the instrument in escrow. In common law, escrow applied to the deposits only of instruments for conveyance of land, but it now applies to all instruments so deposited. Money or other property so deposited is also loosely referred to as escrow.

ESOP see Employee Share Ownership Plan [ESOP].

ESQUIRE [ESQ.]

a title for lawyers.

ESSENCE see time is of the essence.

ESTABLISHMENT CLAUSE

provision in the First Amendment of the U.S. Constitution prohibiting enactment of laws pertaining to "the establishment of religion." It has been said that the establishment clause means that neither a state nor the federal government may set up a church; neither may pass laws that aid one religion, aid all religions or prefer one religion over another. In the words of Jefferson, the clause was intended to erect a "wall of separation between church and state."

ESTATE

1. technically, the nature and extent of a person's interest in or ownership of land; 2. broadly, estate applies to all that a person owns, whether real or personal property.

CONTINGENT ESTATE see contingent estate.

DOMINANT ESTATE see dominant estate.

EQUITABLE ESTATE an estate or interest that can be enforced only in equity; applies especially to every trust, express or implied, that is not converted to a legal estate by the Statute of Uses.

FUTURE ESTATE an estate in land that is not possessory but that will or may become so in the future. Future estates are either vested or contingent, and include remainders and reversions.

LEGAL ESTATE originally, an interest in land that was enforced by courts of common law, as opposed to an equitable estate, enforced by courts of equity.

PRECEDING ESTATE see preceding estate.

SERVIENT ESTATE see servient estate.

VESTED ESTATE one either presently in possession or owned by a presently existing person to whom (or to whose successors in interest) the property interest will automatically accrue upon the termination of a PRECEDING ESTATE. Such an estate thus represents a present interest and as such is neither subject to any contingency nor otherwise capable of being defeated.

ESTATE AT SUFFERANCE see tenancy [TENANCY AT SUFFERANCE].

ESTATE AT WILL see tenancy [TENANCY AT WILL].

ESTATE BY THE ENTIRETY see tenancy [TENANCY BY THE ENTIRETY].

ESTATE FOR LIFE see life estate.

ESTATE FOR YEARS see tenancy [TENANCY FOR YEARS].

ESTATE FROM YEAR TO YEAR see tenancy [PERIODIC TENANCY].

ESTATE IN COMMON see tenancy [TENANCY IN COMMON].

ESTATE IN COPARCENARY see coparcenary.

ESTATE OF INHERITANCE

a common law species of land ownership that could descend to heirs; a type of freehold estate that the owner can both enjoy during his or her life and bequeath according to an established order of descent. Estate of inheritance include estates in fee simple absolute, fee simple conditional, fee simple determinable and estates in fee tail.

ESTATE PER AUTRE VIE see per autre vie.

ESTATE TAX see tax.

ESTOPPEL

a restraint; a bar; arises where a person has done some act that the policy of the law will not permit him or her to deny, or where circumstances are such that the law will not permit a certain argument because it would lead to an unjust result. In the context of contract law, for example, one is estopped from denying existence of a binding contract where he or she has done something intending that another rely on his or her conduct, and the result of the reliance is detrimental to that other person. Compare waiver.

EXAMPLE: Nelson convinces an associate to sign what appears to be a valid contract which gives the associate the right to buy certain items from Nelson. When the contract turns out to harm Nelson more than the associate, Nelson tries to deny the validity of the instrument. A court will find that Nelson is *estopped* (i.e., prevented) from raising that claim since it was Nelson who initiated the offer.

AUTHORITY BY ESTOPPEL see authority by estoppel.

COLLATERAL ESTOPPEL see collateral estoppel.

DIRECT ESTOPPEL the prohibition of the relitigation of an issue by two parties who have previously litigated the issue and had it decided by the courts. See collateral estoppel; res judicata.

ESTOPPEL BY DEED a bar that precludes a party from denying the truth and legitimacy of the conveyance represented by a deed he or she has given. It may be invoked only in a suit on the deed or concerning a right arising out of it.

ESTOPPEL BY JUDGMENT see judgment [ESTOPPEL BY JUDGMENT].

ESTOPPEL BY LACHES see laches.

ESTOPPEL IN PAIS [*pá'-ēs*] Old Fr: the country, the neighborhood. An estoppel that arises out of a person's statement of fact, or out of his or her silence, acts or omissions, rather than from a deed or record or written contract; also called an **EQUITABLE ESTOPPEL**.

MUTUALITY OF ESTOPPEL the doctrine that prohibits one party from raising an issue or a matter which the other party is prohibited from raising.

PROMISSORY ESTOPPEL see promissory estoppel.

ESTOVERS

the right of the tenant, during the period of his or her lease, to use timber on the leased premises for proper maintenance of the property.

ET AL.

(*ět äli*) Lat.: and others; abbreviation of *et alii*.

ETHICAL see unethical.

ET NON

(*ět nõn*) Lat.: and not.

ET SEQ.

(*ět sěk*) Lat.: and the following; abbreviation of *et sequentes* or *et sequentia*. Most commonly used in denominating page reference numbers: page 13 *et seq.*

ET UX.

(*ět ũks*) Lat.: and wife; abbreviation of *et uxor*. Used in old legal documents such as wills or deeds; for example, "This will made by John Doe *et ux.*"

EURODOLLAR

a U.S. dollar held as a deposit in a European commercial bank. Eurodollars were created after World War II by United States foreign defense and aid expenditures. Since the dollar was backed by gold, it became a popular reserve currency in Europe and among all the trading partners of the United States.

EUTHANASIA

the putting to death, as an act of mercy, of someone in considerable pain as the result of disease or other physical malady, for whom there is no hope of recovery. While routinely permitted for animals, it has not been permitted in this country for human beings, although some states have authorized removal of extraordinary life support systems

in individual cases. See brain death.

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EVASION OF TAX

generally applied to any of various fraudulent methods by which a taxpayer may pay less than his or her proper tax liability.

EXAMPLE: As an independent consultant, Julie works for many different companies. Her scheme has each company pay her under a different fictitious name. She then sets up bank accounts in each name to facilitate cashing the checks. By that method, she *evades her taxes* because the Internal Revenue Service is unable to locate any of the fictitious individuals.

Evasion is to be distinguished from avoidance of tax, which denotes the legal interpretation of relevant tax law to minimize tax liability.

EVASIVE ANSWER

an answer that fails to admit or deny the allegations set forth in the complaint.

EVICTION

the physical expulsion of someone from land by the assertion of paramount title or through legal proceedings.

CONSTRUCTIVE EVICTION

refers to circumstances under the control of the landlord that compel the tenant to leave the premises though he or she is not asked to do so by the landlord. The tenant may be deemed constructively evicted if the premises are rendered unfit for occupancy, or if the use and enjoyment has been substantially impaired. Where the law of the jurisdiction permits the tenant to claim constructive eviction, he or she is not responsible for further rent, but he or she must actually vacate the premises.

PARTIAL ACTUAL EVICTION an eviction that the law may recognize as having occurred when part of the leased premises has been rendered unusable through the fault of the landlord. If the lease rental is not apportioned by room, nor the premises partitioned in the lease agreement, the tenant may not be responsible for any part of the lease rental while actually evicted from a part of the leased premises, and he or she need not vacate the habitable part of the premises.

EVIDENCE

all the means by which any alleged matter of fact, the truth of which is submitted to investigation at judicial trial, is established or disproved. Evidence includes the testimony of witnesses, introduction of records, documents, exhibits or any other relevant matter offered for the purpose of inducing the trier of fact's (fact finder's) belief in the party's contention. See circumstantial evidence; hearsay rule; insufficient evidence; presumption.

EVIDENCE ALIUNDE see aliunde.

EVIDENCE DE BENE ESSE see de bene esse.

EX AEQUO ET BONO

(*ex é-quō et bō-nō*) Lat: from equity and conscience.

EXAMINATION see cross-examination; cross-examination [DIRECT EXAMINATION].

EXCEPTION

an item that ought to be included in a category but that is eliminated. Exceptions arise in numerous contexts in law: 1. statutory exceptions are intended to restrain the enacting clause or to exclude something that would otherwise be within it, or to modify it in some manner. 2. an exception to a court's ruling is an objection to such ruling or the act of calling to the attention of a court an error made by the same or a different court. 3. Exception is also used generally to mean the withholding from conveyance of some estate or interest in the land conveyed.

EXCESSIVE BAIL

an amount of bail that is set at a higher figure than is reasonably calculated to fulfill the purpose of assuring that the accused will stand trial and submit to sentence if found guilty. Excessive bail is prohibited by the Eighth Amendment to the United States Constitution and by the constitutions of the various states. The prohibition against excessive bails has been held to forbid a person from being capriciously held, by demanding bail in such amount that there is in fact a denial of bail where a right to bail exists. The prohibition against excessive bail has been held not to confer a right to bail on anyone but to provide only that if bail is permitted it may not be set at an excessive amount. See also detention.

EXCHANGE

to give goods or services and to get goods or services of equal value in return. Generally, a transaction is a sale where money is received in return for the goods or services and is an exchange when specific property susceptible of valuation is received. Exchange is synonymous with BARTER.

EXCHANGE, LIKE-KIND see sale or exchange.

EXCHEQUER see court of exchequer.

EXCISE

broadly, any kind of tax not applied to property or the rents or incomes of real estate; a tax upon articles of manufacture or sale and also upon licenses to pursue certain trades or to deal in certain commodities. It is a tax imposed directly and without assessment and is measured by amount of business done, income received, etc.

EXAMPLE: A customer buys a new set of tires for his car, the price of which includes a federal *excise* tax. The money generated by the tax is used for road maintenance and other transportation expenses and is justified by the rationale that anyone who buys tires must be

using them on the roads. The tax is a means of ensuring that users pay for related government services.

EXCLUSION

an amount that otherwise would constitute a part of GROSS INCOME(see income) but that under a specific provision of the Internal Revenue Code is excluded from gross income.

EXCLUSIONARY RULE

a constitutional rule of law that provides that otherwise admissible evidence may not be used in a criminal trial if it was obtained as a result of illegal police conduct. See fruit of the poisonous tree doctrine.

EXAMPLE: The police unlawfully stop a car, order the driver to wait outside, and proceed to search the vehicle. Twenty pounds of marijuana are discovered in the back seat. Since there was never a lawful reason to stop the car in the first place, the subsequent search of the car is unreasonable and in violation of the Fourth Amendment of the Constitution. The primary remedy today for the violation is to apply the *exclusionary rule*, which bars the prosecutor from using the confiscated marijuana to convict the driver of possession of the drug. In fact, application of the rule will usually end any prosecution based on items that were discovered but now must be excluded.

EXCLUSIVE USE see use [EXCLUSIVE USE].

EX CONTRACTU

(*ěks kōn-trāk'-tū*) Lat.: arising out of contract.

EXCULPATORY

refers to evidence or statements that tend to justify or excuse a defendant from alleged fault or guilt. Contrast incriminate; inculpatory.

EXCULPATORY CLAUSE

a clause in a legal document that excuses a party from liability for its acts other than those caused by willful neglect or gross negligence.

EXCUSABLE NEGLIGENCE

the failure to perform a required act, usually procedural in nature, because of unusual circumstances. The party failing to perform the act is usually given the opportunity by the court to cure his or her neglect.

EX-DATE see ex-dividend [EX-DIVIDEND DATE].

EX DELICTO

(*ěks dě-lĭk'-tō*) Lat.: arising out of wrongs. See action ex delicto.

EX-DIVIDEND

without a right to a declared dividend. When a stock trades ex-dividend the buyer does not receive the declared dividend because the date on which he or she will officially own the stock will occur after the record date of ownership for purposes of

receiving same. A stock will trade ex-dividend during the settlement period, usually five business days, between the execution of an order to buy or sell the security by a broker and the date of settlement when the certificate and funds change hands. The PAYMENT DATE refers to the date on which the dividend is actually paid and is usually sometime after the EX-DIVIDEND DATE (sometimes called simply EX-DATE) and the record date.

EXECUTE

1. to complete, as a legal instrument; 2. to perform what is required; 3. to give validity to, as by signing and perhaps sealing and delivering. For example, a contract is executed when all acts necessary to complete it and to give it validity as an instrument are carried out, including signing and delivery.

EXECUTED

fully accomplished or performed; leaving nothing unfulfilled; opposite of executory.

EXECUTED INTEREST see interest [EXECUTED INTEREST].

EXECUTION

1. the process of carrying into effect a court's judgment, decree or order. It gives the successful party the fruits of his or her judgment. For instance, when a party has won a judgment on his or her claim, the judgment creditor can enforce or execute the judgment by having the sheriff seize and sell the judgment debtor's property and then use the proceeds to pay the judgment. 2. in criminal law, the process by which a sentenced defendant serves his or her sentence. For instance, a person sentenced to ten years of imprisonment executes his or her sentence by spending that amount of time in prison, unless released earlier by parole. The term also refers specifically to carrying out a death sentence. See capital punishment.

EXECUTION OF INSTRUMENT

signing of a legal instrument such as a deed or contract so that it is legally binding and enforceable.

EXECUTION SALE see sheriff's sale [JUDICIAL SALE].

EXECUTIVE AGREEMENT see treaty.

EXECUTIVE CLEMENCY

the power constitutionally reposed in the President, and by most state constitutions, in the governor, to pardon or commute (i.e., reduce) the sentence of one convicted by a court within his jurisdiction. Compare reprieve.

EXECUTIVE ORDER

an order issued by the executive head of government, such as the President of the United States or a governor of a state, and that has the force of law.

EXECUTIVE PARDON see pardon.

EXECUTIVE PRIVILEGE

the privilege of the executive branch of government to refuse to disclose confidential communications, the disclosure of which would impair its ability to function. The privilege is based upon the doctrine of separation of powers, but it may be overcome in criminal cases, if necessary, in the interest of fundamental fairness.

EXECUTIVE PROCLAMATION see proclamation [PRESIDENTIAL PROCLAMATION].

EXECUTOR [OR EXECUTRIX]

a person who either expressly or by implication is appointed by a testator [one who dies leaving a will] to carry out the testator's directions concerning the dispositions he makes under his will. When the appointee is a woman, she is the executrix.

EXAMPLE: Frank's will names Nat *executor* of Frank's estate. As executor, Nat must make sure the provisions in Frank's will are carried out, debts against the estate are paid, and any money owed is collected. If there are ambiguities in the will or the will is contested, Nat is responsible for seeing that a lawsuit is either filed or answered. Nat is compensated for his job, although that may be a small amount, and he is reimbursed by Frank's estate for any expenses.

EXECUTORY

not fully accomplished or completed, but contingent upon the occurrence of some event or the performance of some act in the future; not vested; opposite of executed. An EXECUTORY CONTRACT is one in which some performance remains to be accomplished.

EXECUTORY BEQUEST see bequest [EXECUTORY BEQUEST].

EXECUTORY INTEREST see interest [EXECUTORY INTEREST].

EXECUTORY WAIVER see waiver [EXECUTORY WAIVER].

EXEMPLAR

nontestimonial identification evidence such as fingerprints, blood samples, handwriting samples, voice exemplars, and the like. See search and seizure.

EXEMPLARY DAMAGES see damages [EXEMPLARY [PUNITIVE] DAMAGES].

EXEMPT see tax exempt.

EXEMPTION

a deduction allowed to a taxpayer because of his or her status or circumstances rather than because of specific economic costs or expenses during the taxable year.

EXAMPLE: Jeff and Lisa are married and have three children. Federal income tax laws allow the couple three *exemptions*, one for

each child on the couple's joint tax return. The exemption reduces the amount of income upon which the couple is taxed.

EX GRATIA

(ěks grā'-shē-á) Lat.: out of grace; gratuitously. Describes that which is done as a favor rather than as a required task or as of right.

EXHAUSTION OF REMEDIES

a judicial policy or statutory requirement that certain administrative or non-federal judicial remedies be pursued by a litigant before a state or federal court will consider the controversy.

EXHAUSTION OF ADMINISTRATIVE REMEDIESthe doctrine of all courts, adopted either as judicial policy or by statutory directive, that the courts will not interfere with or review an administrative decision or process until the available administrative channels of review have been attempted. This requirement stems from the usual requirement that courts review only "final" administrative actions. The doctrine avoids piecemeal interruption of administrative processes, conserves scarce judicial resources, and ensures that the expertise of administrative agencies will be fully employed. In some extreme cases, where irreparable harm to public or private interests may be caused by honoring the doctrine, it will be held inapplicable.

EXHAUSTION OF STATE REMEDIESthe practice of federal courts of not intervening in matters where state administrative remedies are available to the litigant seeking federal relief. This is a policy of comity and may be excused when it would be unjust or inappropriate to await state administrative consideration. The doctrine applies only to state administrative remedies and not state judicial remedies except in cases involving state prisoners seeking federal habeas corpus relief. In those instances, the federal habeas corpus statute requires that state prisoners first exhaust state judicial remedies, provided they are then currently available. Even in the context of habeas corpus petitions by state prisoners, the doctrine of exhaustion is not absolute. If the prisoner can demonstrate that resort to state remedies would be "ineffective," he or she need not exhaust; also the prisoner need not present the state with more than one opportunity based on the same issue provided he or she has pursued all available appeals in that previous state application. The Supreme Court has held that exhaustion of state remedies is not required when federal courts are asked to remedy a violation of one's civil rights pursuant to the Civil Rights Act.

EXHIBIT

an item of real evidence that has been presented to the court.

EXIGENCY

an emergency situation that excuses some particular procedure or right from being followed or enforced. Thus, an exigency may justify speeding to the hospital with a critically ill person, breaking into someone's home to secure shelter from life-threatening harm, or dispensing with the warrant requirement to effect a search and seizure under the Fourth Amendment. See exigent circumstances.

EXIGENT CIRCUMSTANCES

emergency situations or conditions that the law recognizes as excusing compliance with some procedural requirement or recognition of another's property or other interests. Term is most commonly used to refer to the variety of contexts in which a valid search and seizure may be conducted without a warrant. If the police action must be taken on a "now or never" basis to preserve evidence, it may be reasonable to permit a seizure without obtaining prior judicial approval. Exigent circumstances may be found when substantial risk of harm to others or the police would exist if police were to delay a search until a warrant could be obtained. The mobility of a motor vehicle has been held in itself to create an exigent circumstance. In every instance where a search or arrest warrant has been dispensed with on grounds of exigency, probable cause must be present to justify the intrusion.

EXIGIBLE

demandable; capable of being required.

EXILE

to force out, or cut off from membership or privileges; the punishment, by a political authority, inflicted upon criminals by compelling them to leave a city, place or country for a period of time or for life.

EX-OFFENDER see criminal.

EX OFFICIO

(ěks ō-fī'-shě-ō) Lat.: from the office; by virtue of his office; officially.

EX OFFICIO MEMBER one who is a member of a board, committee or other body by virtue of his or her title to a certain office, and who does not require further appointment.

EX OFFICIO SERVICES services imposed by law on a public officer by virtue of his office.

EX PARTE

(ěks pär'-tā) Lat.: in behalf of or on the application of one party; by or for one party. An ex parte judicial proceeding is one brought for the benefit of one party only, without notice to or challenge by an adverse party. Therefore, in an ex parte proceeding the adverse party and his or her evidence are excluded. For

this reason, such proceedings are not favored, and any relief obtained *ex parte* is subject to speedy review.

EXAMPLE: Applications to install wiretaps on telephones are always made *ex parte*, i.e., without notice to the person whose phone is sought to be electronically surveilled. Otherwise, the person will know his or her phone is wiretapped and avoid incriminating conversations. Because the application is *ex parte*, requirements not usually insisted on must be met to protect privacy, and the person who is recorded may challenge the sufficiency of the application at a later opportunity.

EXPECTANCY

future interest as to possession or enjoyment. In the law of property, estates may be either in possession or in expectancy; if an expectancy is created by the parties it is a remainder; if created by operation of law it is a reversion. See contingent estate. Compare vested.

EXPECTATION DAMAGES see damages [EXPECTATION DAMAGES].

EXPENSE

any business cost incurred in operating and maintaining property. For purposes of information and in reporting to shareholders of publicly held corporations, expenses are calculated as the cost of goods and services used in the process of profit-directed business activities.

In tax law, expenses are costs that are currently deductible, as opposed to CAPITAL EXPENDITURES (see capital), which may not be currently deducted but must be depreciated or amortized over the useful life of the property.

EXPERT TESTIMONY [OR EVIDENCE] see expert witness.

EXPERT WITNESS

a witness having special knowledge, skill or experience in the subject about which he is to testify. Testimony given by such a witness, in his capacity as such, constitutes EXPERT EVIDENCE or EXPERT TESTIMONY.

EXPORT

1. to transport out of one country and into another; 2. the article so transported.

EX POST FACTO

(*ěks pōst fāk'-tō*) Lat.: after the fact. Refers especially to a law that makes punishable as a crime an act done before the passing of the law and that was innocent when done. An *ex post facto* law is also one that makes a crime more serious than when it was committed, inflicts a greater punishment, or alters legal rules of evidence to require less or different testimony to convict than the law required when the crime was committed.

Such laws violate provisions of the Constitution of the United States, which provide that neither Congress nor any state shall pass an *ex post facto* law.

EXAMPLE: Knowing that he has no money in the bank, Ed writes a check for \$150 and is arrested for the crime. At the time of his arrest, the law made it criminal to write bad checks only for amounts over \$200. By the time Ed is brought to trial, the amount that is necessary to make the writing of a bad check criminal had been lowered to \$100. Ed must be tried under the law as it was at the time he was arrested and is, therefore, not guilty. To prosecute him under the new, lower limit of \$100 would violate the *ex post facto* protection of the United States Constitution.

EXPRESS

to set forth an agreement in words, written or spoken, that unambiguously signify intent. As distinguished from implied, the term refers to something that is not left to inference from conduct or circumstances.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

(*ěks-prě'-sē-ō ū'-nē-ūs ěst eks-klū'-sē-ō äl-tēr'-ē-ūs*) Lat.: the expression of one thing is the exclusion of another. In construing statutes under this maxim, mention of one thing within the statute is said to imply the exclusion of another thing not mentioned. The maxim is an aid to construction and is applicable where the contrast between what is expressed and what is omitted enforces the inference that what is omitted must have been intended to have contrary treatment. Thus a statute granting certain rights to "police, fire, and sanitation employees" would be interpreted to exclude other public employees not enumerated in the legislation.

EXPRESS POWERS see enumerated powers.

EXPRESS WARRANTY see warranty [EXPRESS WARRANTIES].

EXPROPRIATION

the taking of private property for public purpose upon the payment of just compensation, which is recognized as an inherent power of the state over its citizens. See eminent domain.

EXPULSION see deportation [EXPULSION].

EXPUNGEMENT OF RECORDS

a procedure whereby a court orders the annulment and destruction of records of an arrest or other court proceedings. Some jurisdictions provide that an individual arrested and not convicted may apply to a court for an order of expungement and that if such an order is granted the individual may regard the arrest and all subsequent proceedings had as having not occurred in contemplation of law. Court-ordered expungements

may also be available as a remedy for unlawful arrests. Many states permit an expungement remedy as a means of removing civil disabilities following a period of good behavior after a conviction. Even an expunged record may be used for sentence enhancement and as a basis for denial of a federal firearms permit. Compare sealing of records. See also executive clemency, pardon.

EX REL

(ěks řěl) Lat.: upon relation or report; abbreviation of ex relatione. Legal proceedings that are initiated ex rel. are brought in the name of the state but on the information and at the instigation of a private individual with a private interest in the outcome. The real party in interest is called the RELATOR. The action will be captioned "State of X [or United States] ex rel. Y versus Z."

EX-RIGHTS

refers to stock sold without rights to purchase stock subsequently offered by the same corporation. Rights normally have value, since the new issue is usually priced at a discount from the prevailing market price.

EXTENSION

an increase in the date of expiration or due date for a term or obligation. In a lease, an extension represents continuation of an existing arrangement on the same terms, whereas a renewal may involve new terms in a different lease instrument. In procedure, an extension of time within which a pleading or process must be filed or completed under the rules governing the courts of the particular jurisdiction.

EXTENUATING CIRCUMSTANCES

unusual factors tending to contribute to the consummation of an illegal act, but over which the actor had little or no control. These factors therefore reduce the responsibility of the actor and serve to mitigate punishment or the actor's payment of damages. Compare justification.

EXTINGUISHMENT

a discharge of an obligation or contract by operation of law or by express agreement.

EXAMPLE: Phil signs a mortgage with a bank to purchase a new home. After twenty monthly payments, he stops paying the bank. A law in Phil's state provides that if a bank does not sue on a mortgage where no payment has been made for five years, the obligation is *extinguished*. By operation of that law, if the bank does not sue Phil within five years from the first payment date that he fails to meet, Phil is no longer liable on the mortgage.

EXTORTION

1. in common law, the corrupt collection by a public official under color of office of an excessive or unauthorized fee; punishable as a misdemeanor. 2. under modern statutes the offense includes illegal taking of money by anyone who

employs threats, or other illegal use of fear or coercion, to obtain money, and whose conduct falls short of the threat to personal safety required for robbery. Extortion is used interchangeably with blackmail and is commonly punished as a felony.

EXAMPLE: Joe threatens Alice that he will reveal certain aspects of her past that would ruin her career unless she pays him \$200 a month. Even if what Joe threatens to say is true, the fact that he has threatened her to obtain money constitutes *extortion*.

Compare bribery.

EXTRADITION

the surrender by one state to another of an accused or convicted person. A state's chief executive has the right to demand from the asylum state the return of a person who was accused of crime based on probable cause. Extradition prevents the escape of fugitives who seek sanctuary in another state. It enables the state in which the offense occurred to swiftly bring the offender to trial.

EXTRAJUDICIAL

beyond a court's jurisdiction; not directly connected with a court or its proceedings; e.g., a confession or an identification made outside of court.

EXTRAORDINARY DIVIDENDS see dividend [EXTRAORDINARY DIVIDENDS].

EXTRAORDINARY REMEDY see remedy [EXTRAORDINARY REMEDY].

EXTREMIS see in extremis.

EXTRINSIC EVIDENCE

external evidence. All evidence outside of the writing, including parol evidence, may be considered by the court in determining the true intent of the parties if there is any doubt or controversy as to the meaning of the language embodying their bargain.

EXTRINSIC FRAUD see fraud [EXTRINSIC [COLLATERAL] FRAUD].

EX TURPI CAUSA NON ORITUR ACTIO

(ĕx tūr'-pē kāw'-zá nõn ôr-ē-tūr äk'-shē-ō) Lat: no disgraceful [foul, immoral, obscene] matter can be the basis of an action.

EYEWITNESS

a person who can testify as to what he or she has experienced by his or her presence at an event.

F

FAA see Federal Aviation Administration [FAA].

FACE VALUE

the value indicated in the wording of the instrument. For instance, the face value of a bank check is the amount the check is written for. Compare market value.

FACIAL INVALIDITY see void for vagueness.

FACILITATION

in criminal law, a statutory offense rendering a person guilty when, believing it probable that he or she is aiding someone who intends to commit a crime, he or she assists the potential criminal in obtaining the means to commit the crime, and in fact such conduct does aid the person to commit the crime.

EXAMPLE: A very irate man walks into a gun store, screaming loudly that he is going to shoot someone for running a red light and destroying his new car. The man demands to purchase a gun, and the owner allows him to do so once the proper forms are filled out, even though the owner is aware of the man's state of mind. If the man then goes out and shoots the person who ran the light, the store owner may be guilty of criminal *facilitation*.

In common law, facilitation may give rise to liability for aiding and abetting. Compare accomplice; conspiracy.

FACINUS QUOS INQUINAT AEQUAT

(*fät'-sĭ-nūs kwōs ĩn'-kwĭ-nät t'-kwät*) Lat.: villainy and guilt make all those whom it contaminates equal in character.

FACT

an event or circumstance the actual occurrence or existence of which is to be established by the evidence and determined by the fact finder.

FACTA SUNT PROTENTIORI VERBIS

(*fäk'-tä sūnt pō-tĕn'-tē-ō'-rē vĕr'-bēs*) Lat.: the facts, deeds, or accomplishments are more powerful than words.

FACT FINDER

in a judicial or administrative proceeding, the person or group responsible for determining the facts relevant to resolving a controversy. It is the role of a jury in a jury trial; in a nonjury trial the judge sits both as a fact finder and as a trier of law;

in administrative proceedings it may be a hearing officer or a hearing body. The term TRIER OF FACT generally denotes the same role.

FACTO

(fäk'-tō) Lat.: in fact; by a deed. See also de facto.

FACTOR

a person who receives and sells goods for a commission (called FACTORAGE). He or she is entrusted with possession of the goods he or she sells and generally sells them in his or her own name. The term also refers to a garnishee in states where factorizing is the name for garnishment. Compare jobber.

FACTOR'S ACTS

the name of certain English statutes, which have also been enacted in a number of states, whose general effect is to make a factor's [agent's] possession of property or documents of title stand as evidence of ownership to enable him or her to do all things the true owner might do with respect to the property or title documents. The owner thus becomes responsible for the factor's actions. The purpose of such statutes is to protect bona fide purchasers where the agent has exceeded his or her authority by giving an appearance that he or she is the true owner.

FACT, QUESTION OF see question of fact.

FACTS, PROBATIVE see probative [PROBATIVE FACTS].

FACTUAL IMPOSSIBILITY see impossibility.

FACTUM

(fäk'-tūm) Lat.: a deed, or accomplishment. With respect to a change in a person's domicile, the factum is the person's physical presence in the new domicile. In civil law the word factum distinguishes a matter of fact from a matter of law.

FACTUM PROBANDUM

(fäk'-tūm prō-bän'-dūm) Lat.: the fact to be proved. See evidence.

FAILURE OF CONSIDERATION see consideration.

FAILURE OF ISSUE

termination of one's bloodline. The words are most often used in a will or deed to refer to a condition that operates in the event either no children be born or no children survive the decedent. These words, or the phrase "die without issue," may fix a condition whereby an estate will, in the event of failure of issue, pass automatically to an alternative person or in an alternative manner designated in the will itself. Unless the instrument indicated to the contrary, the common law read the condition as operating ad infinitum. This construction is termed INDEFINITE FAILURE OF ISSUE. Thus, if children of the first taker themselves fail to leave children, the estate will still go to the alternative. The first taker is regarded as possessing a fee tail, and his or her descendants continue to hold the

same limited estate. A majority of American jurisdictions by statute have reversed this presumption and construe "die without issue" as a DEFINITE FAILURE OF ISSUE; i.e., the condition is satisfied fully if the first taker has issue surviving at the time of his or her death. Alternative expressions include "if he or she dies before he or she has any issue," "for want of issue," "without leaving issue."

FAILURE TO PROSECUTE see default judgment; dismissal; non prosequitur.

FAIR COMMENT

a plea by a defendant in a libel suit that the statements made, even if untrue, were not intended to create ill will but rather to state the facts as the writer honestly believed them to be. Generally, one will not be held guilty of libel on the basis of honest and unintentional mistakes of fact.

FAIR COMPETITION see unfair competition.

FAIR HEARING

a statutorily authorized extrajudicial hearing granted primarily where the normal judicial processes would be inadequate to secure due process, either because a judicial remedy does not exist, or because one would suffer grievous harm or substantial prejudice to his or her rights before a judicial remedy became available. Thus, fair hearings have been authorized as forums for the administrative determination of a citizen's rights in a number of contexts.

FAIR LABOR PRACTICE see unfair labor practice.

FAIR MARKET VALUE see market value.

FAIRNESS DOCTRINE

a requirement that broadcasting stations present contrasting viewpoints on controversial issues of public importance. This doctrine imposes two affirmative responsibilities on the broadcaster: (1) to present adequate coverage of controversial public issues and (2) to ensure that this programming presents differing viewpoints so that the public is fully and fairly informed.

FAIR TRADE LAWS

state statutes that permit a manufacturer to establish minimum resale prices that may not be varied by the wholesaler or distributor. Such agreements do not violate the antitrust laws when they are entered into under the provisions of state fair trade laws.

FAIR USE

in federal copyright law, an insubstantial permitted use by another of material protected by copyright.

EXAMPLE: Jenny copyrights an article that she publishes in a medical journal. Although Jenny has the sole right to authorize copies

of the article, the fair use doctrine permits a teacher to make as many copies as he or she needs if the teacher uses the copies for classroom discussion.

FALSE ARREST

unlawful arrest; unlawful restraint of another's personal liberty or freedom of locomotion. It may be a criminal offense or the basis of a civil action for damages.

FALSE IMPRISONMENT

as a tort, the intentional, unjustified detention or confinement of a person. Where the restraint is imposed by virtue of one claiming legal authority to do so and an arrest occurs, it will be a false arrest as well as a false imprisonment. Compare kidnapping.

FALSE OATH see false swearing.

FALSE PRETENSE

the statutory crime of obtaining money or property by making false representations of fact; also known as MISREPRESENTATION.

EXAMPLE: A salesman tells Jackie that the diamond she wants to buy is a perfect cut and therefore very valuable. In reality, the diamond has many flaws and the salesman purposefully made contrary representations. Jackie purchases the diamond based on the salesman's representations since she knows nothing about diamonds. When she learns that the stone is flawed, she can sue the salesman for *false pretense* in the sale.

See counterfeit; embezzlement; forgery; fraud.

FALSE RETURN

1. a return to a writ made by a ministerial officer (such as a sheriff) in which there is a false statement that is injurious to a party having an interest in the writ. For example, if a sheriff is supposed to serve a summons and untruthfully claims on his or her return that he or she did serve it, this would constitute a false return. 2. an incorrect tax return in which there appears either an intent to deceive on the part of the taxpayer, or at least negligence that is sufficiently serious to warrant holding the taxpayer liable for his or her error.

FALSE SWEARING

the giving of a false oath in connection with some proceeding or matter in which an oath is required by law. It is a common law misdemeanor and consists of an act that would amount to perjury except that it is not committed in a judicial proceeding. See affidavit.

FALSE VERDICT

a manifestly unjust verdict; one inconsistent with the evidence. When such a verdict is rendered, the court can enter a judgment n.o.v. (notwithstanding the verdict).

FALSI CRIMEN see crimen falsi.

FAMILY [WIDOW'S] ALLOWANCE

an amount awarded to a widow for support during the administration of her deceased husband's estate, regardless of whether the widow has any right in the corpus or income of the estate.

FAMILY, CRIMINAL see organized crime.

FAMILY PURPOSE DOCTRINE

a doctrine establishing tort liability of the owner of a family car when that car is used by another member of the family.

EXAMPLE: A mother explicitly tells her daughter not to use the car at night but leaves a set of keys on the table. The daughter takes the car one night and gets into an accident. The mother is held responsible for any injuries under the *family purpose doctrine*, despite her admonitions to the daughter.

FAMOSUS LIBELLUS

(*fä-mō'-sūs lī-bēl'-ūs*) Lat.: a scandalous libel. A slanderous or libelous letter, handbill, advertisement, petition, written accusation or indictment.

FANNIE MAE see mortgage market [FANNIE MAE].

F.A.S. see free alongside.

FATAL VARIANCE see variance.

FAULT

generally, error. 1. in describing people's conduct, it is the responsibility for or cause of wrongdoing or failure. 2. in describing goods, it is a defect in either the quantity or quality of the goods.

FAVORED BENEFICIARY

one who, in a will, has been favored over others having equal claim to the testator's bounty.

FBI see Federal Bureau of Investigation [FBI].

F.C.I. see jail [FEDERAL CORRECTIONAL INSTITUTION (F.C.I.)].

F.D.A. see Food and Drug Administration [F.D.A.].

FEALTY

in feudal times, loyalty sworn by the tenant to his lord.

FEATHERBEDDING

in labor law, the unfair labor practice of creating or spreading employment by unnecessarily maintaining or increasing the number of employees or the time used to complete a particular job. Minimum crew regulations on the railroad is a typical example. Unions attempt to justify such practices on grounds of health and safety although

job security is their primary motivation. See labor organization [union].

FEDERAL AVIATION ADMINISTRATION [FAA]

an agency of the U.S. Department of Transportation, charged with regulating air commerce, promoting aviation safety and overseeing the operation of airports, including air traffic control.

FEDERAL BUREAU OF INVESTIGATION [FBI]

an agency of the U.S. Department of Justice, charged by law with investigating violations of all laws of the U.S. government, except those expressly assigned to other agencies.

FEDERAL COMMON LAW

the body of decisional law developed by the federal courts, not resting on state court decisions. Before the decision in *Erie Railroad v. Tompkins*, 304 U.S. 64, it referred primarily to the decisional law that federal courts developed in diversity of citizenship cases. After *Erie*, federal courts sitting in diversity cases have been bound to follow the general (substantive) common law of the state from which, respectively, each case arose. See preemption.

FEDERAL CORRECTIONAL FACILITY see jail [FEDERAL CORRECTIONAL INSTITUTION].

FEDERAL COURTS

the United States courts (distinguished from the courts of the individual states), including district courts (general courts of original jurisdiction, which are the federal trial courts), courts of appeals (formerly circuit courts of appeals, which are principally appellate review courts), and the Supreme Court (the only court created directly by the constitution, and the court of last resort in the federal system). Other specialized courts in the federal system are court of claims (hears suits involving allowable claims against the United States government), COURT OF CUSTOMS AND PATENT APPEALS (reviews customs court decisions), and CUSTOMS COURT (reviews decisions of the customs collectors).

FEDERAL EMPLOYERS' LIABILITY ACT

the federal law imposing liability on railroads for injuries sustained by their employees in the course of employment. It is based upon the federal government's power over interstate commerce. Compare Jones Act.

FEDERAL INSURANCE CONTRIBUTION ACT see F.I.C.A.

FEDERALISM

a system of government wherein power is constitutionally divided between a central government and local governments.

EXAMPLE: The United States Supreme Court decides that the Constitution does not protect a person's privacy from a certain police tactic. Under the doctrine of *federalism*, though, a state court

may nonetheless interpret its state constitution as prohibiting the same police conduct. The federal and state judicial systems are sufficiently separate so that a state court can afford greater protection to its citizens than the federal courts by a more liberal interpretation of its own constitution and laws. The state courts must observe any minimum federal rights, however, under the Supremacy Clause to the United States Constitution.

FEDERAL MAGISTRATE see magistrate [UNITED STATES [FEDERAL] MAGISTRATE].

FEDERAL MAGISTRATE'S ACT OF 1968 see magistrate [FEDERAL MAGISTRATE'S ACT OF 1968].

FEDERAL QUESTION JURISDICTION

one kind of original jurisdiction that allows federal courts to hear cases wherein the application of something in the Constitution, laws or treaties of the United States is being disputed. See also diversity of citizenship.

FEDERAL RESERVE SYSTEM

established under the Federal Reserve Act of 1913 to hold cash reserves of member banks and to provide other services, such as furnishing currency for circulation, facilitating clearance and collection of checks, and issuing and redeeming government obligations such as savings bonds. The functions of the agency were expanded in 1933 and 1935 to place greater emphasis on government control of the money supply, the credit structure and the economy in general. Twelve federal reserve banks are located throughout the country. All national banks are member banks; state banks may join at their option.

FEDERAL TORT CLAIMS ACT

an act passed in 1946 that confers exclusive jurisdiction on United States district courts to hear claims against the United States for money damages, for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant under the laws of the place where the act or omission occurred. The act is a broad waiver of sovereign immunity, although there are a number of qualifications on the waiver. Some state governments have enacted similar legislation.

FEDERAL TRADE COMMISSION [FTC]

a federal administrative agency established in 1914 to protect consumers against unfair methods of competition and deceptive business practices, including sales frauds and violation of the anti-trust laws.

FEDERAL TRADE COMMISSION IMPROVEMENT ACT see Magnuson-Moss Warranty Act.

FEE

in real property, an estate. Fee, fee simple and FEE SIMPLE ABSOLUTE are often used as equivalents to signify an estate of absolute ownership that can be sold by the owner or devised to the heirs; however, the term is used to refer also to ownership that is qualified, as in the case of a conditional or determinable fee, which are types of estates that might last forever but are subject to termination upon the happening of a certain event.

EXAMPLE: Nancy conveys land to her brother in fee simple absolute. The brother has complete ownership of the land and can do with it as he pleases. If she conveys the land to him restricting its use to religious purposes, that conveyance is called a determinable fee. The moment the land is used for some purpose other than a religious one, it reverts to Nancy or to whomever she designates.

FEE SIMPLE

a freehold estate of virtually infinite duration and of absolute inheritance free of any limitations or restriction to particular heirs; also called FEE SIMPLE ABSOLUTE.

FEE SIMPLE CONDITIONAL see conditional fee.

FEE SIMPLE DEFEASIBLE see determinable fee.

FEE SIMPLE DETERMINABLE see determinable fee.

FEE TAIL

the estate created by a conveyance, by deed or will, to a person "and the heirs of his body." A fee tail establishes a fixed line of inheritable succession and cuts off the regular succession of heirs at law. It is a limited estate in that inheritance is through lineal descent only, which, if exclusively through males is called FEE TAIL MALE, and if exclusively through females is called FEE TAIL FEMALE. If the family line runs out (failure of issue), the fee reverts to the grantor or his successors in interest.

FELA see Federal Employers' Liability Act; Employers' Liability Acts.

FELLOW SERVANTS

co-workers: employees engaged in common pursuits under the same general control, serving the same employer, engaged in the same general business and deriving authority and compensation from a common source; defined for the purpose of the FELLOW SERVANT RULE, which absolves an employer of liability for injury to a worker resulting from the negligence of a co-worker. Fellow servants were said to assume the risk of each other's negligence. Employers' Liability Acts and Workers' Compensation statutes have abrogated the fellow servant doctrine.

FELONY

generic term employed to distinguish certain high crimes from minor offenses known as misdemeanors; crimes declared to be such by statute or to be "true crimes" by the common law. Statutes often define felony as an offense punishable by imprisonment for more than one year or by death or imprisonment generally. The original common law felonies were felonious homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach (escape) and rescue of a felon. See also misprision of felony.

FELONY, MISPRISION OF see misprision of felony.

FELONY MURDER

a homicide that occurs in the commission or attempted commission of a felony; considered first-degree murder by operation of this doctrine. In many modern statutes, only homicides that occur in the course of certain specified felonies are felony murders. The malice necessary to find someone guilty of murder is inferred from the actor's intent to commit a felony.

EXAMPLE: Alan and Mike hold up a liquor store. The owner attempts to trigger an alarm, and Alan fires at him with a pistol, intending only to frighten him but unfortunately killing him. Even though Alan did not intend to kill the owner, both Alan and Mike will be guilty of the owner's murder under the doctrine of *felony murder*.

FENCE

a structure erected in order to enclose real property. A fence may be used to determine a boundary for purposes of trespass.

In criminal law, an individual who receives stolen property and resells it for profit. A fence commits the crime of receiving stolen property.

FEOFMENT

the name given in common law to the means of conveying title to freehold estates, which required livery of seisin. At the site of the land and in the presence of neighbors, the vendor would point out the boundaries of the purchase and hand over to the vendee the appropriate symbol of seisin. The method was used until the use of the written deed came to be prescribed by statute.

FERAE NATURAE

(*fēr'-ī nā-tūr'-ī*) Lat.: wild beasts of nature. Animals of natural disposition in that, unlike domestic animals, they are untamed.

FERTILE OCTOGENARIAN

refers to a legal fiction that, for purposes of the Rule Against Perpetuities, every living person is presumed capable of having children as long as he or she lives, even though it may be biologically impossible. The impact of this fiction under the rule against perpetuities has been modified by statute in many jurisdictions.

FEUDALISM

a system of government and a means of holding property in England and Western Europe that grew out of the chaos of the Dark Ages. Through a ceremony, called homage, in which mutual duties of support and protection were promised, the vassal in effect gave his land to the lord and the lord then had a duty to protect it and the vassal. Though the vassal thenceforth owned no land, he held the land of the lord as a tenant and retained a use in that land. The land that the vassal held was called his feud, fief, or feudum. The relationship between the lord and his vassals could become more indirect by the process of subinfeudation, so that theoretically there could be placed between the lord and his vassal any number of persons at different levels, each serving as a link in the chain of relations between the lord at the top and the least of the vassals. Eventually, the king became the ultimate lord over all, and all land in England was held of him. Only in England was feudalism the sole method of holding land, although it was the general method elsewhere in Western Europe.

The feudal land holding system influenced all of the early common law concerning real property, and despite the fact that the feudal system never existed in the United States, it has played a vital role in shaping modern land law.

FIAT JUSTITIA

(fē'-ät jūs-ī'-shē-ä) Lat.: let justice be done.

F.I.C.A. [FEDERAL INSURANCE CONTRIBUTION ACT]

this Act imposes a tax on employees and employers that is used to fund the Social Security system.

FICTION, LEGAL see legal fiction.

FIDUCIARY

a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with the undertaking; one who holds a position of confidence, as, for example, a trustee.

FIERI FACIAS

(fēē'-rē fā'-shē-ās) Lat.: that you cause to be made; a common law writ to enforce the collection of a claim that has gone to judgment and has become final. By this early English writ, a creditor with judgment was, in effect, ordering the sheriff to enforce against the debtor by seizure and sale of the debtor's personal property to the extent necessary to satisfy the judgment. At common law, the real property of the debtor could not be sold at execution. Today, the law of execution is for the most part statutory, and most state laws provide for a single writ for the enforcement of judgments out of the real and personal property of the debtor. Other common law writs made virtually obsolete by modern statutory provisions include:

ELEGIT (*ē-lē'-jīt*) Lat: that he has chosen; a writ resulting in the appraisal and transfer of a debtor's goods to his or her creditor, and, if necessary to satisfy the judgment, the transfer of an interest in the rents and profits from all (originally only a moiety) of his or her real property.

EXTENDI FACIAS (*ěx-těn'-dī fā'-shē-ās*) Lat.: you cause to be extended; also known as "extent," a writ calling for the setting off of lands of a debtor for purposes of appraisal as to its sufficiency to satisfy the writ of the creditor.

LEVARI FACIAS (*lē-vā'-rī fā'-shē-ās*) Lat.: a writ authorizing enforcement of a judgment out of both the debtor's goods and the profits and rents of his or her land.

FIFO see first-in, first-out.

FIFTEENTH AMENDMENT

the amendment to the United States Constitution, ratified in 1870, which guarantees each citizen the right to vote, regardless of race, color, or previous condition of servitude.

FIFTH AMENDMENT

the amendment to the U.S. Constitution, part of the Bill of Rights, that establishes certain protections for citizens from actions of the government by providing (1) that a person shall not be required to answer for a capital or other infamous crime unless an indictment or presentment is first issued by a grand jury, (2) that no person will be placed in double jeopardy, (3) that no person may be required to testify against himself or herself, (4) that neither life, liberty nor property may be taken without due process of law, and (5) that private property may not be taken for public use, without payment of just compensation.

FIGHTING WORDS

those that by their very utterance, in the context in which they are spoken, inflict injury or tend to incite the hearer to an immediate breach of the peace.

In tort law, one who uses fighting words and thereby creates reasonable apprehension of harm in another person may be guilty of assault. See also defamation.

FIGURE see public figure.

FILE

refers to both the physical collection of documents (such as pleadings, motions, briefs, and other papers) (example: "Where is the *Nicholas* file?") as well as the act of delivering documents to the proper authority (example: "Please file this brief with the court."). See filing.

FILIBUSTER see cloture [FILIBUSTER].

FILING

the depositing of documents with the court or with other public officials to become preserved as part of the official record. Often specific deadlines are imposed by which time the documents must be filed. Failure to meet the deadline may result in the imposition of late fees or may result in the document being excluded from consideration. Court documents must be served on the opposing party. See service. See also return [FILING].

FINAL DECISION [OR DECREE OR JUDGMENT]

a decision that settles the rights of parties respecting the subject matter of the suit until the decision is reversed or set aside; ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Compare interlocutory.

FINAL DECREE see decree [FINAL DECREES].

FINAL HEARING see hearing [FINAL HEARING].

FINAL JUDGMENT see final decision; judgment.

FINAL ORDER see order.

FINANCE CHARGES

any charge for an extension of credit.

FINANCIAL INTERMEDIARY

an organization such as a bank that brings together lenders (in the form of depositors) and borrowers. Other examples include savings and loan associations, credit unions, real estate investment trusts [REITs] and various kinds of finance companies.

FINANCIAL RESPONSIBILITY LAWS see assigned risk.

FINANCIAL STATEMENT see balance sheet; income statement.

FINDER OF FACT see fact finder.

FINDER'S FEE

a fee or commission paid for finding what a customer desires. In merger activities, the finder either locates a buyer when the client company wants to sell or locates a seller when the client company is looking for acquisitions. In real estate activities, finder's fees are paid for locating property, for obtaining mortgage loans and for referring buyers, sellers and mortgage loans.

FINDING

the decision of a court on issues of fact. The decision's purpose is to answer questions raised by the pleadings or charges. It is designed to facilitate review by disclosing the grounds on which the judgment rests. Findings of fact are made by a jury in an action at law, or, if there is no jury, they are made by the judge.

FINE

a sum of money imposed upon a defendant as a penalty for an act of wrongdoing. The fine is payable to the public

treasury as

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opposed to restitution, which is payable to the victim of the wrongdoing. Modern statutes favor restitution over fines and sometimes provide that courts may not impose a fine if its satisfaction would interfere with the making of restitution. The Court has held that a state has discretion in setting punishment for state crimes and may impose alternative sanctions. However, under the Equal Protection Clause, a state may not subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. It is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it.

FINGERPRINT

unique line patterns on each finger that may be left when the finger comes in contact with an object. If a suspect drank from a glass, the glass may be dusted with powder that clings to the oils left by the finger, and an impression may be lifted and later compared against the suspect. No two people (except identical twins) have the same fingerprints. Arrested persons are routinely fingerprinted. The prints are classified and entered into a computer system known as AFIS (Automated Fingerprint Identification System). Prints lifted from a gun, for example, can be compared against the hundreds of thousands of prints in the system for a possible match against a suspect. Note: the term "DNA fingerprinting" does not refer to fingerprints but rather to the science of DNA technology and its ability to link an accused person to a particular criminal act. See DNA testing.

FIRM OFFER

an offer in writing that states the offer is to be irrevocable for a set time. As long as it is stipulated in a signed writing that the offer is to be held open, it need not be supported by consideration to be binding.

EXAMPLE: A new stationery business undertakes an enthusiastic effort to acquire new customers and develop an excellent reputation. Pursuant to that desire, it makes several *firm offers* to other local businesses, guaranteeing that it will supply all the stationery the others need for ninety days at a fixed price. The others can enforce that offer against the new business at any time during the year, even though they provided no consideration in return for the offer.

FIRST AMENDMENT

the first of ten amendments added to the Federal Constitution in 1791 by the Bill of Rights, it guarantees freedoms of speech, assembly, press, petition, and the free exercise of religion. As written, it applies to the federal government but has been applied to states by the Fourteenth Amendment. Litigation under

this amendment has included the use of prayer in public schools, censorship of the press, and the community's right to regulate obscene materials. See establishment clause; free exercise clause.

FIRST-DEGREE MURDER see murder [FIRST-DEGREE MURDER].

FIRST DEVISEE

the first person who is to receive an estate devised by will.

FIRST IMPRESSION

first discussion or consideration. A case is one of first impression when it presents a question of law that has never before been considered by any court, and thus is not influenced by the doctrine of stare decisis.

FIRST-IN, FIRST-OUT [FIFO]

a method of inventory valuation in which cost of goods sold is charged with the cost of raw materials, semi-furnished goods, and finished goods purchased "first" and in which inventory contains the most recently purchased materials. In times of rapid inflation, FIFO inflates profits, since the least expensive inventory is charged against cost of current sales, resulting in "inventory profits." As a consequence, LAST-IN, FIRST-OUT [LIFO] inventory valuation has become a more popular method, since it reduces current taxes by eliminating inventory profits. See balance sheet.

FISC

the treasury of a political entity.

FISCAL

pertaining to the public finance and financial transactions; belonging to the public treasury (called the FISC).

FISCAL POLICY

the use of public finance and financial transactions to achieve desired economic goals.

FISCAL YEAR

any twelve-month period used by a business as its accounting period.

FIT see unfit.

FITNESS see warranty [WARRANTY OF FITNESS].

FIXED ASSETS see asset.

FIXED CAPITAL

the amount of capital permanently invested in a business.

FIXED INCOME

income that does not change; for instance, bonds paying interest at a specified rate that does not change are fixed-income securities.

FIXED INVESTMENT TRUST see nondiscretionary trust.

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FIXED SALARY

a salary that is set at a dollar amount and does not increase or decrease as a result of certain events occurring or not occurring, such as a level of business being done by the employer.

FIXING, PRICE see price fixing.

FIXTURE

something that was once a chattel but that is attached to real property in such a way that its removal would damage the property, and that is thus considered part of the realty.

EXAMPLE: To install a new chandelier in the house, the occupant had to reinforce the ceiling and attach extra bolts. A few years after the installation, a new room is added that requires construction of a wall near the chandelier. Removal of the chandelier will now require not only a removal of the bolts but destruction of the new wall as well. If the present occupants move, the chandelier must stay behind since it has become a *fixture* of the house.

TRADE FIXTURE see trade fixture.

FLIGHT

escape; leaving the scene of a crime by one who feels guilt, or self-concealment to avoid arrest or prosecution after arrest. Compare resisting arrest. See also abscond.

FLOAT

checks that are in transit between banks and that have not yet been paid; checks in the process of collection that remain conditional checks in a depositor's checking account until the checks are paid to the bank in currency.

FLOATING DEBT

any short-term obligation of a business, such as bank loans due in one year and commercial paper. Government floating debt consists of treasury bills and short-term treasury notes. Long-term debt, such as treasury bonds, is referred to as FUNDED DEBT.

F.O.B. see Free on Board.

F.O.I.A. see Freedom of Information Act.

FOOD AND DRUG ADMINISTRATION [FDA]

an administrative agency of the Department of Health and Human Services that regulates the safety and quality of foodstuffs, pharmaceuticals, cosmetics, and medical devices.

FORBEAR

to refrain from doing an act. See forbearance.

FORBEARANCE

the act of declining, usually for a period of time, to enforce a legal right. For purposes of the law of usury, the term is often used to refer to a contractual obligation of a creditor to refrain for a specific period from claiming a debt that has already

become payable; such forbearance is in substance a loan for which a creditor may impose a charge. In contract law, forbearance of a valid claim, if bargained for, constitutes consideration.

EXAMPLE: A grandfather is so distressed by his grandson Brad's smoking habit that he promises Brad \$1,000 if Brad discontinues smoking until his 25th birthday. The grandfather dies when Brad is 23, but Brad still refrains from smoking. At age 25, he requests the \$1,000, but the executor of the estate claims that Brad never promised anything in return for the money. A court will find that Brad's *forbearance* from smoking constitutes consideration to support the contract and will order the executor to pay.

FORCE

physical acts or the threat of physical acts intentionally used to do an act or to commit a crime.

DEADLY FORCE in criminal law, force that is intended or is likely to cause death or great bodily harm. The doctrine of self-defense justifies the use of deadly force only to repel deadly force. See self-defense.

UNLAWFUL FORCE in the law of torts, the use of force without the consent of the person against whom it is directed, for which the user may be liable. See battery.

FORCED HEIRS

persons who cannot be disinherited, such as a person's spouse or children. In the United States, a spouse may elect to take a share of a decedent's estate, usually one-third, instead of taking what the decedent has given the spouse under a last will and testament. Civil law countries such as France and Switzerland have forced heirship laws under which members of a person's family, including children, are entitled to inherit a certain portion of the estate, regardless of the person's wishes as expressed in a last will and testament.

FORCED SALE see sale.

FORCIBLE DETAINER see detainer [UNLAWFUL DETAINER].

FORCIBLE ENTRY

entry on real property in the possession of another, against his or her will and without authority of law, by actual force, or with such an array of force and apparent intent to employ it that the occupant, in permitting possession to be taken from him or her, must be regarded as acting from a well-founded fear that resistance would be perilous or unavailing. In many states a mere trespass without any force will be considered forcible. Compare detainer [UNLAWFUL DETAINER].

FORCIBLE ENTRY AND DETAINER

a summary statutory proceeding for restoring to the possession of land one who has been wrongfully deprived of the possession, usually the landlord.

FORECLOSURE

generally, the termination of a right to property; specifically, an equitable action to compel payment of a mortgage or other debt secured by a lien. As to real property, foreclosure is precipitated by nonpayment of the debt or other default under the loan agreement, and leads to the court's order that the property to which the mortgage or lien is attached be sold to satisfy that debt. As a consequence, the mortgagor's equity of redemption is irrevocably destroyed, subject to any statutory redemption rights that may survive for a limited time in some jurisdictions. A security interest in personal property can likewise be foreclosed by a JUDICIAL SALE(see sale [FORCED SALE]) of the collateral.

FOREMAN [FOREPERSON] OF JURY

the presiding member of the jury and the person who speaks on the jury's behalf when communicating with the court or in rendering the jury's verdict. Normally the individual selected first or seated in the number one position in the jury box is designated the foreperson, but sometimes the jurors themselves elect their foreperson.

FORENSIC

belonging to the courts of justice; indicates the application of a particular subject to the law. For example, FORENSIC MEDICINE employs medical technology to assist in solving legal problems.

FORESEEABILITY

a concept to limit a party's liability for the consequences of his or her acts to effects that are within the scope of a FORESEEABLE RISK, i.e., risks whose consequences a person of ordinary prudence would reasonably expect might occur as a result of his or her actions.

EXAMPLE: During the refueling of a ship, gasoline spills into the harbor. A spark from a nearby welder ignites when it lands on a piece of highly flammable fabric. The fabric falls into the harbor and a fire develops. Consequently, the whole harbor burns down. Even though no fire would have started had the fueling company been more careful, that company is not responsible for the destruction of the harbor. The damage was an *unforeseeable* consequence of spilling a small amount of fuel oil.

In a contract setting, a party's liability for consequential or special damages is limited to damages arising from the foreseeable consequences of his breach.

In tort law, in most cases, a party's actions may be deemed negligent only where the injurious consequences of those actions were foreseeable.

FORFEITURE

the permanent loss of property for failure to comply with the law; the divestiture of the title of property, without compensation, for a default or an offense.

FORGERY

1. fraudulent making or altering of a writing with intent to prejudice the rights of another; making of a false instrument or the passing of an instrument known to be false. 2. fabrication or counterfeiting of evidence.

FORM

model of a document containing the phrases and words of art needed to make the document technically correct for procedural purposes; used by lawyers in drafting legal documents.

FORMAL CONTRACT see sealed instrument.

FORMA PAUPERIS see in forma pauperis.

FORMS OF ACTION

technical categories of personal actions developed in common law, containing the entire course of legal proceedings peculiar to those actions. The forms of action are no longer in use, but they continue to affect modern civil procedure and tort law.

Forms of action consisted of proceedings for recovery of debts, and recovery of money damages resulting from breach of contract, or injury to one's person, property or relations. The forms can be classified as (*a*) actions in form ex contract, including assumpsit, covenant, debt and account; and (*b*) actions in form ex delicto (i.e., those not based on contracts), including trespass, trover, case, detinue and replevin. The result was a highly formal and artificial system of procedure.

FORNICATION

generally, sexual intercourse of two unmarried persons of different sexes, punished as a misdemeanor by statute in some states. In some states, it refers to illicit sexual intercourse between a man, whether married or single, and an unmarried woman. In some states, illicit intercourse can be fornication for the party who is not married and adultery for the party who is married. It is not a common law crime and is not part of modern penal codes, though it remains a criminal offense in many jurisdictions.

FORUM

a court; a place where disputes are heard and decided according to law and justice; a place of jurisdiction; a place where remedies afforded by the law are pursued. See also venue.

FORUM NON CONVENIENS

(*för'-ūm nõn kõn-vē'-nē-ěns*) Lat.: an inconvenient court. Under this doctrine a court, though it has jurisdiction of a case, may decline to exercise it where there is no legitimate reason for the case to be brought there, or where presentation in

that court will create a hardship on the defendants or on relevant witnesses because of the court's distance from them. The court will not dismiss the case under the doctrine unless the plaintiff has another forum open to him.

EXAMPLE: A truck lightly hits the rear end of a car, but, because of the vehicle's construction, the car bursts into flames and the driver is seriously injured. The driver, who is from another state, wants to have the case heard in his home state. The car company asks the court to invoke the *forum non conveniens* doctrine and have the case transferred to the state where the accident occurred. That request is granted because the witnesses to the accident, as well as the actual scene, are both in the other state, and it would be more inconvenient to have that information brought to the driver's home state than to have the driver go to the state where the accident occurred.

FOUNDATION

in evidence law, preliminary evidence necessary to establish the admissibility of other evidence. A lawyer will lay a foundation to establish the relevancy of evidence that does not otherwise appear relevant to the matter at hand.

Also, an organization whose assets are dedicated to charitable purposes. See charity.

FOUNDER

one who provides the first gift to establish a charitable institution, such as a college.

FOUR CORNERS

the doctrine that requires that the meaning of a document be derived from its entire contents as they relate to one another, and not from its individual parts.

FOURTEENTH AMENDMENT

one of the so called "Civil War Amendments" to the Constitution in that it was ratified after the Civil War; protects all persons from state laws that attempt to deprive them of "life, liberty, or property, without due process of law," or that attempt to deny them equal protection of the laws. The amendment has been used to extend the protection of almost all of the provisions of the Bill of Rights to citizens of every state.

FOURTH AMENDMENT

constitutional amendment guaranteeing the right of persons to be secure in their homes and property from unreasonable searches and seizures and consisting of the following elements: (1) the issuance of a warrant upon oath or affirmation; (2) upon probable cause, as determined by a neutral and detached magistrate; and (3) particularly describing the place to be searched and the items or persons to be seized.

The Fourth Amendment is most frequently encountered in cases involving the use of illegally seized evidence, or fruits of the poisonous tree, and is applied through the exclusionary rule. It was

initially incorporated in the Bill of Rights to counter the abuses from searches conducted without warrants, with general warrants, or with writs of assistance and designed to safeguard the public's legitimate or reasonable expectation of privacy. Such expectations of privacy extend to a person's home (in such areas as use of contraceptives, obscene materials, or marijuana in a private residence), and to lesser extents, to a person's place of business, automobile, or even body. Courts have upheld invasions of a person's body in the areas of compulsory vaccinations, blood tests, rectal and vaginal searches, and surgical removal of a bullet. See search warrant.

FOUR UNITIES see unities.

FRANCHISE

1. a special privilege that is conferred by the government upon individuals that does not of common right belong to citizens. For example, a municipality may grant to a local bus company a franchise that will give it sole authority to operate buses in the municipality for a certain number of years. 2. the right given to a private person or corporation to market another's product within a certain area. 3. ELECTIVE FRANCHISE(sometimes called simply "the franchise") refers to the right of citizens to vote in public elections.

FRATRICIDE

the murder of one's brother.

FRAUD

intentional deception resulting in injury to another. Fraud usually consists of a misrepresentation, concealment or nondisclosure of a material fact, or at least misleading conduct, devices or contrivance.

CONSTRUCTIVE [OR LEGAL] FRAUD comprises all acts, omissions and concealments involving breach of equitable or legal duty, or trust and resulting in damage to another. It is thus fraud that is presumed from the circumstances, without the need for any actual proof of intent to defraud.

EXTRINSIC [OR COLLATERAL] FRAUD fraud that prevents a party from knowing about his or her rights or defenses or from having a fair opportunity to present or litigate them at a trial. It is a ground for equitable relief from a judgment.

EXAMPLE: Jane obtains a court order requiring a company to give her all relevant information concerning a certain product that she claims injured her. At trial, a judge finds her evidence insufficient and dismisses her claim. Afterwards, Jane finds other documents in the company's possession that she never received but that would have proved her case. The *extrinsic fraud* committed upon her gives rise to both a suit against the company for the fraud and a right for Jane to have a new trial with the new documents.

FRAUD IN FACT [POSITIVE FRAUD] actual fraud; deceit; concealing something or making a false representation with an evil intent [sci-enter] when it causes injury to another. It is used in contrast to **CONSTRUCTIVE FRAUD**, which does not require evil intent.

FRAUD IN LAW fraud that is presumed from circumstances, where the one who commits it need not have any evil intent to commit a fraud; it is a **CONSTRUCTIVE FRAUD** or legal fraud.

FRAUD IN THE FACTUM generally arises from a disparity between the instrument executed and the one intended to be executed, as for example when a blind or illiterate person executes a deed when it has been read falsely to him or her after he or she asked to have it read.

FRAUD IN THE INDUCEMENT intentional fraud that causes one to execute an instrument, or make an agreement, or render a judgment. The misrepresentation does not mislead one as to the paper being signed but rather misleads as to the facts upon which the decision to sign is based.

INTRINSIC FRAUD fraudulent representation that is considered in rendering a judgment.

FRAUDULENT CONVEYANCE

any conveyance made, or presumed to have been made, with the intention to delay or defraud creditors, where such intention is known to the party to whom the conveyance is made. It is generally characterized by a lack of fair and valuable consideration and is usually made by a debtor to place his property beyond the reach of creditors.

FREE ALONGSIDE [F.A.S.]

a commercial delivery term that signifies that the seller must at his or her own risk and expense deliver the goods to the side of the transporting medium in the usual manner and obtain and tender a receipt for the goods in exchange for which the carrier must issue a bill of lading. Compare free on board [f.o.b.].

FREE AND CLEAR

unencumbered. In property law, a title is free and clear if it is not encumbered by any liens or restrictions; one conveys land free and clear if he or she transfers a good title or marketable title.

FREEDOM

the state of being free; the absence of restrictions.

FREEDOM OF ASSOCIATION the right to peaceably assembly as guaranteed by the First Amendment.

FREEDOM OF EXPRESSION general term referring to the freedom of press, religion, and speech.

FREEDOM OF PRESSthe right to publish and circulate one's views, as guaranteed by the First Amendment. Closely related to **FREEDOM OF SPEECH**(below). See open court.

FREEDOM OF RELIGIONsee establishment clause.

FREEDOM OF SPEECHthe right to express one's thoughts without governmental restrictions on the contents thereof, as guaranteed by the First Amendment.

FREEDOM OF CONTRACT

the liberty or ability to enter into agreements with others, which is a fundamental right reserved to citizens by the United States Constitution.

FREEDOM OF INFORMATION ACT

a federal law requiring that, with specified exceptions, documents and materials generated or held by federal agencies be made available to the public and establishing guidelines for their disclosure.

FREE EXERCISE CLAUSE

a provision in the First Amendment to the United States Constitution providing that "Congress shall make no laws . . . prohibiting the free exercise" of religion. The "free exercise clause" guarantees against government compulsion in religious matters, while the establishment clause insures that the government will maintain neutrality towards religion.

FREEHOLD [ESTATE]

an estate in fee or a life estate; an estate or interest in real property for life or of uncertain duration.

FREE ON BOARD [F.O.B.]

a commercial term that signifies a contractual agreement between a buyer and a seller to have the subject of a sale delivered to a designated place, usually either the "place of shipment" or the "place of destination," without expense to the buyer. Thus a shipment "f.o.b. shipping point" requires the seller to bear the expense and the risk of putting the subject of the sale into the possession of the carrier, but the duty to pay the transportation charges from the f.o.b. point is on the buyer. Where the shipment is "f.o.b. destination point," the seller is required to bear the transportation charges and the risk of transport until the buyer point of destination. Compare free alongside [f.a.s.].

FREIGHT FORWARDER

a shipper who accepts small shipments, consolidates them into larger shipments, and takes responsibility for their safe arrival at their point of destination.

FRESH PURSUIT

in criminal law, the common law right of a police officer to cross jurisdictional lines in order to arrest a felon. The term also refers to the power of a police officer to make an arrest without a warrant when he or she is in immediate pursuit of a criminal.

FRIEND, NEXT see next friend.

FRIENDLY SUIT

an action authorized by law brought by agreement between the parties, to secure a judgment that will have a binding effect in circumstances where a mere agreement or settlement will not; for example, where a claim in favor of an infant or another lacking legal capacity to enter into a binding contract can, for that reason, be settled only through the entry of a judgment. The term also refers to a suit by an administrator or an executor in the name of a creditor, against himself or herself, seeking an order compelling distribution to the creditor of a fixed share of the assets by the estate being administered. Suits that are collusive, on the other hand, will be dismissed. Compare declaratory judgment.

FRIEND OF THE COURT see amicus curiae.

FRINGE BENEFIT see benefit [FRINGE BENEFIT].

FRISK

quick, superficial search; patting outer clothing to detect, by the sense of touch, if a concealed weapon is being carried.

FRIVOLOUS

clearly insufficient as a matter of law; presenting no debatable question. A claim is frivolous if it is insufficient because unsupported by the facts or because the law recognizes no remedy for the claim.

FRONT-END LOAD PLAN

a contractual agreement to buy mutual fund shares through periodic payments, usually monthly, in which the sales commission and other expenses, called load, are taken out of the initial payments.

FRUCTUS INDUSTRIALES

(frūk'-tūs ĩn-dūs-trĭ-a'-lēz) Lat.: the produce of land resulting from manual labor, such as crops.

FRUCTUS NATURALES

(frūk'-tūs nă-tū-ră'-lēz) Lat.: the produce of land that grows naturally, such as timber.

FRUIT OF THE POISONOUS TREE DOCTRINE

a rule under which evidence that is the direct result of illegal conduct on the part of an official is inadmissible in a criminal trial against the victim of the conduct. The doctrine draws its name from the idea that once the tree is poisoned (the primary evidence is illegally obtained) then the fruit of the tree (any secondary evidence) is likewise TAINTED and may also not be used.

EXAMPLE: The police illegally break into Rob's house and obtain a confession from him as to his drug-dealing activities. He also tells the police where they can find more drugs that he intended to sell. The police attempt to use the confession and the drugs to convict

Rob. Under the *fruit of the poisonous tree doctrine*, neither the confession nor the drugs can be used against him because they are the product of an illegal entry by the police.

FRUITS OF CRIME

the results of a criminal act. See forfeiture.

FRUSTRATION OF PURPOSE

a doctrine under which the occurrence of unexpected events may justify one of the parties to a contract in rescinding the contract. Such frustration (also called **COMMERCIAL FRUSTRATION**) typically occurs when an implied condition of an agreement (a circumstance without which the contract would never have been made) does not occur or ceases to exist without fault of either party, so that the absence of the implied condition "frustrates" one party's intentions in making the agreement.

EXAMPLE: Andy signs a contract with a real estate salesman to purchase a house, with the understanding that he will be able to get a zoning change and use part of the house for his office. Contrary to what either party expected, the zoning change is not approved. Andy may seek to renege on his contract to purchase the house because his purpose in purchasing the house has been *frustrated*.

See also impossibility.

F.T.C. see Federal Trade Commission [F.T.C.].

FUGITIVE FROM JUSTICE

one who commits a crime within a state, and then leaves that state without awaiting the consequences of the crime he or she committed there; also, one who conceals himself or herself within the state in order to avoid its process.

FULL FAITH AND CREDIT

the federal constitutional requirement that the public acts, records and judicial proceedings of one state be respected by each of the other states. Thus, if a judgment is conclusive in the state where it was pronounced, it is equally beyond dispute everywhere in the courts of the United States. The judgment is entitled to full faith and credit when the second court's inquiry discloses that the same questions were properly before the first court and were fully and fairly litigated and finally decided there.

EXAMPLE: Following a long trial, a company is found negligent in manufacturing a product that caused Lance substantial hair loss. The manufacturer's assets in that state are insufficient to cover the full amount of the judgment. Lance can take that judgment to another state where the manufacturer has assets, sue upon that judgment, and by applying the *full faith and credit* principle, obtain another judgment and collect whatever he is still owed.

FULL DISCLOSURE

obligation to reveal details. In a commercial setting, a merchant must disclose to the consumer all details of the consumer transaction, including the cost of financing the purchase. Under federal and state election laws, candidates for public office are required to fully reveal the amount and source of campaign contributions.

FUND

an amount of money that may be available either for general uses or purposes or that may be dedicated to a specific use or purpose; to pay such an amount.

FUND IN COURT an amount deposited in court because parties are contesting title to it or so that money will be available to pay a liability that is contingent.

GENERAL FUND a fund that is not dedicated to a specific purpose but that may be used to pay any debt or liability.

HEDGE FUND see hedge fund.

INDEX FUND see index fund.

MUTUAL FUND see mutual fund.

SINKING FUND in finance, a bond issue under the terms of which the issuer is obligated to repurchase a portion of the bonds each year until all of the bonds have been repurchased, rather than to redeem all of the bonds at the end of the term of the issue.

TRUST FUND see trust fund.

FUNDED DEBT see floating debt.

FUNGIBLE

a term applied to goods that are interchangeable or capable of substitution by nature or agreement. Oil, grain and coal are examples of naturally fungible goods. When storing fungible goods, warehousemen are exempt from the legal requirement of keeping stored goods from one depositor separate from the goods of another. Securities of the same issue are considered fungible; hence a person obligated to deliver securities may deliver any security of the specified issue.

FUTURE ESTATE see estate.

FUTURE INTEREST

an interest in presently existing real property or personal property, or in a gift or trust, that will commence in use, possession, or enjoyment in the future. A legatee to receive an annual income upon reaching the age of 21 has a future interest that, when that age is reached, will ripen into a present interest. Future interests may constitute either vested or contingent estates.

EXAMPLE: A father conveys 200 shares of stock to Beth, his daughter, but if Beth dies before the father, the stock goes to Marcy. Marcy has a *future interest* in the stock that is contingent on Beth's predeceasing the father. If Beth does predecease the father, Marcy's future interest then vests.

FUTURES

agreements whereby one person agrees to sell a commodity at a certain time in the future for a certain price. The buyer agrees to pay that price, knowing that the person has nothing to deliver at the time, but with the understanding that when the time arrives for delivery the buyer is to pay him or her the difference between the market value of that commodity and the price agreed upon if the commodity's value declines; and if it advances, the seller is to pay to the buyer the difference between the agreed-upon price and the market price. Thus, if the price of the commodity rises, the buyer makes a profit, and if the price declines, the buyer suffers a loss.

G

GAG ORDER

a court-imposed order to restrict information or comment about a case. The ostensible purpose of such an order is to protect the interests of all parties and preserve the right to a fair trial by curbing publicity likely to prejudice a jury. A gag order cannot be directly imposed on members of the press because this constitutes an impermissible prior restraint and violates the First Amendment.

GAIN see recognition [NONRECOGNITION OF GAIN; RECOGNITION OF GAIN].

GAINFUL EMPLOYMENT [OR OCCUPATION]

employment suited to the ability of the one employed. For purposes of disability covered by insurance, it may mean the ordinary employment of the insured, or other employment approximating the same livelihood as the insured might be expected to follow in view of his or her circumstances and physical and mental capabilities.

GAIN OR LOSS REALIZED see realization [GAIN OR LOSS REALIZED].

GAINS OR LOSSES see capital [CAPITAL GAINS OR LOSSES].

GAMBLING

a play for value against an uncertain event in the hope of gaining something for value. Includes the payment of a price for a chance to gain a prize. Gambling is illegal in most jurisdictions, although many states permit state-run lotteries or casinos. See aleatory [ALEATORY CONTRACT].

GAME LAWS

laws whose general aim is to protect from unauthorized pursuit and killing certain birds and animals. These laws may include outright prohibitions, or may restrict the hunting seasons, classes of animals, or type of weapons used.

GAOL

the British and early-American spelling of "jail."

GARAGEMAN'S LIEN see lien [MECHANIC'S LIEN].

GARNISH

to bring a garnishment proceeding or to attach wages or other property pursuant to such a proceeding.

EXAMPLE: Charles owes money to a department store for several appliances that he purchased on credit. Once Charles stopped paying, the store brought a *garnishment* proceeding against him for the money owed. If the court agrees with the store, it will order that a part of Charles' wages go directly to the store and not to Charles.

GARNISHEE

a person who receives notice to retain, until he or she receives further notice from the court, custody of assets in his or her control that are owed to or belong to another person. The garnishee merely holds the assets until legal proceedings determine who is entitled to the property. The term thus signifies one on whom process of garnishment is served. In a statutory garnishment proceeding, the garnishee (often an employer) may be directed to pay over to the creditor a portion of the debtor's property (such as an employee's wages) that is in the garnishee's possession.

GARNISHMENT

process in which money or goods in the hands of a third person, which are due a defendant, are attached by the plaintiff. It is a statutory remedy that consists of notifying a third party to retain something he or she has that belongs to the defendant (debtor), to make disclosure to the court concerning it, and to dispose of it as the court shall direct.

G.A.T.T.

General Agreement on Tariffs and Trade. See tariff.

GAVELKIND

at common law, a form of feudal land ownership that required land to descend to all sons equally. By the end of the first quarter of the twentieth century all land ownership, or tenure, was reduced to a single form of common socage and peculiar customary tenures such as gavelkind were abolished.

By distributing land to all sons equally, gavelkind tenure differed from the English doctrine of primogeniture that allowed only the oldest son to inherit. In the United States, statutes of descent and distribution in each state govern intestate succession. These statutes generally provide that all children share equally. See primogeniture and descent and distribution.

GENERAL APPEARANCE see appearance [GENERAL APPEARANCE].

GENERAL CONTRACTOR see contractor [GENERAL CONTRACTOR].

GENERAL COURT-MARTIAL see court-martial; military law [COURT-MARTIAL].

GENERAL INTENT see intent [GENERAL INTENT].

GENERAL PARTNER see partnership.

GENERAL POWER OF APPOINTMENT see power of appointment [GENERAL POWER OF APPOINTMENT].

GENERAL WARRANT see search warrant [GENERAL WARRANTS].

GENERAL WARRANTY DEED see warranty deed [GENERAL WARRANTY DEED].

GENERATION SKIPPING TRANSFER

a generation skipping transfer is one more than a single generation removed from the transferor; e.g., a transfer by a grandfather to a grandchild. A GENERATION SKIPPING TRUST is created to make a generation skipping transfer. Certain generation skipping transfers made by a generation skipping trust or its equivalent are subject to a generation skipping transfer tax. If the transfer is not by a trust but directly by the donor, such transfer is subject to tax [UNIFIED ESTATE AND GIFT TAX], regardless of whether it skips a generation.

GENERIC

general, relating to a group or class of related things; something not specific, not referring to a particular thing. The term "generic" has reference to a class of related things while the term "specific" is limited to a particular, definite, or precise thing.

GENERIC DRUG LAW refers to modern statutes enacted by many states that permit or require pharmacists in certain circumstances to substitute a drug product with the same active ingredients and of the same generic type for the drug prescribed by the physician.

GERRYMANDER

to create a civil division of an unusual shape within a particular locale for improper purpose; to redistrict a state, creating unnatural boundaries and isolating members of a particular political party, in the hope that a maximum number of the elected representatives will be of that political party.

EXAMPLE: A political party finally wins control of a state legislature. At the same time, the legislative districts must be restructured to account for population shifts. The party in power uses the opportunity to insure future control of the legislature by *gerrymandering* the districts. The end result is to create unnatural boundaries that will give the party the least opposition for future elections. The object of gerrymandering is to create districts in which the controlling party maintains a majority among registered voters.

GIFT a voluntary transfer of property made without consideration, that is, for which no value is received in return, which is accepted by the recipient. In federal tax law, a gift is excluded from the gross income of the recipient, but the transferor may be subject to the unified estate and gift tax. See tax [UNIFIED ESTATE AND GIFT TAX].

SPLIT GIFT a transfer in which the person receiving the property makes a payment that is less than the value of the property transferred.

GIFT CAUSA MORTIS

a gift of personal property made in contemplation of impending death; delivery of the property must be made and death must occur as expected; otherwise, the gift is void.

GIFT IN CONTEMPLATION OF DEATH

any gift made by a person within three years of death. Such transfers (except if less than \$3,000) are subject to the unified estate and gift tax as if they had occurred at death.

GIFT OVER

an estate that is to follow upon the expiration of a preceding estate.

GIFT TAX

a tax that is imposed on transfers of property by gift during the transferor's lifetime. While the federal government imposes a gift tax most states do not. The federal gift tax is imposed at the same rates as the federal estate tax.

GINNIE MAE see mortgage market [GINNIE MAE].

G.N.P. see Gross National Product [G.N.P.].

GOING CONCERN VALUE

the additional element of value of a trade or business that attaches to property by reason of its existence as an integral part of a going concern. Going concern value includes the value that is attributable to the interruption notwithstanding a change in ownership. Going concern value also includes the value that is attributable to the use or availability of an acquired trade or business (for example, the net earnings that otherwise would not be received during any period were the acquired trade or business not available or operational. Good will is the value of a trade or business that is attributable to the expectancy of continued customer patronage, whether due to the name of a trade or business, the reputation of a trade or business, or any other factor. The pre-1993 Act law rule barring amortization for good will and going concern value has produced an enormous amount of litigation. The IRS has generally taken the position that any amount paid for intangibles in the acquisition of a business relates to nonamortizable good will or going concern value, while the taxpayer has attempted to show that amortizable intangibles such as customer lists have a value apart from good will or going concern value and a limited useful life. Currently the code eliminates this IRS-taxpayer conflict by providing that good will and going concern value are amortizable over the same 15-year period applicable to other intangibles. Self-created good will and going concern value generally are not subject to 15-year amortization.

GOOD CAUSE

substantial or legally sufficient reason for doing something. For example, if a statute provides for granting a new trial upon a showing of good cause, such good cause might include the existence of fraud, lack of notice to the parties or newly discovered evidence.

EXAMPLE: Motions submitted before a judge, which in essence ask the judge to do something, must be supported by a showing of *good cause*. On a motion to exclude or suppress evidence for trial, good cause must be shown by example of illegal police conduct in the seizing of the evidence. For the motion to be granted, the judge must be convinced the conduct occurred and is enough to justify exclusion.

GOOD FAITH

total absence of intention to seek unfair advantage or to defraud another party; an honest intention to fulfill one's obligations; observance of reasonable standards of fair dealing.

EXAMPLE: Don purchases securities for 60 percent of their face value from an associate. The associate had obtained the securities fraudulently, and the real owner then sued Don for their return. Don is protected from the owner's claims if he acted in *good faith* and is thus a bona fide purchaser. The owner states that Don could not have acted in good faith since he purchased them at such a low cost in comparison with their face value. But that fact alone does not preclude Don's good faith defense, since the low price can be justified by the associate's dire need for quick cash.

In property law, a good faith purchaser of land pays value for the land and has no knowledge or notice of any facts that would cause an ordinary, prudent person to make inquiry concerning the validity of the conveyance.

GOODS

any species of property that is not real estate, CHOSE IN ACTION(see chose), investment securities or the like.

GOOD SAMARITAN

one who renders voluntary aid without compensation to a person who is injured or in danger. There is no requirement to intervene; however, if one chooses to be a Good Samaritan, one may face liability if reasonable care is not exercised and the rescued party is further injured. Various state statutes may provide limited levels of immunity from lawsuits for the rescuer.

GOOD TENANTABLE REPAIR

as used in a lease, describes the obligation of a tenant to maintain the condition of property that has been rented.

GOOD TITLE

a clear title free from present litigation, obvious defects and grave doubts concerning its validity or merchantability;

a title valid in fact that is marketable to a reasonable purchaser or mortgaged as security for a loan of money to a person of reasonable prudence. In a contract to convey good title, the term also signifies that there are no encumbrances on the land. See also recording acts; warranty.

GOOD UNTIL CANCELLED see order [GOOD UNTIL CANCELLED].

GOOD WILL

an intangible but recognized business asset that is the result of such features of an ongoing enterprise as the production or sale of reputable brand-name products, a good relationship with customers and suppliers, and the standing of the business in its community. Good will can become a balance sheet asset when a going business is acquired at a price exceeding the net asset value (assets less liabilities).

GOVERNMENT

the exercise of authority in the administration of the affairs of a state, community, or society; an instrument to preserve an ordered society; the authoritative direction and restraint exercised over the actions of men and women.

In the United States, the federal and state governments operate under a written constitution from which their sovereignty and authority emanate.

GOVERNMENTAL FUNCTIONS

activity done or furnished for general public good; legal duties imposed by a state upon its citizens that it may not omit with impunity, but must perform at its peril.

When a jurisdiction engages in a governmental function, such as operating a police department, conducting safety inspections, suing to enforce public policy as manifested by city ordinances, or generally is not acting in a proprietary manner, it is immune from tort liability for its actions unless a lawsuit is specifically permitted by statute. See sovereign immunity.

GOVERNMENTAL IMMUNITY

the common law doctrine that the government, be it federal, state, or local, is not amenable to suit unless it consents to be sued. See federal tort claims act; sovereign immunity.

GOVERNMENT, MILITARY see military law [MILITARY GOVERNMENT].

GRACE PERIOD

in general, any period specified in a contract during which payment is permitted, without penalty, beyond the due date of the debt. In the insurance context, it is a span of time after an insurance policy premium was due to be paid, during which the insurance nevertheless remains in force.

GRADED OFFENSE

one where an offender is subject to different penalties for various degrees of the offense, according to terms of a statute. Modern criminal codes rely upon degrees of an offense to vary sanctions according to the level of harm to others caused or risked by the actor.

GRAFT

fraudulent obtaining of public money by the corruption of public officials; a dishonest advantage that one person by reason of his or her position, influence or trust acquires from another.

GRANDFATHER CLAUSE

a provision permitting persons engaged in an activity before passage of a law affecting that activity to receive a license or prerogative without the necessity of fulfilling all that is legally required of persons subsequently undertaking the same activity.

EXAMPLE: Felix has been selling hot dogs on the street for 15 years. The town council then decides to require licenses for all street vendors. Because the measure includes a *grandfather clause*, Felix can continue selling his food without a license.

GRAND JURY see jury [GRAND JURY].

GRAND LARCENY see larceny.

GRANT

to give, allow or transfer something to another, with or without compensation; especially, a gift of land made by one having authority over it. The one giving the gift or making the transfer is the grantor. The recipient is the grantee.

GRANTOR-GRANTEE INDEX see chain of title.

GRATIS

free; given or performed without reward or consideration.

GRATUITOUS BAILMENT see bailment.

GRATUITOUS PROMISE

one by which a person promises to do, or refrain from doing, something without requiring consideration in return.

GRATUITY see gift.

GRAVAMEN

the essence of a complaint, charge, cause of action, etc.

EXAMPLE: A complaint is filed against Bruce alleging that he seriously hurt someone in a barroom brawl and then fled the scene. The *gravamen* of the complaint is that Bruce seriously hurt someone.

GREAT CHARTER see Magna Carta [Magna Charta].

GREAT WRIT see habeas corpus.

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GREEN CARD

a common name for the alien registration card carried by permanent resident aliens in the United States. Permanent resident status is a first step towards becoming a naturalized citizen.

GRIEVANCE

one's allegation that something imposes an illegal burden, or denies some equitable or legal right, or causes injustice. An employee may be entitled by a collective bargaining agreement to seek relief through a GRIEVANCE PROCEDURE.

GROSS

conduct that is willful and flagrant, out of all measure, beyond allowance, not to be excused, as in gross negligence.

Consideration, profit, or income before charges and deduction as in gross income. Compare net income. See easement [EASEMENT IN GROSS].

GROSS ESTATE see net estate [GROSS ESTATE].

GROSS INCOME see income [GROSS INCOME].

GROSS NATIONAL PRODUCT [G.N.P.]

the total money measure of a nation's annual production of goods and services. G.N.P. is defined both in terms of factor consumption (goods and services purchased by private citizens and government, gross private investment, and the net foreign trade-investment balance), and in terms of factor earnings (wages, taxes, rents, interest and profits, and depreciation). G.N.P. is a gross production measure since no allowance is made for capital consumption; i.e., depreciation is part of G.N.P. Since economists consider G.N.P. to be one of the most important concepts in economic science, the United States and other national governments expend considerable effort in collecting, analyzing, and publishing G.N.P. statistics. Results are reported in both current dollars, including inflation, and constant dollars.

GROSS NEGLIGENCE see negligence [GROSS NEGLIGENCE].

GROUND RENT

an estate of inheritance in the rent of lands, i.e., an inheritable interest in and right to the rent collected through the leasing of certain lands. It is a freehold estate, and as such is subject to encumbrance by mortgage or judgment (lien, attachment, etc.). The ground rent is an interest distinct from that held by the owner of the property, whose estate is in the land itself. The term most frequently signifies the long-term rent paid on land upon which office buildings, hotels, and other structures are built, where the owner of the land retains title.

GROWTH STOCK

the stock of a company that has achieved above-average earnings growth in the past and has good prospects for continued increases in the future.

GTC see order [GTC].

GUARANTEE

1. to agree or promise to be responsible for the debt, default or miscarriage of another; 2. a promise or contract to answer for the debt, default or miscarriage of another; 3. one who receives a guaranty. Compare save harmless.

GUARANTEE CLAUSE

Article IV, Section 4 of the United States Constitution, which states that "the United States shall guarantee to every state in this Union a republican form of government."

GUARANTEED SECURITY

a bond or stock that is guaranteed as to principal or interest or both by someone other than the issuer.

GUARANTOR

one who makes a guaranty.

GUARANTY

1. a promise to be responsible for the debt, default or miscarriage of another; 2. a warranty or promise to undertake an original obligation; 3. something given as security for the performance of an act or the continued quality of a thing. See surety.

GUARDIAN

one who legally has care and management of the person or estate, or both, of an incompetent; an officer or agent of the court who is appointed to protect the interests of minors or incompetent persons and to provide for their welfare, education, and support. See also committee; next friend; ward.

GUARDIAN AD LITEM a person appointed by the court to protect the interests of a ward in a legal proceeding. Compare next friend.

GUEST

1. a transient who rents a room at a hotel; 2. someone to whom hospitality is extended without charge.

An **AUTOMOBILE GUEST** is one who rides in an automobile for his or her own benefit without giving the driver compensation for the ride; designated by the law as such for purposes of determining liability of the owner or driver of the automobile. See guest statute.

For purposes of tort law, a **SOCIAL GUEST** is considered a licensee with respect to his or her entry upon the host's premises, so that no duty of affirmative care or inspection of the premises for defects is owed to him or her.

EXAMPLE: After a late night of drinking, the host invited Steve to spend the night at his house. As Steve was getting into bed, the wooden frame cracked and injured Steve's foot. Steve has no cause of action against the host since Steve was only a guest and not a paying customer.

GUEST STATUTE

a law that provides that a lesser standard of care is owed by an automobile owner or driver toward his or her nonpay-

ing passenger [guest]. These statutes differ from state to state, but all require more than ordinary negligence on the part of an owner or driver for an automobile guest to recover damages in a civil suit.

GUILD see National Lawyers Guild.

GUILTY

the condition of having been found by a jury to have committed the crime charged, or some lesser-included offense. The term may, though rarely does, refer to the commission of a civil wrong or tort. Compare conviction.

GUN CONTROL LAW

a law restricting or regulating the sale, purchase or possession of firearms, or establishing a system of licensing, registration or identification of firearms or their owners or users.

H

HABEAS CORPUS

(*hā'-bē-ŭs kōr'-pŭs*) Lat.: you have the body.

The writ of habeas corpus, known as the GREAT WRIT, has varied use in criminal and civil contexts. It is a procedure for obtaining a judicial determination of the legality of an individual's custody. Technically, it is used in the criminal law context to bring the petitioner before the court to inquire into the legality of his confinement. The writ of federal habeas corpus is used to test the constitutionality of a state criminal conviction.

EXAMPLE: Sandy believes that his conviction in the trial court was obtained unconstitutionally in that he was not provided counsel until three days before his trial. He raised the issue on appeal in the state court system but was denied a new trial. Having exhausted all state remedies, Sandy files a writ of *habeas corpus* in the federal district court, alleging that his conviction and present confinement violate his Sixth Amendment right to counsel.

The writ is used in the civil context to challenge the validity of child custody and deportations.

HABENDUM

that clause of the deed that names the grantee and defines the estate to be granted. It begins with the words "to have and to hold. . . ."

HABITABILITY

the condition of residential or other premises being reasonably fit for occupation, and that does not impair the health, safety, or well-being of the occupants. If this condition is not met, due to a failure to provide heat, for example, the occupant may be eligible for a rent abatement or may under some circumstances vacate the premises. See eviction [CONSTRUCTIVE EVICTION]; warranty [WARRANTY OF HABITABILITY].

HABITUAL OFFENDER see criminal.

HAEC VERBA see in haec verba.

HALFWAY HOUSE

a residence established to assist persons who have left highly structured institutions to adjust to and reenter society and live within its accepted norms. Mental patients and prisoners may be released to facilities of this kind located within the community and

usually with no security other than supervised regimen of sign-in, sign-out, and curfew rules. Release to halfway houses is sometimes a first step in a parole program. Modern statutes permit courts to sentence defendants directly to such facilities, known as RESIDENTIAL COMMUNITY TREATMENT CENTERS as a condition of probation.

A work-release program may utilize a halfway house instead of a more secure institution for nighttime confinement and weekend supervision. The halfway house provides a supervised and restricted environment in which to ascertain the convict's ability to form a productive life in society while simultaneously fulfilling the functions of a penal institution in its concern for security and rehabilitation.

Although states are not required to utilize such modern correctional concepts as halfway houses, if they choose to do so, the procedures for assigning inmates to such facilities must meet standards of procedural due process and equal protection of the laws.

HALLUCINATION

a state of mind whereby a person senses something that in reality does not exist; a perception of an object having no reality. Any of the senses may be involved, although sight or hearing are most commonly affected. The state of hallucination most often results from mental illness or from ingesting drugs designed to create these perceptions. See controlled substance [HALLUCINOGENS].

HALLUCINOGENS see controlled substances [HALLUCINOGENS].

HANGED, DRAWN, AND QUARTERED

a common law punishment for convictions of high treason or other atrocious crimes where the defendant was drawn to the place of execution, disemboweled alive, and then beheaded and quartered. See cruel and unusual punishment.

HARASSMENT

1. a prosecution brought without reasonable expectation of obtaining a valid conviction; 2. unnecessarily oppressive exercise of authority; 3. conduct motivated by a malicious or discriminatory purpose.

SEXUAL HARASSMENT

refers to any policy or practice pursuant to which employees are subject to physical or verbal harassment by their superiors or are denied employment or promotion on the basis of their gender.

HARD CASES

cases that produce decisions deviating from the true principles of law in order to meet the exigencies presented by the extreme hardship of one party.

It is sometimes said that "hard cases make bad law" because logic is often shortcut in a hard case, and later attempts to justify

the new law thus created often compound the original inadequacy of reasoning.

HARDSHIP, UNNECESSARY see unnecessary hardship.

HARM see injury; irreparable injury [damage, harm].

HARMLESS ERROR

error that is not sufficiently prejudicial to the losing party in a lawsuit to warrant the appellate court's modifying the lower court's decision. A conclusion that an error is harmless reflects the reviewing court's determination that the lower court's decision would have been the same with or without the purported error. Compare plain error.

EXAMPLE: The confessions of two codefendants are improperly introduced at Ray's trial. An appellate court may find that the violation was merely *harmless error* and does not require a new trial for Ray if the confessions had little or no effect upon the jury's determination of Ray's guilt.

HATE CRIME see bias crime.

HEADNOTE

summary, placed at the beginning of a case report, of points discussed and issues decided in a case.

HEAD OF HOUSEHOLD

an unmarried taxpayer who maintains as his or her home a household that is the principal residence of a designated dependent. A qualified head of household is subject to a lower tax rate than that applied to a person not a head of household.

HEARING

a proceeding where evidence is taken to determine an issue of fact and to reach a decision on the basis of that evidence; describes whatever takes place before magistrates sitting without jury. Thus a hearing, such as an ADMINISTRATIVE HEARING, may take place outside the judicial process, before officials who have been granted judicial authority expressly for the purpose of conducting such hearings.

FINAL HEARING is sometimes used to describe that stage of proceedings relating to the determination of a suit upon its merits, as distinguished from those of preliminary questions. See also fair hearing.

HEARING DE NOVO see de novo [DE NOVO HEARING].

HEARSAY RULE

a rule that declares not admissible as evidence any statement other than that by a witness while testifying at the hearing and offered into evidence to prove the truth of the matter stated. The hearsay statement may be oral or written and includes nonverbal conduct intended as a substitute for words (such as a nodding of the head). If, for example, a witness' statement as to

what he or she heard another person say is elicited to prove the truth of what that other person said, it is hearsay. If, however, it is elicited to merely show that the words were spoken, it is not hearsay. The witness' answer will be admissible only to show that the other person spoke certain words and not to show the truth of what the other person said. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in weighing the truth of his or her statement; so when that statement is made out of court, without benefit of cross-examination and without the witness' demeanor being subject to assessment by the trier of fact (judge or jury), there is generally no adequate basis for determining whether the out-of-court statement is true.

EXAMPLE: Defendant Doug is on trial for robbing Victim Vinnie. Witness Walt wants to testify that Bartender Bob told Walt that Doug had admitted to Bob the commission of the robbery. Walt's testimony would be hearsay if it were offered to prove the truth of the matter (Doug confessed) since Doug did not tell Walt. (Note, however, that if Bob himself were to testify it would not be hearsay since he heard the confession and may be cross-examined about the circumstances). If Walt's testimony were offered for a purpose other than the truth of the confession (such as to establish that Bob was an extremely close friend of Doug and that Doug confided in Bob his closest secrets), some courts would allow the testimony.

Hearsay is prohibited due to the constitutional guarantee of confrontation (see confrontation clause); however, there are many exceptions to the hearsay rule of exclusion based on a combination of trustworthiness and necessity. Thus, official written statements, such as payroll records, where the declarant's statements are based on firsthand knowledge and where the officer is under an official duty to make the report (and hence has no motive to falsify) are admissible under the BUSINESS RECORDS EXCEPTION. Another common exception is made for DYING DECLARATIONS. Under this rule a statement made by a person with knowledge or hopeless expectation of his or her impending death is admissible through another who overheard that statement where the declarant is unavailable because he or she died. Originally it was strongly believed that a dying person would tell the truth; thus the witness' testimony as to what the dying declarant said became admissible both on the grounds of trustworthiness and necessity. Today, with more skepticism about the effect of religiosity of truth-telling, necessity remains as a major factor in determining admissibility. The question of the witness' credibility is subject to demeanor examination and cross-examination for bias, memory, etc. Some jurisdictions permit

any admission by a party to be offered by his or her adversary in a civil proceeding through any competent witness as another broad exception to the hearsay rule. See and compare admission by a party-opponent; declaration against interest.

HEART-BALM STATUTE

legislation that abolishes causes of action for alienation of affections, breach of promise to marry, criminal conversation, or seduction.

HEDGE FUND

an investment partnership or mutual fund that uses selling short to hedge long positions in stocks. If stock selection is correct, the stocks sold short decline more in a falling market than the stock owned, and the stocks owned appreciate more in a rising market than the stocks sold short. The goal is to generate trading and investment profits no matter what the direction of the general market. Hedge funds may borrow money to increase their leverage.

HEDGING

a concept that involves offsetting a risk position. In the commodities trade, it might involve a processor position or a speculative position. For example, a potato chip manufacturer can hedge or protect his or her profit margin on a large order of chips to be delivered in the future by buying potatoes in the futures market; a potato farmer may sell the futures contract to the process to protect some or all of the investment in raising his or her crop. A speculator in potato contracts might hedge a long position in old crop futures by selling new crop futures in anticipation of a bumper crop and, therefore, lower prices. Arbitrage is a type of hedge involving the buying of securities in one market and selling in another market when the price difference between markets offers a profitable trade. Hedged trades are used in the stock option market where the various positions are referred to as spreads, straddles, etc. In securities trading and investment, selling short is used to hedge stock ownership positions against a decline in the general market. See hedge fund.

HEIR APPARENT

one who has the rights to inheritance provided that he or she lives longer than the donor ancestor. An antilapse statute may operate to save a gift to the estate of an heir apparent who predeceases the testator.

HEIRS

strictly, those whom statutory law would appoint to inherit an estate should the ancestor die without a will [intestate]; sometimes referred to as HEIRS AT LAW, RIGHTFUL HEIRS, LEGAL HEIRS. The term is often applied indiscriminately to those who inherit by will or deed, as well as by operation of law.

AND HIS HEIRS in common law, these words had to be included in order to convey a fee simple absolute. The formal requirement has

been abolished or modified by statute in most of the states, and now one may convey or devise an absolute interest in real property without using these technical words.

HEIRS OF THE BODY

issue of the body, offspring engendered by the person named as parent. These words are used in instruments of conveyance, such as deeds and wills, to create a conditional fee or a fee tail.

HEREDITAMENTS

anything that can be inherited, including real property or personal property. CORPOREAL HEREDITAMENTS generally are tangible property. INCORPOREAL HEREDITAMENTS are less tangible rights connected to land, such as an easement or right to rent.

HEREDITARY SUCCESSION

the passing of title according to the laws of descent, acquisition of title to an estate by a person by operation of law upon the death of an ancestor who has not left a valid will affecting the property inherited. See descent and distribution.

HIDDEN ASSET

a property value that is understated on the balance sheet of a company because of accounting convention and/or deliberate action of management.

EXAMPLE: Glory Corporation is fearful of being taken over by a large international company and thereby losing its independence. To prevent the takeover, it undervalues the worth of its real estate holdings to make Glory look as though the corporation were not worth buying. The real estate holdings constitute *hidden assets*.

HIDDEN DEFECT

defect not recognizable upon a reasonable inspection of a good or product, or that is not readily apparent, for which a seller is generally liable and that would give rise to a right to revoke a prior acceptance. See latent defect. Compare patent defect. See also as is.

HIDDEN INFLATION

a price increase implemented by offering a smaller quantity or poorer quality for the old price.

HIDDEN TAX

an indirect tax paid unwittingly by the consumer, such as taxes levied on goods at some point in their production or transport prior to retail sale.

HIJACKING

the commandeering or seizure of a mode of transportation such as an airplane, truck, or train by force or threat of force for illegal purposes. Such purposes may include theft of the cargo or other contents; redirection of the destination to suit the hijacker's specific purposes; or kidnapping or hostage taking for monetary or political demands. Also known as piracy, such acts are

governed by international agreements regarding jurisdiction over hijackers and extradition.

CARJACKING similar in that a motor vehicle such as a car or van is taken from the occupant by force. The driver or other passengers may be forced to remain in the vehicle while it is driven or may be forced out of the vehicle. Carjacking is distinguished from car theft by the presence of occupants.

HIT-AND-RUN STATUTES

statutes requiring that a motorist involved in an accident stop and identify himself or herself and give certain information about himself or herself to the other motorist and to the police. These laws have been upheld as not violative of the privilege against self-incrimination on the ground that they call for neutral acts, not intended to be probative of guilt, and pose only an insignificant hazard of self-incrimination.

HLA DQ ALPHA see DNA testing [HLA DQ ALPHA].

HOARDING

excess accumulation of commodities or currency in anticipation of scarcity and/or higher prices.

HOBBY LOSS

a loss incurred by a taxpayer in an activity not pursued for profit. In general, hobby losses are deductible only to the extent of income generated by the hobby.

HOLDER

a person in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to the holder or to his or her order or to bearer or in blank.

HOLDER IN DUE COURSE

a good faith holder who has taken a negotiable instrument for value, without notice that it was overdue or had been dishonored or that there was any defense against or claim to it. In property law, the innocent buyer or holder in due course is referred to as a bona fide purchaser.

EXAMPLE: People's Finance Company regularly buys promissory notes from stores that require the customers to sign these notes in return for merchandise. People's is a *holder in due course* of these notes since it has given value for them. That status protects People's from almost all claims against the notes.

HOLD HARMLESS

the assumption by one party to an agreement to relieve the other party of any liability that might attend the situation governed by the agreement. See save harmless.

HOLDING

1. in commercial and property law, property to which one has legal title and of which one is in possession. The term may be used to refer specifically to ownership of stocks or shares of

corporations. 2. in procedure, any ruling of the court, including rulings upon the admissibility of evidence or other questions presented during trial. See dictum.

HOLDING CELL see jail [HOLDING CELL].

HOLDING COMPANY

1. a corporation organized to hold the stock of other corporations; 2. any company, incorporated or unincorporated, that is in a position to control or materially influence the management of one or more other companies by virtue, in part at least, of its ownership of securities in the other company or companies.

HOLDING PERIOD

the period during which property must be held before its disposition will give rise to long-term capital gain or loss.

HOLDOVER TENANCY see tenancy [TENANCY AT SUFFERANCE].

HOLDUP SUIT

a lawsuit that has no legal basis and is instituted solely to prevent or block something from occurring. A party harmed by such a suit may have an action for malicious prosecution. See also strike suit.

HOLOGRAPHIC WILL

a will entirely written, dated, and signed by the testator's own hand. The word is sometimes written OLOGRAPHIC. In some states, such a will need not be witnessed and is valid, under a statute of descent and distribution, to pass property. In other states, such a will is invalid.

HOMAGE

during the feudal period, the ceremony wherein the vassal knelt before the lord, acknowledged himself to be his man, and swore fealty [an oath of loyalty to the lord]. It was frequently accompanied by a grant of land from the lord to the vassal, the land to be held of the lord by the vassal as tenant. As a consequence, any attempt by the vassal [or tenant] to convey more than the estate that had been granted him (e.g., an attempt by the vassal to convey a fee simple when his grant from the lord consisted only of a life estate), was not only tortious conduct with regard to the lord, but was also treasonous. See fealty.

HOME PORT DOCTRINE

in maritime law, refers to the rule that a vessel that is an instrumentality of foreign commerce and engaged therein is subject to property tax only at its "home port" regardless of where it happens to be actually located on tax assessment day. Refers either to the place of a vessel's place of registration or the domicile of the owners. Vessels engaged in interstate commerce may be taxed by jurisdictions other than its home port, but only on an apportioned basis.

The doctrine does not bar the placing of liens on vessels in ports other than the vessel's home port for supplies or repairs to the vessel.

HOME RULE

a means of apportioning power between state and local governments by granting power to the electorate of a local government unit to frame and adopt a charter of government. The effect of this grant is to enable local government to legislate without first obtaining permission from state legislatures.

EXAMPLE: Since the city was first chartered, it has been run by a mayor with virtually no check on his exercise of power. Exercising their rights under *home rule*, the residents vote to install a city council, which must approve any actions taken by the mayor.

See also preemption.

HOMESTEAD

any house, outbuildings, and surrounding land owned and used as a dwelling by the head of the family. Under modern HOMESTEAD EXEMPTION LAWS, enacted in most states, any property designated as a homestead is exempt from execution and sale by creditors. This homestead exemption applies in some states to property taxes as well.

The exemption from claims of creditors may be extended by a probate court upon the death of the head of the family to ensure the surviving spouse and minor children uninterrupted possession and enjoyment of the family home. A home so protected is referred to as a PROBATE HOMESTEAD. See life estate.

HOMICIDE

any killing of a human being by the act, agency, procurement or culpable omission of another. An unlawful homicide, or one resulting from an unlawful act, may constitute murder or manslaughter.

JUSTIFIABLE HOMICIDE the killing of a human being by commandment of the law, in the execution of public justice, in self-defense, in defense of habitation, property or person.

HONORABLE DISCHARGE

a formal final judgment passed by the government upon the entire military record of the soldier. It is an authoritative declaration that he or she has left the service in a status of honor. A person's classification after retirement from the armed services directly affects his or her ability to take advantage of benefits provided to members of the services.

HONORARY

generally refers to a position held without profit, fee, or reward, and in consideration of the honor conferred by holding a position of responsibility and trust. A position recognizing honor or commitment. An HONORARY DEGREE is one conferred without for-

mal qualification in recognition by an educational institution of an individual's nonacademic accomplishments.

HORNBOOK

a book intended to aid one with the fundamentals of the subject being studied; a primer for the student studying in an area of knowledge.

HORNBOOK LAW

those principles of law known generally to all in the legal profession and free from doubt and ambiguity. They are therefore such as would probably be enunciated in a hornbook (a primer of fundamentals).

HORS

(ôr) Fr.: outside of, besides, other than. [Sometimes DEHORS (*dě-ôr'*).]

HOSTILE POSSESSION

actual occupation or possession of real estate, coupled with a claim, express or implied, of ownership, without permission of the holder of paramount title. Hostile possession differs from holding in subordination to the true owner, as in possession under a lease. Hostile does not imply ill will but merely that the occupant claims ownership against all others, including the owner of record. The term is usually used as a condition for adverse possession. See also notorious possession.

EXAMPLE: For 20 years, Ken has lived in a cabin he built in a wooded section of the state. He has cleared an area adjacent to the house where he grows whatever he uses to live, plus some extras to share with neighbors. Ken is not the owner of the land he lives on, but, because no one has come by in 20 years to assert ownership of the land or even to ask him to get off, he claims it as his and is therefore in hostile possession of it.

HOSTILE WITNESS see witness [ADVERSE (or HOSTILE) WITNESS].

HOT PURSUIT see fresh pursuit.

HOUSE

all-inclusive and may include any and every kind of structure, depending upon the context in which it is used and the purpose sought to be effected. Whether a structure is defined as a "house" or "home" may have constitutional implications. For Fourth Amendment purposes, "houses" include curtilage. See domicile; dwelling house; residence. See also halfway house; prostitution [HOUSE OF PROSTITUTION].

HUNG JURY

one whose members [jurors] cannot reconcile their differences of opinion and that therefore cannot reach a verdict by the degree of agreement required (generally unanimity, but sometimes a substantial majority).

HUSBAND-WIFE PRIVILEGE see marital communications privilege [husband-wife privilege]; compare spousal disqualification.

HYPNOSIS

a state of heightened concentration with diminished awareness of peripheral events, increasing the suggestibility of the subject while hypnotized. In those jurisdictions permitting the use of hypnotically refreshed testimony, the results of hypnosis, as with the results of any scientific test, are admissible only when they have sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of the truth.

HYPOTHECATE

to pledge something as security without turning over possession of it. Hypothecation creates a right in the creditor to have the pledge sold to satisfy the claim out of the sale proceeds.

EXAMPLE: Nathan needs a large amount of cash to put together a business deal. To acquire money from the bank, he *hypothecates* (pledges) his diamond ring as security. The bank allows Nathan to retain the ring because he is a good customer and they are not afraid he will disappear with the money and the ring. The loan agreement between Nathan and the bank is a hypothecation contract.

A mortgage on real property is a form of hypothecation contract. Intangibles and securities are most often the subject of hypothecation contracts. In the case of buying stock on margin the owner signs a hypothecation agreement with the broker who handles the transaction; the broker is then free to pledge the customer's securities as collateral for a bank loan or to lend the customer's securities in connection with selling short. Compare replevin.

HYPOTHETICAL QUESTION

a question that assumes facts that the evidence tends to show and calls for an opinion based on the hypothesis. In trials, hypothetical questions can only be posed to an expert witness who is qualified to give an opinion on the matter in issue.

I

IBID.

(īb'-īd) Lat.: in the same place or manner, at the same time; abbreviation of ibidem. Used to mean "in the same book" or "on the same page"; functions in citations to avoid repetition of source data in the reference immediately preceding.

ICC see Interstate Commerce Commission.

ID.

(īd) Lat.: the same; abbreviation of idem. Used in citations to avoid repetition of author's name and title when a reference immediately follows another to the same item.

I.D.B. [INDUSTRIAL DEVELOPMENT BOND] see guaranteed security.

IGNORANCE

lack of knowledge. Ignorance of the law does not justify an act, since every person is presumed to know the law. However, mistake of fact may provide a legal excuse. See *ignorantia legis non excusat*.

IGNORANTIA LEGIS NON EXCUSAT

(īg-nō-rän'-shē-á lā'-gĭs nõn ěks-kū'-zät) Lat.: ignorance of the law is no excuse. The fact that a defendant did not think his or her act was against the law does not prevent the law from punishing him or her for the prohibited act.

ILLEGAL

against the law. Behavior that can result in either criminal sanctions, such as prison sentences or fines, or civil sanctions, such as liability or injunctions, is illegal.

ILLEGALLY OBTAINED EVIDENCE

evidence obtained by the police through circumstances in which the police or a police agent violated a person's right against unreasonable search and seizure as guaranteed by the Fourth Amendment or analogous state constitutional provisions. See exclusionary rule; fruit of the poisonous tree; search and seizure.

ILLEGITIMATE

illegal or improper. Applied to children, it means born out of wedlock, bastards.

ILLUSORY PROMISE

a promise too indefinite to be enforced or, because of provisions in the promise itself, one whose fulfillment is

optional. Since such a promise is not legally binding, it is not sufficient as consideration for a reciprocal promise and thus cannot create a valid contract.

EXAMPLE: Walter promises his neighbor that, if he remembers, he will water the neighbor's plants twice a week while the neighbor is on vacation. When the neighbor returns, all the plants, including three prize ferns, are dead from lack of water. The neighbor cannot sue Walter for the value of the ferns because, legally, Walter gave the neighbor only an *illusory promise* that is not enforceable nor is its failure actionable in court.

IMMATERIAL

not material; irrelevant, nothing to do with the case; not significant.

EXAMPLE: At Doug's trial for robbery, the prosecution wants to introduce evidence that Doug and his wife argue frequently. That evidence is considered *immaterial* and is not allowed at the trial.

IMMEDIATE CAUSE see cause.

IMMIGRATION

the movement of persons into a foreign country for the purpose of permanently residing in that country.

IMMORAL CONDUCT

behavior opposed to accepted community standards of what is right.

IMMUNITIES, PRIVILEGES AND see privileges and immunities.

IMMUNITY

right of exemption from a duty or penalty; benefit granted in exception to the general rule. Immunity from prosecution may be granted a witness to compel answers he or she might otherwise withhold because of the constitutional privilege to avoid self-incrimination.

EXAMPLE: Ben asserts his privilege against self-incrimination when the grand jury asks probing questions about his activities. If the grand jury gives Ben *immunity* from criminal prosecution for anything to which he testifies before the grand jury, Ben can no longer use the privilege. The privilege is only available when Ben is subject to prosecution for what he says, a fear that the immunity eliminates.

OFFICIAL IMMUNITY the immunity of a public official from liability to anyone injured by actions in the exercise of official authority or duty.

See sovereign immunity.

IMPACT RULE

the requirement of physical contact with an individual person in order for damages for emotional distress to be imposed.

IMPAIR THE OBLIGATION OF A CONTRACT see obligation of a contract.

IMPANEL see panel [IMPANEL].

IMPANELING

1. selection and swearing in of jurors; 2. listing of those selected for a particular jury.

IMPEACH

1. to charge a public official with wrongdoing while in office; 2. to question the truthfulness of the testimony of the witness by means of evidence that the witness is unworthy of belief.

IMPERTINENT MATTER

an inappropriate matter; facts that are irrelevant to the controversy. Under the Federal Rules of Civil Procedure, impertinent matter consists of any allegation that is not responsive nor relevant to issues involved in the action and that could not be put in issue or be given in evidence between the parties.

IMPLEADER

the procedure by which a third party is brought into a suit between a plaintiff and defendant, where that third party may be liable, so as to settle all claims in a single action. It is a procedural device available to any defendant where a third party is or may be liable to him or her for any damages that the defendant owes the plaintiff. The defendant is considered a "third-party plaintiff," vis-à-vis the third party thus joined. The device is also available to a plaintiff against whom a counterclaim has been made. Compare interpleader; joinder. See also cross-claim.

IMPLICATION

intention, meaning; though not expressly stated, a deduced state of mind or facts.

NECESSARY IMPLICATION a conclusion resulting from so strong a probability of intention that an opposite intention is incredible.

IMPLIED

not explicitly written or stated; determined by deduction from known facts.

IMPLIED CONSENT

consent that is found to exist solely because certain actions or signs would lead a reasonable person to believe that consent is present, whether or not that consent is even specifically expressed; in criminal law, generally used as a defense against rape, whereby the defendant claims that he acted under a reasonable and honest belief based on the fact that the woman consented to his advance.

IMPLIED CONTRACT see contract [QUASI [IMPLIED] CONTRACT].

IMPLIED EASEMENT see easement [IMPLIED EASEMENT].

IMPLIED NOTICE see notice [IMPLIED NOTICE].

IMPLIED POWERS

those powers not expressly stated but deemed necessary to carry out the stated objectives. Decisions by the United States Supreme Court may imply powers in the Constitution that are not specifically enumerated. See Fourteenth Amendment; inherent powers; necessary and proper clause. Compare enumerated powers.

IMPLIED WARRANTY see warranty [IMPLIED WARRANTIES].

IMPORT

the transportation of goods into one country and out of another; also, the article imported. The term under the customs laws requires that the goods be brought voluntarily into this country, into the proper port of entry, and with an intent to unload them. If customs official determine that an article has been imported into the United States, it is assessed a duty under customs laws unless clear evidence is proved to the contrary. To be imported within the scope of the tariff laws, the goods must be from a country subject to our tariff laws and the goods must pass through the custody and control of the customs officials and into the custody and control of the importer. See export.

IMPORTATION the act of transporting goods into a country from a foreign country. As used in tariff statutes the term means merchandise to which the status of an import has attached. Compare exportation.

IMPOSSIBILITY

1. a defense of nonperformance of a contract when performance is impossible because of destruction of the subject matter of the contract (as, for example, by fire) or death of a person necessary for performance. Performance is then excused and the contract duty terminated. See also frustration of purpose.

EXAMPLE: Grace contracts to purchase a boat at a nearby marina. Before the boat is ready for use, a storm destroys the marina and all the boats with it. Grace has an *impossibility* defense against performing the contract because the boat no longer exists.

2. in civil law, an excuse for nonperformance of a contract where the promised performance has become illegal. 3. in criminal law, applies to situations in which facts or circumstances render commission of the crime impossible. Thus, it is impossible to murder another if he is already dead.

EXAMPLE: A mugger brings his victim into an alley, robs him and in a fit of rage shoots him dead. Several hours later, a major drug deal is transacted in the same alley. One of the dealers sees the person lying there, believes the person is just drunk and shoots him because he wants no witnesses to the deal. The dealer has an *impossibility* defense to a murder charge because it is impossible to kill a

person who is already dead. The dealer may, however, be subjected to prosecution for attempted murder.

IMPOST

1. a tax; 2. a charge or levy in the nature of a tax.

IMPOUND

to place merchandise, funds or records in the custody of an officer of the law.

IMPOUNDING [IMPOUNDMENT]

in common law, the second step in a distress action, in which the distrainer, having seized the chattels, must bring the goods to a public pound pending the outcome of the action.

IMPRESSION, CASE [MATTER] OF FIRST see first impression, case of.

IMPRIMATUR

the license granted by the government permitting the publication of a particular book.

IMPRISONMENT

the confinement of an individual to a particular place usually as punishment for a crime; any deprivation of liberty or detention of a person contrary to his or her will. The status of imprisonment may affect certain constitutional rights, for example, a right of bail guaranteed to imprisoned persons may not include juveniles held pending delinquency proceedings. Synonymous with incarceration. See false imprisonment.

IMPROVEMENT

any permanent, fixed development of land or buildings through expenditure of money or labor that more than merely replaces, repairs or restores to original condition, and supposedly increases the value of the property.

IMPUTE

to assign legal responsibility for the act of another, because of the relationship between those made liable and the actor, rather than because of participation in or knowledge of the act. See vicarious liability.

IMPUTED LIABILITY see vicarious liability.

IN ABSENTIA

(*īn ab-sĕn'-shĕ-ā*) Lat.: in absence.

EXAMPLE: A defendant who leaves the courtroom without permission after a trial begins may be tried *in absentia*. Such proceedings otherwise require the actual presence of the defendant at all critical stages.

INALIENABLE RIGHTS

fundamental rights, including the right to practice religion, freedom of speech, due process and equal protection of the laws, that cannot be transferred to another nor surrendered except by the person possessing them. See Bill of Rights.

IN ARTICULO MORTIS

(*in är-tik'-ū-lō mōr'-tis*) Lat.: in the moment of death.

IN BANC see en banc.

IN CAMERA

(*iň kǎ'-mě-rá*) Lat.: in chambers. A term designating a judicial act while court is not in session in the matter acted upon. Confidential or otherwise sensitive documents are often examined in camera to determine whether information should be revealed to the jury and so become public record.

INCAPACITY

lack of legal, physical or intellectual power. See incompetency; minority. Compare insanity.

IN CAPITE

(*in kǎ'pēt*) Lat.: in chief; with reference to feudal tenures, as estate in land held by direct grant of the king.

INCARCERATION

confinement in prison.

INCENDIARY

1. arsonist; one who maliciously sets property on fire; 2. an object capable of starting and sustaining a fire, an incendiary device. See arson.

INCEST

a criminal offense of sexual intercourse between members of a family, or those between whom marriage would be illegal because of blood relationship.

IN CHAMBERS see in camera.

IN CHIEF

principal, primary. At trial, the initial presentation of a party's evidence constitutes that party's case in chief, to which rebuttal is allowed.

INCHOATE

not yet completed. In inchoate offenses, something remains to be done before the crime can be accomplished as contemplated. See attempt; conspiracy; solicitation.

INCHOATE DOWER

the interest that a wife has in her husband's lands before his death, and contingent upon his predeceasing her. The right of dower is considered inchoate until the husband's death, at which time the widow has a vested right to a life estate.

INCIDENTAL BENEFICIARY see beneficiary [INCIDENTAL BENEFICIARY].

INCIDENTAL DAMAGES see damages [INCIDENTAL DAMAGES].

INCIDENT OF OWNERSHIP

an aspect of the legal title to property; for federal estate tax purposes, if a decedent possessed any "incidents of ownership" over life insurance at the time of his or

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her death, the value of these insurance policies would be includable in the decedent's gross estate.

INCLOSURE

any land enclosed by something other than an imaginary boundary line, i.e., some wall, hedge, fence, ditch, or other actual obstruction. The word "town" derives from the Anglo-Saxon word "tun," meaning "inclosure." Compare close.

INCOME

an economic benefit; money or value received.

ADJUSTED GROSS INCOME the gross income of the taxpayer reduced by specified deductions, generally business deductions.

CASH EQUIVALENT DOCTRINE the doctrine that property received by a taxpayer is includable in income if it can be converted into cash. The amount of income is the amount of such cash.

CONSTRUCTIVE RECEIPT OF INCOME a doctrine under which a taxpayer is required to include in gross income amounts that, though not actually received, are deemed received during the tax year. Thus there is constructive receipt when income is made available to a taxpayer without substantial restriction or condition on the taxpayer's right to exercise control over the income. Under this theory, interest credited on a savings account must be included in income even though the taxpayer does not withdraw it, since he or she had the right to withdraw it. The doctrine is to be distinguished from the cash equivalent doctrine.

GROSS INCOME the total of the taxpayer's income from any source, except items specifically excluded by the Internal Revenue Code and other items not subject to tax, such as capital income and **FRINGE BENEFITS** (see benefit).

IMPUTED INCOME economic benefit a taxpayer obtains through performance of his or her own services or through the use of his or her own property. In general, imputed income is not subject to **INCOME TAXES** (see tax). For example, if a taxpayer is a plumber and repairs his or her own toilet, such repair service is not subject to tax.

INCOME IN RESPECT OF A DECEDENT income earned by a taxpayer before his or her death but received by, and taxed to, the taxpayer's heirs or personal representatives.

ORDINARY INCOME income that is fully subject to ordinary income tax rates, as distinguished from income that is subject to the benefit of special deductions for capital gains and losses.

TAXABLE INCOME gross income reduced by deductions allowable in obtaining adjusted gross income and further reduced by deductions allowable in calculating itemized deductions.

INCOME AVERAGING

a method of calculating tax liability to minimize adverse consequences to a taxpayer with substantial fluctuations in income from year to year; permits a taxpayer to compute his or her tax as if the higher amount of income had been earned equally over that year and the previous four years.

INCOME SPLITTING

a device that allows married taxpayers to calculate their joint taxes as if one half of their joint taxable income were earned by each spouse. See return, income tax [JOINT RETURN].

INCOME STATEMENT

a financial statement that gives operating results, such as net income and loss, depreciation, for a specific period; also referred to as earnings report, operating statement and profit-and-loss statement. See also balance sheet.

INCOME TAX see tax; return, income tax.

INCOMPETENCY

inability, disqualification, incapacity. 1. lack of legal qualifications or fitness to discharge a required duty; 2. lack of physical, intellectual or moral fitness.

EXAMPLE: Herman is arrested for assault. Prior to his trial, a judge determines that he is *incompetent*, that he cannot aid in his defense nor can he endure the rigors of a criminal trial without suffering a mental breakdown. Herman may at some point be declared competent to stand trial, but at the present time his trial for assault is postponed.

When a person is adjudicated incompetent, a guardian is appointed to manage the incompetent's affairs, unless the incompetent recovers competency to the satisfaction of the court. An adjudicated incompetent lacks capacity to contract and his contracts are void. Compare competent.

INCOMPETENT EVIDENCE

evidence that is not admissible.

Compare competent.

INCONSISTENT

contradictory to one another. In pleading, inconsistent facts or legal theories may be pled in the alternative. See alternative pleading.

INCONSISTENT STATEMENT see prior inconsistent statement.

INCONTESTABILITY CLAUSE see noncontestability [incontestability] clause.

INCONVENIENT FORUM see forum non conveniens.

INCORPORATE

to organize and be granted status as a corporation by following prescribed legal procedures.

INCORPORATION, SELECTIVE see selective incorporation.

INCORPOREAL see corporeal.

INCORPOREAL HEREDITAMENT see hereditament.

INCORRIGIBLE

uncorrectable; one whose behavior cannot be made to conform to standards dictated by law. See criminal [HABITUAL OFFENDER]; recidivist.

INCREMENT

an amount of increase in number or value.

INCRIMINATE

1. to hold another, or oneself, responsible for criminal misconduct; 2 to involve someone, or oneself, in an accusation of a crime.

INCROACH

to use unlawfully or otherwise impair possession or title to another's property. See encroach; trespass.

INCULPATORY

tending to incriminate or bring about a criminal conviction. Compare exculpatory.

INCUMBENT

person in present possession of an office or position. See de facto [DE FACTO INCUMBENT].

INCUMBRANCE see encumbrance.

INDEBITATUS ASSUMPSIT

(in-dē-bī-tā-tūs ās-sūmp'-sīt) Lat.: to be indebted, to have undertaken a debt. At common law, a form of action founded in contract in which the plaintiff alleges that the defendant has undertaken a debt and has failed to satisfy it.

INDEBTEDNESS, INVOLUNTARY see bankruptcy [INVOLUNTARY PROCEEDING].

INDECENT

vulgar, offensive, obscene.

INDECENT EXPOSURE see lewdness [INDECENT EXPOSURE].

INDEFEASIBLE

incapable of being defeated or altered. An indefeasible estate is absolute and cannot be changed by any condition.

EXAMPLE: A sister conveys an *indefeasible* estate to her brother. The brother has perfect title to the land and can do with it as he pleases, since there is no circumstance that can operate to deprive him of title.

INDEFINITE FAILURE OF ISSUE see failure of issue.

IN DELICTO

(*in dĕ-lĭk'-tō*) Lat.: at fault.

INDEMNIFY

1. to insure; to secure against loss or damage that may occur in the future; 2. to compensate for loss or damage already suffered; 3. to save harmless. See damages; insurance.

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INDEMNITY

1. the obligation to make good any loss or damage another person has incurred or may incur; 2. the right that the person suffering loss or damage is entitled to claim.

EXAMPLE: John buys a piece of land from Pat. Unbeknown to John, the land was encumbered by a lien for several years of back taxes that Pat had not paid. John pays the taxes but has a right of *indemnity* against Pat for the tax liability.

Compare contribution.

INDENTURE

1. a deed between two parties conveying real estate by which both parties assume obligations. Indenture implies a sealed instrument. 2. a lengthy written agreement that sets forth terms under which bonds or debentures may be issued.

INDEPENDENT CONTRACTOR see contractor.

INDETERMINATE SENTENCE see sentence.

INDEX FUND

a portfolio of stocks selected to match a stock market index number, usually the Standard & Poor's Industrial Index or the Standard & Poor's Composite Index. The guiding principle is creation of a proxy for the selected index since the index itself contains an unmanageably large number of stocks.

INDIAN CLAIMS COMMISSION see Indian law [INDIAN CLAIMS COMMISSION].

INDIAN LAW

area of law relating to Native Americans. "Native American" is the preferred term for indigenous Americans; however, many statutes and treaties use the term "Indian" and it is for that reason only that the reference is included herein. Title 25 of the United States Code contains the federal laws regulating Native American affairs. The BUREAU OF INDIAN AFFAIRS (BIA) is a bureau of the Interior Department. The BIA and the ADMINISTRATION FOR NATIVE AMERICANS are federal agencies concerned with the interaction between the federal government and Native Americans. The INDIAN CLAIMS COMMISSION determines claims brought by tribes against the government.

INDIAN RESERVATION lands set aside for the use and occupancy of tribes of Native Americans. The federal government retains title to and exercises supervision and administration over the lands.

INDIAN TITLE also known as ABORIGINAL TITLE, inherent right of Native American tribes to occupy certain territory by virtue of their original occupancy of such territory and to the exclusion of other Native American tribes. This title cannot be conveyed as it consists of possession and not ownership.

INDIAN RESERVATION see Indian law [INDIAN RESERVATION].

INDIAN TITLE see Indian law [INDIAN TITLE].

INDICIA

(ĭn-dĭ'-shē-ă) Lat.: indications; signs or circumstances that tend to support a belief in a proposition as being probable, but that do not prove to a certainty the truth of the proposition. It is often said to be synonymous with circumstantial evidence. Where one exercises dominion and control over personal property as if it were his or her own, such behavior is an indicium of ownership. A carbon copy of a bill of sale has also been held to be an indicia of title.

"Indicia" is important in many contexts. Thus, where the owner of property is responsible for giving another indicia of ownership, that other person may effectively transfer the owner's interest to a bona fide purchaser. Indicia of reliability are necessary to use information supplied by an informer as a basis to support a search warrant.

INDICIUM

(ĭn-dĭ'-shē-ŭm) Lat.: singular of indicia.

INDICTABLE OFFENSES

crimes that can be prosecuted by the GRAND JURY (see jury) indicting the accused. In common law, these crimes were known as felonies and were defined by the punishment for them either death, forfeiture of all one's property or mutilation. The crimes included murder, treason, robbery, assault, rape, arson, burglary and larceny. These crimes could also be prosecuted by individuals bringing lawsuits against the defendants. Today felonies, as defined by modern statutes, are still prosecuted by indictment. Compare misdemeanor. See crime; prosecution; suit.

INDICTMENT

a formal written accusation, drawn up and submitted under oath to a GRAND JURY (see jury) by the public prosecuting attorney, charging one or more persons with a crime. The grand jury must determine whether the accusation, if proved, would be sufficient for conviction of the accused, in which case the indictment is indorsed by the foreman as a TRUE BILL. Once an indictment is filed, the matter passes to the Court. Indictments also serve to inform an accused of the offense with which he is charged and must be clear enough to enable him to prepare his defense adequately. Compare charge; complaint; information; presentment.

INDIGENT

1. generally, a person who is poor, financially destitute; 2. in a legal context, a person found by a court to be unable to hire a lawyer or otherwise meet the expense of defending a criminal matter, at which point defense counsel is appointed by the court.

INDIGNITY

affront to the personality of another; lack of reverence for the personality of one's spouse. Indignity is a ground for divorce

in some states; may consist of vulgarity, unmerited reproach, malignant ridicule and any other plain expression of settled hate or estrangement. See mental cruelty.

INDIRECT ATTACK see collateral attack.

INDIRECT EVIDENCE

evidence that supports a factual theory but that does not make it explicit; circumstantial evidence.

INDISPENSABLE EVIDENCE

evidence necessary to prove a submitted fact.

INDISPENSABLE PARTY

a party who has such an interest in the litigation that a final decree cannot be issued without either affecting that interest or determining the controversy in a way inconsistent with equity and good conscience. Therefore, an action may not proceed without an indispensable party, who must be joined to the action, because his or her nonjoinder would result in prejudice to his or her rights and the rights of other parties to the action.

INDIVIDUAL RETIREMENT ACCOUNT [IRA]

a retirement account for individuals not eligible to participate in a qualified pension or profit-sharing plan for an entire taxable year. Such individuals may pay into the account a specified sum (in general, no more than the lesser of \$2,000 or 15 percent of compensation or personal service income). Such amounts are deductible to the employee and the income earned thereon is not recognized if the account provides that the employee may not make withdrawals, without substantial monetary penalty, except if he or she dies or becomes disabled, prior to age 59½ and that withdrawal must commence no later than age 70½.

INDORSEE

one to whom a negotiable instrument is assigned by indorsement. For instance, the payee or holder of a check may write on the back of the check "pay to X" and sign below. X is the indorsee. In the absence of fraud or illegality, an indorsee has all of the right, title, and interest in a negotiable instrument that the indorser had prior to assignment.

INDORSEMENT

signature on the back of an instrument, with or without other words, the effect of which is to transfer the instrument and to create a new, independent contract by which the indorser becomes a party to the instrument and liable, on certain conditions, for its payment.

ACCOMMODATION INDORSEMENT one made without consideration, solely to extend credit to the holder by the indorser, generally to enable the holder to obtain credit or money from another on the basis of the indorsement.

BLANK INDORSEMENT One that specifies no particular party to whom the indorsed instrument is exclusively payable, and that therefore authorizes negotiation by the bearer upon delivery alone.

RESTRICTIVE INDORSEMENT One that limits transferability of the instrument.

SPECIAL INDORSEMENT One that specifies to whose order the instrument shall be payable. The instrument is then negotiable only by such person unless he or she makes a further indorsement.

INDORSER

one who indorses negotiable paper. For instance, the payee or holder of a check may indorse the check by signing it on the back. An indorser is liable to pay the negotiable instrument in case it is dishonored.

INDUSTRIAL DEVELOPMENT BOND [I.D.B.] see guaranteed security.

INDUSTRIAL RESERVE BANK [I.R.B.] see guaranteed security.

INELIGIBILITY

disqualification; legal inability to perform some task or assume some office. See disqualify.

IN ESCROW

held in an escrow account, held by one who is not a party to a transaction for future delivery to a party upon the occurrence or nonoccurrence of a specific event or events.

IN ESSE

(in ěs'-ē) Lat.: in existence. Compare in posse.

IN EXTREMIS

(in ěks-trě'-mĭs) Lat.: in extreme circumstances; especially, on the brink of death. Compare causa [CAUSA MORTIS].

INFAMOUS CRIME

a crime that, in common law, rendered the convicted person incompetent as a witness, because of presumed untrustworthiness. See crimen falsi; felony; treason.

INFANCY

the legal status preceding majority; minority.

IN FEE [IN FEE SIMPLE]

absolute ownership of an estate in land.

INFERENCE

a process of reasoning by which a proposition is derived as a logical consequence from given facts.

INFERENCE, NECESSARY see necessary inference.

INFERIOR COURT

a court whose decision is subject to review by another court, which is referred to as a SUPERIOR COURT.

INFEUDATION

the act of granting a freehold estate; same as feoffment or enfeoffment.

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INFIRM

sickly; a weak person. In particular circumstances the testimony of an infirm person may be obtained in a manner that differs from regular procedure to prevent its loss through the death of the witness. See *de bene esse*.

INFLUENCE, UNDUE see undue influence.

INFORMAL PROCEEDINGS

in probate law, the admission of a will to probate without the requirements necessary in an adversarial proceeding, such as notice to interested parties.

IN FORMA PAUPERIS

(*in fôr'-mä paw-pěr'-ĭs*) Lat.: in the manner of a pauper. In pleadings, *in forma pauperis* grants the right to sue without assuming the burden of costs or formalities of pleading. A criminal defendant granted permission to proceed *in forma pauperis* may be entitled to court-appointed counsel.

INFORMATION

a written accusation of crime signed by the prosecutor, charging a person with the commission of a crime; an alternative to indictment as a means of starting a criminal prosecution. The purpose of an *information* is to inform the defendant of the charges against him or her and to inform the court of the factual basis of the charges.

INFORMATION AND BELIEF

verification short of actual knowledge, but based on reasonable, good faith efforts to determine truth or falsity. The term is used with reference to documents requiring verification, such as requests for search warrants, responses to interrogatories, complaints, pleadings, etc.

INFORMED CONSENT

consent given only after full disclosure of what is being consented to; constitutionally required in certain areas where one may consent to what otherwise would be an unconstitutional violation of a right.

EXAMPLE: Jan is arrested for burglary. She decides to handle her case by herself, without the assistance of an attorney. Since she has a constitutional right to an attorney and to have one appointed if she cannot afford one, a judge must insure that her decision is based on *informed consent*. Such consent would include an understanding of her right to an attorney and what her decision entails.

The phrase is also used in tort law, where a patient must be told the nature and risks of a medical procedure before the physician can validly claim exemption from liability for battery or from responsibility for medical complications.

Compare Miranda rule; self-incrimination, privilege against.

INFORMER

one who, on a confidential basis, gives information about some wrongdoing to the police or other governmental authorities.

INFORMER'S PRIVILEGE

the privilege of the government to not reveal the identity of an informer. The identity of an informant need not be disclosed to the defendant at a suppression hearing so long as the person relying upon the informer's information has testified and has been cross-examined as to what the informant told him or her and as to why the information was believed to be trustworthy. The privilege may not survive a demand for disclosure at the trial level, however, if necessary to insure a fair trial. In no event can the informer's true identity be withheld from the accused once the prosecution decides to use the informer as a government witness in a criminal trial.

INFRA

(*īn'-frā*) Lat.: below. In text the term refers to a discussion or a citation appearing subsequently; the opposite of supra (above).

INFRINGEMENT see patent infringement. See also copyright; trademark; plagiarism.

INFRINGEMENT OF COPYRIGHT see copyright [INFRINGEMENT]; plagiarism.

INFRINGEMENT OF PATENT see patent infringement.

IN FUTURO

(*īn fū-tū'-rō*) Lat.: in the future; at a later date.

IN GENERE

(*īn gē'-nē-rā*) Lat.: in kind; of the same class or species.

INGRESS AND EGRESS

1. entrance and departure; 2. means of entering and leaving; 3. the right to do so. See easement.

IN GROSS

at large. See easement [EASEMENT IN GROSS].

IN HAEC VERBA

(*īn hēc vē'r'-bā*) Lat.: in these words.

INHERENT DEFECT

a defect that exists in an item regardless of the use made of that item. Although an inherent defect may not be readily detectable, a manufacturer is nonetheless strictly liable for any injury caused by it. Synonymous with latent defect.

INHERENT POWERS

those powers an authority such as a court or a government must have in order to achieve the purposes for which it was created.

INHERENT CONSTITUTIONAL POWERSthe federal government possesses all those inherent and implied powers that, at the time of

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adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. These powers include the ability to conduct foreign affairs, to exclude and deport aliens, to protect persons in federal custody or employment, to protect federal elections, and to protect federally created or federally guaranteed rights.

INHERENT RIGHT

a right that exists by reason of an individual's status as an individual and is not derived from any other source.

INHERIT

technically, to take as an heir at law solely by descent, rather than by devise; more commonly used to signify taking either by devise (i.e., by will) or by descent (i.e., from one's ancestor by operation of law).

INHERITANCE

real property or personal property that is received by heirs according to the laws of descent and distribution. A nontechnical meaning of inheritance includes property passed by will.

IN HOC

(*in hōk*) Lat.: in this; in reference to this.

IN INVITUM

(*in in-vē'-tūm*) Lat.: against the will of the other party.

INITIATIVE

a process by which a small percentage of voters may propose legislation and compel officials to submit the proposed legislation to voters. It involves the power of the people to propose bills and laws and to enact or reject them at the polls, independent of legislative assembly. In contrast, referendum is the right of the people to have submitted for their approval or rejection an act passed by the legislature. Referendum is a process by which a small percentage of voters may delay effective legislation and compel officials to submit it for voter approval or rejection.

Initiative is a form of direct legislation by the people consisting of two parts: petition and election. An initiative does not become effective until passed by voters and its availability does not remedy the denial of the right to referendum.

IN JEOPARDY see double jeopardy; jeopardy.

INJUNCTION

a judicial remedy awarded to restrain a particular activity; first used by courts of equity to prevent conduct contrary to equity and good conscience.

The injunction is a preventive measure to guard against future injuries, rather than one that affords a remedy for past injuries.

MANDATORY INJUNCTION one requiring positive action, rather than one forbidding a party to act.

EXAMPLE: A landlord refuses to supply his tenants with heat during the winter months. Regardless of the reasons for the landlord's action, a court might issue a *mandatory injunction* forcing the landlord to supply heat.

PERMANENT INJUNCTION One issued upon completion of a trial in which the injunction has been actively sought.

TEMPORARY [OR INTERLOCUTORY] INJUNCTION One that will expire at a particular time, and that is typically used to maintain the status quo or preserve the subject matter of the litigation during trial.

INJURIA ABSQUE DAMNO

(*ĭn-jū'-rē-ā äb'-skwā däm'-nō*) Lat.: wrong without damage; insult without damage. Where a cause of action requires that damages be pleaded, this maxim expresses the rule that a wrong that causes no legally recognized damage cannot give rise to a cause of action. But see damages [NOMINAL DAMAGES].

INJURIA NON EXCUSAT INJURIAM

(*ĭn-jū'-rē-ā nōn ěx-kū' zāt ĭn-jū-rē-äm*) Lat.: one wrong does not justify another.

INJURY

wrong or damage done to another, either in his or her person, rights, reputation or property. **LEGAL INJURY** is any damage that results from a violation of a legal right and that the law will recognize as deserving of redress. Compare *damnum absque injuria*; depreciation; fault. See also relief; remedy.

EXAMPLE: Federal law prohibits discrimination based on race. May, a black woman, is refused a job because of her race. Even if she gets another job and although no physical injury resulted to her, she has been *injured* in the eyes of the law and can pursue a monetary remedy or an award of the job she was refused.

IN KIND

1. of the same or similar type or quality; 2. in the same or similar manner.

IN LIMINE

(*ĭn ĩl'-mĭ-nē*) Lat.: at the beginning or the threshold. See motion in limine.

IN LOCO PARENTIS

(*ĭn lō'-kō pä-rĕn'-tĭs*) Lat.: in the place of a parent. Refers to a person or agency who has assumed the obligations of a parent. Commonly refers to the role of a residential institution such as a boarding school, in relation to the minors in its care.

INMATE

one who is committed to an institution, such as a prisoner at a prison. See jail; penal institution.

IN MORTMAIN see mortmain.

INNOCENT PURCHASER see bona fide purchaser.

INNS OF COURT

four private societies in England that prepare students for the practice of law and that alone may admit them to the bar; that is, confer the rank of barrister. The four inns of court are Inner Temple, Middle Temple, Lincoln's Inn, Gray's Inn.

INNUENDO

that part of a pleading in an action for libel that explains, improperly, the spoken or written words that are the basis of the action, thereby attaching to those words more than their plain meaning. The plaintiff in a libel action cannot enlarge or change original language by innuendo, since the purpose of innuendo is to explain the application of words used, and words that are not libelous in themselves cannot be made so by innuendo.

IN OMNIBUS

(*ĭn ǒm'-nĭ-bŭs*) Lat.: in all things; in all the world; in all nature; in all respects.

IN PAIS

(*ĭn pĕ'-ĭs*) Fr.: in the country, neighborhood. Applies to a transaction handled outside the court or without a legal proceeding.

IN PARI DELICTO

(*ĭn pĕ'-rĕ dĕ-lĭk'-tō*) Lat.: in equal fault. Refers to an exception to the general rule that illegal transactions or contracts are not legally enforceable; thus, where the parties to an illegal agreement are not *in pari delicto*, the agreement may nevertheless be enforceable at equity by the innocent or less guilty party. See also clean hands; duress; fraud.

IN PARI MATERIA

(*ĭn pĕ'-rĕ mĕ-tĕr'-ĕ-Ā*) Lat.: on like subject matter. Statutes or document provisions that relate to the same person or subject. In the construction or interpretation of a statute or instrument, the various provisions of the statute or instrument and all other acts or instruments on the same subject or having the same purpose are to be read together as one law or agreement, giving equal importance to each.

IN PERPETUITY

existing forever.

IN PERSONAM

(*ĭn pĕr-sō'-nĕm*) Lat.: into or against the person. In pleading, an action against a person or persons, founded on personal liability and requiring jurisdiction by the court over the person sought to be held liable, i.e., the defendant.

EXAMPLE: David causes an accident while driving recklessly. He is sued *in personam* in the state where the accident occurred, but he claims that as an out-of-state driver the courts of that state do not have jurisdiction over him and cannot force him to answer the suit. Although that might be true without applicable statutes, every state has laws automatically establishing jurisdiction over persons using

their highways. If the victim of the accident wins this suit, based on the merits, he can use the judgment against David in any other state.

In such an action, the plaintiff seeks either to subject defendant's general assets to execution in order to satisfy a money judgment, or to obtain a judgment directing defendant to do an act or refrain from doing an act.

Compare in rem.

IN POSSE

(*īn pōs'-ē*) Lat.: in the future, that which is not yet but that may exist. Compare in esse.

IN PRAESENTI

(*īn prā-zēn'-tē*) Lat.: in the present. Often signifies a presently effective act or interest, distinguished from one effective in futuro.

IN QUANTUM MERUIT see quantum meruit.

INQUEST

1. a judicial inquiry; 2. an inquiry made by a coroner to determine cause of death of one who has been killed, has died suddenly, or under suspicious circumstances or in prison.

INQUIRY NOTICE see notice [IMPLIED NOTICE].

IN RE

(*īn rā*) Lat.: in the matter of. Usually signifies a legal proceeding with no opponent, but rather judicial disposition of a thing, or res, such as the estate of a decedent.

IN REM

Lat.: into or against the thing. Signifies actions against the res, or thing, rather than against the person. The goal of a proceeding *in rem* is the disposition of property without reference to the title of individual claimants. Compare in personam.

ACTIONS IN REM those that seek not to impose personal liability but rather to affect the interests of persons in a specific thing (or res). A few such actions purport to affect the interests of all persons ("all the world") in the same thing as, for example, in actions to protect the environment; most of them seek to affect the interests of only particular persons in the thing. Typical modern examples are actions for partition of, or for foreclosure of a lien upon, or to quiet title to, real estate. The concept of *in rem* actions has been extended to those that seek to affect the condition of a thing as well as the thing itself.

ACTIONS QUASI IN REM actions based on a claim for money damages begun by attachment or garnishment or other seizure of property where the court has no jurisdiction over the person of the defendant but has jurisdiction over a thing belonging to the defendant or over a person who is indebted or under a duty to the defendant.

INSANE DELUSION see delusion.

INSANITY

mental illness. The term may be used to signify lack of criminal responsibility, need for commitment to a mental institution, inability to transact business, inability to stand trial (i.e., to assist in one's own defense). Compare incompetency; non compos mentis; non sui juris. See Durham rule; M'Naghten rule.

INSANITY, PLEA OF see plea.

IN SE

(*in sã*) Lat.: in and of itself.

INSIDER

a person whose opportunity to profit from his or her position of power in a business is limited by law to safeguard the public good. Both federal securities acts and state blue sky laws regulate stock transactions of individuals with access to inside information about a corporation, since the prospect of insider trading may inhibit investment by the general public due to their concern that the price of securities has been artificially inflated or deflated by such trading.

INSIDER TRADING

buying or selling of corporation stock by a corporate officer who profits by his or her access to information not available to the public. Corporate insiders who trade on the basis of nonpublic corporate information may be exposed to liability under state or federal law, because of a policy that everybody should have equal access to information and that insiders should not profit personally from something that belongs to the corporation.

INSOLVENCY

1. inability to meet financial obligations as they mature in the ordinary course of business; 2. excess of liabilities over assets at any given time. In the absence of definition by statute, the first definition is more widely recognized; however, statutory definition is common today. See also bankruptcy.

EXAMPLE: Baden Company borrows money from a bank to pay overdue debts in the hope that business will improve. That hope is not realized, and payments to the bank as well as other debts begin to develop again. Baden is finally declared *insolvent*. If any assets remain in the company, Baden's creditors and/or a court will divide them in some fair fashion.

INSOLVENCY PROCEEDINGS see bankruptcy.

IN SPECIE

(*in spē'-shē*) Lat.: in like form. To repay a loan in specie is to return the same kind of goods as were borrowed.

INSPECTION OF DOCUMENTS

right of parties in a civil action to view and copy documents in the possession of the court

and essential to the adverse party's cause of action. This is done as part of the discovery process before trial; but apart from the production for pretrial inspection, a party may by the use of a subpoena duces tecum require the production of documents at the time of trial for the purpose of introducing them into evidence.

INSTALLMENT

the partial satisfaction of a debt or other obligation.

INSTALLMENT CONTRACT

a contract in which the obligation of one or more of the parties such as an obligation to pay money, deliver goods or render services is divided into a series of successive performances.

EXAMPLE: Flavor Bread Company wants to insure supplies of wheat over the next five years. It writes an *installment contract* with a farmer's cooperative to deliver monthly shipments of wheat to its plant over the five-year period, with Flavor's obligation to pay likewise apportioned over the five-year period. Since the contract is long-term, prices are arrived at by a formula that can vary each month.

INSTALLMENT SALE

a contract by which goods are purchased now but paid for over a period of time by a number of installments. Consumers have extensive protection against abusive installment sales of consumer goods under the Truth-in-Lending Act, which governs advertising, the computation of interest on unpaid installments, and other aspects of such sales.

INSTANT MATTER see sub judice.

IN STATU QUO

(*in stā'-tū kwō*) Lat.: in the existing situation or condition. In the same position a party is in currently or was in at some relevant prior time.

IN STATU QUO ANTE in a contract means being placed in the same position in which a party was at the time of the inception of the contract that is sought to be rescinded.

INSTITUTION see correctional institution; penal institution.

INSTRUCTION

the judge's directions to the jury before their deliberation, informing them of the law applicable to the case, to guide them in reaching a verdict according to law and the evidence. An instruction to the jury is a charge to the jury, more a command than a request.

INSTRUMENT

in commercial law, a written formal document that records an act or agreement and provides the evidence of that act or agreement.

INSUFFICIENT EVIDENCE

a term usually referred to in a decision by a judge that a prosecutor or other party charged with proving a crime has failed to provide the minimum of evidence necessary to even ask a jury to decide a question of fact; results in a directed verdict in favor of a defendant. If an appellate court decides that the evidence at a defendant's trial is insufficient, it will reverse the conviction and dismiss the charges that the State failed to prove at the trial.

INSURABLE INTEREST

a relationship with a person or thing that supports issuance of an insurance policy. A person having an insurable interest can derive financial advantage from preservation of the subject matter insured or suffer loss from its destruction.

An insurable interest in the life of another requires that the continued life of the insured be of real interest to the insuring party. The connection may be financial (as when a creditor insures the life of his or her debtor) or it may consist of familial or other ties of affection.

EXAMPLE: A basketball team drafts Astor, the best player in college. His contract will pay him over a million dollars a year for ten years. The team has an *insurable interest* in Astor and will undoubtedly take out an insurance policy to protect their investment.

INSURANCE

the benefit from an agreement by one party (insurer) to provide the other (insured), for a consideration, money or some other benefit in the event of the loss of, or injury to, a specified person or thing in which the other has an interest.

ENDOWMENT INSURANCE insurance for a specified amount payable to the insured at the expiration of a certain period or to a designated beneficiary immediately upon the death of the insured.

TERM INSURANCE insurance for the period for which a premium has been paid. With life insurance it is a contract in which the insured pays the actual cost of insurance for each assessment period, without defraying a future deficit from the cost of insuring older persons. Economical premium eliminates cash surrender value and loan value.

WHOLE LIFE INSURANCE insurance upon the life of the insured for a fixed death benefit at a definite annual premium; synonymous with ordinary life insurance or straight life insurance.

INSURED

the person whose interests are protected by an insurance policy; the person who contracts for a policy of insurance that indemnifies him against loss of property, life or health.

INSURRECTION

a violent uprising of part or all of the people against the government or other authority.

INTANGIBLE ASSET

an asset that has no physical being, apart from a writing that evidences its existence. For instance, the debt of another that is evidenced by a promissory note is an intangible asset. The intangible assets of a business include going concern value and good will.

INTANGIBLE PROPERTY

possessions that only represent real value, such as stock certificates, bonds, promissory notes, franchises.

INTEGRATION

1. the process by which the parties to an agreement adopt a writing or writings as the full and final expression of their agreement; 2. the writing or writings so adopted. 3. the bringing together of different races.

INTENDMENT OF LAW

the true meaning of or purpose behind a law.

INTENT

a state of mind wherein the person knows and desires the consequences of his or her act. For criminal and certain types of civil liability, intent must exist at the time the offense is committed. See *animus*; *mens rea*; *scienter*.

INTER ALIA

(*ĭn'-tĕr ä'-lē-ä*) Lat.: among other things.

INTERCEPTION see wiretap.

INTEREST

1. in commercial law, consideration or compensation for the use of money loaned or forbearance in demanding it when due. 2. in legal practice, a term connoting bias or concern for the advantage or disadvantage of a party to the action or of the subject matter of the action. Interest affects the credibility of witnesses. Interest is required for the intervention of third parties in a lawsuit and is also a ground for disqualifying a judge or juror. 3. in real property, the broadest term applicable to claims on real estate, including any right, title or estate in or lien on real property. Interest thus refers to the legal concern of a person in the property, or in the right to some of the benefits from which the property is inseparable.

EXECUTED INTEREST an interest in property presently enjoyed and possessed by a party.

EXECUTORY INTEREST interest in property that may become actual in the future or upon the occurrence of some event.

COMPOUND INTEREST interest that is paid not only upon the principal sum, but also upon the interest previously paid on that sum. Thus, interest already paid or accrued becomes part of the principal, for purposes of subsequent interest calculations.

SHIFTING INTEREST a future interest arising in derogation of or out of a preceding interest.

SPRINGING INTEREST a future interest arising from an estate in the grantor. Compare chain of title.

VESTED INTEREST one in which there is a present fixed right of present or future enjoyment.

INTERIM FINANCING

debt that is incurred on a short-term basis until permanent financing can be arranged.

INTERIM ORDER

a temporary order, made until another or **FINAL ORDER** (see order) takes its place or a specific event occurs.

INTERLOCKING DIRECTORATE

two or more boards of directors of corporations that have one or more common members. Common control of the corporations may result from interlocking directorates, and can be used to restrict competition. Consequently, interlocking directorates are subject to prohibition and regulation under the Clayton Antitrust Act.

INTERLOCUTORY

provisional; temporary. An order or judgment that does not determine the issues but directs further proceeding preliminary to a final order or decree. Until final decree, an interlocutory judgment is subject to change by the court to meet the needs of the case and is often not appealable except by leave of court.

EXAMPLE: Fran wins a suppression motion to exclude certain evidence against her in an upcoming trial. Before the trial begins, the prosecutor seeks leave from the judge to file an *interlocutory* appeal from the suppression order, rather than wait until the trial is concluded before appealing the judge's ruling on Fran's motion. If the prosecutor's request is granted, Fran's trial will not proceed until an appellate court rules on the motion.

INTERLOCUTORY DECREE see decree [**INTERLOCUTORY DECREES**].

INTERLOCUTORY ORDER

order determining an intermediate issue, made in the course of a pending litigation that does not dispose of the case, but abides further court action resolving the entire controversy. Such orders are not generally appealable until after the entire matter has been disposed of by final order or judgment.

INTERMEDDLER see officious intermeddler.

INTERNAL REVENUE CODE

the massive statute providing the foundation for all federal tax law. This statute is located in Title 26, United States Code. Its various subtitles include tax provisions relat-

ing to the INCOME TAX, GIFT TAX and ESTATE TAX (now UNIFIED ESTATE AND GIFT TAX), as well as other less important and less wellknown taxes. As with all federal statutes, it is enacted and amended by Congress, and is implemented through the Internal Revenue Service by the Commissioner of Internal Revenue, appointed by the President.

INTERNAL REVENUE SERVICE [IRS]

the federal agency primarily concerned with the administration of the federal tax laws.

INTERNATIONAL AGREEMENTS

agreements between nations such as treaties, conventions, and protocols.

INTERNATIONAL COURT OF JUSTICE

the principal tribunal of the United Nations, consisting of 15 members elected by the General Assembly and the Security Council for a definite, limited term. The only appeal from a judgment of this Court is to the U.N. Security Council. The seat of the Court is at the Hague, though it may meet elsewhere at its discretion.

INTERNATIONAL LAW

the law governing relations of nations with one another, which arises principally from international agreements or from customs that nations adopt.

In a broader sense, international law includes both public law and private law. The public law regulates political relations between nations. The private law is the comity nations grant to each other's laws in enforcing rights arising under foreign law.

INTER PARES

(*ĭn'-tĕr pĕr'-Ās*) Lat.: among peers; among those of equal rank.

INTER PARTES

(*ĭn'-tĕr pĕr'-tĀs*) Lat.: between the parties.

INTERPLEADER

an equitable action in which a debtor, not knowing to whom among his or her creditors a certain debt is owed, and having no claim on the property in dispute, will petition a court to require the creditors to litigate the claim among themselves. The person interpleading is called the stakeholder. Interpleader is used to avoid multiple liability on the part of the debtor and is used often by insurance carriers, who deposit the proceeds of a policy in court where several persons with conflicting rights have made claims.

EXAMPLE: An insurance company immediately realizes that an airline it insures is responsible for a crash that has killed 20 people. The company, by way of *interpleader*, is able to deposit with the court the maximum liability for which the airline is insured for these 20 people and thereby lets the families of each person and the court determine how the money will be allocated.

Compare cross-claim; joinder.

INTERROGATION

the process by which suspects are rigorously questioned by police. See Miranda rule.

INTERROGATORIES

in civil actions, a pretrial discovery tool in which one party's written questions are served on the adversary, who must serve written replies under oath. Interrogatories can only be served on parties to the action, and while not as flexible as depositions, which include opportunity of cross-examination, they are regarded as a good and inexpensive means of establishing important facts held by the adversary.

IN TERROREM

(*ĭn tĕr-rō'-rĕm*) Lat.: in fear. A CONDITION SUBSEQUENT (see condition) placed in a will or contract that, although unenforceable, has the purpose of intimidating the beneficiary and thereby perhaps securing his compliance.

INTER SE [INTER SESE]

(*ĭn'-tĕr sĕ, ĭn'-tĕr sĕ'-sĕ*) Lat.: among or between themselves; commonly applied to trust instruments to signify that only the rights of shareholders and trustees are involved.

INTERSTATE COMMERCE

business activity among inhabitants of different states, including transportation of persons and property and navigation of public waters for that purpose, as well as purchase, sale and exchange of commodities.

INTERSTATE COMMERCE COMMISSION

federal regulatory agency concerned with interstate commerce in the transportation industry (trucks, trains, and bus lines, but not airlines) as well as oil pipelines. The ICC's goal is for the industries to provide reasonable rates and services. See commerce clause.

INTERSTATE COMPACT see compact clause [INTERSTATE COMPACT].

INTERVAL OWNERSHIP see time-sharing.

INTERVENING CAUSE see cause.

INTERVENTION

a proceeding permitting a person to enter a lawsuit already in progress; in civil law, admission of a person not an original party to the suit, to protect a right or interest allegedly affected by the proceedings. The INTERVENOR may wish to join the plaintiff or the defendant or demand something adverse to both. A person generally can become an intervenor only by proving he or she has an interest in the subject matter of the original litigation. The purpose of intervention is to prevent delay and unnecessary duplication of lawsuits; it may be denied, however, if it interferes

excessively with the rights of original parties to conduct the suit on their own terms.

EXAMPLE: A family sues Durable Paperboard Company for using chemicals that contain carcinogens in phone repair products. Two other companies use the same chemicals and fear that a decision adverse to Durable will result in many lawsuits against them based on the same claim. The companies therefore seek to *intervene* in the suit between the family and Durable.

INTER VIVOS

(*ĭn'-tĕr vĕ'-vōs*) Lat.: between the living. Transactions inter vivos are made while the parties are living, and not upon death (as in inheritance) or upon contemplation of death (cause mortis). A deed, therefore, is an instrument that conveys inter vivos a present interest in land. Gifts are either inter vivos, causa mortis or by will.

INTESTATE [INTESTACY]

the condition of having died without leaving a valid will. An intestate estate is property that a decedent has failed to dispose of (devise) by will.

INTESTATE SUCCESSION

the disposition of property to heirs according to the laws of descent and distribution upon the death of a person who has left no will, or who has left a portion of his or her estate unaccounted for in the will. See inheritance.

IN TOTO

(*ĭn tō'-tō*) Lat.: in total.

INTOXICATION

state of drunkenness, or a similar condition caused by use of drugs other than alcohol.

INTRINSIC EVIDENCE

part of the internal chain composing the process of adjudication. Where allegations of fraud in the complaint attacking a judgment in a former action were that false testimony was given, such allegations of fraud concerned "intrinsic fraud" and thus res judicata barred the complaint.

INTRINSIC FRAUD see fraud.

INURE

to take effect; to serve to the benefit of someone; in property, to vest.

IN VACUO

(*ĭn vāk'-ū-ō*) Lat.: in space.

INVALID ON ITS FACE see void for vagueness.

INVASION OF PRIVACY

the wrongful intrusion into a person's private activities by other individuals or by the government. See also due process of law.

INVENTION see patent [PATENT OF INVENTION].

INVENTORY

the category on a balance sheet reflecting the cost of goods purchased by a business for future sale. Inventories are generally required in every business in which the sale of merchandise is a material income producing factor. To determine the gross profit from the business operation involving the sale of merchandise, the taxpayer reduces from gross receipts the cost of goods sold. To determine costs of goods sold, the taxpayer adds the inventory on hand at the beginning of the year to the cost of goods purchased during the year and subtracts the inventory on hand at the close of the year. In general, there are two methods available for determining the basis of inventory on hand at the end of the year LIFO and FIFO.

FIRST-IN, FIRST-OUT [FIFO] a method of inventory accounting in which the goods sold during the year are assigned the cost of the goods purchased earliest and the goods on hand at the end of the year are given the value of the goods most recently purchased. The underlying assumption of FIFO is that a business sells its inventory in the order in which it was purchased, i.e., the items purchased first are sold first. During a period of rapid inflation, FIFO will cause large profits to result, since the least expensive goods, i.e., those purchased earliest, are considered sold. To avoid the distortion of income that may result from FIFO, business may change to the **LAST-IN, FIRST-OUT** method of inventory accounting.

LAST-IN, FIRST-OUT [LIFO] a method of inventory accounting under which the goods sold during the year are assigned the cost of the goods most recently purchased, and the goods on hand at the end of the year are given the value of the goods purchased earliest. The underlying assumption of LIFO is that a business sells its most recently purchased goods first. During a period of inflation, LIFO tends to understate profits since the most expensive goods, i.e., those most recently purchased, are considered to be sold.

LOWER COST OR VALUE a method of valuing inventory in which the goods on hand are valued at the lower of the price paid to purchase them or their fair market value at the time of valuation.

IN VENTRE SA MERE

(in vĕn'-trĕ sĕ mār) Leg. Fr: in the mother's womb; an unborn child.

INVERSE ORDER OF ALIENATION see marshaling [marshalling] [INVERSE ORDER OF ALIENATION].

INVESTMENT

the purchase of property with the expectation of obtaining income or capital gain in the future.

INVEST

to transfer capital to an enterprise in order to secure income or profit for the investor.

INVESTIGATORY POWERS

the powers given to governmental agencies and other entities to investigate violations of laws and to gather information regarding laws that are proposed to be enacted.

INVESTITURE

at common law, a ceremony demonstrating the transfer of possession of land. An open and notorious livery of seisin or corporeal possession in the presence of other vassals was essential to transfer land in the system of feudal tenure. During the early English period, when the art of writing was not widely known, this ceremony demonstrated who had title in case title was disputed at a later time. Investitures were probably first used in conquered countries to demonstrate the legitimate possession of lands by the lord. See seisin.

INVESTMENT BANKER

a broker of stocks who acts as an underwriter of securities. The investment banker can act as principal by buying the entire issue from the selling corporation or from selling shareholders, or as agent by selling the offering on a "best-efforts" basis. In either event the investment banker sells the issue to other dealers who together with the lead banker have formed an underwriting syndicate. Members of the syndicate in turn sell the shares to the investing public and to institutional investors such as pension funds (see retirement plan) or mutual funds. Investment banking is not banking as generally defined, and investment banking activities are illegal for commercial banks.

INVESTMENT COMPANY [OR TRUST]

a company or trust formed to pool the money resources of many individual investors in a large fund offering potential for investment diversification and professional management. Such a corporation typically invests in real estate or stocks and bonds, distributing the profit therefrom to its shareholders in the form of dividends.

INVESTMENT COMPANY ACT OF 1940 see Securities Acts [INVESTMENT COMPANY ACT OF 1940].

INVESTMENT STOCK see restricted securities.

INVESTMENT TAX CREDIT see tax credit [INVESTMENT TAX CREDIT].

INVESTORS ADVISORS ACT OF 1940 see Securities Acts [INVESTORS ADVISORS ACT OF 1940].

INVITEE

one who comes upon private land by the owner's invitation, whether express or implied. In tort law, the owner is not an insurer of the safety of invitees, but he or she owes a duty to them to exercise reasonable care for their protection against latent defects in the premises that might cause them injury.

EXAMPLE: John has a vacation home in a wooded area where he lays traps to catch animals. He invites neighbors to take a walk with him in some of the back parts of the property to enjoy the scenic view. One of these invitees steps on a trap that was buried below the ground and injures his foot. John is responsible for the invitee's injuries.

INVOLUNTARY

unwilling; forced; opposed; in criminal law, can act as a defense to a charge of committing a crime. See duress.

EXAMPLE: Bernice is forced at gunpoint to accompany several men into a bank to aid them in a robbery. Since her actions are *involuntary* and performed under duress, she cannot be charged with criminal responsibility in the crime.

INVOLUNTARY BAILMENT see bailment [INVOLUNTARY BAILMENT].

INVOLUNTARY MANSLAUGHTER see manslaughter [INVOLUNTARY MANSLAUGHTER].

INVOLUNTARY NONSUIT see nonsuit [INVOLUNTARY NONSUIT].

IOLTA

acronym for Interest on Lawyers' Trust Accounts. Program in some states where lawyers holding funds belonging to clients, which are too small or short-term for an individual interest-bearing account, deposit such funds into a special bank account containing similar funds from other lawyers. The interest generated from the pooled account helps fund legal programs for the needy.

IPSE DIXIT

(*ĩp'-sā dĩks'-ĩt*) Lat.: he himself said it. Refers to an assertion the sole authority for which is that the speaker has said it.

IPSO FACTO

(*ĩp'-sō fāk'-toō*) Lat.: by the fact itself; in and of itself.

IPSO JURE

(*ĩp'-sō jũ'-rā*) Lat.: by the law itself; merely by the law.

IRA see Individual Retirement Account.

I.R.B. [INDUSTRIAL RESERVE BOND] see guaranteed security. Also, Individual Retirement Bond.

I.R.C. see Internal Revenue Code.

IRRELEVANT

immaterial; not relevant; generally used in the context of a rule of evidence, whereby one party objects to the introduction at trial of evidence that is not connected to the issue being decided.

IRREPARABLE INJURY [OR DAMAGE OR HARM]

a type of injury for which no remedy at law (damages) suffices, and that thus requires a court of equity to intervene, often by issuing an injunction to prevent the conduct or conditions that are causing or threatening the injury. In fact, showing of imminent irreparable injury is ordinarily prerequisite to a request for an injunction.

I.R.S. see Internal Revenue Service.

ISSUE

1. as a verb, to put into circulation, as to a buyer. 2. In corporation law, a STOCK ISSUE is the process by which a corporation authorizes, executes and delivers shares of stock for sale to the public. The term also describes the shares offered by the corporation at a particular time. 3. in the law of real property, the noun issue means descendants.

EXAMPLE: Paula's will declared that any part of her estate not specifically distributed to someone else be divided among her *issue*. Her children tried to claim the full amount of this residual property, but, as the children were reminded by the court in a lawsuit against them, "issue" refers to all descendants, including children, grandchildren and other more remote descendants.

4. in legal practice, a point of fact or law disputed between parties to the litigation, generally an assertion by one side and a denial by the other.

ISSUED see when issued.

ISSUE PRECLUSION

the rendering of a decision that precludes the issue decided from being relitigated. See collateral estoppel; res judicata.

J

J.

abbreviation for a judge or justice. Other abbreviations include A.J., Associate Judge/Justice; C.J., Chief Judge/Justice; J.A.G., Judge Advocate General; JJ., Judges/Justices; J.P., Justice of the Peace; L.J., Law Judge; P.J., Presiding Judge; etc.

J.A.G.

abbreviation for Judge Advocate General; a designation used in military justice.

JAIL

place used for the detention of persons in the lawful custody of the government, such as a person accused of a crime who is held for trial, or a person convicted of a crime who is serving a sentence. If the inmate is confined in a local police station, it is generally referred to as a LOCK-UP; if temporarily confined in a courthouse during a trial, it is generally called a HOLDING CELL; if confined in a county facility for a period of 18 months or less, it is often called a WORKHOUSE. Most long-term confinement is now held in a CORRECTIONAL FACILITY such as the Federal Correctional Institution at [particular place]. These are referred to as F.C.I. at [place]. Older usage called such long-term confinement facilities PRISONS or PENITENTIARIES. See penal institution.

JAILHOUSE LAWYER

inmate who, through self-study of law, assists fellow inmates in the preparation of their appeals but does not possess formal training and is not licensed to practice law. Reliance upon jailhouse lawyers is often the only means by which indigent prisoners can be assured of access to the courts. Thus, the use of such assistance has been declared to be constitutionally protected.

J.D.

Juris Doctor. Degree awarded today upon completion of formal legal studies by most American law schools. The degree was formerly designated LL.B.

JENCKS ACT

a statute entitling a criminal defendant in a federal prosecution to discover any witness statement against him or her that is relevant to the witness's testimony and that is in the possession of the United States government. It was enacted after the U.S. Supreme Court held that defendants were entitled to such material. Since the Act restricts the defendant's access to such material until after the witness has testified in court, pretrial discovery of such

material is not permitted. Testimony of a grand jury witness is specifically included in the definition of "statement" by virtue of a later-enacted amendment to the Act.

JEOPARDY

the danger of conviction and punishment in which a person is placed when he or she is put on trial for a criminal offense. See double jeopardy.

JEOPARDY ASSESSMENT see assessment of deficiency [JEOPARDY ASSESSMENT].

JJ.

abbreviation for judges or justices.

JOBBER

a middleman in the sale of goods; one who buys from a wholesaler and sells to a retailer. A jobber, who actually purchases goods himself or herself and then resells them, is distinguished from a broker or agent, who sells goods on another's behalf.

JOBS CREDIT see tax credit [TARGETED JOBS CREDIT].

JOHN/JANE DOE

fictional names used to identify persons in a hypothetical situation in order to explain an issue; name used when a person refuses to identify himself or herself or when a person cannot be identified.

JOINDER

uniting of several causes of action or parties in a single suit. In federal practice, a party may join as many claims as he or she has against the opposing party. Compare class action; impleader; misjoinder.

COMPULSORY JOINDER mandatory joining of a person needed in an action for a just adjudication of the controversy. All related claims against another must be joined, or the claimant faces the possibility of being barred from litigating claims separately on the grounds that such action constitutes multiplicity of suits. A defendant must raise related claims as compulsory counterclaims.

PERMISSIVE JOINDER the joining of persons, so that in a single lawsuit a plaintiff may raise all his or her unrelated claims against another party with the court severing claims that ought not be tried together. A defendant may plead in his or her answer any PERMISSIVE COUNTERCLAIMS against the plaintiff.

JOINDER OF ISSUE

the act by which an issue is formally structured for its determination by a court.

JOINT

a common as opposed to individual interest or liability.

JOINT ACCOUNT

a bank account belonging to two or more persons, with funds in JOINT TENANCY (see tenancy).

JOINT AND SEVERAL

refers to the sharing of rights and liabilities among a group of persons collectively and also individually. Thus, if defendants in a negligence suit are jointly and severally liable, all may be sued together or any one may be sued for satisfaction to the injured party.

EXAMPLE: Sue is injured when a bottle of soda she purchased at a store explodes. She sues both the owner of the store and the manufacturer of the soda. If they are both found liable, their liability will probably be *joint and several*. Sue may choose to collect her entire damage award from one of the parties or may apportion the total owed to her between the two defendants in any manner she chooses.

See contribution; indemnity. Compare severally.

JOINT CUSTODY see custody of children.

JOINT ENTERPRISE

undertaking founded on mutual agreement of parties; essential elements are agreement, common purpose, community of interest and equal right of control. Those who engage in a joint enterprise that is unlawful or causes injury may be liable as joint tortfeasors, accessories or conspirators.

JOINT LIABILITY

shared liability that allows a sued person the right to insist that others be sued jointly with him.

JOINT LIVES

a period that lasts until the death of the last to survive of two or more specified persons.

JOINT OWNERSHIP see joint tenancy [OWNERSHIP].

JOINT STOCK COMPANY see company [JOINT STOCK COMPANY].

JOINT TENANCY see tenancy [JOINT TENANCY].

JOINT TORTFEASORS

two or more persons who owe to another person the same duty and whose negligence results in injury to such other person, thereby rendering the tortfeasors both jointly and severally [individually] liable for the injury. To be liable as joint tortfeasors, the parties either must act in concert or must by independent acts cause a single injury.

EXAMPLE: Two friends practice their hunting skills on a reservation that does not permit hunting. A hiker is injured by a stray bullet from one of the friend's guns. Since it cannot be determined which friend shot the bullet that injured the hiker, both friends are liable for the injury as joint tortfeasors.

Compare conspiracy.

JOINTURE

an estate or property secured to a prospective wife as a marriage settlement, to be enjoyed by her after her husband's

decease. The estate existed under the common law as a means of protecting the wife's future, upon the death of her husband, in place of dower.

JOINT VENTURE

a business undertaking by two or more parties in which profits, losses and control are shared. Though the term is often synonymous with partnership, a joint venture may indicate an enterprise of more limited scope and duration, though there is the same mutual liability of the participants for debts and torts of the venture.

EXAMPLE: Several business associates develop a new method of marketing pet food. A *joint venture* is established, limiting business activity to the marketing scheme and obliging each associate to contribute enough money for the new company to last one year. If the company is not successful by that time, any remaining money will be distributed to the associates and the venture will be dissolved.

JONES ACT

the federal statute that gives a sailor who suffers a personal injury in the course of employment, or the personal representative of a sailor who dies as the result of a personal injury suffered in the course of employment, the right to sue for damages at law. A federal statute provides that all statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply to sailors. See also Federal Employers' Liability Act.

JOURNALIST'S [NEWSPERSON'S] PRIVILEGE

some states have enacted shield laws granting media persons the privilege of declining to reveal confidential sources of information. No constitutional basis for such a privilege has been found in the First Amendment's guarantee of freedom of the press. Such a privilege, however, must yield to a defendant's need for discovery and for a fair trial as constitutionally granted under the Sixth Amendment and similarly must yield in any circumstance where the interests of justice so require. However, disclosure can only be required if relevant to issues at trial.

JOYRIDING

the illegal taking of an automobile for the purpose of using it for a short period of time. Joyriding is a specific offense, usually lesser in degree than larceny, and is in many states punishable by fines and/or imprisonment. In other states, it is one of many acts that may constitute the more serious crime of larceny.

J.P.

abbreviation for Justice of the Peace.

JUDGE

one who conducts trials or presides over a court of justice. Judges determine controversies between parties based upon

evidence and legal argument presented. They are not investigators or advisors

JUDGE-MADE LAW

law made in the common law tradition; law arrived at by judicial precedent rather than by statute.

JUDGMENT

the determination of a court of competent jurisdiction upon matters submitted to it.

ESTOPPEL BY JUDGMENT estoppel brought about by the judgment of a court because a similar question or fact in dispute has been determined by a court of competent jurisdiction between the same parties or their privies.

FINAL JUDGMENT a conclusive determination of the rights of the parties, disposing of the entire controversy before the court, or of some separable portion of the dispute, so that immediately after the judgment, or an appeal therefrom, the enforcement of that judgment can be made. The term also refers to the sentence imposed in a criminal case. See final decision.

JUDGMENT BY DEFAULT see default; default judgment.

JUDGMENT IN REM one pronounced upon the status of a particular subject matter, property or thing, as opposed to one pronounced upon persons.

JUDGMENT N.O.V. see n.o.v.

JUDGMENT OF CONVICTION the sentence in a criminal case formally entered in the clerk's records.

JUDGMENT ON THE MERITS a binding judgment determined by analysis and adjudication of the factual issues presented, rather than by the existence of a technical or procedural defect that requires one party to prevail.

EXAMPLE: Alice files a lawsuit but inadvertently names the wrong parties as defendants. When her case comes to trial, it may be dismissed as against the people she wanted to sue because they were not named. That dismissal would not be a *judgment on the merits*, since the court's action in doing so is necessitated by a procedural error committed by Alice.

JUDGMENT CREDITOR

a creditor who has obtained against a debtor a judgment through which the creditor can obtain the sum due him or her. The effect of becoming a judgment creditor is to create against other creditors a certain priority right to have the debt satisfied out of the debtor's assets, and to extend the life of the claim under the statute of limitations so that the judgment debt may be sued upon for a longer period than would be possible for a debt without a judgment.

JUDGMENT DEBTOR

a person against whom there is a legal judgment for repayment of a debt. The effect of becoming a judgment debtor is that the debtor's property may be subject to creditor's claims. See creditor's bill; garnishment; judgment creditor; lien; sheriff's sale; writ of execution. Compare bankruptcy.

JUDGMENT PROOF

a person who lacks the financial resources necessary to satisfy a judgment for damages or whose wages or property is protected from judicial attachment by law.

JUDICATURE see judiciary.

JUDICIAL ACTIVISM

the theory of judicial behavior that advocates basing decisions not on the judicial precedent but on achieving what the court perceives to be for the public welfare, or what the court determines to be fair and just on the facts before it. Compare judicial restraint.

JUDICIALADMISSION see stipulation.

JUDICIAL DISCRETION see discretion.

JUDICIAL ECONOMY

the most efficient use of judicial resources; often used as the rationale underlying doctrines in civil procedure such as permissive joinder or res judicata, and sometimes offered as the justification for a judge's decision in a particular case.

JUDICIAL IMMUNITY

the immunity of a judge from civil liability for any acts performed in the judge's official capacity. The immunity is absolute provided only that the judge is acting within his or her jurisdiction. The scope of the judge's jurisdiction must be construed broadly to protect the court's independence; therefore, the judge will not be deprived of immunity because the action taken was in error, was done maliciously, or was in excess of the judge's authority; rather, the judge will be subject to liability only when the action taken was in clear absence of all jurisdiction. Where the relief sought is injunctive or declaratory and not money damages, immunity is not provided under the Civil Rights Act of 1964 and state courts may be sued for such relief.

JUDICIAL NOTICE

the court's recognition of facts that can be confirmed by consulting sources of unquestioned accuracy, thus removing the burden of producing evidence to prove these facts. A court can admit facts that are common knowledge to an average, well-informed citizen.

EXAMPLE: Doug claims that on the day of the accident the roads were very slick as a result of a torrential downpour. However, the

victim of the accident brings in several weather maps and reports showing that for seven days prior to and including the day of the accident, there was not a single raindrop. A court can take *judicial notice* of the maps and reports.

JUDICIAL RESTRAINT

the theory of judicial behavior that advocates basing decisions on grounds that have been previously defined by judicial precedent rather than on the basis of achieving some public good, which is viewed as the proper role of the legislature. Compare judicial activism.

JUDICIAL REVIEW

the review by a court of law of some act, or failure to act, by a government official or entity, or by some other legally appointed person or organized body; the review of the decision of a trial court by an appellate court.

In a constitutional law context, judicial review expresses the concept first articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) that it is "the province and the duty of the judicial department to say what the law is." Under this doctrine the U.S. Supreme Court and the highest courts of every state have assumed the power and responsibility to decide the constitutionality of the acts of the legislative and executive branches of their respective jurisdictions.

JUDICIAL SALE see sale [FORCED SALE].

JUDICIARY

that department of government established to interpret and administer the law. The courts and all those connected with the practice of law.

JUMP BAIL

colloquial expression meaning to leave the jurisdiction or to avoid appearance as a defendant in a criminal trial after bail has been posted, thus causing a forfeiture of bail: to abscond after the posting of bail. See also flight.

JURAL

of or pertaining to law or justice.

JURAT

(*jūr'-ät*) Lat.: has been sworn. The clause at the end of an affidavit with the date, location and person before whom the statement was sworn.

JURE UXORIS

(*jû'-rē ū-xō-rĭs*) Lat.: right of the wife.

JURIS

(*jūr'-ĭs*) Lat.: of law.

JURISDICTION

1. power to hear and determine a case; may be established and described with reference to a particular subject or to parties in a particular category. In addition to power to adjudicate, a valid exercise of jurisdiction requires fair

for affected parties to be heard. 2. the geographic or political entity governed by a particular legal system or body of laws.

APPELLATE JURISDICTION the power vested in a superior tribunal to correct legal errors of inferior tribunals and to revise their judgments accordingly.

CONCURRENT JURISDICTION equal jurisdiction; jurisdiction exercisable by different courts at the same time, over the same subject matter and within the same territory, so that litigants may, in the first instance, resort to either court.

DIVERSITY JURISDICTION jurisdiction that federal courts have when the opposing parties are from different states.

IN PERSONAM JURISDICTION jurisdiction over the person of the defendant; necessary where the action is in personam.

SUBJECT MATTER JURISDICTION the competency of the court to hear and determine a particular category of cases.

See also ancillary jurisdiction; federal question jurisdiction; limited jurisdiction; original jurisdiction; pendent jurisdiction.

JURISDICTIONAL AMOUNT

the minimum value a lawsuit must have for certain courts to have jurisdiction to hear the case. The method of determining the jurisdictional amount may vary with the nature of the case; it may be the amount of damages claimed, money demanded, the value of property in disputed ownership, or the value of a claimed right. In some classes of federal cases, for example, a minimum amount of \$10,000 must be in controversy to confer jurisdiction on the federal courts.

JURIS DOCTOR see J.D.

JURIS IGNORANTIA EST CUM NOSTRUM IGNORAMUS

(jû'-rĭs ĩg-nō-rän'-shē-ā ěst kŭm nōs'-trŭm ĩg-nō-rä'-mŭs) Lat.: it is ignorance of the law when we are unfamiliar with our own rights.

JURISPRUDENCE

1. the science of law; the study of the structure of legal systems, such as equity, and of the principles underlying that system; 2. a collective term denoting the course of judicial decision, i.e., case law, as opposed to legislation; 3. sometimes a synonym for law.

JURIST

1. a legal scholar; one versed in law, particularly the civil law or the law of nations; 2. a judge.

JUROR

1. person sworn as member of a jury; 2. person selected for jury duty, but not yet chosen for a particular case.

JURY

a group, composed of the peers of the parties or a cross section of the community, summoned and sworn to decide on the facts in issue at a trial.

BLUE RIBBON JURY a jury that was chosen from prominent members of the community, such as well-educated persons or persons in positions of high responsibility, thought to be particularly well qualified to serve as jurors. These juries were used for certain highly publicized cases where ordinary juries were thought to be too influenced to judge impartially. Such special juries raised serious constitutional questions of the right to trial by a jury of one's peers and so are no longer used.

EXAMPLE: The murder of a beautiful actress made headlines and television reports across the nation. When someone was finally arrested for the crime, a *blue ribbon jury* was chosen from among bankers, doctors and leaders of the business community. These people were selected for their perceived ability to separate the news stories from the facts they would hear at trial.

GRAND JURY a jury to determine whether the facts and accusations presented by the prosecutor warrant an indictment and eventual trial of the accused; called grand because of the relatively large number of jurors impaneled (traditionally 23) as compared with a petit jury.

PETIT [PETTY] JURY ordinary trial jury, whose function is to determine issues of fact in civil and criminal cases and to reach a verdict in conjunction with those findings. While the number of jurors has historically been twelve, many states now permit six-member juries in civil cases, and some states permit six-member juries to hear criminal cases as well.

JURY OF THE VICINAGE literally, a jury from the neighborhood where a crime was committed; a jury of peers. See vicinage.

See also evidence; hung jury.

JURY TRIAL

the trial of an issue of fact before a jury. The parties to the action present their evidence to the jury. The judge then instructs the jury as to how the law applies to their findings of fact. The jury deliberates and renders its verdict. The Sixth Amendment to the Federal Constitution guarantees a jury trial to those accused of crime.

JURY VOIR DIRE see voir dire.

JUS ACCRESCENDI

(*jūs à-krě-sěn'-dī*) Lat.: right of survivor See joint tenancy [OWNERSHIP].

JUST COMPENSATION

full indemnity for the loss or damage sustained by the owner of property taken or injured under the power of eminent domain. The measure generally used is the fair market value of the property at the time of taking.

JUS TERTII

(*yūs tēr'-shē-ī*) Lat.: the right of a third; the legal right of a third. The term often appears in the context of actions involving claims of title to real property, where it is said that because a possessor's title is good against all the world except those with a better title, one seeking to oust a possessor must do so on the strength of his or her own title, and may not rely on a *jus tertii*, or the better title held by a third party.

JUSTICE OF THE PEACE

a judicial officer of inferior rank, who presides in a court of statutorily limited civil jurisdiction and who is also a conservator of the peace with limited jurisdiction in criminal proceedings, prosecutions, and commitment of offenders, as fixed by statute.

JUSTICIABLE

1. capable of being tried in a court of law or equity; 2. feasible for a court to carry out and enforce its decision, as opposed to having jurisdiction the authority to hear a case. A court can have jurisdiction, but at the same time have a nonjusticiable issue before it.

EXAMPLE: A governor is required by law to extradite a person sought by another state when that state institutes proper legal proceedings. Still, the governor may decide not to extradite if, for example, he or she sees an obvious life-threatening situation should the person be returned to the state seeking him or her. In such instances, a court will usually deem the failure to extradite as a *nonjusticiable* controversy and will take no action to force the governor to extradite.

JUSTICIABLE CONTROVERSY a real controversy appropriate for judicial determination, as distinguished from a hypothetical dispute; a dispute that involves legal relations of parties who have real adverse interests, and upon whom judgment may effectively operate through a conclusive decree.

JUSTIFIABLE HOMICIDE see homicide.

JUSTIFICATION

1. just and lawful cause or excuse; 2. showing in court sufficient reason the defendant did what he or she is called upon to answer to, so as to excuse liability.

JUVENILE COURTS

tribunals designed to treat youthful offenders separately from adults. The purpose of this has been to place

the state, through the presiding judge, in the position of *parens patriae*, to replace the adversary nature of normal proceedings with paternal concern for the child's well-being.

JUVENILE DELINQUENT

a minor who has committed an offense ordinarily punishable by criminal processes, but who is under the age, set by statute, for criminal responsibility. When a juvenile commits an offense it is considered an act of JUVENILE DELINQUENCY. See juvenile courts.

K

KANGAROO COURT

a court that has no legal authority and that disregards all the rights normally afforded to persons; its conclusions are not legally binding. This is a slang term referring to a court that is biased against a party and thus renders an unfair verdict or judgment.

KEOGH PLAN see retirement plan.

KEY NUMBERS

a numbering system used by the West Publishing Company in their publications to break down legal research into manageable topic areas with subcategories. It is a quick and useful method of finding cases pertaining to a given subject.

KICKBACK

the practice of a seller of goods or services paying the purchasing agent of those goods or services a portion of the purchase price in order to induce the agent to enter into the transaction. In the context of public officials, purchasing goods or services for a government entity, kickbacks are plainly illegal, since they cause the official to act in his or her own, not the public's, interest. In most commercial contexts, they are illegal and prohibited by criminal commercial bribery statutes. The principal of the purchasing agent may also have a cause of action against the agent to recover the amount of the bribery. For tax purposes, amounts paid as kickbacks or bribes generally are not deductible.

KIDNAPPING

unlawful carrying away of a person against his or her will; false imprisonment coupled with removal of the victim to another place. Kidnapping was only a misdemeanor in common law, but is a serious felony in the United States. Compare abduction. See ransom.

KIN [KINSHIP] see consanguinity.

KIND see in kind.

KING'S BENCH [QUEEN'S BENCH]

Court of King's Bench or Court of Queen's Bench (depending on the reigning monarch); the highest English common law court, both civil and criminal, so called because the king or queen formerly presided; now known as the King's Bench or Queen's Bench Division of the High Court of Justice, embracing the jurisdiction of the former Courts of Exchequer and Courts of Common Pleas.

L

LABOR-MANAGEMENT RELATIONS ACT see Taft-Hartley Act.

LABOR PRACTICE see unfair labor practice.

LABOR UNION

an association of workers for the purpose, in whole or in part, of bargaining on behalf of workers with employers about the terms and conditions of employment.

LACHES

a doctrine providing a party an EQUITABLE DEFENSE(see defense) where long-neglected rights are sought to be enforced against him or her. Laches signifies an undue lapse of time in enforcing a right of action, and negligence in failing to act more promptly. It recognizes that on account of the delay the defendant's ability to defend may be unfairly impaired because witnesses or evidence may have become unavailable or been lost. The doctrine also recognizes that if the delay has led the adverse party to change his or her position as to the property or right in question, it is inequitable to allow the negligent delaying party to be preferred in his or her legal right. The consequent barring of the negligent party's action is a kind of equitable estoppel known as ESTOPPEL BY LACHES.

EXAMPLE: Believing that he had good title to property, Jason constructs an office building and fully rents it out. George watches Jason construct the building and waits an additional ten years before asserting an ownership interest in the property. A court might apply the doctrine of *laches* and bar George's claim for two reasons. George was aware of the construction and took no action until the building was completed, a point at which Jason had invested a considerable amount of money. Also, George took an inordinate amount of time to raise his claim.

LADING, BILL OF see bill of lading.

LAME DUCK

an elected official who has not been reelected but who continues to serve until his or her present term of office expires.

LAND

1. real estate or real property, or any tract that may be conveyed by deed. 2. an estate or interest in real property; often refers not only to the earth itself but also to things of a permanent nature found or affixed there.

LANDLORD

one who leases real property. See lease.

LANDMARK CASE [DECISION]

legal decision of great magnitude. A precedent-setting decision. A case such as *Miranda v. Arizona*, 384 U.S. 436 (1966) was a landmark case in the area of the rights of criminal suspects and led to the requirement that police give "Miranda rights" to a suspect before taking a statement. See Miranda rule [warnings].

LANDRUM-GRIFFIN ACT

officially known as the Labor-Management Reporting and Disclosure Act, it created broad reporting and disclosure provisions to eliminate or prevent improper practices on the part of labor organizations, employers, labor relation consultants, their officers and representatives.

LAND TRUST

also called an ILLINOIS LAND TRUST. This device vests title to real property in the name of a trustee under a recorded deed of trust while a second unrecorded agreement between the trustee and the beneficiaries declares the trustee to be vested with full legal and equitable title subject to certain specified rights of the beneficiaries that are declared to be personal property of the beneficiaries.

LAPSE

to expire. Generally refers to termination of a right or privilege that can no longer be exercised because of a particular contingency or the passage of time. See antilapse statutes.

EXAMPLE: Fred signs a 30-day option to purchase a home. That option gives him the exclusive right to purchase the home within 30 days. If 30 days expire and Fred does not purchase the house, the option *lapses*.

LARCENY

the felonious taking and carrying away of the personal property of another, without his or her consent, by a person not entitled to possession, with intent to deprive the owner of the property and to convert it to the use of the taker or another person other than the owner.

Larceny is sometimes classified as either GRAND LARCENY or PETIT [PETTY] LARCENY, according to the value of the property taken or the method employed. Compare embezzlement.

LAST ANTECEDENT DOCTRINE

in statutory construction, the doctrine under which relative or modifying phrases are to be applied only to words immediately preceding them, and are not to be construed as extending to more remote phrases unless this is clearly required by the context of the statute or the reading of it as a whole.

LAST CLEAR CHANCE

the doctrine that a defendant may still be liable for the injuries he or she caused, even though the plaintiff

was guilty of CONTRIBUTORY NEGLIGENCE(see negligence), if the defendant could have avoided injury to the plaintiff by exercising ordinary care at the last moment and after the plaintiff's negligence had ceased.

EXAMPLE: A passerby without a hard hat walks on a construction site that is clearly marked "Hard Hats Required." A worker is throwing garbage out of a window so that it will fall into a garbage dump below. One of the pieces of garbage hits the passerby. Although the passerby is at fault for not wearing a hard hat, the worker may be held liable since he had the *last clear chance* to avoid the injury either by being more careful with the garbage or by carrying it to the dump site.

LAST-IN, FIRST-OUT [LIFO] see first-in, first-out.

LAST WILL AND TESTAMENT see will.

LATENT AMBIGUITY

language of legal effect that can be interpreted to have more than one meaning. Extrinsic evidence, when allowable, is often necessary to determine the correct interpretation of a latent ambiguity. In contract law, a latent ambiguity that one party interprets differently from the other party can prevent the meeting of the minds necessary to the formation of a valid contract.

LATENT DEFECT

a defect that is hidden from knowledge as well as from sight and one that would not be discovered even by the exercise of ordinary and reasonable care.

EXAMPLE: A part of a new car engine was prone to wearing down after a few hundred miles, causing the engine to stop immediately. The part was inside the engine and could not be detected by even a very thorough examination unless the engine was dismantled. The faulty part was a *latent defect* of the engine.

Compare patent defect. See also warranty [WARRANTY OF HABITABILITY].

LATERAL SUPPORT

an owner of real property has the right to have one's land, in its natural condition, supported and held in place from the sides by one's neighbor's land.

LAW

1. the legislative pronouncement of rules to guide one's actions in society; 2. the total of those rules of conduct put in force by legislative authority or court decisions, or established by local custom. See also case law; common law; session laws; statute; substantive law; uniform laws; wager of law.

AT LAWsee at law.

LAW, CHOICE OF see conflict of law [CHOICE OF LAW].

LAWFUL

any act performed within the bounds of law or authorized by law and that does not give rise to any legal liability; activity that is not illegal and is not contrary to public policy.

LAW MERCHANT

a body of commercial law governing merchants in England, particularly noted for contributions to the law of negotiable instruments. The law merchant was the common law's recognition of usages and procedures that had developed over a long period among merchants in England and other European countries. As part of the common law of England, it was incorporated into American law and has been largely supplemented by common law evolution and statutory enactment.

LAW OF ADMIRALTY see maritime law.

LAW OF CAPTURE see capture.

LAW OF THE CASE

doctrine whereby courts will refuse to consider matters of law that have been already adjudicated by motion or appeal in the same cause; reflects the courts' unwillingness to reopen issues already finally determined in a suit.

EXAMPLE: A judge schedules a pre-trial hearing to decide what evidence will be allowed at trial. Each party is given an opportunity to make arguments, and the judge decides not to allow a statement by one of the plaintiff's witnesses. At trial, the plaintiff attempts to argue for the introduction of the statement. Because of the pre-trial decision, the judge applies the *law of the case* doctrine and refuses to allow the introduction of the statement.

Compare collateral [COLLATERAL ESTOPPEL]; double jeopardy.

LAW OF THE LAND

1. phrase first used in Magna Carta to refer to the then established law of the kingdom as distinguished from Roman or civil law; 2. today, basic principles of justice in agreement with due process of law; those rights that the legislature cannot abolish or significantly limit, because they are fundamental to our system of liberty and justice. 3. the law as developed by the courts or in statutes in pursuance of those basic principles or rights. The United States Constitution (Article 6, Section 2) establishes itself, and laws made under its authority, and treaties of the United States, as the "supreme law of the land."

LAW, QUESTION OF see question of law.

LAW REPORTS see advance sheets; reports.

LAWSUIT see suit.

LAYWITNESS

any witness not testifying as an expert witness and who is thereby generally precluded from testifying in the form of an opinion. However, under federal rules a "lay witness" is able to testify in the form of an opinion or inference if the testimony is (a) rationally based on the perceptions of the witness, and (b) helpful to a clear understanding of his or her testimony or the determination of a fact in issue. The witness may be a LAY EXPERT WITNESS, meaning a person whose expertise or special competence derives from experience in a field of endeavor rather than from studies or diplomas.

LEADING CASE

a case continually cited for a proposition of law that controls in that particular area. For example, *Katz v. United States*, 389 U.S. 347 (1967), is a leading case in the area of search and seizure, and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is a leading case in constitutional law. See also landmark.

LEADING QUESTION

a question posed by a trial lawyer that is sometimes improper because it suggests to the witness the answer he or she is to deliver, or in effect prompts answers in disregard of actual memory.

EXAMPLE: In direct examination during the trial, the witness is asked, "Isn't it true that you saw Rich standing outside the store waiting for a friend when the robbery occurred?" That question will be objected to as a *leading question* since it suggests to the witness how he should explain or recall the event, instead of simply inquiring how the event actually took place. However, leading questions are proper as part of cross-examination since the object of such examination is to test the credibility of the statement made during direct examination.

LEASE

1. an agreement by the lessor temporarily to give up possession of property while retaining legal ownership (title);
2. an agreement by the owner landlord to turn over, for all purposes not prohibited by terms of the lease, specifically described premises to the exclusive possession of the lessee for a definite period and for a consideration called rent.

PROPRIETARY LEASEthe kind of lease that the resident/stockholder in a cooperative apartment maintains, with the cooperative as owner of the building. See condominium.

LEASEHOLD

the estate in real property of a lessee, created by a lease; generally an estate of fixed duration, but may also describe tenancy at will, a month-to-month tenancy, **PERIODIC***tenancy*, etc. (see tenancy).

LEAVE OF COURT

permission obtained from a court to take some action that, without such permission, would not be allowable. This

permission in some instances may come before or after the expiration of the period in which the action was to be taken. For instance, a trustee may need "leave of court" in order to spend trust corpus for the support of the trust beneficiary; an attorney will need "leave of court" in order to file papers after the time allowed for filing the papers has elapsed.

LEGACY

a disposition by will of personal property; synonymous with bequest, but properly distinguished from devise, which is a disposition of real property.

LEGATEE recipient of personal property by virtue of a will*i.e.*, the recipient of a legacy.

LEGAL AGE

the age, determined by each state, at which a person becomes responsible for his or her actions and is capable of entering into contracts or other business relationships. In many jurisdictions, the legal age is 18, although the legal age for some activities, such as drinking, may be higher, and for others, such as driving a car, may be lower.

LEGAL AID SOCIETY

state-funded and state-administered offices established throughout the country to deliver legal services to financially needy litigants, that is, those unable to afford to retain private counsel.

LEGAL ASSISTANT see paralegal.

LEGAL CAPACITY TO SUE

requirement that a person bringing suit have a sound mind, be of lawful age, and be under no restraint or legal disability. The term has no reference to failure of the petition to show a right of action in the plaintiff.

LEGAL CONSIDERATION see consideration [LEGAL CONSIDERATION].

LEGAL DETRIMENT

giving up something a person was privileged to retain, or doing or refraining from doing something that a person was privileged not to do, or not to refrain from doing. Where a person changes his or her legal position, or assumes duties or liabilities not therefore imposed, that change of position constitutes the consideration necessary to form a contract and therefore imposes duties on the person benefiting from the detriment.

LEGAL DISCRETION see discretion [LEGAL DISCRETION].

LEGAL DUTY

that which the law requires be done or forborne. Breach of a legal duty owed another is an element of negligence and is the essence of most actions in tort. Legal duties not otherwise

imposed may be created by a contract or by one's entering into some other such relationship (landlord-tenant, host-invitee, etc.).

EXAMPLE: In an apartment house, a landlord usually has the *legal duty* to keep the common areas, such as a hallway, clean and in good repair. If a tenant injures himself or herself because a light bulb in a hallway has gone out and the landlord has been made aware that the bulb is not working, the landlord's breach of the legal duty makes him or her liable.

LEGAL ESTATE see estate [LEGAL ESTATE].

LEGAL FICTION

a fact presumed in law, regardless of its truth, for the purpose of justice or convenience. For example, the domicile of the owner is presumed to be the situs of personal property for taxing purposes regardless of where it is actually located. The term legal fiction commonly occurs in cases where adherence to the fiction is perceived as working an injustice. Thus, when the personal property has never been in the state where the owner is domiciled and it would clearly be unfair to tax the property, the court will dispense with the situs presumption as a mere legal fiction.

LEGAL HEIRS see heirs.

LEGAL IMPOSSIBILITY see impossibility.

LEGAL NOTICE see notice [LEGAL NOTICE].

LEGAL SECRETARY

secretary having specific familiarity with legal language and processes, such as the filing of court documents.

LEGAL SEPARATION see divorce [SEPARATION]; separation agreement.

LEGAL SERVICES CORPORATION

a corporation established by Congress in 1974 to provide financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance. The Corporation is empowered to make grants to qualified programs and to contract with outside organizations. See also Legal Aid.

LEGAL TENDER

the kind of money lawfully acceptable for payment of a debt where the medium of payment is not specified by statute or agreement. All legal tender is money, but not all money is legal tender. Congress has the power to determine what is legal tender. All coins and paper money of the United States, as well as Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations, are legal tender.

LEGATEE

one who takes a legacy.

LEGISLATION

the act of giving or enacting laws; the power to make laws; the act of legislating; preparation and enactment of laws; the making of laws by express decree; the exercise of sovereign power.

LEGISLATION, SPECIAL see special legislation.

LEGISLATIVE HISTORY

those recorded events leading up to the passage of a bill including committee reports, hearings, and debates. Published commentary may accompany the legislation itself. Courts often look to the legislative history in later determining the meaning of a particular statute. Compare plain meaning (rule).

LEGISLATIVE INTENT see intent [LEGISLATIVE INTENT].

LEND

to part with a thing of value for either a fixed or indefinite period. Such item or something equivalent to it must be returned at the time originally established or when lawfully demanded. When used in a will, it means "give" or "devise" unless it is manifest that the testator intended otherwise.

LESSEE

one who holds an estate by virtue of a lease; the tenant of a landlord.

LESSER-INCLUDED OFFENSE

1. a violation of law that is necessarily established by proof of a greater offense and that is properly submitted to the jury, should the prosecution's proof fail to establish guilt of the greater offense charged, without necessity of multiple indictment; 2. that necessarily committed lesser offense accompanying the conduct leading to a greater offense.

EXAMPLE: Jenny is charged with robbery, which is the taking of property by threat or fear of violence. If Jenny cannot be convicted of robbery because there is insufficient proof of a threat or fear, she could still be convicted of larceny, which is simply the taking of another's property. Larceny is a *lesser-included offense* in relation to robbery.

See also graded offense; plea bargaining.

LESSOR

one who grants a lease to another, thereby transferring exclusive temporary right of possession of certain property, subject only to rights expressly retained by the owner.

LET

to lease; 1. to grant the use of realty for a compensation. 2. The term does not always connote the act of leasing, but the granting of a license.

LETTER OF CREDIT

in commercial law, a promise by a bank or other issuer that it will honor on behalf of one of its customer's demands for payment upon compliance with specified conditions;

intended to facilitate long-distance sales by allowing a buyer to establish a credit line against which a seller can draw. Letters of credit guard against risk insolvency and uncertainty in delivery and settlement due to market fluctuations.

LETTER OF INTENT

customarily employed to reduce to writing a preliminary understanding of the parties. This letter is not a contract, and it does not constitute a binding agreement. Rather, it is an expression of tentative intentions of the parties and creates no liability as between the parties. It is, in essence, "an agreement to agree." If a formal writing is contemplated by the parties, a binding contract may arise between them before the writing is executed as long as there has been a meeting of the minds concerning the essential elements of the writing.

LETTERS ROGATORY see rogatory letters.

LETTER RULING

a written statement issued to a taxpayer by the Office of Assistant Commissioner of Tax in which interpretation of the tax laws are made and applied to a specific set of facts.

LETTERS OF ADMINISTRATION

document issued by a probate court appointing the administrator or administratrix of the estate of a decedent. If the decedent left a will naming a particular executor or executrix, the corresponding term for the court document is LETTERS TESTAMENTARY. If the decedent left a will but failed to name an executor or the named executor of a will cannot or refuses to serve, the document is termed LETTERS OF ADMINISTRATION CTA. CTA stands for the Latin CUM TESTAMENTO ANNEXO and means "with the will annexed." If a previous administrator or executor fails to complete the administration of the estate the document is called LETTERS OF ADMINISTRATION DBN. DBN stands for the Latin DE BONIS NON and means "goods not administered." Modern usage has favored the term SUCCESSOR ADMINISTRATOR.

LETTERS TESTAMENTARY see letters of administration [LETTERS TESTAMENTARY].

LETTER STOCK

a category of stock that derives its name from an inscription on the face of the stock certificate, indicating that the shares have not been registered with the Securities and Exchange Commission and, therefore, cannot be sold to the general public.

LEVARI FACIAS see fieri facias [LEVARI FACIAS].

LEVERAGE

the use of debt to finance capital investment, for the purpose of increasing the investor's rate of return on his equity. As

long as the return income and appreciation on the total investment exceed the interest paid on the borrowed money, the investor benefits.

LEVY

1. to raise or collect; 2. to seize; 3. to assess, as to levy a tax; 4. a seizure or levying, as of land or other property or rights, through lawful process or by force. When one places a levy upon some property, right or a CHOSE IN ACTION (see chose), it is seized and may be sold to satisfy a judgment. See writ of execution.

LEWDNESS

criminal act of sexual indecency committed in public. Exposure of intimate parts for the purpose of arousing or gratifying the sexual desire of the actor (or of any other person) when such exposure is likely to be observed by nonconsenting persons who would be affronted. INDECENT EXPOSURE is sometimes synonymous with lewdness but more often is considered to be nudity in public, a lesser offense and punishable generally as a misdemeanor. Enforcement may not be practiced in such areas as nude beaches but enforcement may take place if a beachgoer leaves the beach while still nude.

LEXIS

a computerized legal research system that enables the user to type in various search terms and receive information and cases that fit the designated query. Another popular system is called WESTLAW. Both are private sector innovations in legal research and more are likely to be developed as microcomputer technology becomes more common in offices of every size.

LEX LOCI CONTRACTUS

(*lěks lō'-kē kōn-trăk'-tūs*) Lat.: law of the place of making a contract. See conflict of laws.

LEX LOCI DELICTI

(*lěks lō'-kē dě-lĭk'-tē*) Lat.: law of the place of the wrong. See conflict of laws.

LIABILITY

1. an obligation to do or refrain from doing something; 2. a duty that eventually must be performed; 3. an obligation to pay money; 4. money owed, as opposed to an asset; 5. responsibility for one's conduct, such as contractual liability, tort liability, criminal liability, etc. See limited liability; strict liability; vicarious liability.

EXAMPLE: Lauren runs a red light and hits another car, injuring both the driver and the passenger. Lauren has incurred *tort liability* for her action.

CURRENT LIABILITIES in accounting, debts due within one year, including salary payable to employees, purchase costs payable to suppliers, taxes and annual portion due on long-term debt.

LONG-TERM LIABILITIES in accounting, debts due after one year, including term bank loans, mortgages payable, bonds outstanding and liabilities under long-term lease and rental agreements.

LIABILITY WITHOUT FAULT see strict liability.

LIABLE

responsible for; obligated in law.

LIBEL

a tort consisting of a false, malicious, unprivileged publication aiming to defame a living person or to mar the memory of one dead. Printed or written material, signs or pictures that tend to expose a person to public scorn, hatred, contempt or ridicule may be considered libelous.

EXAMPLE: A candidate for public office reads in the paper of an earlier conviction against him for bribery. After some investigation, the candidate finds out that Vic, who is in contact with his opponent, had planted the story, which is unquestionably false, in order to ruin the candidate's standing in the election. The candidate can sue Vic or the newspaper for *libel*.

See slander. Compare privileged communications.

LIBERTY

freedom; the ability to enjoy all the rights granted by the United States and a particular state's constitution, as well as other rights such as the right to earn a living, the right to acquire knowledge, the right to marry, etc.; refers to the fullest scope of freedoms one has but at the same time limits those freedoms so as not to interfere with another person's exercise of them.

LIBERTY, CIVIL see civil rights.

LICENSE

a grant of permission needed to legalize doing a particular thing, exercising a certain privilege or pursuing a particular business or occupation. Licenses may be granted by private persons or by governmental authority.

In the law of property, a license is a personal privilege or permission with respect to some use of land, and is revocable at the will of the landowner. The privilege attaches only to the party holding it and not to the land itself, since, unlike an easement, a license does not represent an estate or interest in the land.

EXAMPLE: When Linda opens a new shop in a small shopping center, a neighboring businessman gives her *license* to use some of his storage space. The businessman can deny Linda the use of that space at any time, and, most importantly, if Linda ever sells her store, she could not guarantee that storage space to the purchaser.

Compare franchise; lease; monopoly.

LICENSEE

one to whom a license has been granted; in property, one whose presence on the premises is not invited, but tolerated. Thus, a licensee is neither a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the

premises, but is permitted expressly or impliedly to go upon the property of another merely for his own interest, convenience, or gratification. Compare invitee.

LICENSE TAX

the fee or tax charged by a government to issue the license required for engaging in some regulated activity such as the sale of liquor or the practice of a profession.

LICENSOR

one who grants a license.

LIE DETECTOR TEST see polygraph.

LIEN

a charge, hold or claim upon the property of another as security for some debt or charge. The term connotes the right the law gives to have a debt satisfied out of the property to which it attaches, if necessary by the sale of the property.

EQUITABLE LIEN a right in equity, but not at law, to have specific property applied in satisfaction of a debt. Whenever parties enter into an agreement indicating an intention to post some particular property as security for an obligation, an equitable lien is created on such property. An equitable lien may also be created by implication and is based on the doctrine of unjust enrichment.

FACTOR'S LIEN a lien that the factor has on goods consigned to him or her while in his or her possession for any advances made by him or her and for his or her commissions. In common law, it was purely a possessory lien and was lost by surrender of possession, but today, under the Uniform Commercial Code, a written security agreement is a sufficient substitute for possession.

FEDERAL TAX LIEN a lien of the United States on all property and rights to property of a taxpayer who fails to pay a tax for which he or she is liable to the federal government.

FLOATING LIEN in commercial law, one that covers not only inventory and accounts possessed by the debtor at the time of the original loan, but also his or her after-acquired property of inventory or accounts. The floating lien allows a buyer's operations to be completely financed with periodic advances and repayments secured by changing collateral of raw materials, work in progress, finished goods, proceeds, etc. This financing may be accomplished in a single security agreement, with only one filing required.

LANDLORD'S LIEN in common law, the landlord's right to levy (distress) upon the goods of a tenant in satisfaction of unpaid rents or property damage; now generally a statutory lien giving the lessor status of a preferred creditor with regard to the lessee's property.

MECHANIC'S LIEN one created to secure priority of payment for value of work performed and materials furnished in erecting or

repairing a structure; attaches to the land as well as its buildings and improvements. Statutes according priority to the satisfaction of the debt represented by a mechanic's lien are found in most jurisdictions and extend to automobiles and other goods as well as to structures. As applied to automobiles, the claim is sometimes called GARAGEMAN'S LIEN.

EXAMPLE: Standard Heating and Air Conditioning Company has installed all the ventilation in an office complex. The owner of the complex falls into bankruptcy and cannot pay Standard. By operation of the law of the state in which the work was done, Standard has a *mechanic's lien* equalling the value of the work it performed. That lien attaches to the office complex, so that Standard has a priority of payment for any money that is paid to the complex.

LIEN JURISDICTION

jurisdiction in which title to the mortgaged premises remains with the mortgagor pending payment of the mortgage price. See title jurisdiction.

LIEN THEORY OF MORTGAGE see mortgage [LIEN THEORY].

LIFE ESTATE

an estate whose duration is limited by the life of the person holding it or by that of some other person [per autre vie]. It is a freehold interest in land.

EXAMPLE: A grandfather conveys his summer home to his daughter for life and then to his three grandchildren. Since the daughter's interest in the house exists only so long as she is alive, her interest is considered a *life estate*.

LIFE EXPECTANCY

the period of time a person is predicted to live, based on their present age and sex. This figure is most frequently used by actuaries to determine insurance premiums.

LIFE INTEREST

an interest in property measured by the life of either the person using the property or by another's life. See life estate.

LIFE TENANT

tenant whose legal right to remain in possession of certain lands is measured either by his or her life or the life of another. See life estate.

LIFO

last-in, first-out. See first-in, first-out.

LIKE-KIND EXCHANGE see sale or exchange. Compare boot.

LIMINE see in limine.

LIMITATION

a restriction or restraint; the act of limiting. A state constitution constitutes a *limitation* on the power that the state may exercise, not a *grant* of power. "Limitation" also declares the nature

and extent of the estate granted, and the uses for which the grant is made. For example, in an estate granted "to A and his heirs," the phrase "and his heirs" constitutes words of limitation and indicates that A has a fee simple, and can use the land as he pleases. Also, a limitation determines an estate upon the happening of the event itself without the necessity of doing any act to regain the estate, such as re-entry. See statute of limitations.

LIMITATIONS PERIOD see statute of limitations.

LIMITATIONS, STATUTE OF see statute of limitations.

LIMITATION, WORDS OF see words of limitation.

LIMITED JURISDICTION

refers to courts that are only authorized to hear and decide certain or special types of cases; also known as SPECIAL JURISDICTION. See jurisdiction.

EXAMPLE: The Court of Claims has *limited jurisdiction* to only hear claims against the United States based on certain types of violations.

A small claims court is limited to a specified dollar amount that it can litigate.

LIMITED LIABILITY

the limitation placed on the amount an investor of a corporation can lose resulting from a lawsuit against the corporation or other loss suffered by the corporation; the liability for losses that is limited to the amount an investor or shareholder invests in the corporation. The corporation itself also enjoys limited liability inasmuch as the corporation's obligations are always limited to its assets unless, with regard to particular transactions, personal responsibility is assumed by an officer or shareholder of the corporation.

EXAMPLE: Phil purchases ten shares of a corporation's stock for \$5 a share. If the corporation becomes bankrupt with many creditors who are unpaid, Phil's *liability* is *limited* to the \$50 he invested. He can never be charged for a greater amount.

LIMITED PARTNERSHIP see partnership.

LINEAGE

race; family; kin; blood. A common ancestor with all ascending and descending persons. See lineal.

LINEAL

refers to descent by a direct line of succession in ancestry. See consanguinity [LINEAL CONSANGUINITY].

LINEUP

the police procedure in which a person suspected of a crime is placed in a line with several other persons and a witness to the crime attempts to identify the suspect as the person who committed

the crime. The procedure must not be "unduly suggestive," or the identification will not be admissible in a criminal trial.

LIQUIDATE

to settle; to determine the amount due, and to whom due, and then to extinguish the indebtedness. Although the term more properly signifies the adjustment or settlement of debts, to liquidate often means to pay.

LIQUIDATE A BUSINESSto assemble and mobilize the assets of the business, settle with creditors and debtors, and apportion remaining assets, if any, among the shareholders or owners.

LIQUIDATE A CLAIMto determine by agreement or litigation the precise amount of the claim, and to settle it on the basis of that determination.

LIQUIDATED AMOUNT [OBLIGATION]

amount that may be readily ascertained by a mere computation based on the terms of the obligation or instrument. See liquidate; sum certain. Compare unliquidated.

LIQUIDATED DAMAGES

a stipulated contractual amount that the parties agree is a reasonable estimation of the damages owing to one in the event of a breach by the other.

EXAMPLE: Safety Corporation and Fire Prevention, Inc., enter into a long-term contract whereby Fire Prevention supplies Safety with all the sprinkler systems Safety needs. Instead of leaving a damage figure to a court decision if either party should breach the agreement, the parties include a *liquidated damages* clause in the contract. That clause provides both a dollar figure and a formula for calculating damages, with the higher of the two figures constituting the maximum damages either party could charge.

LIQUIDATED SUM CERTAIN see sum certain [LIQUIDATED SUM CERTAIN].

LIQUIDATION DIVIDEND see dividend.

LIS PENDENS

Lat.: a pending lawsuit. Refers to the maxim that pending the suit nothing should be changed; thus, for example, one who acquired an interest in property from a party to litigation respecting such property takes that interest subject to the decree or judgment in such litigation and is bound by it.

NOTICE OF LIS PENDENSin some jurisdictions, a publicly recorded notice required to warn persons (such as prospective purchasers) that title to the property is in litigation and that they will be bound by a possibly adverse judgment.

LISTED STOCK

a company's stock that is traded on an organized stock exchange. To be listed, the company must meet requirements of the selected exchange and file application for listing with both the exchange and the Securities and Exchange Commission.

LISTING

in real estate, an agency relationship between the seller and broker with the purpose of effecting a juncture between buyers and sellers of real property with an ultimate pecuniary reward to the broker for his or her part in "bringing the parties together." See also listed stock.

LITE PENDENTE see pendente lite.

LITIGANTS

the parties actively involved in a lawsuit; plaintiffs or defendants involved in litigation.

LITIGATION

a judicial contest aiming to determine and enforce legal rights.

LITIGIOUS

most commonly used to refer to one's fondness for or propensity to become engaged in litigation. Thus, a citizen who repeatedly sues his or her neighbor over various issues would be called "litigious." Also, the subject of a lawsuit or action. Compare malicious prosecution. See also vexatious litigation.

LIVERY OF SEISIN

an ancient ceremony signifying an alienation of land by feoffment. It consisted of a formal delivery of possession of the premises, symbolized by the manual delivery of a clod or piece of turf from the land, all of which was done in the presence of witnesses. See seisin.

LIVE VIEW TRANSCRIPT see court reporters [LIVE VIEW].

LIVING TRUST see trust.

L.J.

abbreviation for Law Judge.

LKA

last known address.

LL.B. see J.D.

LOAN

delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form. The characterization of a transaction as a loan or some other type of borrowing has significance in ascertaining whether usury laws apply to the amount of interest being charged.

LOANSHARKING

the practice of loaning money at usurious rates of interest. Many states have laws that render usurious interest and

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in some instances even the underlying debt uncollectable. The use or the threat to use violence in order to collect the interest or the debt constitutes the crime of extortion. See extortion; usury.

LOBBYING EXPENSE see expense [LOBBYING EXPENSE].

LOBBYIST

one engaged in the business of persuading legislators to pass laws that are favorable, and to defeat those that are unfavorable, to the interests of the lobbyist or of his or her clients.

LOCATION see mining [LOCATION].

LOCKDOWN

a temporary confinement of inmates in a correctional facility to their cells on a 24-hour basis with no outside contact and little if any ordinary privileges or recreation. Such a restriction on normal activity of prisoners is done as a security measure following an escape or riot or during the course of some other prison emergency. Prison officials have been accorded considerable latitude by the courts in the use of such lockdowns both in terms of duration and quality. Any measures taken by prison officials that are "unnecessarily cruel" or completely unjustified may violate an inmate's right to be free from cruel and unusual punishment.

LOCKOUT

the employer counterpart of an employee strike. The employer locks out the employees preventing them from working in an effort to gain a better bargaining position in labor negotiations. Unemployment benefits may accrue to employees who are locked out as opposed to employees on strike. See also collective bargaining.

LOCKUP see jail.

LOCO PARENTIS see in loco parentis.

LOCUS

(*lō'-kūs*) Lat.: the place.

LOCUS CONTRACTUS (*kōn-trāk'-tūs*) Lat.: the place where the contract was made.

LOCUS DELICTI (*dě-līk'-tē*) Lat.: the place where the wrong occurred.

LOCUS IN QUO (*īn kwō*) Lat.: the place where or in which. Refers to a locale where an offense was committed or a cause of action arose.

LOCUS POENITENTIAE (*pō-ě-nī-těn'-shē-ī*) Lat.: a place for repentance. The opportunity for one to change his or her mind.

LOCUS SIGILLI (*sī-jīl'-lē*) Lat.: the place of the seal; usually abbreviated L.S. Commonly used within brackets on copies of documents to indicate the position of the seal in the original; also used to call attention of the signer to the place for his or her seal.

LOGROLLING

refers to schemes by legislators to force passage of desired bills without convincing their colleagues of the merits of their proposals. One type of logrolling is the inclusion under one bill of secondary bills, each of which probably would not be approved if voted on singly.

EXAMPLE: Conservative legislators are finding it very difficult to get their bills passed on the strength of the bills' own merits. In an attempt to sidestep this problem, the legislators tack their proposals onto a tax bill that has to be passed or government employees cannot be paid. This attempt is called *logrolling*.

Another practice is for legislators to agree to vote for each other's bills, even if neither has any interest in the other's bill.

LOITER

to linger for no evident reason, particularly in a public place, near a school or a transportation facility. There are criminal prohibitions of such behavior as loitering for purposes of begging, gambling, soliciting another to engage in sexual intercourse, or for the purpose of selling or using drugs; being masked or disguised in an unusual manner; or simply not being able to give a satisfactory explanation of one's behavior. Compare probable cause; void for vagueness.

LONG-ARM STATUTES

laws that allow a local forum to obtain jurisdiction over nonresident defendants when the cause of action is generated locally and affects local plaintiffs. Such expanded jurisdiction is authorized where the contacts of the nonresident defendant with the forum are regarded as sufficiently substantial.

EXAMPLE: Federated Television Company sells many televisions in a particular state, but the company does not maintain any sales offices, have any corporate headquarters or employ any sales agents in the state. When one of its televisions explodes and burns down Bob's house, Bob can use the state's *long-arm statute* to bring Federated into the state court. Without the statute, there may be a procedural difficulty in forcing Federated to come in to Bob's state and defend against the action or pay for the damages caused.

Long-arm statutes are commonly employed to allow a local court to exercise jurisdiction over nonresident motorists who cause automobile accidents within the state.

LONG POSITION

in finance, the ownership of a stock or security, subjecting the owner to risk of loss in case the security declines in value. Compare selling short.

LONG-TERM CAPITAL GAIN see capital; capital gains or losses.

LONG-TERM LIABILITY see liability [LONG-TERM LIABILITIES].

LOOKOUT

person specifically charged with duty of observing lights, sounds, echoes, or any obstruction to navigation. Such a person must devote his or her undivided attention to the task with that watchfulness that a prudent and reasonable person must maintain for his or her own safety and the safety of others. The doctrine of PROPER LOOKOUT requires that one operating a motor vehicle use such care, prudence, and watchfulness as a person of ordinary care and prudence would use under similar circumstances to avoid liability for negligent operation of the vehicle. In popular usage, it refers to a person stationed outside the area where a crime is being committed to watch for police or persons who may alert police or be witnesses to the crime.

LORD

at common law, one who granted a feudal estate in land to a tenant. For instance, the King would be the Lord of the Dukes and other nobles to whom the Crown had granted property; the dukes and other nobles were the lords of the persons to whom they in turn granted property. The lord was responsible for protecting and maintaining order among his tenants, for which purpose he maintained a court. In return, the tenant was responsible for providing services to the lord. Under the English Parliamentary system of government, the House of Lords arose to provide representation for nobles. Traditionally, membership in the House of Lords was hereditary. In recent times, the Crown has appointed individuals as lords for life only, with the individual's title ceasing at his death.

LORD CAMPBELL ACT

the English statute that first provided that the surviving family of a person who suffered a wrongful death may sue the tortfeasor for damages. It is to be distinguished from the WRONGFUL DEATH STATUTE, which provides that the personal representative of a person who has suffered a wrongful death may sue for damages, thus contravening the common law rule that an action for personal injuries did not survive the plaintiff's death. Most states have enacted some form of a Lord Campbell Act or wrongful death statute.

LOSS

the act of losing or the thing lost; synonymous with "damage"; as used in an insurance policy, a state of fact of being lost or destroyed, ruin or destruction; and where a policy requires notices of a loss, refers to the date that a fraud was discovered. See also casualty loss; lost property; risk of loss; total loss.

LOST PROPERTY

property involuntarily lost to the owner through neglect, carelessness or oversight. Compare abandonment; mislaid property.

LOT, ODD see odd lot.

LOTTERY

a gambling scheme in which consideration is taken in return for the offering of a prize that will be given on the basis of chance and not merit. The use of interstate commerce, the U.S. mail, or radio or television to distribute or advertise a lottery constitutes a federal crime. However, these laws do not apply to any lottery conducted by a state, nor to a SWEEPSTAKES (for which no consideration is required) conducted by a business entity.

LOWER OF COST OR MARKET

a method of valuating inventory, using the lower of either the price of the item as of the time it was purchased or the present market value of the item.

L.S. See locus sigilli.

LSAT

Law School Admissions Test. A standardized examination administered by a private, nonprofit testing organization known as the Educational Testing Service and used by law schools as one factor in accepting applicants.

LUMP-SUM PAYMENT

a single amount of money; a sum paid all at once rather than in part or in installments. For instance, under an insurance policy the proceeds may be paid immediately, as a lumpsum payment, or at the option of the payee over time as an annuity or in installment payments.

LUMP-SUM ALIMONY PAYMENT the discharge of one's obligation to pay alimony by the payment of a single lump sum. For income tax purposes, the payment of lump-sum alimony may or may not shift the income tax burden on the alimony to the payee, depending on the circumstances.

LUMP-SUM DISTRIBUTION lump-sum payment to an employee from a pension or profit-sharing plan upon termination of employment either by retirement or death.

LYING IN WAIT

hiding or concealing oneself for the purpose of committing a crime when the opportunity arises. Regarding murder, "lying in wait" implies premeditation or malice aforethought necessary for first-degree murder.

M

MACHINATION

that which is devised; a device; a hostile or treacherous scheme; an artful design or plot.

MAFIA see organized crime.

MAGISTRATE

1. a public civil officer, invested with some part of the legislative, executive or judicial power. 2. In a narrower sense, the term includes only inferior judicial officers, such as justices of the peace.

MAGNA CARTA [MAGNA CHARTA]

the "great charter" to which King John gave his assent in 1215, and that is considered the fundamental guarantee of rights and privileges under English law.

MAGNUSON-MOSS WARRANTY ACT

federal statute requiring warranties for consumer products to be written in easily understood language and providing the Federal Trade Commission with better means of protecting consumers.

MAIL BOX RULE

a rule that an acceptance made in response to an offer is valid and forms a binding contract at the time of dispatch of the acceptance, as when it is placed in the mailbox, if that method of accepting is a reasonable response to the offer.

MAIM

at common law, to deprive a person of such a part of his or her body as to render that person less able to fight or defend himself or herself than that person would otherwise have been. See mayhem.

MAIN PURPOSE RULE see statute of frauds.

MAINTAIN

to continue, to support, to sustain; to hold or keep in any particular state or condition; in terms of "maintaining" a nuisance, includes both knowledge of the nuisance and preserving and continuing its existence by some positive act or by acquiescence.

MAINTENANCE see criminal maintenance.

MAJORITY, AGE OF

the age when a person is considered legally responsible for all his or her activities and becomes entitled to the legal rights held by citizens generally.

MAJORITY OPINION see opinion.

MAKER

in commercial law, one who executes a note, or indorses it before its delivery to the payee, and who thereby assumes an absolute obligation to make payment on the note.

EXAMPLE: Before a supplier ships any goods to Creative Bottle Company, the supplier requires the company to sign a promissory note explaining payment terms and dates and also obliging Creative Bottle to meet those terms. Creative Bottle is the *maker* of the note since it is the one who has to make the payments.

MALA IN SE see malum in se.

MALA PROHIBITA see malum prohibitum.

MALFEASANCE

1. the doing of a wrongful and unlawful act; 2. any wrongful conduct that interrupts or interferes with the performance of official duty.

MALICE

the state of mind that accompanies the intentional doing of a wrongful act without justification and in wanton or willful disregard of the plain likelihood that harm will result.

With respect to slander and libel, malice is the mental state that accompanies a false statement when the maker knows it to be false or when the maker recklessly disregards the truth or falsity of it. Tort liability may also attend the malicious disclosure of true but private facts.

In malicious prosecution, there is intent to institute a prosecution for a purpose other than bringing an offender to justice.

MALICE AFORETHOUGHT

the distinguishing state of mind that may render an unlawful homicide murder at common law. It is characterized by a "person-endangering" mental disposition for which there is no justification or excuse and as to which no mitigating circumstances exist.

Malice aforethought is the characteristic mark of all murder, as distinguished from the lesser crime of manslaughter, which lacks it. It does not mean simply hatred, ill-will, a spite or a grudge. It extends to and embraces generally the state of mind with which one commits a wrongful act. It may be discoverable in a specific deliberate intent to kill, in hardness of heart, cruelty, a wanton and depraved spirit, or in utter disregard of society. It is not synonymous with premeditation, however, since a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed. Modern homicide statutes do not employ malice aforethought but instead rely upon an intent to cause death and the absence of extenuating circumstances.

MALICIOUS ARREST

the arresting of a person on a criminal charge without probable cause, with knowledge that the person did not commit the offense charged. See malicious prosecution. Compare false arrest.

MALICIOUS MISCHIEF see criminal mischief.

MALICIOUS PROSECUTION

an action for recovery of damages that have resulted to person, property or reputation from previous unsuccessful civil or criminal proceedings that were prosecuted without probable cause and with malice.

EXAMPLE: Martha wants to persuade her estranged husband Peter to pay her generous alimony and child support. She contrives a story, which she tells the local prosecutor, connecting Peter with child abuse. Her misuse of the criminal process is an example of *malicious prosecution*, for which Peter may be able to sue her.

MALPRACTICE

a professional's improper or immoral conduct in the performance of his or her duties, done either intentionally or through carelessness or ignorance; commonly applied to physicians, surgeons, dentists, lawyers and public officers to denote negligent or unskillful performance of duties where professional skills are obligatory on account of the fiduciary relationship with patients or clients.

MALUM IN SE

(mǎ'-lŭm ĩn sǎ) Lat.: evil in itself. Evil, as adjudged by a civilized community; refers to an act or case involving conduct punishable because of the nature of the conduct, not only because the law has declared it punishable.

MALUM PROHIBITUM

(mǎ'-lŭm prō-hĭ'-bĭ-tŭm) Lat.: wrong because it is prohibited. Made unlawful by statute for the public welfare, but not inherently evil and not involving moral turpitude. Compare malum in se.

MANAGEMENT COMPANY see closed-end management company.

MANDAMUS

Lat.: we command. An extraordinary writ, issued from a court to an official, compelling performance of an act that the law recognizes as an absolute duty, as distinct from acts that may be at the official's discretion.

EXAMPLE: A state legislature passes a law that provides that, upon request, a person has the right to see any information the government has on file for that person. Kathy files such a request with the State's Attorney General and is refused access to her information. Unless the refusing party can show some compelling need for secrecy,

a court will issue a writ of *mandamus* to the holder of the records, directing him to release the information.

See ministerial act.

MANDATE

a judicial command; 1. an official mode of communicating the judgment of the appellate court to the lower court; 2. a bailment of something for the performance of some gratuitous service with respect to it by the bailee.

MANDATORY INJUNCTION see injunction.

MANDATORY SENTENCING see sentence [MANDATORY SENTENCE].

MANDATUM

in civil law, a bailment, in which the bailee performs services without recompense.

MANIFEST WEIGHT see against the [manifest] [weight of the] evidence.

MANIPULATION

under the Securities Exchange Act of 1934, refers to practices that are intended to mislead investors by artificially affecting market activity. Such practices include WASH SALES or MATCHED ORDERS, i.e., buy and sell orders of substantially the same size at the same time to create a false impression of active trading, or RIGGED ORDERS. See also wash sale.

MANN ACT

a federal statute prohibiting the transportation of a woman or girl in interstate or foreign commerce for the purpose of prostitution, debauchery or any other immoral purpose; also known as the WHITE SLAVE TRAFFIC ACT.

MANSLAUGHTER

unlawful killing of another person without malice aforethought; distinguished from murder with possible attendant death penalty; an explainable, less extreme homicide. Most jurisdictions distinguish between voluntary and involuntary manslaughter. VOLUNTARY MANSLAUGHTER is intentional killing committed under circumstances that, although they do not justify the homicide, reduce its evil intent. A charge of manslaughter is appropriate where the defendant killed the victim in rage, terror or desperation. INVOLUNTARY MANSLAUGHTER consists of a homicide resulting from criminal negligence or recklessness.

MARGIN

the payment, a percentage of purchase cost, that a buyer of regulated securities must make when buying on credit from a stockbroker.

MARIJUANA [MARIHUANA] see controlled substance [CANNABIS].

MARITAL AGREEMENT see postnuptial agreement; prenuptial agreement; separation agreement.

MARITAL COMMUNICATIONS PRIVILEGE [HUSBAND-WIFE PRIVILEGE]

principle that either spouse is precluded from disclosing a confidential communication (oral, written, or expressive action) made by one to the other. The privilege is only valid during a legal marriage and communications made before the marriage or after the marriage terminates are not protected. However, those communications made during the marriage continue to be protected even after divorce or death. Its purpose is to preserve the marital status and to encourage free and open communication and confidence between spouses. Numerous courts have held that the privilege does not apply to persons living together without being married nor to those in a bigamous marriage. The privilege does not apply if third persons are present whether or not such presence was known to the spouses unless the third party lacks the capacity to be a witness. A presumption does exist that the communication was confidential. Where a spouse or child is the victim of a crime by the other spouse, the privilege does not apply as to that crime. The privilege belongs to the spouse against whom testimony is offered and while it may be waived, many courts feel both spouses, not merely the spouse making the communication, must consent for a valid waiver. Compare spousal disqualification.

MARITAL DEDUCTION

an ESTATE TAX(see tax) deduction permitting a spouse to take, tax free, up to one half the value of the decedent spouse's total estate. The marital deduction thus permits property to pass to the surviving spouse without being depleted by the federal estate tax; enacted for all to have tax treatment similar to that enjoyed by surviving spouses in the several community property states, where one half of the decedent's gross estate was presumed by law to already belong to the surviving spouse and hence was not subject to an estate tax.

MARITAL ESTATE [PROPERTY]

property acquired by a husband and wife during the marriage. Division of the property upon dissolution of the marriage is decided by the court unless a marital agreement exists. See community property; equitable distribution.

MARITIME JURISDICTION see admiralty and maritime jurisdiction.

MARITIME LAW

the traditional body of rules and practices related to business transacted at sea or to navigation, ships, seamen, harbors and general maritime affairs. It is, and always has been a body

of law separate from every other jurisprudence. See admiralty and maritime jurisdiction; admiralty courts.

MARKETABLE TITLE

one that a reasonably well-informed purchaser would, in the exercise of ordinary business prudence, be willing to accept. A title, to be marketable, need not be free from every technical criticism, but it must be demonstrated to be reasonably free of encumbrances.

MARKET MAKERS see over-the-counter market [MARKET MAKERS].

MARKET PRICE

price established by public sales or sales in the way of ordinary business; figure fixed by sales in ordinary business transactions, established when other property of the same kind and in the same or comparable location has been bought or sold in so many instances that such value may reasonably be inferred. This price is based on a theoretical transaction between a free seller and buyer dealing at arm's length. This term is synonymous with ACTUAL VALUATION, ACTUAL VALUE, MARKET VALUE, and FAIR VALUE. In determining a buyer's damages for nondelivery or repudiation of goods, market price is determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

MARKET VALUE

the price that property would bring in a market of willing buyers and willing sellers, in the ordinary course of trade. Market value is generally established, if possible, on the basis of sales of similar property in the same locality. Market value is generally regarded as synonymous with ACTUAL VALUE, CASH VALUE, and FAIR MARKET VALUE. See book value.

MARRIAGE

a voluntary union for life (or until divorce) of a man and a woman; the union is solemnized in accordance with local law by a wedding ceremony and the filing of a certificate of marriage. A license is required before a marriage can be performed. Such license can only be obtained after medical testing of the couple and, in the case where either the man or woman is a minor, by consent of a parent. The Supreme Court has held that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness. The common law recognized a marital status from a period of cohabitation as husband and wife but such common-law marriages are no longer recognized as valid in most jurisdictions. Compare bigamy.

MARRIED WOMEN'S ACTS see tenancy [TENANCY BY THE ENTIRETY].

MARSHAL

1. an officer of the peace, appointed by authority of a city or borough, to answer calls within the general duties of a constable or sheriff, 2. an officer in each federal district who performs the same duties as sheriffs do for states.

MARSHALING [MARSHALLING]

arranging or ranking in order.

MARSHALING ASSETSa rule of ranking assets of a debtor that seeks equitable distribution of those assets among as many claims as possible according to the equities of the parties. Courts of equity sometimes invoke the rule to compel a creditor, who has the right to satisfy his or her debt out of either of two funds, to resort to the fund that will not interfere with the rights of another creditor who has recourse to only one of these funds.

EXAMPLE: When Triad Corporation goes bankrupt, it owes money to both secured and unsecured creditors. The secured creditors have priority claims over specific property, while the unsecured creditors get paid only after all secured creditors are paid. One of the secured creditors has a claim on Triad's computers. If that creditor now wants to satisfy its debt with something other than the computers and that action will adversely affect the unsecured creditors, a court might apply the rule of *marshaling assets* to force that creditor to take the computers. Under that rule, both types of creditors have a better chance of having their claims satisfied.

Probate courts marshal assets to meet the stated wishes of a testator (testatrix) in a will when appointed property (property disposed of in the will by power of appointment) would, because of technical impediments, pass into an inappropriate residuary clause rather than be distributed as intended by the testator. Marshaling of assets in probate courts to achieve this objective is also called **SELECTIVE ALLOCATION**.

MARTIAL LAW

law of military necessity, where the military exercises great control over civilian affairs, generally because of war or civil insurrection. When instituted, martial law represents the unchecked will of the commander, controlled only by consideration of strategy and policy. In America, the President, as Commander-in-Chief of the Armed Forces, would assume unreviewable discretion were martial law declared. Compare separation of powers. See also court-martial.

MARY CARTER AGREEMENT

an agreement by the plaintiff to settle with some of the defendants in a tort case for the payment of specified damages even if the case is lost by the plaintiff. If the damages awarded exceed the settled amount, the defendant pays only the agreed upon amount or a specified percentage of the recovery.

The case proceeds to the jury with all the defendants including the settled defendants who appear to be active litigants. Some states allow confidential agreements while others require the information to be disclosed to the jury.

MASSACHUSETTS TRUST

a business trust that confers limited liability on the holders of trust certificates; also called a common law trust, a voluntary association of investors who transfer contributed cash or other property to trustees with legal authority to manage the business. Ownership interest is represented by transferable certificates of beneficial interest, also called trust certificates, and, less properly, shares. The business trust is a common form of organization among real estate investment trusts (REITs).

MASTER [MASTER IN CHANCERY; SPECIAL MASTER]

1. a judicial officer, often expert in the field with which the litigation is concerned, appointed by courts of equity to hear testimony and make reports that, when approved by the presiding judge, become the decision of the courts; 2. the employer in an employment relationship. See master and servant.

MASTER AND SERVANT

the relationship that develops from an express or implied employment contract between a master, or employer, and a servant, or employee. See agent; respondeat superior; servant.

MASTER PLAN

a long-term, general outline of a project or governmental function. For instance, in zoning law, a planning board or zoning commission will adopt a master plan for an area or a development project, which will regulate the height, density, and other characteristics of structures that may be erected.

MATCHED ORDERS see manipulation [MATCHED ORDERS].

MATERIAL

necessary, meaningful, pertinent to a given matter. In contract law, a material breach excuses further performance by the aggrieved party and can give rise to an action for breach of contract.

EXAMPLE: A contract between Plastics, Inc., and a cassette recording company called for 12 separate shipments of plastic cassettes. The first three shipments were defective and were returned to Plastics. The recording company was falling behind in its production schedule when the fourth shipment arrived and that shipment was also defective. The four defective shipments constitute a *material* breach of the contract and permit the company to cancel the contract and perhaps to institute a lawsuit against Plastics as well.

MATERIAL ALTERATION

any alteration of a document that changes its legal effect, i.e., that changes the rights, interests, and obligations of the parties to the instrument.

MATERIAL BREACH see breach [MATERIAL BREACH].

MATERIAL ISSUE

an issue that is of legal consequence or other importance.

MATERIAL WITNESS see witness.

MATERNAL

of the mother; belonging to or coming from the mother.

MATRICIDE

the crime of killing one's mother.

MATRIMONIAL ACTION

a lawsuit for the purpose of establishing or altering the marital status of the parties through an annulment or a divorce. See custody; equitable [EQUITABLE DISTRIBUTION].

MATTER

the substantial facts upon which a claim or defense is based; the subject of litigation, upon which issue is brought before the court and joined.

MATTER OF FACT see question of fact.

MATTER OF LAW see question of law.

MATURITY

the date at which legal rights in something ripen. In the context of commercial paper [negotiable instruments], it is the time when the paper becomes due and demandable, that is, the date when an action can enforce payment.

MAXIMS

statements espousing general principles of law; not usually used to justify a court decision based on law, but frequently used to determine the equities of a situation.

EXAMPLE: "Equity treats as done what ought to be done": The court will order the party to do what he or she should in good conscience already have done:

"First in time is first in right": If the claim of two parties is equal, the first in time is the party who will normally prevail.

MAYHEM

the common law felony of maliciously maiming, dismembering or in any other way depriving another of the use of

part of his body so as to render the victim less able to fight in the king's army. Many states today treat mayhem as AGGRAVATED ASSAULT(see assault).

MC NABB-MALLORY RULE

a judicial policy, based on federal law, that renders incriminating statements not admissible in federal court if obtained from a suspect held in violation of the speedy

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arraignment provisions of federal law. i.e., if there is unreasonable delay in arraignment.

MECHANIC'S LIEN see lien.

MEDIATE DATA

facts from which ultimate facts may be inferred for purposes of collateral estoppel.

MEDIATELY

indirectly; having been deduced from proven facts.

MEDIATION

a method of settling disputes outside of a court setting; the imposition of a neutral THIRD PARTY (see party) to act as a link between the parties; similar to arbitration and conciliation. Compare negotiation.

EXAMPLE: Jane and Ed wish to obtain a divorce. Hoping to avoid undue litigation and emotional trauma, they secure the help of a professional divorce mediator, who attempts a *mediation* of their affairs.

MEDIATOR see mediation [MEDIATOR].

MEDICAL EXAMINER see coroner.

MEETING OF MINDS

mutual assent to terms by parties to a contract. A traditional rule of contract law is that the agreement, to be legally enforceable, must be accurately expressed within the terms of the contract the parties create for therein lies the required meeting of the minds; a hidden intent of either party will not change the agreement as expressed.

MEGAN'S LAW see registration of offenders [MEGAN'S LAW].

MEMBER BANK

a member of the Federal Reserve System.

MEMBER CORPORATION

a securities brokerage firm, organized as a corporation, with at least one member of the New York Stock Exchange who is a director and a holder of voting stock in the corporation. See member firm.

MEMBER FIRM

a securities brokerage firm organized as a partnership and having at least one general partner who is a member of the New York Stock Exchange. See member corporation.

MEMORANDUM

1. an informal record; 2. a brief note, in writing, of some transaction; 3. an outline of an intended instrument; 4. an instrument written in concise summary.

MEMORANDUM OF LAW an argument by an advocate in support of his or her position; like a brief but less formal.

OFFICE MEMORANDUM informal discussion of the merits of a matter pending in a lawyer's office; usually

written by a law clerk or junior associate for a senior associate or partner.

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MEMORANDUM CHECK see check.

MENACING see assault.

MENSA ET THORO see divorce [SEPARATION].

MENS REA

(mēns rā'-ā) Lat.: a guilty state of mind. The mental state accompanying a forbidden act. Criminal offenses are usually defined with reference to one of four recognized criminal states of mind: (1) intent; (2) knowledge; (3) recklessness; (4) gross (criminal) negligence. See assault; larceny. Compare insanity.

MENTAL ANGUISH

compensable injury embracing all forms of mental pain, distinguished from physical pain, including deep grief, distress, anxiety and fright. See pain and suffering.

MENTAL CRUELTY

a ground for divorce, consisting of behavior by one spouse toward the other that so imperils the mental and physical health of the other that continuation of the marriage is unbearable.

MERCANTILE LAW

the branch of law (often called commercial law) that deals with rules and institutions of commercial transactions; derived from the law merchant.

MERCHANT

under the Uniform Commercial Code, "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." A one-time seller who is not engaged in the business of selling goods in question, or does not hold himself or herself out as a person who deals in such goods, is not a merchant for purposes of implied warranty.

Merchants include car dealers, producers of remanufactured engines, manufacturers of mobile homes, and with respect to the leasing of an apartment, landlords.

A warranty of merchantability will only be implied if the seller is a merchant with respect to goods of the kind in the contract of sale.

Under the Uniform Commercial Code, risk of loss passes to the buyer upon his or her receipt of goods only if the seller is a merchant; otherwise, the risk passes to the buyer on tender of delivery. See warranty [WARRANTY OF MERCHANTABILITY].

MERCHANTABLE

1. salable; 2. reasonably fit for the purpose for which an article is manufactured and sold; 3. having at least average quality, compared to similar products.

MERCHANTABLE TITLEsee marketable title.

WARRANTY OF MERCHANTABILITYsee warranty.

MERCY KILLING see euthanasia [ACTIVE EUTHANASIA].

MERE EVIDENCE RULE

a former rule of criminal procedure prohibiting the seizure of objects of evidential value whether pursuant to a warrant, or incident to arrest. The rule is no longer in effect and thus there is no distinction between *mere evidence* and instrumentalities, fruits of crime and contraband, in terms of seizure under the reasonableness standards of the Fourth Amendment. Even private personal papers may be seized as long as the privilege against self-incrimination is not violated by compelling a person to make a record or to authenticate the papers by their production.

MERGER

1. in criminal law, the process by which, when a single criminal act constitutes two offenses, the lesser-included offense merges with the more serious offense for purposes of conviction and sentence.
2. In the law of corporations, a merger is effected when one corporation ceases to exist by becoming part of another continuing corporation. The company that continues to exist retains its name and identity and acquires the assets, liabilities, franchises and powers of the corporation that ceases to exist. CONSOLIDATION, by contrast, occurs when two or more corporations unite to form a new corporation and all the original corporations cease to exist.
3. Procedurally, merger describes the effect of a judgment in a plaintiff's favor. Such a judgment extinguishes the entire claim or cause of action that was the subject of a former action, so that it becomes merged in the judgment. Plaintiff is then precluded from making any further claim that was or could have been part of the action that has been ended.
4. In the conveyance of real property, once the deed is accepted, representations and agreements made before delivery of the executed deed are said to merge with the deed, which is the final expression of the mutual rights and obligations of the parties, replacing the contract of sale and other prior understandings.
5. In property law, merger is the absorption of a lesser estate into a higher estate when the two estates meet in the same person at the same time, without any intermediate estate separating them. Thus, when a TENANT FOR YEARS purchases or inherits the reversion in fee simple, the tenancy terminates in ownership.

EXAMPLE: Irwin has the right to possess and use a farm until his death, at which time the land passes to his sister. The sister has no desire to farm or own a country house, so she sells her interest to

Irwin. Irwin's right of possession until his death *merges* with the interest he purchases from his sister to give him full ownership of the land forever. The result is that Irwin can now dispose of the property in whatever manner he desires.

Similarly, when the owner of an easement becomes the owner of the land, the easement is terminated by merging into the possessory interest.

6. The term also applies to the process by which, since the Statute of Uses, equitable ownership becomes legal ownership and conveyance of the former effectively conveys the latter.

MERGER CLAUSE see parol evidence [PAROL EVIDENCE RULE].

MERITS

the various elements that qualify plaintiff's right to the relief sought, or defendant's right to prevail in his defense.

MESNE

intermediate; between two extremes.

MESNE PROFITS profits obtained from the land by one without legal right to the land and who thus curtails the rights of the owner.

METES AND BOUNDS

the territorial limits of property expressed by measuring distances and angles from designated landmarks and in relation to adjoining properties.

MILITARY JURISDICTION

refers to the constitutional setup of three types of military jurisdiction: military law, which provides for governing the armed forces in both peace and war; military government, which is exercised in times of foreign war outside the United States or in times of rebellion and civil war within states occupied by rebels, supersedes local law, and is exercised by a military commander under the authority of the President; and martial law, which can only be declared by Congress, or by the President for a temporary period, to be used in time of invasion or insurrection within the United States where ordinary law no longer adequately secures public safety and private rights. See court-martial.

MILITARY LAW

a statutory code of rules and articles provided by Congress for the government and discipline of troops. It only applies to those in military service, but is enforced in both peace and war. See military jurisdiction. Compare martial law.

CODE OF MILITARY JUSTICE see [UNIFORM] CODE OF MILITARY JUSTICE on the following page.

COURT-MARTIAL see court-martial.

COURT OF MILITARY APPEAL the final appellate court that may review court-martial convictions of any armed service. It is not an

Article III constitutional court but is established by Congress under its power to raise and regulate the land and naval forces of the United States. Its decisions are subject to review by the President of the United States.

COURT OF MILITARY REVIEW an intermediate appellate court established by each branch of the armed forces for purposes of reviewing court-martial cases.

MILITARY COMMISSION in time of war, a court appointed by a field commander to try alien enemy combatants for offenses against the laws of war.

MILITARY COURT OF INQUIRY a board of three or more commissioned officers that is convened by any person authorized to convene a general court-martial for the purpose of making an investigation and advising whether further proceedings shall be had.

MILITARY GOVERNMENT military jurisdiction established under the Constitution, superseding local law, and exercised by the military commander under the direction of the President with the express or implied sanction of Congress. It is exercised either outside the boundaries of the United States or in time of rebellion and civil war within states or districts occupied by rebels. When a military government exists, any offense against the "law of war" is tried before a military court. See martial law.

[UNIFORM] CODE OF MILITARY JUSTICE the statute that sets forth procedures by which the armed forces may enforce discipline within its ranks. The military justice code establishes a system of courts to try members of the armed forces for service-related crimes. Service-related crimes are those committed on military posts, or while wearing a service uniform, but may extend to "nonmilitary" offenses in appropriate circumstances. The military courts function as a part of the executive branch of government, not the judicial branch, and are specifically exempted from the requirement of a grand jury. The proceedings of the military courts are not generally subject to review by the federal courts; however, the federal courts may hear habeas corpus applications from military prisoners who allege the denial of basic constitutional rights.

MILITARY WILL

a relaxation of formal requirements for wills for members of the armed services while in actual military service. The will may be oral or written, sometimes without witnesses, and can be made by minors. The will is not contingent on the physical condition of the testator/testatrix at the time the will is made.

MINER'S INCH

unit of measure involved in water rights of the amount of water passing through a standard opening under a prescribed

pressure. Different states have different rates specified by statute (e.g., 1 miner's inch = .02 cu. ft. per sec. in Idaho and .025 cu. ft. per sec. in Arizona).

MINERAL LEASE see mining [MINING LEASE].

MINIMUM WAGE

minimum hourly wages established by Congress under the Fair Labor Standards Act to maintain the health, efficiency, and general well-being of workers. That Act has been held inapplicable to state and local governments.

MINING

the process of extracting valuable natural resources from the earth including but not limited to gold, silver, diamonds, gas, coal, uranium, oil, and phosphorus.

LOCATIONseries of acts required by law to acquire a mining claim. Public notice of the claim and identification of the parameters of the land must be given.

MINING CLAIMportion of land appropriated by an individual according to established rules and allowing for exclusive rights to harvest the natural resources therein.

MINING LEASEan agreement allowing a lessee the right to enter upon real property to explore for minerals or other natural resources and, if found, to extract them from the earth. The lessee pays the lessor rent or a share of the proceeds. A mining lease differs from an ordinary lease in that the right exists to take from the soil with only a limited right of possession of the land incidental thereto, as in an oil or gas lease.

MINISTER

a person ordained in conformity to the customs of any organized religion. To be exempt from military training and service, but not from registration, under the Universal Military Training and Service Act, a person must be ordained in accordance with the formalities required by their religious denomination and preach and teach its religious tenets as their regular and customary vocation, not merely irregularly or incidentally.

MINISTERIAL ACT

an act performed according to explicit directions (often embodied in a statute) by a subordinate official, allowing no judgment or discretion on the part of that official. See mandamus.

MINORITY

condition of being under legal age.

MINUTES

a transcription or other written record of judicial proceedings. While the minutes kept by the judge are neither a memorial of the judgment nor a legally required record, they are legal evidence

of the judgment, and as such they may serve as the foundation for the correction of errors.

MIRANDA RULE

the requirement to inform a person of his or her privilege against self-incrimination (right to remain silent) and his or her right to the presence and advice of a retained or appointed attorney before any custodial interrogation by law enforcement authorities. Prior to any questioning, the person must also be warned that any statement he or she does make may be used as evidence against him or her.

Statements and evidence obtained in violation of this rule, unless these rights have been knowingly waived (and the evidence voluntarily provided), are not admissible in the defendant's criminal trial and are grounds for federal constitutional challenge to any conviction obtained thereby.

MISADVENTURE

an accidental and unintentional homicide, distinguished from involuntary manslaughter in that the homicide by misadventure must be the result of a lawful act unaccompanied by criminal carelessness or recklessness.

MISAPPLICATION [MISAPPROPRIATION] OF PROPERTY

the conscious illegal use of funds or property for a wrongful purpose; particularly applies to the acts of a fiduciary [one in a position of trust], public servants as well as private trustees. The terms can include misapplication of funds intended for another purpose, e.g., the misapplication of public money, or the conversion of another's funds for one's own benefit. Compare embezzlement; larceny.

MISAPPROPRIATION see misapplication [misappropriation] of property.

MISCARRIAGE OF JUSTICE

damage to the rights of one party to an action that results from errors made by the court during trial and that is sufficiently substantial to require reversal. Where the appellate court is seriously doubtful that without committed errors the result in the case would have been the same, the errors may require a reversal on the grounds of a miscarriage of justice. See plain error.

MISCEGENATION

in America and England, a marriage between a Caucasian and a member of any of the other races; the mixture of races in a marriage or cohabitation in a state of adultery or fornication by a white and a black person.

MISCONDUCT IN OFFICE

corrupt misbehavior by an officer in the exercise of the duties of the office or while acting under color of

the office; includes any act or omission in breach of a duty of public concern by one who has accepted public office. See bribery.

MISDELIVERY

includes both delivery to the wrong party and delivery of goods damaged by the carrier; failure to deliver goods within the terms of the bill of lading; a total failure to deliver the goods, or leaving them at the wrong place, which is also deemed a conversion. In a bailment for hire, the bailee is held strictly accountable for a misdelivery and is liable for conversion when such misdelivery occurs. For purposes of commercial contracts, a delivery pursuant to a forged delivery order is a misdelivery rather than a theft.

MISDEMEANOR

a class of criminal offenses less serious than felonies and sanctioned by less severe penalties. In a jurisdiction where there are no felonies, the more serious misdemeanors are called **HIGH MISDEMEANORS**.

MISFEASANCE

the wrongful or injurious performance of an act that might have been lawfully done.

MISJOINDER

1. the improper joining together in one trial of distinct unrelated counts in a single indictment or complaint; 2. the improper joining of parties or criminal defendants in a single action. See joinder.

MISLAID PROPERTY

property that the owner has intentionally placed where he or she can resort to it, but which place is then forgotten. Compare abandonment; lost property.

EXAMPLE: Ken inadvertently leaves his briefcase at the train station. Later that evening, Ken realizes he no longer has the briefcase and cannot remember where it is. The briefcase is *mislaid property*, and Ken still has an ownership interest in it. He did not leave the property where he had no intention of recovering it. In that case the property would have been abandoned.

MISNOMER

a mistake in a person's name. The **MISNOMER RULE**, which affords relief from the statute of limitations, applies when the plaintiff has sued and served the party he intends to sue but has mistakenly used the wrong name of the defendant.

MISPRISION OF FELONY

in common law, the misdemeanor of observing the committing of a felony and failing to prevent it, or of knowing about a felony and failing to disclose its occurrence, or of concealing the felony without any previous agreement with or subsequent assistance to the felon as would make the concealer an accessory before-or after-the-fact. Today, to be guilty of the federal

crime of misprision of felony, in addition to knowing about a felony and failing to disclose information about it, one must take an affirmative step to conceal it.

EXAMPLE: Mark observes a bank robbery taking place at a federally insured bank. As a believer in the axiom of stealing from the rich to give to the poor, Mark not only does not call the police but picks up a pair of gloves the thieves left behind. Those gloves, which might help solve the crime, are destroyed by Mark. That destruction makes Mark guilty of the federal crime of *misprision of felony*.

MISREPRESENTATION See false pretense.

MISTAKE

an act or omission arising from ignorance or misconception, which may, depending upon its character or the circumstances surrounding it, justify rescission of a contract, or exoneration of a defendant from tort or criminal liability.

MISTAKE OF FACT mistaken notion as to circumstances, events or facts.

MISTAKE OF LAW ignorance of the legal consequences of one's conduct, though he or she may be cognizant of the facts and substance of that conduct. Compare *ignorantia legis non excusat*.

MUTUAL [or BILATERAL] MISTAKE in commercial law, an error on the part of both parties regarding the same matter for example, where both parties understood that the real agreement was what one party alleges it to be, but had unintentionally executed a contract that did not express the true agreement.

EXAMPLE: Steve buys his mother a raincoat for her birthday. The salesperson tells him that one size fits all and believes that to be the case. In fact, the particular coat is tailored for a very large person and is manufactured in several different sizes. The mutual *mistake* will allow the sale to be cancelled by Steve even though it was a final sale with no returns.

UNILATERAL MISTAKE a mistake on the part of only one of the parties.

MISTRIAL

a trial that has been terminated and declared void prior to the jury's returning a verdict (or the judge's declaring his or her verdict in a nonjury trial) because of some extraordinary circumstance (such as death or illness of a necessary juror or of an attorney), or because of some fundamental error prejudicial to the defendant that cannot be cured by appropriate instructions to the jury (such as the inclusion of highly improper remarks in the prosecutor's summation), or most commonly because of the jury's inability to reach a verdict because it is hopelessly deadlocked in its deliberations (hung jury). Mistrial does not result in a judgment for any party, but merely indicates a failure of trial. Compare double jeopardy.

MITIGATING CIRCUMSTANCES

a set of conditions that, while not exonerating the accused, might reduce the sentence or the damages arising from the offense. Compare aggravating circumstances; defense.

MITIGATION OF DAMAGES

1. a requirement that one injured by another's breach of an agreement or tort employ reasonable diligence and care to avoid aggravating the injury or increasing the damages; 2. a defendant's request to the court for a reduction in damages owed to the plaintiff, a request that the defendant justifies by evidence demonstrating that the plaintiff is not entitled to the full amount that might otherwise be awarded.

DUTY TO MITIGATE DAMAGES the rule that in some circumstances one who is wronged must act reasonably to avoid or limit losses, because he or she cannot recover damages that could have been avoided.

EXAMPLE: Rusty signs a three-year lease with a landlord but has to move out of the apartment after one year. For two years, the landlord lets the apartment stay vacant, even though several people are interested in renting that specific apartment. When the landlord sues Rusty for rent due over the two-year period, Rusty will claim that the landlord's right to collect should be limited because of the landlord's failure to *mitigate his damages*. In this instance, the landlord may have easily rented the apartment to another person so that the landlord's losses, and therefore his damage claims, would have been greatly reduced. The offset for rents that could have been collected will be allowed.

MIXED NUISANCE see nuisance [MIXED NUISANCE].

MIXED QUESTION OF LAW AND FACT see question of law [MIXED QUESTION OF LAW AND FACT].

M'NAGHTEN RULE

the common law test of criminal responsibility under which a person was not responsible for criminal acts and was thus entitled to an acquittal by reason of insanity if as a result of a mental disease or defect he or she did not understand what he or she did or that it was wrong, or if he or she was under a delusion (but not otherwise insane) that, if true, would have provided a good defense (as where the defendant thought he or she was acting in self-defense or carrying out the will of God). This is called the **RIGHT AND WRONG TEST** because it is often said that one was not insane under the M'Naghten rule if he or she could distinguish right from wrong. The test has been criticized as too restrictive and has been changed in many jurisdictions. See Durham rule.

M.O. see *modus operandi*.

MOB see organized crime.

MODELACTS see uniform laws.

MODEL RULES OF PROFESSIONAL CONDUCT

most recent pronouncement of rules governing professional conduct of lawyers recommended by the American Bar Association in 1983 to replace the Code of Professional Responsibility. Generally consists of rules of reason prescribing terms for resolving ethical problems that arise from "conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." Preamble to the Rules. The adoption of the Rules recognizes that the legal profession is largely self-governing, a status that can be maintained only as long as the profession can assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. The Rules, however, simply provide a framework for the ethical practice of law. They do not exhaust the moral and ethical considerations that should guide a lawyer. Moreover, the Rules are not designed to be a basis for civil liability. Each state body that regulates lawyer conduct within its jurisdiction is free to adopt all or part of the Rules, or to reject them.

The Rules address eight separate areas: (1) the client-lawyer relationship, (2) the lawyer as a counselor, (3) the lawyer as an advocate, (4) transactions with persons other than lawyers, (5) law firms and associations, (6) public service, (7) information about legal service, and (8) maintaining the integrity of the profession.

One of the more controversial rules concerns Confidentiality of Information, which essentially requires the lawyer to not reveal any information the client tells to the lawyer, even if that information concerns the commission of a crime or fraud upon others, except if the crime is likely to result in imminent death or substantial bodily harm, or establishes a claim or defense on behalf of the lawyer in a controversy between the lawyer and client.

MODUS OPERANDI

(mō'-dūs ōp-er-ān'-dē) Lat.: the manner of operation. The means of accomplishing an act; especially, the characteristic method employed by defendant in repeated criminal acts.

MOIETY

the half part.

MOLLITER MANUS IMPOSUIT

(mō'-lī-tēr mā'-nūs ĩmpō'-zū-ĭt) Lat.: the gentle laying upon of hands. In a tort action, the term refers to an assertion by one of the parties that he or she used only the force necessary to protect himself or herself or his or her property from injury by the other party. Compare self-defense.

MONEY DEMAND

any demand or action arising out of contract, tort, or statute, express or implied, where the relief demanded is a recovery of money, and may be enforced by attachment when the amount due is fixed or can be ascertained.

MONEY HAD AND RECEIVED

in early common law pleading, one of the categories in the action for general assumpsit. The plaintiff declared that the defendant "had and received certain money . . ." The other two related declarations in the same category were "for money lent" and "for money paid."

MONEY JUDGMENT

a judgment ordering the payment of a sum of money. Such judgments may be executed under a writ of execution.

MONEY ORDER

a credit instrument, either negotiable or nonnegotiable, calling for payment of money to a named payee, and involving the payee, drawee, and remitter.

MONEYSUPPLY [M-1, M-2, M-3]

the various measures of money used by the Federal Reserve System. M-1 is currency plus demand deposits or checking account balances; M-2 is M-1 plus net time deposits other than large certificates of deposit; M-3 is M-2 plus deposits at nonbank thrift institutions such as savings and loan associations. Various other components and combinations are also used.

MONOGAMY see polygamy.

MONOPOLY

1. a market condition where all or so nearly all of an article of commerce within a district is brought within the control of one person or company, that competition or free traffic in that article is excluded. See antitrust laws. 2. a privilege or license granting a group or company sole authority to deal in certain products, or provide a product or service in a specified area.

EXAMPLE: Public Utilities Gas Company is granted the exclusive right to supply gas to the northern part of a state. The right is granted out of convenience and necessity, since it would be impractical to have several gas company lines running underground. Moreover, it is desirable to have the state control pricing of a necessary item for any household. As a grant by the state, the *monopoly* in favor of Public Utilities is a lawful monopoly.

MONTH-TO-MONTH TENANCY see tenancy [PERIODIC TENANCY].

MOOT CASE

a case that seeks to determine an abstract question that does not rest upon existing facts or rights, or that seeks a judgment in a pretended controversy, or one that seeks a decision about

a right before it has actually been asserted or contested, or a judgment upon some matter that, when rendered for any cause, cannot have any practical effect upon the existing controversy. See advisory opinion.

EXAMPLE: Tina files a lawsuit against Private University, claiming that the university has denied her admission because of her race. Before the case reaches the trial court, Private admits Tina as a student. Because of the school's actions, the case between Tina and Private is rendered *moot*. Tina can no longer claim that race was a factor in denying her admission, since she has been admitted.

MOOT COURT

a fictitious court established to argue a moot case.

Law schools form moot courts as an instrument of learning.

MORAL CERTAINTY

certainty beyond a reasonable doubt; a conviction based on persuasive reasons and excluding doubts that a contrary conclusion can exist. A juror is said to be morally certain of a fact when he or she would act in reliance upon its truth in matters of greatest importance to himself or herself.

MORAL CONSIDERATION see consideration [MORAL [EQUITABLE]CONSIDERATION].

MORAL TURPITUDE

vileness or dishonesty of a high degree. A crime of moral turpitude demonstrates depravity in the private and social duties a person owes to others, contrary to what is accepted and customary.

MORATORIUM

delay, a period during which certain proceedings or obligations are suspended. During the pendency of bankruptcy proceedings, for example, there is a moratorium on the debtor's obligation to pay his debts.

MORTGAGE

in common law, a conveyance of, or granting of a lien upon, real property of a debtor to his creditor, intended as a security for the repayment of a loan, usually the purchase price (or a part thereof) of the property so conveyed or encumbered. The transfer was rendered void upon repayment of the loan; i.e., the property reverted to the debtor upon the discharge of the mortgage by timely payment of the sum loaned.

TITLE THEORY refers to the modern version of the common law mortgage under which the creditor has the legal right to possession (though in fact the debtor remains in possession of his or her property). Under the HYBRID THEORY the creditor's right to possession arises only upon default by the debtor. Under the LIEN THEORY, the mortgagee (creditor) takes a lien on the property, and is not entitled to possession until he or she has pursued remedy in foreclosure and

the mortgaged premises have been sold; i.e., the right to possession arises only when the mortgagor's (debtor's) equity of redemption has been foreclosed. In the mortgage relationship, the debtor is called the mortgagor and the creditor is called the *mortgagee*.

ASSUMPTION OF MORTGAGEtaking upon oneself the obligations of a mortgagor towards a mortgagee, generally as part of the purchase price of a parcel of real estate. By assuming the mortgage rather than taking subject to the mortgage, the purchaser becomes personally liable on the debt.

EXAMPLE: Ed wants to buy Frank's home for \$80,000. He can afford a \$16,000 down payment and is willing to assume Frank's \$64,000 mortgage. If the bank agrees to the assumption of its mortgage, Ed will be personally responsible for the mortgage payments. If Ed should default, the bank can still hold Frank liable, since he was the original mortgagor, unless he is released by the bank as part of the assumption.

SUBJECT TO MORTGAGEa condition of sale whereby the purchaser takes land encumbered by a preexisting mortgage. The purchaser's obligation to the mortgagee is limited to the value of the property subject to the mortgage, unless the purchaser becomes personally liable on the debt by assuming the mortgage.

CHATTEL MORTGAGEconveyance of a present interest in personal property, generally as security for payment of money, such as the purchase price of property, or for the performance of some other act. Like a mortgage of real property, it operates in some states to pass title to the mortgagee, but in other states merely to create a lien; but in either case the mortgagor retains possession. It is thus distinguished from a pledge, which establishes a bailment and that therefore establishes the pledgee as bailee and grants him or her possession of the personalty.

EQUITABLE MORTGAGEsecurity transaction that fails to satisfy the legal requirements of a mortgage but that nevertheless is treated in equity as a mortgage. It includes cases in which interest in the property in the hands of the creditor is full legal ownership, and the aid of equity is necessary to reduce it to a security interest and to establish the rights of the debtor as a mortgagor. Also included are cases where the transaction is technically insufficient to create a mortgage at law, but where equity intervenes to protect the mortgagee.

MORTGAGEE

the party lending the money to a mortgagor, who takes a security interest in property owned by the mortgagor.

MORTGAGE MARKET

origination of mortgage loans in the primary mortgage market and resale of mortgages in the secondary

mortgage market, especially mortgage certificates that are bond-like securities backed by blocks of mortgage loans. Primary origination is conducted by mutual savings banks, savings and loan associations, mortgage bankers, commercial banks, and insurance companies. The same institutions are active in the secondary market with mortgage certificate issues directed to the general public and traditional investment groups such as pension funds. Mortgage loans represent first liens on real estate property that, unlike bonds, require periodic payment (usually monthly) of both principal and interest over the term of the mortgage. The federal government has assumed a major economic role in the mortgage loan market because real estate development is a major sector of the U.S. economy. The Federal Housing Authority and the Veterans Administration promote primary mortgage originations by guaranteeing home mortgages. The Government National Mortgage Association (known as GINNIE MAE) and the Federal National Mortgage Association (known as FANNIE MAE) promote the secondary mortgage market in government-insured loans. The Federal Home Loan Bank Board regulates savings banks, which are the primary originators of home mortgages, and promotes the secondary market in government-insured mortgages, privately insured mortgages and conventional uninsured mortgages.

MORTGAGOR

the party borrowing money from a bank or other lending agency, who secures the loan with property the party owns in whole or in part.

MORTIS CAUSA see cause [CAUSA MORTIS].

MORTMAIN

literally, dead hand; applies to all property that, from the nature of the purposes to which it is devoted, or the character of the ownership to which it is subjected, is for every practical purpose not freely alienable.

MOST FAVORED NATION CLAUSE

in international law, a clause in a treaty by which each signatory country grants to the other the broadest rights and privileges that it accords to any other nation in treaties it has made or will make.

MOTION

an application to the court requesting an order in favor of the applicant. Motions are generally made in reference to a pending action and may be addressed to a matter within the discretion of the judge, or may concern a point of law. Motions may be made orally or, more formally, in writing.

MOTOR VEHICLE CODE see code.

MOVANT

the moving party; applicant for an order by way of motion before a court.

MOVE

to make a motion; in practice, to make application to a court or other tribunal for a ruling, order or particular relief.

MULCT

a fine or penalty imposed for an offense; a forfeiture.

MULTIFARIOUS

refers to a suit where independent matters are improperly joined and thereby confused; also refers to misjoinder of causes of action and misjoinder of parties in a suit.

MULTIPARTITE

consisting of two or more parts or parties, as where several nations join in a treaty.

MULTIPLICITY OF SUITS

the existence of several separate actions at law brought against the same defendant to litigate the same right. In the exercise of its equity powers, a court can enjoin the proceedings at law and hear all of the claims at a single proceeding.

MUNICIPAL BOND

a bond issued by a state or local government body such as a county, city or town.

MUNICIPAL CORPORATIONS

usually incorporated cities, towns and villages having subordinate and local powers of legislation. The term is sometimes used in a broader sense to include every corporation formed for governmental purposes, so as to embrace counties, townships, school districts and other governmental subdivisions of the state.

MUNICIPAL COURT

city court that administers the law within the city. These courts generally have exclusive jurisdiction over violations of city ordinances and may also have jurisdiction over minor criminal cases arising within the city and over certain civil cases.

MUNICIPAL ORDINANCE

a law of local application, whose violation is an offense against the city enacting it. See ordinance.

MURDER

unlawful killing of another human being with premeditated intent or malice aforethought.

FIRST DEGREE MURDERunlawful killing that is deliberate and premeditated.

SECOND DEGREE MURDERunlawful killing of another with malice aforethought but without deliberation and premeditation. Such malice may be in the form of express malice as the actual intention to kill, or of implied malice where there is no intent, but where death is caused by an act that discloses such a reckless state of mind as to be equivalent to an actual intent to kill.

EXAMPLE: Tom becomes very angry at his business partner, Andy, and throws a brick at him. Since Tom

intended to hurt Andy, if death results the act will be second degree murder. If the provocation was

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sufficient, the crime might be reduced by the jury to manslaughter. If Tom planned the attack on Andy and intended to inflict grievous injury, it might be first degree murder.

See also homicide; manslaughter.

MUTE see standing mute.

MUTINY

to rise against lawful or constituted authority, particularly in the naval or military service. At sea, an attempt to usurp command of a vessel from its master. Includes resisting a federal warden or subordinate officers in the free and lawful exercise of their legal authority.

MUTUAL FUND

an investment company that sells its own shares to investors and then invests the proceeds from that sale in other securities, thus affording its investors a diversified portfolio. OPEN-END MUTUAL FUNDS do not have a fixed capitalization and may issue new shares on a customer-demand basis. CLOSED-END MUTUAL FUNDS do have a fixed capitalization and may sell only as many shares as were authorized in the first instance.

MUTUAL FUND SHARE

a security reflecting an undivided ownership in a mutual fund company that is not traded by the shareholders but is redeemable upon its request.

MUTUALITY OF ESTOPPEL see estoppel [MUTUALITY OF ESTOPPEL].

MUTUALITY OF OBLIGATION

responsibilities imposed on each of the parties to a contract, which must be mutual and by which each must be bound. Unless each party is bound to perform in some way, the agreement will lack consideration.

MUTUALITY OF REMEDY

a doctrine that one party should not obtain from equity that which the other party could not obtain. Accordingly, whenever a contract is incapable of being specifically enforced against one party because of the personal nature of the contract, that party cannot specifically enforce it against the other.

MUTUAL MISTAKE see mistake [MUTUAL [BILATERAL] MISTAKE].

N

NAKED POWER see power of appointment [NAKED POWER].

NALA see National Association of Legal Assistants.

NALS see National Association of Legal Secretaries.

NAMED INSURED

the party who contracts for insurance and who is named in the policy. It sometimes happens that one who is a named insured has a claim in tort against another who is an additional insured under the policy. For example, the owner of an insured automobile may lend it to another whose operation of the vehicle injures the owner (the named insured).

NARCOTICS see controlled substances [NARCOTICS].

N.A.S.D. see National Association of Securities Dealers [N.A.S.D.].

NASDAQ

the national automated quotation service for over-the-counter securities. Operation is supervised by the National Association of Securities Dealers [N.A.S.D.] and input is provided by hundreds of over-the-counter market makers. NASDAQ is an acronym for National Association of Securities Dealers Automated Quotations.

NATIONAL ASSOCIATION OF LEGAL ASSISTANTS [NALA]

a national organization of paralegals and legal assistants providing continuing education, job placement, and professional certification. Use of CLA (Certified Legal Assistant) after a name indicates the receipt of certification through NALA

NATIONAL ASSOCIATION OF LEGAL SECRETARIES [NALS]

a national organization of legal secretaries providing continuing education, professional certification, and job placement.

NATIONAL ASSOCIATION OF SECURITIES DEALERS [N.A.S.D.]

a body empowered by the Securities and Exchange Commission to regulate over-the-counter market brokers and dealers. It is charged to adopt, administer, and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of

trade for the protection of investors. It publishes quotations for national and regional over-the-counter transactions and supervises operation of NASDAQ, the national automated quotation service for over-the-counter stocks.

NATIONAL CRIME INFORMATION CENTER see NCIC.

NATIONAL LABOR RELATIONS ACT

comprehensive federal law that regulates the relations of employers and establishes the National Labor Relations Board. See labor organization [union].

NATIONAL LABOR RELATIONS BOARD [NLRB]

an independent agency created by Congress that oversees relationships between unions and employees. The Board has the power to adjudicate claims before it and to enforce its judgments in the federal courts. See labor organization [union].

NATIONAL LAWYERS GUILD

an association of lawyers, law students, legal workers, and jailhouse lawyers dedicated to the need for basic change in the political and economic system of the country. It actively seeks to eliminate racism and to maintain and protect civil rights and civil liberties. It was founded in 1937 as a progressive alternative to the American Bar Association.

NATIVE AMERICAN LAW see Indian law.

NATURAL CHILD

any child by birth as opposed to an adopted child. Compare adoption.

NATURALIZED CITIZEN

one who, having been born in another country or otherwise reared as a foreigner, has been granted U.S. citizenship and the rights and privileges of that status. The process by which such a person attains citizenship is called NATURALIZATION.

NATURAL LAW

law that so necessarily agrees with the nature of human beings, that without observing its maxims, the peace and happiness of society cannot be preserved; that law, knowledge of which may be attained merely by the light of reason, and from the facts of its essential connection with human nature. Natural law exists regardless of whether it is enacted as positive law. See also positivism.

NATURAL LAW THEORY

in jurisprudence, the view that the nature and value of any legal order is best understood by studying how the positive law of that legal order agrees or contrasts with natural law.

NATURAL PERSON

a human being, as opposed to an artificial or fictitious person such as a corporation.

NAVIGABLE WATERS

within meaning of congressional acts, when waters form (in their ordinary condition by themselves or by uniting with other waters) a continued highway over which commerce is or may be carried on with other states or foreign countries in customary modes in which such commerce is conducted by water. See admiralty and maritime jurisdiction.

N.B. see note bene.

NCIC

National Crime Information Center. Computerized records used by law enforcement agencies to determine criminal records, arrest or bench warrants, or stolen vehicles and guns.

NECESSARY AND PROPER CLAUSE

constitutional provision, U.S. Constitution, Art. I, Sec. 8, Cl. 18, empowering Congress to make all laws that shall be "necessary and proper" for carrying into execution the enumerated powers of Congress. The phrase is not limited to such measures as are absolutely necessary, but includes all appropriate means that are conducive to the end to be accomplished, and that in the judgment of Congress, will most advantageously effect it. The clause is not a grant of power but a declaration that Congress possesses all the means necessary to carry out its specifically granted powers.

NECESSARY IMPLICATION see implication [NECESSARY IMPLICATION].

NECESSARY INFERENCE

deduced fact that is unavoidable from the standpoint of reason, so that no other inference may be reasonably drawn from the facts as stated.

EXAMPLE: Mark is in a maximum security prison when a robbery occurs in a local jewelry store. Several witnesses to the robbery are shown pictures of criminals at police headquarters, and one of those witnesses identifies Mark as the robber. Mark cannot be charged because there is a *necessary inference* that he could not have committed the robbery in town while an inmate at a maximum security prison.

Compare presumption.

NECESSARY PARTY see party.

NECESSITY, DEFENSE OF see justification.

NE EXEAT

(nē ɛx'-ē-ăit) Lat.: do not leave. An order (sometimes called a writ) forbidding a person from leaving the court's jurisdiction unless a suitable surety, such as a bond, is posted.

NEGATIVE AVERMENT

an averment in some of the pleadings in which a negative is asserted. Generally a party need not prove a

negative averment, but the point in issue is to be proved by the party who asserts the affirmative.

NEGATIVE EASEMENT see easement [NEGATIVE EASEMENT].

NEGATIVE PREGNANT

in pleading, a denial that implies an affirmation of a substantial fact and hence is beneficial to the opponent. Thus, when only a qualification or modification is denied while the fact itself remains undenied, the denial is pregnant with an affirmation of that fact.

LITERAL DENIAL If the complaint alleges that the defendant was at the bar on July 5th and the defendant denies that he was at the bar on July 5th, this would be an admission that he may have been at the bar on July 3rd or July 7th (or any other date).

CONJUNCTIVE DENIAL If the complaint alleges that the defendant injured the plaintiff by kicking and slapping and punching and the defendant denies that he was kicking and slapping and punching, this would constitute an admission that he was guilty but in a combination less than all three. Instead, the defendant should have responded in the disjunctive by denying that he was kicking *or* slapping *or* punching.

NEGLECT

the omission of proper attention; avoidance or disregard of duty from heedlessness, indifference, or willfulness; failure to do, use, or heed anything; negligence, as neglect of business, of health, or of economy. See also excusable neglect.

NEGLIGENCE

failure to exercise a degree of care that a person of ordinary prudence (a reasonable man) would exercise under the same circumstances. The term refers to conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm.

COMPARATIVE NEGLIGENCE the proportionate sharing between plaintiff and defendant of responsibility for injury to the plaintiff based on the relative negligence of the two. It results in a reduction of the damages recoverable by the negligent plaintiff in proportion to his fault.

EXAMPLE: John runs across a busy street at a point between two trucks, so that both his vision and the vision of other vehicles is impaired. A car travels down the street over the speed limit, but not excessively fast, and hits John. A jury finds John 30 percent responsible for the accident and the driver 70 percent. Under a *comparative negligence* theory, if John would have normally recovered \$10,000 in damages, he now only recovers \$7,000.

CONCURRENT NEGLIGENCE the wrongful acts or omissions of two or more persons acting independently but causing the same injury.

The independent actions do not have to occur at the same time, but must produce the same result. The actors are all responsible for paying the damages and can usually be sued together in one lawsuit or individually in separate lawsuits.

CONTRIBUTORY NEGLIGENCE conduct on the part of the plaintiff that falls below the standard to which he or she should conform for his or her own protection, and that is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm. In common law, the plaintiff's contributory negligence precludes his or her right to recover from the defendant.

EXAMPLE: On the same facts as in the example under comparative negligence, if the jurisdiction John sues in follows a theory of *contributory negligence*, John's fault will prevent any recovery against the other driver since John's negligence contributed to his injury.

CRIMINAL [or CULPABLE] NEGLIGENCE such negligence as is necessary to incur criminal liability. In most jurisdictions, culpable negligence is more than the ordinary negligence necessary to support a civil action for damages. Thus, culpable negligence is a reckless disregard of consequences or a heedless indifference to the personal safety of others.

GROSS NEGLIGENCE an intentional or willful failure to perform a clear duty, recklessly disregarding the consequences of injury to person or property that attend such failure.

NEGLIGENCE PER SE negligence as a matter of law; an act or omission recognized as negligent either because it is contrary to the requirements of law or because it is so opposed to the dictates of common prudence that one could say without doubt that no careful person would have committed the act or omission. While negligence ordinarily must be found by the trier of fact (see fact finder) from the facts and circumstances disclosed by the evidence, negligence per se arises from a violation of a specific requirement of law or ordinance, the only fact for determination by the trier of fact being the omission or commission of the specific act prohibited or required.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS see emotional distress [NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS].

NEGOTIABLE INSTRUMENT

a writing signed by the maker or drawer, containing an unconditional promise or order to pay a specific sum, payable on demand or at a definite time, and payable to order or to bearer. A draft, check, certificate of deposit and note may or may not be negotiable instruments, depending upon whether the elements of negotiability are satisfied.

EXAMPLE: Mickey takes a loan from a bank and signs a promissory note to repay the bank in twelve months. That note is a *negotiable instrument* and can be transferred by that bank to any other party. Because it is freely transferable, Mickey does not repay the note unless he knows who possesses it, and demands that, upon payment, the note be returned to him so that it is not transferred to another party.

An ordinary check issued by an employer to an employee or by a customer to a store is also a negotiable instrument.

NEGOTIABLE ORDER OF WITHDRAWAL [N.O.W.] see bank [NEGOTIABLE ORDER OF WITHDRAWAL [N.O.W.]].

NEGOTIATION

a method of dispute resolution where either the parties themselves or the representatives of each party attempt to settle conflicts without resort to the courts; an impartial third party is not involved. Compare arbitration; mediation.

NEMO EST SUPRA LEGIS

(*nā'-mō ěst sū'-prá lā-gĭs*) Lat.: nobody is above the law.

NET ASSET VALUE

an accounting term similar in meaning to book value and net worth; most often used in reference to value of mutual fund shares and similar investment companies. Investment companies compute their net asset value at the end of each market day by taking the total market value of securities, cash, etc., owned, less any liabilities. See balance sheet.

NET ESTATE

estate that under federal and state statutes is subject to an estate tax; generally that estate remaining after all debts of decedent, funeral and administrative expenses, and other deductions prescribed by law have been subtracted from the GROSS ESTATE (total valuation of the estate's assets at decedent's death). The term thus refers generally to that estate left to be distributed after all deductions have been made.

NET INCOME

the gross [total] income less the deductions and exemptions allowed by law.

NET OPERATING LOSS

the excess of allowable deductions over GROSS INCOME(see income) with certain specific adjustments set forth in the Internal Revenue Code, which are generally designed to limit the net operating loss deductions of individual taxpayers to business losses. A net operating loss reduces the TAXABLE INCOME(see income) of the taxpayer for the taxable year by the amount of such net operating loss.

NET WORTH

one of several methods used by the Internal Revenue Service to reconstruct a taxpayer's income when it is determined

that either the taxpayer has failed to file a return or the tax liability shown is not correct. Under this method the taxpayer's net worth for the start of the period in question is determined, and his or her net worth at the end of the period is also calculated, with the difference, less any nontaxable amounts received, deemed to be the taxpayer's income for the period. This approach is often used in cases involving suspected evasion by the taxpayer, but it is also used in normal civil or civil fraud contexts.

NEUTRALITY LAWS

laws governing a country's abstention from participating in a conflict or aiding a participant of such conflict, and the duty of participants to refrain from violating the territory, seizing the possession, or hampering the peaceful commerce of the neutral countries. For example, the Neutrality Act of 1939 was passed by Congress for the purpose of preserving the neutrality of the United States and averting the risks that brought the United States into World War I.

NEWLY DISCOVERED EVIDENCE

evidence in existence at the time of trial of which a party was unaware. Newly discovered evidence may be grounds for a new trial, but an aggrieved party is not entitled to similar relief for evidence that has come into existence after the trial is over since such a procedure could result in perpetual trials. Newly discovered evidence that will entitle a party to a new trial on such grounds must be material, such that it will probably produce a different result on retrial, and it must appear that with reasonable diligence, such evidence could not have been discovered and produced at trial.

NEW MATTER

matters raised by defendant that go beyond mere denials of plaintiff's allegations. New matter consists of new issues, with new facts to be proved, and purports to show that the alleged cause of action never did exist and that material allegations are not true.

NEWSPERSON'S PRIVILEGE see journalist's [newsperson's] privilege.

NEWSPERSON'S SHIELD see shield laws.

NEW TRIAL see trial [NEW TRIAL].

NEW YORK CURB EXCHANGE see American Stock Exchange.

NEW YORK STOCK EXCHANGE [NYSE]

the oldest organized stock exchange in the United States, which has been active, since its organization, in establishing listing requirements for companies

whose stocks are traded on the Exchange and in encouraging accurate and timely disclosure of listed company income statement and balance sheet results.

NEXT FRIEND

a competent person who, although not an appointed guardian, acts in behalf of a party who is unable to look after his or her own interests or manage his or her own lawsuit; one who represents an infant, or other party, who by reason of some disability, is not sui juris. A next friend is not considered a party to the suit, but is regarded as an agent or officer of the court to protect the rights of the disabled person.

NEXT-IN, FIRST-OUT [N.I.F.O.]

a method of inventory valuation. See inventory [NEXT-IN, FIRST-OUT [N.I.F.O.]].

NEXT OF KIN

the term is used generally with two meanings: (1) nearest blood relations according to law of consanguinity, and (2) those entitled to take under statutory distribution of intestates' estates. In the latter case, the term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage, and may well embrace persons who, in the natural sense of the word, bear no relation of kinship at all.

NIHIL

(nī'-hīl) Lat.: nothing; not at all, in no respect; NIL is an often-used form of the noun. Most commonly used to describe a sheriff's return after an unsuccessful attempt to serve a summons or otherwise gain jurisdiction over an individual.

NIL see nihil.

NINTH AMENDMENT

one of the Bill of Rights stating that the rights enumerated in the Constitution shall not be construed to deny or disparage other rights retained by the people. These rights are those so basic and fundamental and so deeply rooted in our society to be truly *essential rights*, and that nevertheless, cannot find direct support elsewhere in the Constitution. The Amendment was included in an abundance of caution and together with the reserved powers amendment (Tenth Amendment) was intended to emphasize the limited powers conferred upon the new central government. The Ninth Amendment has been cited by the United States Supreme Court very few times but was relied upon by some members of the Court to identify a right of marital privacy to bar a state from prohibiting the use of contraceptives by married persons.

NISI

(nē'-sē) Lat.: unless. Used in law after decree, order, rule to indicate that the adjudication shall take permanent effect at a specified time unless cause is shown why it should not or unless it is changed by further proceedings. More particularly, a decree *nisi* is a

conditional divorce, which becomes absolute upon the expiration of a stipulated period unless cause to the contrary is shown within the time period.

NISI PRIUS

(*nē'-sē prē'-ūs*) Lat.: unless the first. In American law, sometimes used to describe any court where a case is first heard by a judge and jury, distinguishing such courts from the appellate courts. See original jurisdiction.

N.L.R.A.

National Labor Relations Act. See labor organization [union]. See also National Labor Relations Board.

N.L.R.B. see National Labor Relations Board.

NO BILL see grand jury [NO BILL]; indictment [NO BILL].

NO FAULT

a system of insurance whereby all persons who are injured in an automobile accident may be compensated for any injuries resulting therefrom, without regard to who was at fault.

EXAMPLE: At one o'clock in the morning, two automobile drivers get into an accident. Each claims that the other ran a red light. Under a *no-fault* insurance plan, the argument as to who ran the light is irrelevant. The plan provides each driver with compensation for his injuries from his own insurance company. If the injuries are substantial, fault may be relevant, as suit is generally permitted based on fault, even in no-fault jurisdictions, for injury that exceeds some specified dollar amount. Under a no-fault system, most cases, however, can be settled without litigation.

NO-FAULT DIVORCE see divorce.

NOLENS VOLENS

(*nō-lēnz vō'-lēnz*) Lat.: whether willing or unwilling.

NOLLE PROSEQUI

(*nōl'-ē prōs'-ē-kwī*) Lat.: unwilling to prosecute; the prosecution's abandonment of a charging document, count or part of a count; a discontinued prosecution by the authorized attorney for the state; the formal entry of a declaration that a case will not be further prosecuted. If applicable statutes of limitation have not run, the defendant can be re-indicted and prosecuted again. A *nolle prosequi* cannot be pleaded as former jeopardy or res judicata. Sometimes abbreviated as NOL. PROS. See dismissal.

NOLO CONTENDERE

(*nō'-lō kōn-tēn'-dē-rā*) Lat.: I do not wish to contend, fight or maintain (a defense). A statement that the defendant will not contest a charge made by the government. Like a demurrer to an indictment, it admits all facts stated in the indictment for the purposes of a particular case, but it cannot be used as

an admission elsewhere, or in any other proceeding, such as a civil suit arising from the same facts.

EXAMPLE: Dan is charged with careless driving. He pleads "nolo contendere" and is fined by the court. Since he did not admit guilt, his plea cannot be used against him if he is sued by an injured party.

NOL PROS see nolle prosequi.

NOMINAL DAMAGES see damages [NOMINAL DAMAGES].

NOMINAL PARTY see party [NOMINAL PARTY].

NOMINEE

one who has been asked to act for another in a particular context, such as a trustee or an agent; one who has been nominated as a candidate for office; one to whom a party to an agreement may assign his or her rights under a contract.

EXAMPLE: John agrees to buy a property from Steven. Since John may want to put the title in the name of another person or entity, the agreement will provide for title to be issued "to John or his nominee."

NONACCESS see access.

NON-ASSESSABLE STOCK

stock purchased from the issuer at full par value or more per share. Fully paid stock cannot be assessed to pay debts of the issuer in the event of bankruptcy liquidation and is, therefore, non-assessable. Almost all domestic stock issues are non-assessable and instances of assessments against shareholders are extremely rare.

NON ASSUMPSIT

(nŏn á-sŭmp'-sĭt) Lat.: he did not promise; he did not undertake. A form of pleading in which the defendant claims that he or she did not undertake or promise any obligation in the manner or form that is set forth in the plaintiff's complaint. See assumpsit.

NONCOMPETITION CLAUSE see covenant [COVENANT NOT TO COMPETE].

NON COMPOS MENTIS

(nŏn kŏm'-pŏs mĕn'-tĭs) Lat.: not having control over the mind or intellect; not of sound mind; insane. In certain circumstances its effect is lessened to mean only not legally competent.

NONCONFORMING USE

a use of land that lawfully existed before enactment of a zoning ordinance and that may be maintained after the effective date of the ordinance although it no longer complies with use restrictions newly applicable to the area. Continuation of the existing use includes preservation of both the functional use

of the land and the physical structures thereon, and neither of these aspects of use may be extended once the zoning restriction has taken effect.

EXAMPLE: Prior to any zoning restrictions, Russ opens a doctor's office adjacent to his home. Subsequently, the town passes an ordinance prohibiting any business in Russ's section of town. Russ is permitted to continue operating his office as a *nonconforming use*, but he cannot expand his office without express permission from the zoning officials.

See also grandfather clause. Compare variance.

NONCONTESTABILITY CLAUSE

a provision in an insurance policy that precludes the insurer from disputing the validity of the policy on the basis of fraud or mistake after a specified period. If the insurer wishes to contest the policy on any grounds that would justify rescission, it must do so within the prescribed period, either by suing to cancel the policy or by asserting fraud or misrepresentation as a defense in an action instituted by the policyholder or beneficiary. The purpose of the clause is to require the insurer to investigate with reasonable promptness the accuracy of information provided by the policyholder. It prevents the insurer from lulling the policyholder into a sense of security during the time when facts could best be ascertained, only to litigate them belatedly.

NONCUSTODIAL SENTENCE see sentence.

NONDISCRETIONARY TRUST [FIXED INVESTMENT TRUST]

an investment trust that may buy only those securities on a list set forth when the trust is organized. The percentage of total assets that may be invested in a specific security or type of securities is usually predetermined. See unit investment trust.

NONFEASANCE

in the law of agency, the total omission or failure of an agent to perform a distinct duty that he or she has agreed with his or her principal to do; also, the neglect or refusal, without sufficient excuse, to do what is an officer's legal duty to do. Nonfeasance differs from misfeasance, which is the improper doing of an act that one might lawfully do, and from malfeasance, which is the doing of an act that is wholly wrongful and unlawful.

NONMEMBER BANK

a bank that is not a member of the Federal Reserve System and is regulated only by the banking laws in the state in which it is chartered.

NONNEGOTIABLE INSTRUMENTS see negotiable instruments.

NON OBSTANTE VEREDICTO see n.o.v.

NONPERFORMANCE

the failure to fulfill an obligation. The nonperformance must be material and substantial to justify suspension of another's return performance. See performance. See also consideration [FAILURE OF CONSIDERATION].

NONPROFIT CORPORATION [NOT-FOR-PROFIT CORPORATION]

an incorporated organization chartered for other than profit-making activities and exempt from corporation income tax. Most such organizations are engaged in charitable, educational, or other civic or humanitarian activities, although nonprofit corporations are not restricted to such activities. See charity.

NON PROSEQUITUR

(nôn prō-sĕk'-wi-tēr) Lat.: he has not proceeded. An entry by the defendant that the plaintiff has not continued his or her action. Under modern rules, such failure on the part of the plaintiff would result in either a dismissal of the action or in a default judgment for the defendant. Abbreviated NON PROS.

NONQUALIFIED PENSION OR PROFIT SHARING PLAN see retirement plans [NONQUALIFIED PENSION OR PROFIT SHARING PLAN].

NONREBUTTABLE PRESUMPTION see presumption [NONREBUTTABLE PRESUMPTION].

NONRECOGNITION OF GAIN see recognition [NONRECOGNITION OF GAIN].

NONRECOURSE

without personal liability. An obligation that is nonrecourse does not provide a basis for federal taxation purposes for individuals or partnerships except in certain limited cases such as when real estate is involved. If a promisor has limited his or her exposure in the event of a default to a particular pledged asset such as equity in a building or entity, his or her obligation will be regarded as nonrecourse. Individuals often structure transactions in corporate form to achieve similar limited personal liability.

NON SEQUITUR

(nōn sĕ'-kwĭ-tūr) Lat.: it does not follow; it does not come after (in time); abbreviated non seq. A non sequitur action or decree is unrelated to the preceding events. A non sequitur has no logical, temporal, or spatial purpose for its place in the progression of events.

NONSTOCK CORPORATION

a corporation owned by its members under the membership charter or agreement, rather than through the issue of shares.

NONSUFFICIENT FUNDS CHECK see NSF [NONSUFFICIENT FUNDS] CHECK.

NON SUI JURIS

(nōn swē jū'-rĭs) Lat.: not by his own authority or legal right. Refers to those who are not legally competent to manage their own affairs as regards contracts and other causes in which this incompetency restricts exercise of sound judgment. Compare non compos mentis.

NONSUIT

a judgment rendered against a plaintiff who fails to proceed to trial or is unable to prove his or her case. Since the adjudication is made when the plaintiff has failed to provide evidence sufficient to establish a case, it does not decide the merits of his or her cause of action, and thus does not preclude bringing it again. The term is sometimes broadly applied to various terminations of an action that do not amount to a judgment on the merits.

EXAMPLE: Rose sues a local appliance store for selling her a defective washing machine. At the beginning of the trial, she cannot produce any evidence to show that she bought the machine at that particular store. The judge declares a *nonsuit* against Rose and dismisses her claim.

Compare acquit.

NONSUPPORT

the failure to provide support that one can provide and that one is legally obliged to provide to a spouse, child, or other dependent. Although nonsupport of wife and child were apparently not crimes at common law, statutes in all states contain provisions making such acts crimes with respect to children and in nearly all states with respect to spouses. Most jurisdictions treat the offense as a misdemeanor. See desertion; support.

NON VULT

(nōn vūlt) Lat.: abbreviation of non vult contendere ("He will not contest"). Refers to a plea by one charged with a crime that does not expressly admit guilt, but acknowledges that the defendant will not contest the charge and therefore agrees to be treated as though he or she had been found guilty. See also nolo contendere.

NO-PAR STOCK

stock issued with no value stated on the stock certificate.

NORMAL COURSE OF BUSINESS see ordinary course of business.

NOSCITUR A SOCIIS

(nō'-si-tēr ā sō'-shē-ĭs) Lat.: it is known by its associates. Under this rule of statutory construction, the meaning of a word in a statute is ascertained in light of the meaning of words with which it is associated. When two or more words in a statute are grouped together, and ordinarily have a similar meaning

but are not equally comprehensive, the general word will be limited and qualified by the specific word. Compare *ejusdem generis*.

NO STRIKE CLAUSE

a clause in a labor agreement that prohibits employees from striking for any reason during the life of the contract. Such a clause regulates relations between the employer and the employees. It is not an unfair labor practice under the National Labor Relations Act for an employer to bargain in good faith for such a clause.

NOTA BENE

(nō'-tā bā-nā) Lat.: note well. Written on the original note N.B. to indicate an important portion of the text to be studied.

NOTARY PUBLIC

a public officer authorized to administer oaths, to attest to and certify certain types of documents, to take depositions, and to perform certain acts in commercial matters. The seal of a notary public authenticates a document. In some jurisdictions an attorney admitted to practice within the jurisdiction can act as a notary public. In many jurisdictions private persons can apply for and receive authority to act as notaries to witness documents.

NOTE

a written paper that acknowledges a debt and promises payment to a specified party of a specific sum, and that describes a time of maturity that is either definite or will become definite. See commercial paper.

NOT-FOR-PROFIT CORPORATION see corporation [NOT-FOR-PROFIT CORPORATION]; nonprofit [not-for-profit] corporation.

NOT GUILTY

a plea by the accused in a criminal action that denies every essential element of the offense charged. A plea of not guilty on arraignment obliges the government to prove the defendant's guilt beyond a reasonable doubt and preserves the right of the accused to defend against the charge. A jury verdict of not guilty does not mean the jury found the accused innocent, but simply that the state failed to prove its case beyond a reasonable doubt.

NOT GUILTY BY REASON OF INSANITY a special form of verdict or finding that is usually followed by commitment of the defendant to a mental institution. The insanity defense differs from other defenses in that, if successful, it is not an acquittal and does not result in the outright release of the accused.

NOTICE

information concerning a fact actually communicated to a person by an authorized person, or actually derived by him or her from a proper source. Notice to a defendant of a lawsuit that has been instituted against him or her or of an action in which he or she may have an interest to defend is accomplished by service of process on him or her.

AVERTMENT OF NOTICEa statement in the pleadings declaring that a party to an action has received proper notice thereof.

CONSTRUCTIVE NOTICEnotice presumed by law to have been acquired; often accomplished by posting of notices or by mailing of notification to the defendant if he or she cannot be personally served with process.

EXAMPLE: Neil sues Jim for a debt incurred when Neil painted his house. One requirement of filing the suit is that Neil personally notify Jim of the court action. After several unsuccessful attempts to meet Jim and physically hand him a copy of the complaint, Neil satisfies the notice requirement by sending a copy to Jim's business and home addresses and by tacking a copy on Jim's door. Jim is considered to have received *constructive notice* of the action whether or not he actually learned of it.

INQUIRY NOTICEwith respect to one who claims to have been a bona fide purchaser without notice of adverse claims to the purchased property, information from whatever source derived that would create in an ordinary mind apprehension about the actual state of ownership of the property and that would prompt a person of average prudence to make inquiry.

JUDICIAL NOTICEsee judicial notice.

NOTICE BY PUBLICATIONmethod of bringing a lawsuit to the attention of parties who may have an interest therein by publishing notification of it in a newspaper of general circulation; permissible only where specifically allowed by statute and generally limited to actions involving land, estates or status.

NOTICE OF APPEAL see appeal [NOTICE OF APPEAL].

NOTICE OF APPEARANCE see appearance.

NOTICE OF DISHONOR

notice, given in any reasonable manner, that an instrument has been dishonored. Notice of dishonor may be given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself or herself received notice, or any other party who can be compelled to pay the instrument. In addition, an agent or bank in whose hands the instrument is dishonored may give notice to a principal or customer or to another agent or bank from which the instrument was received. Delay without excuse in giving notice of dishonor completely discharges an indorser.

NOTICE OF LIS PENDENS see lis pendens.

NOTICE OF MOTION see motion.

NOTICE TO QUIT

formal notification terminating a tenancy on a specified date. A notice to quit part of the property is valid only if specifically allowed by the tenancy. The notice may be given by either the landlord or the tenant to the other party.

NOTORIOUS POSSESSION

possession of real property that is open, undisguised, generally known or recognized. The term is one of the elements in defining or determining existence of adverse possession, which involves a claim of right to property not by title but by possession for a prescribed period.

N.O.V. [NON OBSTANTE VEREDICTO]

(nŏn ŏb-stān'-tā vĕr-ĕ-dĭk'-tŏ) Lat.: notwithstanding the verdict. A JUDGMENT N.O.V. is one by the trial court that reverses the determination of the jury, granted when it is obvious that the jury verdict had no reasonable support in fact or was contrary to law. The motion for a judgment n.o.v. provides a second chance for the trial court to render what is, in effect, a directed verdict for the moving party.

NOVATION

substitution of another party for one of the original parties to a contract, with the consent of the remaining party. The old contract is then extinguished, and a new contract, with the same content but with at least one different party, is created. A novation often involves a transaction whereby the original debtor is discharged from liability to his creditor by substitution of a second debtor.

NOW ACCOUNT [NEGOTIABLE ORDER OF WITHDRAWAL ACCOUNT]

an interest-bearing savings account against which depositors are permitted to write checks. See bank.

NSF CHECK

nonsufficient funds check. If the drawee (bank) discovers that the drawer lacks funds to cover the presented check, the drawee can dishonor the check, and the presenter is powerless to make the drawee pay.

NUDUM PACTUM

(nŭ'-dŭm pāk'-tŭm) Lat.: a bare contract. A promise naked of obligation on one side; not enforceable, since contracts must generally be supported by a consideration on each side. See mutuality of obligation.

NUGATORY

void; invalid; for example, judicial proceedings in courts that lack jurisdiction. See voidable.

NUISANCE

1. anything that disturbs the free use of one's property, or that renders its ordinary use uncomfortable; 2. in tort law, a wrong arising from unreasonable or unlawful use of property to the annoyance or damage of another or of the public.

EXAMPLE: Gail rents an apartment in a residential apartment building. In the adjacent apartment, a politically active group meets very frequently at late hours to discuss strategy and to type press releases. The apartment is at no time used for sleep. Even if the group's activities are legal, Gail has a *nuisance* action against the group. Their late hours disturb her, and the apartment is not used for its normal and intended purpose.

ABATABLE NUISANCE a nuisance that can be suppressed, extinguished or rendered harmless, and whose continued existence is not authorized under law.

ABATEMENT OF A NUISANCE the removal or termination of a nuisance by self-help.

ATTRACTIVE NUISANCE see attractive nuisance.

PRIVATE NUISANCE an actionable interference with a person's interest in the private use and enjoyment of his or her land.

PUBLIC [or COMMON] NUISANCE an unreasonable interference with a right common to the general public; behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the community.

NUISANCE PER SE

an act, occupation, or structure that is a nuisance at all times and under any circumstances, regardless of its location or surroundings; acts that are denounced as illegal by law, when perpetration of them invades rights of others. From an evidentiary point of view once a nuisance per se is established by proof, it becomes a nuisance as a matter of law.

NULL AND VOID see nullity.

NULLITY

in law, a void act or an act having no legal force or validity; invalid; null. It is the highest degree of an irregularity, and is such a defect as renders the proceeding in which it occurs of no avail or effect whatever and incapable of being made so. A proceeding that is essentially defective, or that is expressly declared to be a nullity by statute.

NUL TIEL RECORD see trial [TRIAL BY THE RECORD].

NUNC PRO TUNC

(nŭnk prŏ tŭnk) Lat.: now for then.

NUNC PRO TUNC ORDER an order used by the courts to correct the record usually after a proceeding has been concluded. It supplements a prior judgment or order in any matter over which the court originally had jurisdiction.

NUNCUPATIVE WILL

oral declarations of a person made with dispositive intent during a last illness, where a written will would

not be possible. Such oral wills are rarely upheld because of the opportunity for fraud and because of the detailed requirements for their validity. Such requirements are that the testator, during sickness, indicate that the disposition is to be a will, that it be reduced to writing by a witness within a short time, that more than one witness prove the will, and that the witnesses are disinterested and competent. The requirements are strictly adhered to, except for persons in actual military service. See military will. Nuncupative wills are generally restricted to personalty under the statute of frauds and thus cannot operate to transfer real property.

N.Y.S.E. see New York Stock Exchange [N.Y.S.E.].

O

OATH

an affirmation of the truth of a statement. See affidavit.

Compare perjury.

OATH EX OFFICIO

at common law, an oath administered by an ecclesiastical court whereby a member of the clergy accused of a crime would have to swear to his or her innocence. An accused was also obliged to put forward proof of his or her innocence, after which the ecclesiastical judge, not a jury, decided innocence or guilt.

The phrase has also referred to a process whereby the court, upon an accusation, could order the accused into court to swear an oath. After the courts abused their right by turning their proceedings into inquisitions, the English Parliament abolished the oath.

OBITER DICTA

(*ō'-bī-tēr dīk'-tā*) Lat.: passing or incidental statements. Statements made or decisions reached in a court opinion that were not necessary to disposition of the case; plural of obiter dictum. See dictum.

OBJECT

a procedure whereby a party asserts that a particular witness, line of questioning, piece of evidence or other matter is improper and should not be continued, and asks the court to rule on its impropriety or illegality.

EXAMPLE: Michael is on trial for theft. The prosecution asks a witness whether Michael ever owned a gun. Michael's attorney will *object* and seek to exclude the question and answer on the grounds that the question will introduce improperly "other crimes" (i.e., possession of a gun) into the case.

OBJECTION

a procedure whereby a party asserts that a particular witness, line of questioning, piece of evidence, or other matter is improper and should not be continued, and asks the court to rule on its impropriety or illegality. A timely objection on the record, stating the grounds thereof, must be made to evidence rulings admitting or excluding evidence if the ruling is to be challenged later on appeal. This is necessary to preserve the point on appeal. As to other rulings or orders entered by a trial court, the failure to object will not prejudice a party's right to challenge on appeal the action taken if he or she had no opportunity to object. See also challenge; motion [MOTION IN LIMINE].

OBLIGATION, MUTUALITY OF see mutuality of obligation.

OBLIGATION OF A CONTRACT

the term refers not to any duty that rises out of the contract itself, but to the legal requirements that bind the contracting parties to the performance of their undertaking.

IMPAIR THE OBLIGATION OF A CONTRACT to weaken the contract in any respect. Any law that changes the intention and legal effect of the original parties, giving to one a greater and to the other a lesser interest in the contract, that hastens or postpones the prescribed time of performance, or imposes conditions not included in the contract, or dispenses with the performance of those that are included, impairs the obligation of a contract. Impairment also exists where the right to enforce a contract is eliminated or substantially lessened. State statutes that impair contract obligations are prohibited by Article 1, Section 10 of the United States Constitution.

OBLIGEE

one who is entitled to receive a sum of money or to have an act or deed performed as promised or agreed to by the obligor.

OBLIGOR

one who has promised or is otherwise obligated to perform an act or deed, such as the payment of a sum of money under a promissory note or other contract. Compare obligee.

OBLOQUY

blame, censure, reproach; to expose one to obloquy is to subject one to blame or disgrace and may constitute defamation.

OBSCENE MATERIAL

material that, taken as a whole, appeals to the prurient interest of the average person, depicts sexual conduct in a patently offensive manner, and lacks serious literary, artistic, political or scientific value. Matter so classified is not protected by the free speech guarantee of the First Amendment.

OBSCENITY see obscene material.

OBSOLESCENCE

the process by which property becomes useless, not because of physical deterioration, but because of scientific or technological advances.

OBSTRUCTION OF JUSTICE

the impeding of those who seek justice in a court, or of those who have duties or powers of administering justice therein; includes attempting to influence, intimidate or impede any juror, witness or officer in any court regarding the discharge of his duty.

EXAMPLE: Ned possesses telephone recordings of a contractor offering a bribe to secure a construction grant. When Bill, another contractor, sues to have the grant overturned because of the possibility of a bribe, he requests that Ned give him the recordings. If

Ned destroys or otherwise loses the recordings after they are requested, he will be charged with *obstruction of justice*.

Statutes addressing this subject may reach beyond interference with the judicial process and also proscribe interference with police officers and other such administrative officials. See embracery.

OBVIOUS RISK

a risk that is readily apparent. At common law, a master was not liable to servants for any obvious risks of the employment, rather, the servant was held to have assumed the risk of the employment.

OCCUPANCY

the act of occupying or taking possession; to hold or use. See certificate of occupancy.

OCCUPANT

one who has the actual use or possession of property. See tenant. Compare landlord; title.

OCCUPATIONAL DISEASE

a disease that is the natural result of a particular employment, where that employment involves a risk of contracting the disease greater than the risk in employment and living conditions in general, and that usually develops gradually from the effects of long-continued work at the employment.

OCCUPATIONAL HAZARD

a risk distinctively associated with a particular type of employment or workplace.

OCCUPATIONAL SAFETY AND HEALTH ACT [OSHA]

a law passed by Congress in 1970 for the purpose of preventing employees from being injured or contracting illnesses in the course of their employment. Under OSHA, the Secretary of Labor is empowered to promulgate national safety and health standards, and to enforce such standards by seeking the imposition of civil and criminal injunctions and penalties. Broad congressional authority granted to OSHA to make warrantless inspections of business premises has been held to be unconstitutional. Thus, an OSHA inspection may be made only in accordance with the administrative inspections permitted in other contexts. See search and seizure.

OCCUPYING THE FIELD see preemption.

OCCURRENCE TEST see transactions or occurrence test.

ODD LOT

in the securities trade, stocks or bonds in a block of fewer than 100 shares. In buying or selling an odd lot, a premium or discount to the round lot price is charged; this charge is referred to as the ODD LOT DIFFERENTIAL.

ODIOUS

base, vile, scandalous, detestable, disgraceful.

ODIUM

hatred, dislike.

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OF COUNSEL

refers to an attorney who aids in the preparation of a case, but who is not the principal attorney of record for the case. He or she usually assists the attorney who has been hired for the case.

OFFENSE

any violation of law for which a penalty is prescribed, including both felonies and misdemeanors.

OFFER

1. a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his or her assent to that bargain is invited and will establish a contract.

EXAMPLE: A representative of Clay Brick Company sends a letter to a large outlet store informing them of an overstock in several types of bricks the company is hoping to eliminate. The store responds that it will buy the full overstock for the price stated in Clay's letter, and includes a check with their response. The store views Clay's letter as an *offer*. By sending a positive response and a check to Clay, the store believes that a bargain has been struck and a valid contract established.

2. a promise, a commitment to do or refrain from doing some specified thing in the future. 3. In the securities trade, an offer indicates price and volume available from open market sellers of stocks and bonds. 4. an underwriting in which a broker offers a large quantity of a specific issue at a fixed price, called an offering.

OFFER OF PROOF

to offer evidence for acceptance at trial. Such an offer of evidence is governed by the appropriate jurisdiction's rules of evidence. For example, if a party offers evidence through the testimony of a witness, certain of the questions asked by counsel may be objected to. Should the court inquire as to the propriety of the questioning, counsel would then ordinarily offer to the court, or proffer, the relevance of the question. In such an instance the offer of proof would not ordinarily be made within the hearing of the jury if one is present. If the court sustains the objection, the appellate court will assume that the proffer could have been established for the purposes of reviewing the trial court's ruling.

EXAMPLE: In an armed robbery trial Simon testifies for the prosecution that he was in the Nightclub Lounge and saw Peter rob the bartender at gunpoint. The defense cross-examines Simon and asks if he has a girlfriend named Doris. The prosecutor objects that the question is not relevant to the subject at hand, which is a robbery trial and not an inquiry into Simon's dating habits. The defense proffers that Doris will be called as a witness to state that she was with Simon at the Nightclub Lounge and they were playing pool but they never were close enough to the bar to see any robbery take place.

OFFICER

1. a person invested with the authority of a particular position or office; may be public or private in that the occupied office may or may not be invested with a public trust. 2. corporate personnel appointed by the directors and charged with the duty of managing the day-to-day affairs of the corporation.

OFFICIAL IMMUNITY see immunity.

OFFICIOUS INTERMEDDLER

one who performs an act that confers a benefit upon another, although he or she had neither a contractual duty nor a legally recognized interest in performing the act, and who nevertheless seeks restitution for the benefit conferred.

OFFSET see setoff.

OF RECORD

refers to the recordings of documents such as deeds or mortgages with the appropriate entity as well as to the testimony recorded as the official transcript of a case. The ATTORNEY OF RECORD is the official designate of a party upon whom service of papers may be made.

OF THE ESSENCE see time is of the essence.

Compare on or about.

OLIGOPOLY

1. an industry in which a few large sellers of substantially identical products, such as automobiles, dominate the market; 2. the condition of a specific products market so dominated. An oligopolistic industry is more concentrated than a competitive one but less concentrated than a monopoly.

OLOGRAPHIC see holographic will.

OMISSION

a failure to do something; something left undone; the neglect to perform what the law requires. Omission will not give rise to liability unless there is a duty to act.

EXAMPLE: A motorist sees an accident on the highway late at night but fails to call anyone, although a telephone is just a few hundred yards away. As a result of that *omission*, one of the victims of the accident dies. Although common standards may view the motorist as somewhat responsible for the death, the motorist cannot be found liable in a court of law since he has no legal duty to report the accident. If he had been involved in the accident, he would have had a legal duty to summon help. His *omission* in that instance would be the subject of civil and possibly criminal action.

Compare actus reus.

OMNIBUS see in omnibus.

OMNIBUS CLAUSE

a clause in an automobile liability insurance policy that gives categories of persons, in addition to the person named as assured (see insured), the benefit of the policy, within specified limitations. The clause extends protection to one permitted to use the car, although the assured may not be liable for an accident under the doctrine respondeat superior. The object is to cover the liability of the operator of the car as unnamed assured, and to protect any injured person by giving him or her a cause of action against the insurer for injuries deemed by law to have been caused by the operation of the car. Statutes have been passed in some jurisdictions requiring the inclusion of omnibus clauses for the protection of automobile accident victims.

ON ALL FOURS

describes a case similar to or identical with the case at hand and therefore possibly useful as precedent; derived from the Latin maxim, "Nullum simile est idem nisi quattuor pedibus currit": Nothing similar is identical unless it runs on all four feet.

ON DEMAND

when asked for. For example, a note payable on demand is payable when the sum is requested; called a demand note if no due date is included.

ONE MAN [PERSON], ONE VOTE see reapportionment [ONE PERSON, ONE VOTE PRINCIPLE].

ON ITS FACE see void for vagueness [FACIAL INVALIDITY].

ON OR ABOUT

language used in legal documents to qualify a time or a place as approximate. Unless the parties expressly provide, any reference to time of performance is presumed to be approximate so that the failure to perform as specified is not a breach. Where the parties intend otherwise, they generally provide in the legal document that "time is of the essence" or words to that effect.

ON THE BRIEF

designation on a brief indicating the names of persons who contributed to the written product. Such persons may or may not be listed as the attorneys of record. Many reported cases list the attorneys of record and all persons "on the brief." See of counsel.

ON THE MERITS

refers to a judgment based upon the essential facts of the case rather than upon a technical rule of practice, such as failure of proper service or other jurisdictional defect. A decision on the merits is rendered after a full presentation of the evidence and determines finally the rights of the parties, barring appeal or subsequent relitigation.

EXAMPLE: After several weeks of preparation, the attorneys for both sides presented their arguments to the judge. By carefully considering

all the evidence and relevant legal theory, the judge was able to base his decision *on the merits*. Had the judge dismissed the case because one of the attorneys failed to comply on time with a rule of court, the case would have been dismissed because of a procedural flaw and not on the merits.

ON THE PLEADINGS see judgment [SUMMARY JUDGMENT].

OPEN

visible, free from concealment, exposed to public view; unobstructed, such as land without trees or fences. See notorious possession; plain view.

An account or matter that is not final and not closed. An attorney *opens* a trial by addressing the trier of fact and briefly summarizing the facts and theory of the case that he or she intends to develop during the trial. This is known as an OPENING STATEMENT.

OPEN ACCOUNT

account that has not yet been settled or paid; a series of transactions that give rise to credits and debits, but that results in a single liability.

OPEN AND NOTORIOUS see notorious possession.

OPEN COURT

a court that is formally opened and engaged in the transaction of judicial affairs, to which all persons who conduct themselves in an orderly manner are admitted. Most legal proceedings take place in open court except where confidentiality is a recognized interest (e.g., matrimonial, adoption or juvenile delinquency proceedings).

OPEN END FUNDS see investment company [TRUST].

OPENING STATEMENT see statement [OPENING STATEMENT].

OPEN POSSESSION see notorious possession.

OPEN PUBLIC MEETINGS LAWS see sunshine laws.

OPEN SHOP

an enterprise that employs workers without regard to whether they are members of a labor union.

OPERATING LOSS see net operating loss.

OPERATION OF LAW

the determination of rights and obligations through the automatic effects of the law and not by any private agreement or direct act of the party affected.

EXAMPLE: A husband and wife own a home as tenants by the entirety. Under that principle of property, when either dies, the surviving spouse has sole ownership of the home. Since this event occurs automatically, it is said to occur by *operation of law*.

OPINION

the reason given for a court's judgment, finding or conclusion, as opposed to the decision, which is the judgment itself. When the court is composed of more than one judge or justice, and more than one opinion has been written in a given case, the opinion that expresses the view of the majority of the judges presiding, and thus announces the decision of the court, is referred to as the MAJORITY OPINION.

CONCURRING OPINION A view basically in accord with the majority opinion, but written to express a somewhat different perception of the issues, to illuminate a particular judge's reasoning or to expound a principle that he or she holds in high esteem. An opinion that concurs "in the result only" is one that rejects the reasoning and conclusions concerning the law or the facts on the basis of which the majority reached its decision, and that expresses a different view that has coincidentally led the judge or justice to recommend the same disposition as was agreed upon by the majority.

DISSENTING OPINION A view that disagrees with the disposition made of the case by the court, with the facts or law on the basis of which the court arrived at its decision, or the principles of law announced by the court in deciding the case. Opinions may also be written that express a dissent "in part."

PER CURIAM OPINION An opinion "by the court," which expresses its decision in the case without identifying the author.

Opinion also refers to the conclusions reached by a witness that are drawn from his or her observations of the facts. See expert witness.

OPTION

a contract that gives the holder a right or option to buy or sell specified property, such as stock or real estate, at a fixed price for a limited period.

OPTIONAL WRIT see peremptory writ.

OPTION CONTRACT

a binding promise in which the owner of property agrees that another shall have the privilege of buying the property at a fixed price within a stated period of time. It is the offeror's acceptance of consideration in exchange for his or her promise to keep the offer open for a designated period of time that renders the offer irrevocable. See firm offer.

An option must be supported by consideration, often the payment of a small sum of money that may be, though need not be, applied as a down payment if the option is exercised. It exists only when the option holder alone has the right to determine whether he or she shall require the performance called for by the option. If the agreement states that the option may be exercised only with the consent of the other party, it is not an option even though so-called by the

agreement. Some types of option contracts are formed without consideration such as an offer that the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and that does not induce such action or forbearance. Such action or forbearance is binding as an option contract to the extent necessary to avoid injustice. Under the Uniform Commercial Code a seller can offer a buyer an option contract without consideration by making an irrevocable offer and complying with other statutory requirements. See also stock option.

ORAL

spoken.

ORAL ARGUMENT legal arguments given in court proceedings by attorneys in order to persuade the court to decide a legal issue in favor of their client.

ORAL CONFESSION an acknowledgment by a criminal defendant that he or she did the act of which he or she is accused and is guilty of a crime as a result of it. See self-incrimination, privilege against.

ORAL CONTRACT see contract [ORAL CONTRACT].

ORAL TRUST a trust created by the agreement of the grantor and the settlor, but for which no document is executed setting forth the terms of the trust. Trusts of land are subject to the Statute of Frauds. Most states will recognize an oral trust of personal property; however, a few states also subject trusts of personal property to the Statute of Frauds.

ORAL WILL see nuncupative will.

ORDER

1. a direction of the court on a matter incident to the main proceeding that adjudicates a preliminary point or directs some step in the proceeding. If an order closes the matter and precludes future hearing and investigation, it is a **FINAL ORDER**; but an order that does not completely dispose of the subject matter of the controversy and settle the rights of the parties is not final. A final order is an appealable order. See interlocutory.

2. In the securities trade, an instruction to buy or sell a specified security under specified conditions.

ORDER PAPER see order paper.

ORDERED LIBERTY

a concept in constitutional law that the due process requirements applicable to the states through the Fourteenth Amendment to the United States Constitution do not incorporate all the provisions of the first ten amendments (the Bill of Rights), but only those measures essential for the preservation of a scheme of ordered liberty.

This restrictive view of due process has been largely replaced by a broader view of incorporating nearly all of the Bill of Rights as representing a national standard of fundamental fairness.

ORDER PAPER

in commercial law, a negotiable instrument that by its terms is payable to a specified person or his or her assignee, rather than, for instance, to cash or to bearer. The payee must be named or otherwise indicated with reasonable certainty. Compare bearer paper.

ORDER TO SHOW CAUSE see show cause order.

ORDINANCE

a local law that applies to persons and things subject to the local jurisdiction. Usually it is an act of a city council or similar body that has the same force as a statute when it is duly enacted. See home rule.

ORDINARY COURSE OF BUSINESS

the common practices of commercial transactions; refers to a necessary activity that is normal and incidental to the business.

ORDINARY INCOME

for tax purposes, income subject to being taxed at the highest rates, as opposed to capital gains, which may be taxed at lower rates. Generally, only capital losses may be deducted against capital gains, and only ordinary income may be offset by the other deductions.

ORDINARY NEGLIGENCE see negligence [ORDINARY NEGLIGENCE].

ORGANIC LAW

the fundamental law of a country, state, or society; the law upon which its legal system is based, whether that law is written, such as a constitution, or unwritten.

ORGANIZED CRIME

a syndicate of professional criminals who rely on unlawful activities as a way of life. Often called the FAMILY, the MAFIA, or the MOB. See racketeering.

ORIGINAL DOCUMENT RULE see best evidence rule.

ORIGINAL ISSUE

the initial sale or issue of a security.

ORIGINAL JURISDICTION

authority to consider and decide cases in the first instance, as distinguished from APPELLATE JURISDICTION(see jurisdiction), which is the authority to review a decision or judgment of an inferior tribunal.

EXAMPLE: The Constitution of the United States provides that the Supreme Court has *original jurisdiction* in all cases affecting ambassadors. Notwithstanding any issue of diplomatic immunity, if

an ambassador from France were sued, the Supreme Court, rather than some lower court, would hear the case.

ORIGINAL PACKAGE DOCTRINE

the constitutional prohibition of state and local taxation of goods while they are still in their original packages. The U.S. Constitution prohibits states from imposing import or export duties. In an early case, the Supreme Court held that an item in its original package retained its character as an import and was thus free of tax by a state while in the original form or package in which it was imported.

OSHA see Occupational Safety and Health Act [OSHA].

OSTENSIBLE AUTHORITY see apparent authority.

OTC see over-the-counter market [OTC].

OUSTER

the wrongful dispossession or exclusion of a person, usually associated with the acts of a co-owner that exclude other co-owners from their legal right to share possession.

OUT-OF-COURT SETTLEMENT

in civil cases, the resolution of a dispute between parties prior to the rendering of a final judgment by the trial court. Compare plea bargaining.

OUT-OF-POCKET EXPENSES

those costs for necessary items paid directly (usually by cash) and subject to recovery at a later time. An example would be a tenant's purchase of a tarp to cover a hole in the roof until the landlord is able to make repairs. Said purchase might be deducted from rent or directly reimbursed by the landlord. An attorney often advances expenses for clients and obtains reimbursement from the client or from the final settlement.

OUT-OF-POCKET (RULE)

method of measuring damages in breach of contract or warranty cases or cases involving fraud or misrepresentation. Calculated as the difference between the actual value of what was received and the purchase price. Compare benefit of the bargain (rule).

OUTPUT CONTRACT see contract [OUTPUT CONTRACT].

OUTSIDE THE RECORD see record [OUTSIDE THE RECORD].

OUTSTANDING ISSUE see authorized issue [OUTSTANDING ISSUE].

OVERBREADTH

the overbroad aspect of a statute forbidding or inhibiting conduct that is constitutionally protected. Compare chill [CHILLING EFFECT].

OVERREACHING

in commercial law, the taking of unfair advantage through cunning, cheating, fraud or abuse of superior bargaining power. Contracts that are the product of overreaching may be unenforceable under modern concepts of fraud or the unconscionability doctrine.

OVERRULE

1. to overturn or make void the holding (decision) of a prior case; generally accomplished in a different and subsequent case, when a court renders a decision that is substantially opposite the decision made in the prior case. A decision can be overruled only by the same court or a higher court within the same jurisdiction. The overruling of a decision generally destroys its value as precedent. Compare *reversal*.

2. to deny a motion, objection or other point raised to the court.

OVERT ACT

open act; especially, an outward act done in furtherance of a crime and as a manifestation of intent to accomplish the crime. See also attempt; conspiracy; treason.

EXAMPLE: Sal and Ed agree to rob a bank. In preparation, Sal steals a car and Ed buys a ski mask. Both the theft of the car and the purchase of the ski mask as well as any other acts innocent or criminal may be *overt acts* if they are done in furtherance of a criminal conspiracy.

OVER-THE-COUNTER MARKET [OTC]

a securities dealers market that handles trading in securities that are not listed stocks on an organized exchange. OTC trading differs from exchange trading in two significant ways: (1) transactions are carried out through telephone contact and negotiation with a number of dealers, called market makers, as compared to the single specialist, single location auction market mechanism used for listed securities trading, and (2) the market maker acts as principal in the transaction that involves the dealer as buyer and seller from his or her own inventory. The bulk of bond trading is carried out in the OTC market.

OWNER

the person who has legal title to property; the person in whom ownership, dominion, or title of property is vested. See also record owner.

OWNERSHIP

exclusive right of possessing, enjoying, and disposing of a thing; often said to include the concept of possession and that of title, thus to be broader than either.

ALLODIAL OWNERSHIP free ownership, not subject to the restrictions or obligations associated with feudal tenures.

TENURIAL OWNERSHIP the holding of land subject to specific services or obligations owed to another. See fee simple.

OYER

hearing. At common law, the reading to a defendant upon his or her demand the writ upon which the action is brought.

OYER AND TERMINER

in English law, special tribunals empowered to hear and determine cases within their criminal jurisdiction, commissioned by the king when the delay involved in ordinary prosecution could not be tolerated, as in the case of sudden insurrection. The term has been sometimes used in American law to identify high courts of criminal jurisdiction in some states.

OYEZ

(often pronounced "O Yes") hear ye. An exclamation used to get attention for an official proclamation or proceeding. In many courtrooms, the bailiff normally cries "oyez" to signal the beginning of the court proceeding.

P

P.A.

Professional Association. See professional corporation.

PACKAGE, ORIGINAL see original package doctrine.

PACTUM

(pāk'-tŭm) Lat.: pact, contract, agreement. See also nudum pactum.

PAID-IN-SURPLUS

in corporate finance, the amount paid for stock in excess of its par value.

PAIN AND SUFFERING

a species of damages that one may recover for physical or mental pain that results from a wrong done. See also survival statute.

PAINTING THE TAPE

expression for a person or group making transactions without a true change of ownership to give the impression that a stock is trading actively. See manipulation [RIGGED ORDERS; WASH SALE].

PAIS

(pā, pās) Fr.: the countryside.

PALIMONY

an award of support like alimony but made to a partner in a dissolved nonmarital relationship. Where the partners had an express contract, founded on consideration other than sexual services, some courts have held the contract enforceable; where no such formal agreement exists, the court may determine whether the conduct of the parties warrants a finding of implied contract or other understanding to support an award.

PANDER

to pimp; to cater to the lust of another. A PANDERER is a pimp, procurer, male bawd. PANDERING is 1. the crime of inducing a female to become a prostitute; 2. the promotion of obscene literature or movies by appeals to prurient interests. See aid and abet; solicitation.

PANDERER see pander; prostitution.

PANEL

the list of persons who have been summoned for jury duty and from whom a jury may be chosen. To IMPANEL a jury means to summon and select a jury.

Panel also refers to the group of appellate judges who will hear an appeal. Typically, intermediate appellate courts consist of several judges who sit in panels of three.

PAPER see bearer paper; chattel paper; commercial paper; order paper.

PAPER PROFIT

unrealized gain; profit that exists and is reflected in financial statements but that has not been reduced to cash and realized for tax purposes. See realization.

PAR

equal to the established value; denotes the face amount or stated value of a negotiable instrument, stock or bond, and not the actual value it would receive on the open market. Bills of exchange, stocks and the like are AT PAR when they sell for their stated value.

PAR VALUE is the stated or face value of a stock or bond. It has little significance for common stock; current practice is to issue no-par stock or stock with an arbitrary low value to avoid taxes. In the case of preferred stock, par takes on added importance since it specifies the dollar value upon which dividends are paid, and preferreds are usually offered for sale or exchange at par value. The par value on bonds specifies both the maturity payment and interest base.

PARALEGAL

one not a member of the bar who is employed, usually by a law office, to perform a variety of tasks associated with a law practice, any of which may be performed properly and conveniently by one not trained or authorized to practice law.

PARAMOUNT TITLE

a title that will prevail over another asserted against it; signifies immediate right of possession, and is generally referred to as the basis for eviction of a tenant by one with a right of possession superior to that of the tenant.

PARAMOUR

one's lover; one in the place of a husband or wife, but ordinarily without the legal rights attached to the marital relationship. See palimony.

PARCENER

in common law, one who, jointly with others, as coparcener, holds an estate by virtue of descent (i.e., inheritance). The holding of a parcener is generally known as an estate in coparcenary and usually refers to the estate held by each inheritor before the inheritance has been divided (i.e., partitioned). The term is no longer widely used, since it is now said to be indistinguishable from a TENANCY IN COMMON (see tenancy).

PARDON

an exercise of the sovereign prerogative to relieve a person from further punishment and from legal disabilities resulting from a crime of which he or she has been convicted. Its effect is that of relaxing the punishment and blotting out guilt, so that in the eyes of the law the offender is as innocent as if he or she had never committed the offense.

EXAMPLE: Joyce is convicted of destroying government property in a protest march. As a result of that conviction, Joyce can no longer keep her job as a state employee. A few years later, serious questions are raised as to some of the witnesses' truthfulness, especially in light of the excellent reputation Joyce enjoyed before her conviction. After being presented with the issues, the governor grants Joyce a *pardon*. That pardon enables Joyce to work once more for the state.

CONDITIONAL PARDON any pardon imposing some condition, precedent or subsequent, before it will become effective. See amnesty; commutation; executive clemency.

PARENS PATRIAE

(*pă'-reñz pă'-trē-ī*) Lat.: parent of his country. The role of the state as sovereign and guardian of persons under legal disability. By exercising this authority the state emphasizes that a child is not the absolute property of a parent but is a trust reposed in a parent by the state as *parens patriae*.

PARENT CORPORATION see subsidiary.

PARENTAL LIABILITY

responsibility of parents for tortious acts committed by their minor children. While at common law, parents did not have such liabilities, the fact that juvenile misbehavior resulted in uncompensated victims led many states to enact statutes imposing liability on parents for the tort of their minor child. These statutes vary widely, but usually limit the parents' liability to a small dollar amount.

PARI DELICTO see in *pari delicto*.

PARI MATERIA see in *pari materia*.

PARITY

equality.

PARLIAMENT

a legislative body. The term was first used to describe the legislative body of England, Scotland, and Ireland and still is used to describe that of the United Kingdom. Many countries and localities that are former British colonies call their legislative bodies "Parliament."

PARLIAMENTARY LAW

general body of rules governing the orderly procedure of any legislative or other deliberative body. The most commonly followed rules are "Robert's Rules of Order."

PAROLE

in criminal law, a conditional release from imprisonment that entitles the person receiving it to serve the remainder of his or her term outside prison if he or she complies with all the conditions connected with his or her release. Compare probation.

PAROL EVIDENCE

oral rather than written evidence.

PAROL EVIDENCE RULE [MERGER CLAUSE] a rule that declares that when terms of a contract have been embodied in a writing (called the integration of the agreement) to which both parties have assented, *parol* (oral) evidence of contemporaneous or prior oral agreements is not admissible for the purpose of varying or contradicting the written contract.

EXAMPLE: Mike signs a contract with a home improvement builder to construct a pool at certain specifications. When the project is completed, Mike claims that the builder orally agreed to change the specifications at Mike's request. Because the specifications were never changed, Mike refuses to pay, and the builder sues him. Unless the circumstances allow Mike to introduce as *parol* [oral] *evidence* the builder's statement agreeing to the changes, the builder will probably prevail on the basis of his written contract with Mike.

PARTIAL ACTUAL EVICTION see eviction [PARTIAL ACTUAL EVICTION].

PARTIAL BREACH

a breach that gives rise to a claim for damages but that is so slight that it does not substantially impair the value of the contract to the injured party and thus does not give the injured party cause to abandon the whole contract.

PARTIALLY DISCLOSED PRINCIPAL see principal.

PARTICULARS, BILL OF see bill of particulars.

PARTITION

a judicial separation of the respective interests in land of joint owners or **TENANTS IN COMMON**(see tenancy), so that each may take possession of, enjoy and control his or her separate estate. Partition is thus the dissolution of the unity of possession existing between common owners, with the result that the parties hold their estates in severalty. Partition is available whenever desired by any co-tenant in a tenancy in common.

A **JOINT TENANCY**(see tenancy) can be destroyed by either the sale or the mortgaging of a joint owner's interest in the estate, and the resultant tenancy in common is then subject to partition, thus defeating the survivorship rights of other joint tenants in the sold or mortgaged property.

EXAMPLE: Pat and his friend own a large piece of undeveloped land as tenants in common. Pat uses his ownership interest to obtain a loan from the bank. When he defaults on the loan, the bank can seek a *partition* of the land. With a partition, the bank owns one-half of the land and Pat's friend owns one-half. Subsequent to a partition,

the parties own particular portions of the land. If the land cannot be divided equitably, the land would be sold and the proceeds divided.

PARTNERSHIP

1. a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful business, and to divide the profit and bear the loss in certain proportions; 2. an association of two or more persons to carry on as co-owners a business for profit. Partners are individually liable for the debts of the partnership, and assets individually owned will be subject to execution to satisfy any such debt when partnership assets are insufficient. A partnership is not subject to tax; rather the income is divided and taxed as personal income to the individual partners, unlike profits in corporations. The decision whether to form a partnership or to incorporate is generally controlled by the tax consequences.

LIMITED PARTNERSHIP an entity in which one or more persons, with unlimited liability (called **GENERAL PARTNERS**), manage the partnership, while one or more other persons contribute only capital. This latter group of partners (called **LIMITED PARTNERS**) have no right to participate in the management and operation of the business and assume no liability beyond the capital contributed. Compare corporation.

PART PERFORMANCE see statute of frauds.

PARTY

1. in a judicial proceeding, a litigant (plaintiff or defendant); a person directly interested in the subject matter of a case; one who would assert a claim, make a defense, control proceedings, examine witnesses or appeal from the judgment. 2. a person or entity that enters into a contract, lease, deed, etc.

INDISPENSABLE PARTY one whose involvement in the subject matter of a controversy is such that his or her interests will be affected, or one whose joinder in the action is required to enable a complete adjudication of the issues as well as the fashioning of an effective remedy. A suit cannot in equity and good conscience proceed without one who is regarded as an indispensable party.

EXAMPLE: Ball Corporation is the largest maker of a chemically based ceiling tile, although other smaller companies also produce the product. The tiles were installed in school buildings, and the chemical in them has had an adverse effect on the children. It could not be determined which company's tiles had been used, but only the smaller companies are named in a suit by the children. Ball is never mentioned. The other companies want Ball named as an *indispensable party* because, by numbers alone, it is most likely that Ball's tiles were used in schools. Ball also wants to be named

because it fears that a judgment against the other companies will be used against it, even though it did not have an opportunity to participate in the litigation, and because otherwise a favorable outcome for the other companies would not prevent Ball from being sued later for the same thing.

NECESSARY PARTY one whose interests will be affected by the suit or without whom complete relief cannot be granted, but who will not be joined if doing so would deprive the court of jurisdiction in the case.

NOMINAL PARTY party appearing on the record not because he or she has any real interest in the case, but because technical rules of pleading require his or her presence in the record.

PROPER PARTY one who has an interest in the subject matter of the litigation, but without whom a substantial decree may nevertheless issue, though such decree will not settle all questions in the controversy with respect to such party.

REAL PARTY IN INTEREST see real party in interest.

THIRD PARTY someone other than the parties directly involved in the action or transaction; an outsider with no legal interest in the matter.

PARTY TO BE CHARGED see statute of frauds.

PARTY WALL

a dividing wall between adjoining landowners that exists for the common benefit of both properties that it separates, and of which any use may be made by either party, so long as such use is not detrimental to the other. The two landowners own the wall as **TENANTS IN COMMON**, (see tenancy), where the wall stands upon ground that is itself held in common, or where it stands partly upon each of the two adjoining properties. A *party wall* may be constructed wholly upon property belonging to one of the parties, or it may be owned entirely by only one of them; in either case the wall is subject to an easement to have it maintained. A party wall is often one that provides support for one or more separately owned structures.

PAR VALUE see par [PAR VALUE].

PASSIVE

inactive, usually used to describe permissive behavior, such as toleration of or failure to correct a dangerous condition on one's property as opposed to an affirmative act threatening the safety of another. In tax law, passive income, such as dividends, is a separate category from active income.

PASSIVE EUTHANASIA see euthanasia [PASSIVE EUTHANASIA].

PASSIVE USE see use [PASSIVE USE].

PATENT

evident; obvious.

PATENT OF INVENTION(often called simply a patent) a grant of right to exclude others from the making or selling of an invention during a specified time. It gives to its owner a legitimate monopoly. See patent infringement.

PATENT PENDING(often abbreviated PAT. PEND.) a notice that the product on which it is inscribed has been the subject of an application for patent protection and that if a patent does issue, those with notice will be subject to the applicant's prior rights.

PATENT OF LANDan instrument by which the government conveys a fee simple interest in land to another.

PATENT APPEALS see federal courts [COURT OF CUSTOMS AND PATENT APPEALS].

PATENT DEFECT

a defect that could be recognized upon reasonably careful inspection or through ordinary diligence.

EXAMPLE: Alex examines a warehouse space prior to renting it for himself. Normal examination would reveal that water leaked into the warehouse in several spots. Some of Alex's property in the warehouse is subsequently damaged by water. Since the leakage is a *patent defect*, which he should have discovered, Alex cannot sue for the damage.

Compare latent defect.

PATENT INFRINGEMENT

the act of trespassing upon the rights secured by a patent. The test of infringement is whether the device in question does substantially the same work in substantially the same way and accomplishes the same result as the device that has been patented.

Copyrights and trademarks can also be the subject of an infringement action.

PATERNITY SUIT [BASTARDY PROCEEDINGS]

a suit initiated to determine the paternity of a child born out of wedlock and to provide for the support of that child once paternity is proved.

PAT. PEND. see patent [PATENT PENDING].

PATRICIDE

the killing of one's own father.

PATRONAGE

giving either protection or support. **POLITICAL PATRONAGE**is the use of political office to protect one's friends and supporters through the influence of the office, and to support them by hiring them for government jobs. The **CIVIL SERVICE COMMISSIONS**were established to create professional bodies of government employees who would be free of political patronage.

PAUPER

indigent; one who is unable to provide his or her own support and is otherwise without financial resources. Under the Equal Protection Clause to the United States Constitution, indigents and paupers may be excused from paying certain court costs and other legal fees so that they may have equal access to the courts. See *in forma pauperis*; indigent.

PAWN

to deposit personal property with another as security for the payment of a debt.

PAYABLES see liabilities.

PAYABLE TO BEARER see bearer paper.

PAYABLE TO ORDER see order paper.

PAYEE

any person to whom a debt should be paid; one to whose order a bill of exchange, note or check is made payable.

PAYER [PAYOR]

one who pays a debt or is obligated to pay a debt under a promissory note or other instrument.

PAYMENT

satisfaction of a claim or debt. Delivery of money in fulfillment of an obligation.

PAYMENT DATE see *ex dividend* [PAYMENT DATE].

PAYMENT IN DUE COURSE

payment of a negotiable instrument at or after its date of maturity, made to its holder in good faith and without notice of any defect in his or her title.

EXAMPLE: Mark fraudulently obtains a negotiable promissory note made out by Paul and payable to a third party. When the note becomes due, Mark presents it to Paul and Paul *pays it in due course*. The third party cannot force Paul also to pay him, because Paul had no knowledge of the earlier fraud and, therefore, had no reason to suspect that the third party did not legitimately negotiate the note to Mark.

PAYMENT INTO COURT

the payment by a party of a sum of money or other subject matter of a lawsuit into court for the duration of the lawsuit. The court disposes of the money or other property as the parties agree in their settlement of the lawsuit, or in accordance with the court's judgment.

PAYOR see payer [PAYOR].

PCR see DNA testing [PCR].

PCR ACTIONS see postconviction relief proceedings [PCR ACTIONS].

P.D.

public defender. Also, police department.

PEACEABLE POSSESSION

possession that is not interrupted by adverse suits or other hostile action intended to oust the possessor from the land. The existence of adverse claims is not precluded, so long as no actual attempt to dispossess is made. See quiet title.

PEACEFUL ENJOYMENT see quiet enjoyment.

PECULATION

the fraudulent misappropriation to one's own use of money or goods entrusted to one's care. See also embezzlement; larceny.

PECUNIARY

consisting of money or that which can be valued in money. A PECUNIARY LOSS is a loss of money or one that can be translated into economic loss.

PENAL ACTION

a civil suit brought for the recovery of a statutory penalty imposed as a punishment for an offense against the public.

PENAL INSTITUTION

any place of confinement for convicted criminals.

PENAL LAW

a law to preserve public order that defines an offense against the public and inflicts a penalty for its violation. Statutes that grant a private (civil) action against a wrongdoer are not considered penal, but remedial, in nature.

PENALTIES see civil penalties.

PENALTY

sanction, usually an amount of money, imposed as punishment for civil or criminal wrongdoing. The term also refers to a sum fixed by contract to be payable by one party to the other for the failure of either to perform his or her obligations under the contract. See civil penalties; liquidated damages.

PENALTY CLAUSE

a contract clause that provides for the payment of an amount as forfeiture in the event a party defaults. Penalty clauses are generally not enforced by the courts when the amount of the penalty is unrelated to the damages incurred. However, the courts will sometimes enforce a penalty on the grounds that the parties were free to agree to it. Courts will enforce a liquidated damage clause when the amount of actual damages is difficult to ascertain and the liquidated damages are a reasonable attempt to approximate the actual damages.

PENDENTE LITE [LITE PENDENTE]

(pě̃n'-dě̃n'-tā lē̃'-tā) Lat.: suspended by the lawsuit; pending the lawsuit. Contingent upon the determination of a pending lawsuit.

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EXAMPLE: Tenants in an apartment building sue their landlord for not providing heat. The tenants do not want to pay full rent since they are not getting heat, but state law requires full rent each month or else the landlord can evict. To protect themselves, the tenants commence a lawsuit and set up a bank account *pendente lite* where they deposit their rent each month while the suit is in court. At the end of the suit, the money in the account is applied to past-due rents less whatever amount the court says the tenants are entitled to for lack of heat.

A wife will seek alimony and child support payments *pendente lite* in most cases after she sues for divorce.

See also *lis pendens*.

PENDENT JURISDICTION

federal court doctrine whereby a plaintiff, notwithstanding the limitations of federal question jurisdiction, may rely upon both federal and nonfederal grounds for the relief sought in a complaint. Thus, where the plaintiff joins a federal claim with a state law claim based on closely related or identical conduct of the defendant, the federal courts have jurisdiction to hear and determine the state law claims as well as those arising under federal law. See *abstention*; *ancillary jurisdiction*.

PENITENTIARY see jail [PENITENTIARIES].

PEN REGISTER see WIRETAP [PEN REGISTER].

PENSION FUND see retirement plan.

PENSION PLAN see retirement plan [PENSION FUND (PLAN)].

PEONAGE see Thirteenth Amendment [PEONAGE].

PER ANNUM

(*pěr ǎn'-nŭm*) Lat.: by the year; annually.

PER [PUR] AUTRE VIE

(*pěr [pūr] ô'-tr vĕ*) Fr.: for or during the life of another. A life estate measured by the life of a third person rather than the life of the grantee.

PER CAPITA

(*pĕr kǎp'-ĭ-tá*) Lat.: by the heads. Anything figured per capita is calculated by the number of individuals, (heads) involved and is divided equally among all.

PERCENTAGE DEPLETION see depletion [PERCENTAGE DEPLETION].

PER CURIAM

(*pěr kū'-rĕ-äm*) Lat.: by the court. See opinion [PER CURIAM OPINION].

PER DIEM

(*pěr dĕ'-ĕm*) Lat.: by the day. 1. pay for a day's services. 2. Government and private business travel allowances are often allocated on a per diem basis.

PEREMPTORY

absolute, final, not admitting of question or appeal.

A peremptory trial date may be established by the court on its own motion or at the request of a party to insure timely disposition of the case. In selection of a jury each side has a right to a fixed number of PEREMPTORY CHALLENGES to the seating of potential jurors, which means that counsel may reject a certain number of potential jurors for any reason, or for no reason. See peremptory writ.

PEREMPTORY CHALLENGE see challenge.

PEREMPTORY PLEA see plea.

PEREMPTORY WRIT

a peremptory writ is a form of mandamus that requires the act commanded be done absolutely. In comparison, a usual writ of mandamus permits the public official the choice of either doing the act commanded or showing legal cause why it need not be done. Before a peremptory writ can issue, the official must be given notice of the legal action and an opportunity to defend.

In common law, peremptory writs were a species of original writs by which lawsuits were begun. The peremptory original writ commanded the sheriff to cause the defendant to appear in court and to defend the suit. It was used when general damages to be assessed by the jury were requested. A suit was otherwise begun by the use of an optional writ, which commanded the defendant to do the acts requested or to show cause why they should not be done. This writ was used when the plaintiff requested a specific remedy, such as the return of a parcel of land or the payment of a specific sum.

PERFECTED

completed, executed, enforceable, merchantable; refers especially to the status ascribed to security interests after certain events have occurred or certain prescribed steps have been taken, such as filing evidence of the interest, taking possession of the collateral, etc. A perfected security interest has priority over an unperfected interest. The date of perfection is also the time from which courts judge priority contests among other holding perfected interest.

In practice, after the accomplishment of all steps necessary to entitle a litigant to proceed in an appellate court, the appeal is said to be perfected.

PERFORMANCE

the fulfillment of an obligation or a promise; especially, completion of one's duty under a contract. Compare obligation of a contract.

PERFORMANCE BOND

a bond that guarantees against breach of contract; generally used in building contracts to guarantee that a contractor will perform the contract. In the event the contractor defaults or otherwise breaches the contract, the owner of the building project

may use the proceeds of the bond to complete the project. Depending upon its terms, the proceeds of a performance bond may also be used to pay subcontractors who furnish labor and materials.

PERIL

risk, such as the risk that is insured in an insurance policy.

PER INFORTUNUM

(*pĕr ĭn-fōr-tū'-nĕ-ŭm*) Lat.: by accident.

PERIODIC TENANCY see tenancy [PERIODIC TENANCY].

PERJURY

criminal offense of making false statements under oath.

In common law, only a willful and corrupt sworn statement made without sincere belief in its truth, and made in a judicial proceeding regarding a material matter, was perjury. Today, statutes have broadened the offense so that in some jurisdictions any false swearing in a legal instrument or legal setting is perjury.

EXAMPLE: Sheila is charged with robbery. At her trial, Tom, Sheila's boyfriend, admits to the crime, which results in a "not guilty" verdict for Sheila. Because of a procedural technicality, Tom cannot be tried for the robbery. But if the prosecution can prove that Tom lied about committing the crime, he could then be prosecuted for *perjury*.

PERMANENT FIXTURE see fixture.

PERMANENT INJUNCTION see injunction [PERMANENT INJUNCTION].

PERMISSION OF COURT see leave of court.

PERMISSIVE COUNTERCLAIM see counterclaim [PERMISSIVE COUNTERCLAIM]; joinder [PERMISSIVE JOINDER].

PERMISSIVE JOINDER see joinder [PERMISSIVE JOINDER].

PERMISSIVE USE see use [PERMISSIVE USE].

PERMISSIVE WASTE see waste [PERMISSIVE WASTE].

PER MY ET PER TOUT

(*pĕr mĕ ā pĕr tū*) Law Fr.: by half and by whole. In joint tenancy, each tenant's share is the whole, for purposes of tenure and survivorship [tout], and each share is an aliquot portion for purposes of alienation [my].

PERPETUITIES, RULE AGAINST see rule against perpetuities.

PERPETUITY see in perpetuity.

PER QUOD

(*pĕr kwōd*) Lat.: through which; by which; whereby. Requiring extrinsic circumstances (context); acquiring

meaning only by reference to external facts.

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PER SE

(*pĕr sĕ*) Lat.: through itself, by means of itself. Not requiring extraneous evidence or support to establish its existence.

PERSON

in law, an individual or incorporated group having certain legal rights and responsibilities.

PERSON AGGRIEVED see aggrieved party.

PERSONAL ATTACK RULE see fairness doctrine [**PERSONAL ATTACK RULE**].

PERSONAL CHATTEL see chattel [**PERSONAL CHATTEL**].

PERSONAL EFFECTS

a vague phrase used to describe tangible property having an intimate relation to the decedent, such as clothing and jewelry.

PERSONAL HOLDING COMPANY

a corporation having a limited number of shareholders and a high percentage of passive income, such as interest, dividends, rents, royalties, and capital gains. A special income tax was imposed on personal holding companies in 1937 in order to prevent taxpayers from avoiding taxes by placing their assets in corporations. Previously, taxpayers would avoid income taxes by placing their assets in one or more corporations, thereby splitting their income among several taxpayers and taking advantage of the lower marginal tax brackets. The **PERSONAL HOLDING COMPANY TAX** is imposed on the undistributed income of such corporations at a flat rate. The purpose of the tax is to force the shareholders to distribute the corporation's income to themselves as dividends so they may be taxed on it at their regular rate of income tax.

PERSONAL JUDGMENT

judgment imposed on defendant requiring sums to be advanced from whatever assets he or she has within the jurisdiction of the issuing court, as opposed to a judgment directed against particular property (called an *in rem* judgment) or a judgment against a corporate entity. See jurisdiction [**IN PERSONAM JURISDICTION**].

PERSONAL JURISDICTION see jurisdiction [**IN PERSONAM JURISDICTION**].

PERSONAL PROPERTY [PERSONALITY]

things movable, as distinguished from real property or things attached to the realty.

EXAMPLE: An agreement between a buyer and seller of a house provides that the sale covers only the land and home and not the seller's *personal property*. This agreement means that the seller can remove items such as furniture and rugs, but not the heating system.

PERSONAL RECOGNIZANCE see release on own recognizance [ROR].

PERSONAL REPRESENTATIVE

a person who manages the affairs of another, either under a power of attorney or due to the incapacity of the principal either through death, incompetency, or infancy; for example, the executor appointed under the will of a decedent or the committee of an incompetent.

PERSONAL SERVICE see service [PERSONAL SERVICE].

PERSONALTY see personal property [PERSONALTY].

PERSONAM see in personam.

PER STIRPES

(pěř stŭr'-pāz) Lat.: through or by roots; by family stock representation. The essential characteristic of a distribution of an intestate's estate per stirpes is that each beneficiary receives a share in the property, representing the accurate fraction of the fraction to which the person through whom he or she claims from the ancestor would have been entitled. It is distinguished from a distribution per capita.

EXAMPLE: Frank dies without a will. His wife has predeceased him, and he is survived by two children. A third child has also predeceased him but has left two children. Under a *per stirpes* distribution, Frank's two children each receive one-third of his estate. The remaining one-third is distributed to the children of the third child who had predeceased Frank.

PERSUASION BURDEN see burden of proof.

PER TOUT ET NON PER MY

(pěř tŭ ā nōn pěř mē) Law Fr.: by the whole and not by the half. Describes the type of seisin that exists in a JOINT TENANCY or TENANCY BY THE ENTIRETY (see tenancy). Thus, the joint tenants or man and wife who own property by the entirety own an undivided interest in the whole of the property but not an individual interest in only a part of the property. See partition; tenancy [TENANCY IN COMMON].

PETITION

in equity procedure, the functional equivalent of a complaint at law. It is a written application addressed to a court or judge, stating facts and circumstances relied upon as a cause for judicial action, and containing a prayer (formal request) for relief.

PETITIONER

one who presents a petition to a court or other body either to institute an equity proceeding or to take an appeal from a judgment. The adverse party is called the respondent.

PETITION IN BANKRUPTCY

the petition by which an insolvent debtor declares bankruptcy and invokes the protection of the bankruptcy court from creditors. Under the United States Constitution, Congress is given power to establish uniform laws of bankruptcy. It has used this power to preempt all state laws and state court actions by granting an automatic stay of any proceedings against the bankrupt debtor upon the filing of a bankruptcy petition. Creditors must seek their remedies against the debtor in the bankruptcy court.

PETIT JURY [PETTY JURY] see jury.

PETIT LARCENY [PETTY LARCENY] see larceny.

PETTY JURY see jury [PETIT [PETTY] JURY].

PETTY LARCENY see larceny [PETIT LARCENY].

PHYSICAL WASTE see waste.

PHYSICIAN-PATIENT PRIVILEGE see privileged communication.

PICKETING

the practice, used in labor disputes, of patrolling, usually with placards, to publicize a dispute or to secure support for a cause; a constitutionally protected exercise of free expression when done peaceably.

PIERCING THE CORPORATE VEIL

the process of imposing liability for corporate activity, in disregard of the corporate entity, on a person or entity other than the offending corporation itself.

Generally, the corporate form isolates both individuals and PARENT CORPORATIONS(see subsidiary [SUBSIDIARY CORPORATION]) from liability for corporate misdeeds. However, there are times (such as when incorporation itself was accomplished to perpetrate a fraud) when the court will ignore the corporate entity and strip the organizers and managers of the corporation of the limited liability that they usually enjoy. In doing so, the court is said to pierce the corporate veil.

PIMP see pander; prostitution.

PINK SHEETS see listed stock [PINK SHEETS].

PIRACY

at common law, the commission of acts of robbery and depredation on the high seas that, if committed on land, would constitute felonies. See hijacking. Piracy is also used to refer to the commercial reproduction and distribution of property protected by copyright, patent, trademark, or trade secret law. Pirated works, such as videotapes or records, constitute copyright infringement. See also plagiarism.

P.J.

presiding judge.

PLAGIARISM

appropriation of the literary composition of another and passing off as one's own the product of the mind and language of another. The offense of plagiarism, known in the law as INFRINGEMENT OF COPYRIGHT, comes into being only when the work allegedly copied is protected by copyright.

PLAIN ERROR

rule applicable to appellate courts that requires the reversal of a conviction and the award of a new trial where an obvious error in the trial proceedings affecting the fundamental right of the accused to a fair trial was not objected to at the time it occurred and went uncorrected by the trial court.

EXAMPLE: The prosecutor introduces very prejudicial evidence at Roy's trial. The judge fails to instruct the jury to limit their consideration of that evidence, despite the obvious need for such an instruction. Roy is convicted and the case is appealed. Even though Roy's attorney did not object to the introduction at the time it occurred a procedure that would normally be required before a new trial could be granted the appellate court may apply the *plain error* rule and grant Roy a new trial.

Compare harmless error; miscarriage of justice.

PLAIN MEANING (RULE)

minority view that the words themselves determine the meaning of a statute. See strict construction. The majority view looks to the legislative history (committee hearings, commentary) or other extrinsic evidence in determining the intent. See also four corners.

PLAINTIFF

the one who initially brings the suit; one who, in a personal action, seeks a remedy in a court of justice for an injury to, or a withholding of, his or her rights.

PLAINTIFF IN ERROR one who appeals from a judgment against him or her in a lower court, whether he or she was plaintiff or defendant in that court.

THIRD PARTY PLAINTIFF refers to a defendant who files a complaint against a third party not named as a defendant by the plaintiff, and so not otherwise a party to the proceeding.

PLAIN VIEW

a doctrine that may legitimize a search or seizure without a search warrant, which otherwise is generally required.

EXAMPLE: While walking on the sidewalk, a policeman sees a marijuana plant growing in someone's house. Under the *plain view* doctrine, the policeman can enter the house without a search warrant, even though a house represents a highly protected privacy area that

in almost every other instance requires a search warrant prior to a policeman's entrance.

PLAN see master plan.

PLAT

in property law, a map that shows the location of real estate in a town or county in relation to adjoining lots and landmarks such as roads.

PLEA

1. in equity, a special answer relying upon one or more things as a reason for the suit to be dismissed, delayed, or barred; 2. at law, broadly, any one of the common law pleadings; 3. technically, the defendant's or respondent's answer refuting the factual basis for the plaintiff's petition or complaint, as distinguished from a demurrer, which is an answer asserting no cause of action exists as a matter of law. 4. In criminal procedure, the defendant will enter a plea at his or her arraignment, of not guilty, guilty or, in some jurisdictions, nolo contendere or non vult (meaning no contest). Pleas are either dilatory or preemptory.

DILATORY PLEA one that tends to defeat the actions to which it refers by contesting grounds other than the merits of plaintiff's case. Hence, the plea raises issues such as improper jurisdiction, wrong defendant, or other procedural defects.

INSANITY PLEA one by which the defendant claims innocence because of a mental disorder or inability to reason that prevented him or her from having a culpable mental state, i.e., from having the sense of purposefulness (intent, willfulness, recklessness) that is a necessary element of the crime charged.

PEREMPTORY PLEA one that answers the plaintiff's material contention, responding to the merits of plaintiff's case.

PLEA IN ABATEMENT one that does not deny the truth of plaintiff's contention, but introduces new matter to avoid what would otherwise be the effect of the pleader's failure to deny plaintiff's allegations.

PLEA BARGAINING

the process whereby the accused and the prosecutor negotiate a mutually satisfactory disposition of the case. The defendant may plead guilty to a lesser offense or to only one or some of the counts in a multicount indictment. In return, the defendant seeks concessions on the type and length of his or her sentence or a reduction of counts against him or her.

EXAMPLE: Fred is charged with robbery while armed with a deadly weapon. All witnesses say that Fred was seen with a gun. However, the only gun found at the scene of the crime is on Fred's partner. In Fred's state, robbery with a deadly weapon carries a much greater sentence than robbery. Fred *plea bargains* with the prosecutor,

offering to plead guilty to robbery if the prosecutor will dismiss the charge relating to the weapon and thus insure a shorter sentence. The State is spared the expense and uncertainty attendant to a trial, and defendant minimizes his overall exposure.

PLEAD

1. to make any pleading; 2. to answer plaintiff's common law declaration; 3. in criminal law, to answer to the charge, either admitting or denying guilt.

PLEADING BURDEN see burden of proof.

PLEADINGS

statements, in logical and legal form, of the facts that constitute plaintiff's cause of action and defendant's ground of defense. Pleadings are either allegations by the parties affirming or denying certain matters of fact, or other statements in support or derogation of certain principles of law, which are intended to describe to the court or jury the real matter in dispute.

PLEADING THE FIFTH AMENDMENT see Fifth Amendment; self-incrimination, privilege against.

PLEA IN ABATEMENT see dilatory plea.

PLEDGE

a deposit of personal property as security for a debt; delivery of goods by a debtor to a creditor until the debt is repaid; generally defined as a lien or a contract that calls for the transfer of personal property only as security. See bailment; collateral.

PLENARY

full or unqualified. In judicial proceedings, denotes a complete, formally pleaded suit wherein a petition or complaint is filed by one or more persons against one or more other persons who file an answer or a response. A PLENARY ACTION is one in which a full trial or PLENARY HEARING is had on the merits of a complaint following full discovery, as distinguished from a summary proceeding.

PLURALITY OPINION see opinion.

POCKET VETO

a means by which the President of the United States may effectively veto an act of Congress without exercising the presidential veto right. Under the U.S. Constitution the President must veto legislation within ten days after it has been passed by both the Senate and the House of Representatives, or else the legislation will become law. However, if Congress adjourns before the end of the ten-day period the legislation will only become law if the President has signed it. Accordingly, the President may effectively veto legislation that was passed within the last ten days of the congressional session merely by not signing it into law.

POINT RESERVED

at trial, the holding of a legal issue in abeyance for argument, so that the testimony or other matters at hand may proceed.

POISONOUS TREE see fruit of the poisonous tree.

POLICE COURT

an inferior municipal court with limited jurisdiction in criminal cases. Minor cases can be disposed of by such courts, but otherwise they generally have power only to arraign the accused and set bail.

POLICE POWER

inherent power of state governments, often delegated in part to local governments, to impose upon private rights those restrictions that are reasonably related to promotion and maintenance of the health, safety, morals and general welfare of the public. Restrictions upon the use of one's property, such as zoning laws, or upon the conduct of one's business, such as environmental regulations, are imposed by state and local governments pursuant to the police power.

EXAMPLE: A federal law sets out certain requirements for processing milk. One state has conclusively found that, because of conditions peculiar to the state, the requirements are insufficient to protect its citizens' health. Under the state's *police power*, the state legislature may enact greater precautions that all milk must meet to be sold in that state.

POLITICAL ASYLUM see asylum.

POLITICAL CONTRIBUTION see charitable contribution [POLITICAL CONTRIBUTION].

POLITICAL CORPORATION see corporation [PUBLIC CORPORATIONS].

POLITICAL PARTY see party [POLITICAL PARTY].

POLITICAL QUESTION

a question that a court determines not to be properly subject to judicial determination (not to be justiciable), because resolution is committed exclusively to the jurisdiction of another branch of government (legislative or executive), or because adequate standards for judicial review are lacking, or because there is no way to insure enforcement of the court's judgment.

EXAMPLE: The Constitution provides that the Senate shall have advise and consent power for all treaties entered into by the President with other nations. After the Senate consents to a certain treaty, a suit is brought challenging the extent to which the Senate deliberated over the treaty. A court will rule that the issue is a *political question* that cannot be decided by the judiciary.

POLLING THE JURY see jury [POLLING THE JURY].

POLL TAX

a direct tax of a fixed amount upon all persons, or upon all persons of a certain class, resident within a specified territory, without regard to their property or their occupation.

POLYGAMY

in criminal law, the offense of having more than one husband or wife at one time.

POLYGRAPH

a lie detector; an electromechanical instrument that measures and records certain physiologic changes that it is believed are involuntarily caused by the subject's conscious attempts to deceive the questioner. Once the machine has recorded the subject's responses to the questions propounded by the operator, the operator interprets the record and determines whether the subject is lying.

POOL

a group or combination of individuals or entities organized for the purpose of eliminating competition between the members and combining their resources in order to accomplish a benefit for each member. A pool sufficiently large or powerful so as to restrict competition throughout a particular trade or industry is illegal under the Sherman Antitrust Act of 1890.

PORNOGRAPHY

books, magazines, films, pictures, and other such material depicting sexual acts that appeal to one's prurient interest. See obscene material.

PORTFOLIO

a group of securities held by an individual or institutional investor, which may contain a variety of common and preferred stocks, corporate and municipal bonds, certificates of deposit and treasury bills that is, appropriate selections from the equity, capital and money markets.

POSITIVE FRAUD see fraud [FRAUD IN FACT].

POSITIVE LAW

standards of conduct dictated by validly enacted laws, rather than by principles of natural law.

POSITIVISM

in jurisprudence, the view that any legal system is best studied by concentrating on the positive law of that system. Compare natural law.

POSSE see in posse.

POSSE COMITATUS

(pŏ'-sā kŏm-ĭ-tä'-tus) Lat.: able to be an attendant. Refers to those called to attend the sheriff to assist him in making an arrest for a felony. A person so summoned is neither an officer nor a mere private person, but occupies

the legal position of a posse comitatus, and, while acting under the sheriff's orders, is as

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much clothed with the protection of the law as the sheriff himself. See immunity.

POSSESSION

the having, holding or detention of property in one's control. When distinguished from mere custody, possession involves custody plus the assertion of a right to exercise dominion.

ACTUAL POSSESSION immediate and direct physical control over property. In real property, it involves actual occupation of the property or direct appropriation of the benefits it yields.

CONSTRUCTIVE POSSESSION the condition of having the conscious power and intention to exercise control over property, but without direct control or actual presence upon it.

EXAMPLE: Ken is arrested for unlawful possession of handguns found in the trunk of his car. Ken argues that he did not have *actual possession* of the guns, since the trunk was locked and he was driving the car. Although that fact may be true, he is still liable for prosecution if he had *constructive possession*, which in this case is shown by the fact that he is the only person with keys to the trunk.

CRIMINAL POSSESSION possession for which criminal sanctions are provided, because the thing (or property) either may not lawfully be possessed, may not be possessed by a particular category of persons or may not be possessed under certain circumstances.

POSSESSORY ACTION

a lawsuit brought for the purpose of obtaining or maintaining possession of real property. See tenancy [TENANCY AT SUFFERANCE].

POSSESSORY INTEREST

a right to exert exclusive control over certain land, coupled with intent to exercise that right. Compare remainderman.

POSSIBILITY OF A REVERTER

the possibility of the return of an estate to the grantor, should a specified event occur or a particular act be performed in the future. It is thus a reversionary interest subject to a **CONDITION PRECEDENT** (see condition). The possibility does not itself constitute an estate, present or future. It describes the interest remaining in the grantor who conveys a conditional or determinable fee.

EXAMPLE: A father conveys a piece of real estate to his daughter as long as she remains unmarried. The possibility of the land returning to the father or his estate if the daughter marries creates a *possibility of a reverter* in the father.

Compare reentry.

POSTCONVICTION RELIEF PROCEEDINGS [PCR ACTIONS]

a statutory or court rule procedure whereby a criminal defendant

may challenge collaterally a judgment of conviction that has otherwise become final in the normal appellate review process. See collateral [COLLATERAL ATTACK]. Compare habeas corpus.

A writ of coram nobis is available in some states as a form of PCR. In other states an out-of-time motion for a new trial to correct a miscarriage of justice can afford this relief.

POST FACTO see ex post facto.

POST HOC ERGO PROPTER HOC

(pōst hōk èr'-gō prōp'-tēr hōk) Lat.: after this, therefore because of this; a maxim setting forth the false logic that because one event occurs after another event, it was caused by the prior event.

POSTING

to affix physically in order to display. 1. In civil procedure, posting of certain required information is a substitute form of service of process. 2. In commercial law, posting is the procedure that a bank follows in deciding to finally pay a negotiable instrument and in recording its payment. It includes verifying any signature, ascertaining that sufficient funds are available, marking the item paid, charging the customer's account and correcting or reversing an entry or erroneous action with regard to the item. 3. Posting also refers to the exhibition of notices on real property, warning potential trespassers that trespass for fishing or hunting is not permitted by the property owner.

POST MORTEM

(pōst mōr'-tēm) Lat.: after death. Examination of the body of a deceased to determine cause of death; may comprehend only examination by a coroner and may consequently not produce a true medical determination of cause of death, which involves autopsy and dissection. See inquest.

POSTNUPTIAL AGREEMENT

an agreement entered into by a husband and wife to determine the rights of each in the other's property in the event of death or divorce. Generally, each spouse must disclose his or her assets to the other and must have independent counsel for a postnuptial agreement to be valid. Even then, most jurisdictions will not permit a postnuptial agreement unless it is made to accommodate the rights of the parties in an already failing marriage. See separation agreement. Compare prenuptial agreement.

POT

slang for marijuana. See controlled substance [CANNABIS].

POUEROVER

1. a provision in a will, or a whole will, that distributes money or other valuables to a previously established trust;
2. in rare instances, a provision in a trust placing the trust assets in a will.

POWER, COMMERCE see power, constitutional [COMMERCE POWER].

POWER, CONSTITUTIONAL

in a constitutional form of government, enumerated and implied power vested in a particular branch or designated authority, for example, the spending power and the taxing power under the United States Constitution. In addition, the COMMERCE POWER describes the whole range of authority granted the Congress to regulate interstate commerce. See inherent powers [INHERENT CONSTITUTIONAL POWERS]; necessary and proper clause; privileges and immunities.

POWER, CORPORATE

a corporation's capacity or right to do certain acts or engage in certain activities, such as to sue or be sued, to enter into contracts, to borrow money, and to do such other things as are necessary to obtain its purposes.

POWER COUPLED WITH AN INTEREST

a power over property that is accompanied by or connected with an interest in the property subject to the power. Under the law of agency, when an agent has a power over property and also has a beneficial interest in that property, the principal may not revoke the agent's power until the interest has expired or unless the principal and agent have agreed otherwise.

POWER, ENUMERATED see enumerated powers.

POWER, IMPLIED see implied powers.

POWER, INHERENT see inherent powers.

POWER OF ACCEPTANCE

the ability of an offeree to create a binding contract by consenting to the terms of an offer. An offer can be accepted only by the individual invited by the offeror to furnish the consideration.

The power of acceptance is always terminated by rejection or counteroffer by the offeree, revocation by the offeror, lapse of time specified in the offer, or death or incapacity of the offeror or offeree.

POWER OF APPOINTMENT

authority given to a person to dispose of property of another, or of an interest therein. The authority must be to do an act that the grantor of the authority might lawfully do. Title to the property or interest passes directly from the donor of the power; the party having the power of appointment acts merely as a conduit through which title passes.

A power of appointment does not itself constitute an estate or interest, but the donee of the power may also be granted, in the same instrument, a present or future interest in the subject or property

over which the power is to be exercised. The donee is then said to have a POWER COUPLED WITH AN INTEREST.

Powers of appointment are exercisable inter vivos (by deed or similar instrument) or by testamentary disposition (will.) A GENERAL POWER may be exercised by the donee in favor of any person(s) he or she chooses, including himself or herself or his or her estate. The donee of a SPECIAL POWER is limited in the choice of beneficiaries by the donor of the power, and so must appoint in favor of member(s) of the class specified in the instrument creating the power.

EXAMPLE: A trust instrument created by a grandmother gives her son a special *power of appointment* to distribute the income generated by the trust principal to all of the grandmother's living grandchildren. The son has no power to touch the principal, but he has discretion to determine which grandchildren get how much of the interest.

POWER OF ATTORNEY

an instrument in writing by which one person, as principal, appoints another as his or her agent and confers upon him or her the authority to perform certain specified acts or kinds of acts on behalf of the principal. The primary purpose of a power of attorney is to evidence the authority of the agent to third parties with whom the agent deals.

POWER OF DISPOSITION see power of appointment.

POWER OF POLICE see police power.

PRACTICE

refers to the rules governing all aspects of a court proceeding.

PRAECIPE

(*prē'-si-pē*) Lat.: order; command. A writ commanding the defendant to do the thing required or to show reason why it has not been done. The clerk of the court is ordered by a *praecipe* to issue an execution for a judgment creditor.

PRAESENTI see in praesenti.

PRAYER (FOR RELIEF)

request contained in a complaint or petition that asks for relief to which plaintiff thinks himself entitled.

PREAMBLE

an introductory clause in a constitution, statute or other legal instrument that states the intent or underlying reason for the instrument.

PRECATORY

advisory or in the form of a recommendation or request rather than a command; applied to language, usually in a trust or a will, by which the settlor or testator expresses a wish to benefit another but does not impose an enforceable obligation upon

any party to carry out this wish. Depending upon how equivocal the language is, the trust or disposition may or may not be enforceable by the person whose benefit the testator seeks.

EXAMPLE: The mother's will leaves her home to her son. Other language in the will provides that if her home is ever sold by the son, she hopes that it will be sold to some other member of the family. That *precatory* language creates a doubt as to whether the son has an obligation to sell the house to another family member and as to what will happen should the son sell to someone else.

PRECEDENT

previously decided case recognized as authority for the disposition of future cases. In common law, precedents were regarded as the major source of law. A precedent may involve a novel question of common law or it may involve an interpretation of a statute. To the extent that future cases rely upon the precedent or distinguish it from themselves without disapproving of it, the case will serve as a precedent for future cases under the doctrine of *stare decisis*.

PRECEDENT CONDITION see condition.

PRECEDING ESTATE

a prior estate upon which a future interest is limited. Thus, a remainder is said to vest upon the termination of a preceding estate, such as a life estate.

PRECLUSION OF ISSUE see estoppel; issue preclusion.

PREEMPTION

a doctrine based on the supremacy clause of the federal constitution, under which a state may be deprived of jurisdiction over matters embraced by an Act of Congress, regardless of whether the state law coincides with, is complementary to or opposes the federal legislation. When Congress legislates in an area of federal concern, it may specifically preempt all state legislation (thus OCCUPYING THE FIELD) or may bar only inconsistent legislation; where Congress does not directly indicate its intention in this regard, the court will determine that intention based on the nature and legislative history of the enactment.

EXAMPLE: A state owns a railroad that operates in interstate commerce and uses guidelines to insure safety. Congress then passes legislation establishing greater safety requirements for railroads nationwide. Since Congress has the power to regulate interstate commerce, its guidelines *preempt* the state guidelines and the state must follow the national requirements.

State legislatures may preempt local governments in the same manner.

In international law, the term expresses the right of a nation to detain goods of a stranger in transit so as to afford its citizens a chance to purchase those goods.

PREEMPTIVE RIGHTS

the right specified in the charter of a corporation, granting to existing shareholders the first opportunity to buy a new issue of stock. Corporations implement such a charter provision by distributing, in advance of a new issue, subscription rights or warrants to existing shareholders in proportion to their current holdings. Shareholders have the choice of exercising the rights by purchasing shares of the new issue or of selling the rights in the open market. Rights usually have market value due to pricing of the new issue slightly below the prevailing market.

PREFERENCE

the paying or securing by an insolvent debtor, to one or more of his or her creditors, the whole or a part of their claims, to the exclusion or detriment of other creditors. Under the Bankruptcy Act, a bankrupt is deemed to have given a preference if within four months preceding the filing of his or her petition for bankruptcy, he or she procures or suffers a judgment against himself or herself, or makes a transfer of any of his or her assets; the effect of this is to give a creditor a greater percentage of his or her debt than any other creditor of the same class.

PREFERENCE ITEMS see tax preference items.

PREFERRED DIVIDEND see dividend.

PREFERRED RIGHTS see First Amendment [PREFERRED RIGHTS].

PREFERRED STOCK

part of the CAPITAL STOCK (see capital) of a corporation that enjoys priority over the remaining stock, or common stock, in the distribution of profits and, in the event of dissolution of the corporation, in the distribution of assets as well. See security [PREFERRED STOCK].

PREGNANT, NEGATIVE see negative pregnant.

PREJUDICE see dismissal [DISMISSAL WITH PREJUDICE; DISMISSAL WITHOUT PREJUDICE].

PREJUDICIAL ERROR see reversible error.

PRELIMINARY HEARING

in criminal law, 1. a hearing, before indictment, to determine whether probable cause for the arrest of a person existed; 2. a hearing to determine whether there is sufficient evidence to warrant the defendant's continued detention and whether submission of such evidence to the GRAND JURY (see jury) is warranted. Compare arraignment. See also fair hearing.

PRELIMINARY INJUNCTION see injunction, temporary restraining order.

PREMEDITATION

forethought. As one of the elements of first-degree murder, the term is often equated with intent and deliberateness.

PREMISE

in logic, the propositions upon which a conclusion is based.

PREMISES

land and its appurtenances; land or a portion thereof and the structures thereon. For purposes of insurance on a building, or in defining the crime of burglary, or with respect to the scope of a search warrant, the range of the term may vary.

EXAMPLE: A search warrant lists 118 South Street as the *premises* to be searched. If there is a garage at 118 South Street that is not attached to the house, the warrant would not extend to the garage. It is not considered part of the premises, because a search warrant must list with particularity the places to be searched. To cover the garage, the warrant would have to list 118 South Street and the adjacent garage.

With respect to Workers' Compensation Acts, premises may include any place where the employee may go in the course of his employment.

PREMIUM

1. the sum paid to the insurer as consideration for a policy of insurance; 2. money paid by a buyer for an option to buy or sell corporate stock; 3. a reward for an act done.

PRENUPTIAL AGREEMENT

an agreement entered into by two people who intend to marry each other, which sets forth the rights of each person in the property of the other in the event of divorce or death. Generally, the entering into marriage constitutes sufficient consideration to make a prenuptial agreement enforceable. Such an agreement is also termed an ANTENUPTIAL AGREEMENT.

PREPONDERANCE OF THE EVIDENCE

general standard of proof in civil cases. The phrase refers to the degree of proof that will lead the TRIER OF FACT(see fact finder) to find that the existence of the fact in issue is more probable than not. See clear and convincing.

PREROGATIVE WRIT

a written order issued by a court in furtherance of its discretionary powers. The prerogative writs are the writs of procedendo, mandamus, prohibition, quo warranto, habeas corpus and certiorari.

EXAMPLE: A corporation files a suit in federal district court challenging a part of a federal securities statute. It loses in the district

court and also in the Court of Appeals. It asks the Supreme Court to issue a writ of certiorari to the Court of Appeals so that the Supreme Court can rule on the question. The Supreme Court has the discretion to issue the writ, making the writ a *prerogative writ*.

PRESCRIPTION

a means of acquiring an easement on the land of another by continued regular use over a specified period of time. Compare adverse possession.

PRESCRIPTIVE EASEMENT see easement [PRESCRIPTIVE EASEMENT (EASEMENT BY PRESCRIPTION)].

PRESENT DANGER see clear and present danger.

PRE-SENTENCE REPORT

material prepared by a probation department to assist the trial court in sentencing a criminal defendant after he or she has been convicted. Pre-sentence reports usually include prior convictions, prior arrests, employment history, education history, and family and social background.

PRESENTMENT

1. a written accusation of crime by the GRAND JURY (see jury) upon its own initiative, without consent or participation of a prosecutor, in the exercise of the jury's lawful inquisitorial powers; 2. the presenting of a bill of exchange or promissory note to the party on whom it is drawn, for his or her acceptance, or to the person bound to pay, for payment.

PRESIDENTIAL PROCLAMATION see proclamation [PRESIDENTIAL PROCLAMATION].

PRESUMPTION

an assumption of fact resulting from a rule of law that requires such fact to be assumed from another fact or set of facts. The term indicates that the law accords to a given evidentiary fact heavy enough weight to require the production of contrary evidence to overcome the assumption thereby established. This rule of evidence thus has the effect of shifting either the burden of proof or the burden of producing evidence.

EXAMPLE: Bill writes a check to a car repair establishment that the bank refuses to cash. The law in Bill's state establishes a *presumption* that he knowingly intended to write a bad check if (1) there is no account in Bill's name at the bank named on the check or (2) the shop was refused payment for lack of funds within thirty days of the date on the check and Bill did not pay the amount owed within ten days of being informed of the bank's refusal to honor the check.

Compare inference.

CONCLUSIVE [or NONREBUTTABLE] PRESUMPTION

one that no evidence, however strong, no argument, or consideration will be permitted

to overcome. Since a presumption always properly refers to a rebuttable assumption of fact, when the term presumption is used in this conclusive sense, it is not a true presumption but is a statement by the court of a rule of law.

REBUTTABLE PRESUMPTION an ordinary presumption that, as a matter of law, must be made once certain facts have been proved, thus establishing a certain conclusion *prima facie*; but it may be rebutted. If it is not overcome through contrary evidence, it becomes conclusive. The prevailing doctrine is that competing facts are weighed on their own merits, without further reference to the presumption.

PRESUMPTION OF INNOCENCE

prevailing assumption that the accused is innocent until proven guilty. Because of this presumption, the government bears the burden of proof that the defendant is guilty beyond a reasonable doubt.

PRESUMPTIVE EVIDENCE

evidence that is indirect or circumstantial; *prima facie* evidence or evidence that is not conclusive and admits of explanation or contradiction; evidence that must be treated as sufficient unless rebutted by other evidence, such as evidence that a statute deems to be presumptive of another fact unless rebutted.

PRETERMITTED HEIR

an heir who was born after a decedent executed his or her will, but before he or she died. Because the heir was not alive when the testator executed the will, the pretermitted heir is not mentioned in and may not take under the will. However, most states have statutes that allow a child of the decedent who was born after the will was executed but before the time of death to take a share of the decedent's estate equal to the share the child would have received if the decedent had died intestate. A child who may so take a share of the decedent's estate is called a pretermitted heir.

PRETRIAL CONFERENCE

in civil procedure, a conference held after the pleadings have been filed and before the trial begins, for the purpose of bringing the parties together to outline discovery proceedings and define the issues to be tried. Courts often use the pretrial conference as an opportunity to encourage settlement.

In criminal procedure, a *pretrial conference* is also used to review evidentiary issues prior to trial, but because of the privilege against self-incrimination and the presumption of innocence, it is not as comprehensive or useful to the parties as in civil cases.

PRETRIAL DETAINEE see detention [PRETRIAL DETAINEE].

PRETRIAL DETENTION see detention [PRETRIAL DETENTION].

PRETRIAL DISCOVERY see discovery.

PRETRIAL INTERVENTION [PTI]

a remedial program by which first-time or petty criminal offenders are not subjected to the regular judicial process, but rather are immediately placed under probationary supervision for a period usually no longer than one year. The program allows persons accused of crime to avoid the stigma of conviction and a permanent criminal record by correcting their criminal behavior during the period of probation. Pre-conviction probationary programs divert persons from the ordinary criminal process without an admission of guilt or a conviction, and, for this reason, are called DIVERSIONARY PROGRAMS.

PREVAILING PARTY

the party in a lawsuit who has successfully obtained a judgment in his or her own favor. Federal law allows for the awarding of attorney's fees to the prevailing party, other than the United States, in proceedings in vindication of civil rights. Courts have broadened the interpretation of "prevailing party" in such a context to include preliminary relief or relief obtained as the result of a consent decree, or settlement, and the party need only prevail on the merits of some of the claims. The plaintiff's lawsuit must be found to be causally linked to the achievement of relief obtained, and the defendant must not have acted gratuitously in response to a frivolous or legally insignificant claim.

PREVARICATION

deceitful, dishonest, or unfaithful conduct.

PREVENTIVE DETENTION

pretrial confinement imposed upon a criminal defendant under the terms of a statute authorizing the denial of bail to certain defendants charged with particular offenses. A hearing is required at which the court must determine that the defendant is likely to be found guilty of an enumerated serious offense and that he or she poses an immediate danger to the public if released on bail. The constitutionality of preventive detention has been upheld by one court but has yet to receive review by the United States Supreme Court. Only a small number of jurisdictions have such statutes. In many instances, however, the same result is accomplished de facto by a magistrate setting bail beyond a defendant's reach. See detention.

PRICE DISCRIMINATION

the practice of charging different persons different prices for the same goods or services. When price discrimination is engaged in for the purpose of lessening competition, for instance, through tying the lower prices to the purchase of other goods or services, it constitutes a violation of the Sherman Antitrust Act. Unlawful price discrimination is also specifically covered by the Clayton Act, and the Robinson-Patman Act.

PRICE FIXING

under federal antitrust laws, a combination or conspiracy for the purpose and with the effect of raising, lowering or stabilizing the price of a commodity in interstate commerce.

HORIZONTAL PRICE FIXING price fixing engaged in by competitors at the same commercial level.

VERTICAL PRICE FIXING price fixing engaged in by members of different levels of production, such as manufacturer and retailer.

PRIEST-PENITENT PRIVILEGE

communications made by a person to a priest, rabbi, or minister in the course of confession, or similar course of discipline by other religious bodies, that are privileged from disclosure. The communications to clergy members must be made while clergy members are acting in the professional capacity of a spiritual adviser and with the purpose of dispensing religious counsel, advice, solace, or absolution. Some states have broadened their privilege to include all forms of individual or group counseling for marital and other personal problems. The definition of "clergy" is the subject of controversy, but has not been found to include nuns.

PRIMAE IMPRESSIONIS

(*prī'-mē im-prě-shě-ō-nis*) Lat.: first impression.

PRIMAFACIE

(*prī'-mà fā'-shá*) Lat.: at first view, on its face. Not requiring further support to establish existence, validity, credibility.

EXAMPLE: Sid is caught with untaxed cigarettes. In the state where he is caught, untaxed cigarettes are designated *prima facie* contraband and are immediately subject to forfeiture to the state.

PRIMA FACIE CASE

1. a case sufficient on its face, supported by at least the requisite minimum of evidence, and free from obvious defects; 2. state of facts that entitles a party to have his case go to the jury; 3. a case that will usually prevail in the absence of contradictory evidence; 4. a case in which the evidence is sufficient to support, but not to compel, a certain conclusion and does no more than furnish evidence to be weighed, but not necessarily to be accepted, by the TRIER OF FACT (see fact finder).

PRIMARY DISTRIBUTION see underwriting.

PRIMARY LIABILITY see liability [PRIMARY LIABILITY].

PRIMARY OFFERING see underwriting.

PRIMOGENITURE

(*prē-mō-jěn'-ī-tūr*) ancient common law doctrine governing descent, under which the eldest son takes all property of decedent father. The opposite of primogeniture, BOROUGH ENGLISH, existed under local custom in at least one jurisdiction even

while primogeniture prevailed elsewhere in England; the youngest son inherited on the death of the father. Under the local custom of gavelkind all sons took equally. In the event all issue of the decedent were daughters, they took equal shares in coparceny.

PRINCIPAL

most important. 1. in criminal law, one who commits an offense, or an accomplice actually or constructively present during commission of the offense. 2. in commercial law, the amount received in loan, or the amount upon which interest is charged; 3. in the law of agency, one who has permitted or engaged another to act for his or her benefit, in accordance with his or her direction and subject to his or her control.

DISCLOSED PRINCIPALone whose identity is known to the party dealing with the agent.

PARTIALLY DISCLOSED PRINCIPALone whose identity is not known, but whose existence is known, to the party with whom the agent deals.

UNDISCLOSED PRINCIPALone of whose existence the party dealing with the agent is not aware i.e., the third party does not know he or she is dealing with an agent.

EXAMPLE: Henry buys property for Sphinx Mall Company. Sphinx desires to be an *undisclosed principal* because it believes that land prices would skyrocket if sellers knew who the real purchaser is.

PRIOR INCONSISTENT STATEMENT

in evidence, a witness's out-of-court statement that contradicts his or her testimony in court; a prior inconsistent statement may constitute hearsay, since the evidence of the prior inconsistent statement may be based only on the witness's out-of-court statement rather than the evidence about which he or she testified. Regardless of its character as hearsay, a prior inconsistent statement is nonetheless admissible in evidence for purposes of impeaching the witness. Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is first given the opportunity to explain or deny the same, and the opposite party is given an opportunity for interrogation thereon, or the interests of justice otherwise require. Compare admission by a party-opponent; declaration against interest.

PRIORITY

preference; the condition of coming before, or of coming first, in a bankruptcy proceeding; the right to be paid before other creditors out of the assets of the bankrupt party. The term may also be used to signify such a right in connection with a prior lien, prior mortgage, etc.

PRIOR LIEN

a first or superior lien, entitled to satisfaction before others.

PRIOR RESTRAINT

any prohibition on the publication or communication of information prior to such publication, or communication under the First Amendment's guarantees of the right to free speech and free press. Prior restraints are subject to strict scrutiny and bear a heavy presumption against constitutional validity.

PRISON see jail, penal institution.

PRISONER

generally, anyone who is held against his or her will.

Specifically, one who has been committed to a prison, jail, or penal institution for the purpose of detention until he or she may be tried for a crime of which he or she is accused, or for the purpose of punishment after conviction of such crime. See detention; sentence. Compare inmate.

PRIVACY

a general right to be left alone. Although not a right specifically protected by the federal Constitution, zones of privacy have been implied from the general thrust of the Bill of Rights and include the right to protection from governmental interference in areas of intimate personal relationships and freedoms of the individual to make fundamental choices involving himself or herself, his or her family, and relationships with others.

PRIVACY, INVASION OF see invasion of privacy.

PRIVATE CORPORATION see corporation.

PRIVATE DWELLING see dwelling house [PRIVATE DWELLING].

PRIVATE FOUNDATIONS see charity [PRIVATE FOUNDATIONS].

PRIVATE NECESSITY see justification [PRIVATE NECESSITY].

PRIVATE NUISANCE see nuisance.

PRIVATE OFFERING [PLACEMENT]

generally, any sale of securities in a corporation not subject to registration requirements under the Securities Act of 1933. Transactions by an issuer not involving any public offering are exempt. These include placements with large institutional investors such as insurance companies and pension funds, securities issued to key employees of a company, and securities issued to acquire the stock of a closely held corporation. The Securities and Exchange Commission has general authority to issue regulations concerning exempt transactions and is specifically authorized to issue regulations exempting offerings if the aggregate amount of the securities to be sold does not exceed \$5,000,000. The SEC issued REGULATION D in 1982, under which offerings of various

amounts of securities are exempt from registration if they meet specific requirements, the most important of which is that the purchasers of the securities be ACCREDITED INVESTORS, that is, an institutional investor such as a bank, an insurance company, a pension fund, or a charitable foundation with assets of at least \$5 million; a director or officer of the issuer; an individual with a minimum net worth of \$1 million or a minimum annual income of \$200,000; or an individual who purchases at least \$150,000 of the securities offered, provided that the purchase does not exceed 20 percent of his or her net worth. If the securities issued total less than \$5 million, then up to 35 percent of the purchasers do not have to be accredited investors.

PRIVATE PLACEMENT see private offering [PLACEMENT].

PRIVATE RULING see revenue ruling [PRIVATE RULING].

PRIVILEGE

1. a particular benefit enjoyed by a person, company or class beyond the advantages of other citizens; 2. an exceptional exemption, or an immunity held beyond the course of the law; 3. an exemption from some burden or attendance, with which certain persons are indulged, from a supposition of the law that the public offices or duties require so much time and care that, without this indulgence, their duties could not be performed to the advantage that the public good demands. See privileged communication.

EXAMPLE: All citizens of a county are required to be available for jury duty. Doctors are *privileged* to avoid this requirement, because of their constant need to attend to their patients.

PRIVILEGE AGAINST SELF-INCRIMINATION see self-incrimination, privilege against.

PRIVILEGED COMMUNICATION

communication that occurs in a setting of legal or other recognized professional confidentiality. Designating a communication as privileged allows the speakers to resist legal process to disclose its contents. When communications are termed privileged, a breach by one party of the concurrent confidentiality can result in a civil suit in tort by the other party to the communication. Communications that are privileged may include: (1) communications in the sanctity of the marital relationship; (2) communications between physicians and their patients; (3) communications of psychological counselors and their clients; (4) priest-and-penitent communications; (5) communications between attorney and client; and (6) in some jurisdictions, communications between journalists and their sources.

ATTORNEY-CLIENT PRIVILEGE an evidentiary privilege protecting the confidential communications between a client and his or her

attorney from disclosure to any other party; can be waived by the client but not by the attorney.

EXAMPLE: John discusses with his attorney a past wrong he is alleged to have committed. If the attorney is asked to discuss this without John's permission, she will not be permitted to do so since the communication was privileged.

PRIVILEGE FROM ARREST

the right of certain persons, granted by either a constitution, statute, or public policy, against being arrested while engaging in certain activities. For instance, the U.S. Constitution grants senators and representatives the privilege from arrest during their attendance at the session of their respective houses, and in going to or returning from the same.

PRIVILEGES AND IMMUNITIES

the phrase used in the Fourteenth Amendment to the Constitution to describe the rights that citizens of the United States have by virtue of their citizenship. These rights derive from the establishment and existence of the federal government and thus were assumed to exist prior to the enactment of the Fourteenth Amendment. That provision makes it clear that the federal government may protect such rights from the state as well as individual denials. Privileges and immunities include the right to travel; the right to vote in federal elections; the right to assemble to petition federal officers and to discuss national legislation; and any other personal right arising out of federal statutes. Such rights are to be distinguished from those that exist regardless of the federal government, such as the right to assembly or of jury trial.

PRIVITY

a relationship between parties out of which arises mutuality of interest.

PRIVITY OF CONTRACT the relationship between two or more contracting parties. To maintain an action on any contract, there must be a privity between the plaintiff and defendant in respect to the matter sued on.

PRIVITY OF ESTATE mutual or successive relation to the same right in the same property. A privity in estate derives from another person's title to property, by contract (grant, will or other voluntary transfer of possession) or law (descent, judgment, etc.).

HORIZONTAL PRIVITY privity of estate between the covenantor and covenantee. Horizontal privity is satisfied any time an estate is conveyed from one party to another, provided that the covenant is made at the time of the transfer.

EXAMPLE: Julie sells some of her land to a neighbor, who by the sale acquires ownership of a lake. Three months later the neighbor

conveys to Julie the right to use the lake. Julie then sells her portion of the land to another party. That party does not have the right to use the lake. The requirements of *horizontal privity* are not met because the covenant is made after the transfer of the land between Julie and the neighbor.

VERTICAL PRIVITY

the privity of estate between the covenantor and his or her successor in interest who acquires the property subject to the *covenant*.

See easement [RECIPROCAL NEGATIVE EASEMENTS]; run with the land.

PRIVY

a person connected with another or having mutual interest with him or her in the same action or thing, by contract or otherwise.

PROBABLE CAUSE

a requisite element of a valid arrest or search and seizure; consists of knowledge of facts and circumstances sufficient in themselves to warrant belief that a crime has been committed (in the context of an arrest) or that property subject to seizure is at a designated location (in the context of a search and seizure). Compare stop and frisk.

EXAMPLE: A policeman, patrolling a high crime area where narcotics offenses are particularly troublesome, observes two men exchange money on a street and then go to a nearby car to retrieve a package from the trunk. One of the men sticks his finger in the bag, puts his finger in his mouth to taste something, stuffs the bag in his pocket and walks away. This routine occurs several times. The owner of the vehicle is known to the officer as a drug dealer. The policeman has *probable cause* to obtain a warrant to search the vehicle and any person who receives a package from the trunk.

PROBATE

1. act of proving that an instrument purporting to be a will was signed and otherwise executed in accordance with the legal requirements for a will, and of determining its validity; 2. combined result of all procedures necessary to establish the validity of a will. In some jurisdictions a **PROBATE COURT** is a special court having jurisdiction of proceedings incident to the settlement of a decedent's estate.

PROBATION

procedure whereby a defendant found guilty of a crime, upon a verdict or plea of guilty, is released by the court without imprisonment, subject to conditions imposed by the court, under the supervision of a **PROBATION OFFICER**. Compare parole.

PROBATIVE

tending to prove a particular proposition or to persuade one of the truth of an allegation.

PROBATIVE FACTS 1. matters of evidence required to prove ultimate facts; 2. facts from which the ultimate and decisive facts may be properly inferred.

PROBATIVE VALUE the relative weight properly accorded particular evidence.

EXAMPLE: The prosecutor wants to introduce an accused's past criminal record as evidence of the accused's guilt of the offense with which he is presently charged. In the past the accused has committed similar offenses. The accused replies that if his record is introduced, the jury might convict him exclusively because of his prior record as opposed to the evidence before it. The judge refuses to allow the introduction of the evidence, finding that the *probative value* of the prior record is far outweighed by the prejudicial effect it will have on the jury's consideration of the evidence. Although the prior record is relevant, that relevance is not sufficient to overcome the right of the accused to be judged on the basis of the evidence of the present offense and not upon demonstration of a criminal disposition. If the defendant decides to testify, the record may be used to impugn his credibility. In that event, the court will instruct the jury that it may only consider the prior record for that limited purpose. Such instructions are rarely effective.

PRO BONO PUBLICO

(*prō bō'-nō pūb'-ly-kō*) Lat.: for the public good or welfare. When an attorney takes a case without compensation to advance a social cause, or to fill a perceived social need to offer legal representation to the poor, the attorney represents the party *pro bono publico*. The phrase *pro bono* is sometimes used.

PROCEDENDO

(*prō-sā-dēn'-dō*) Lat.: duty to have proceeded. Refers to a writ issued by a superior court when a cause has been improperly removed to it, as by certiorari, commanding the inferior court from which it was removed to assume jurisdiction and proceed to judgment on the cause. It is more frequently called a remand.

PROCEDURAL DUE PROCESS see due process of law.

PROCEDURE

legal method; the machinery for carrying on the suit, including pleading, process, evidence and practice. The term thus refers to the mechanics of the legal process the body of rules and practice by which justice is meted out by the legal system rather than the substance and content of the law itself. See adjective law. Compare substantive law.

EXAMPLE: The Federal Rules of Civil Procedure guide the federal courts in conducting all aspects of cases before them, from the filing of a suit to the trial itself. The rules also instruct attorneys how they

must proceed with these cases. Although these rules govern only *procedure*, not the actual merits of the case, a failure to abide by the rules could easily result in a valid claim being dismissed by the court. Each state court also has rules of procedure.

PROCEEDING

1. the succession of events in the process of judicial action; 2. the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them; the mode of deciding them, of opposing and of executing judgments.

PROCESS

1. a formal writing (writ) issued by authority of law; 2. any means used by the court to acquire or to exercise its jurisdiction over a person or over specified property; 3. usually refers to the method used to compel attendance of a defendant in court in a civil suit. See service of process.

PROCLAMATION

a public announcement giving notice of an act done by the government or to be done by the people. A **PRESIDENTIAL PROCLAMATION** is the President's official, public announcement of an executive order or act.

PROCTOR

1. one who manages another's affairs, acting as that person's agent; 2. an attorney who is admitted to practice in a probate, admiralty or ecclesiastical court. Compare administrator.

PRODUCT see work product.

PRODUCTION BURDEN see burden of proof.

PRODUCTS LIABILITY

a concept in the law of torts holding a manufacturer strictly liable in tort when an article the manufacturer places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. One who sells any defective product unreasonably dangerous to the consumer or to his or her property may be liable for physical harm thereby caused to the consumer or to his or her property, even though there is no contractual or other relationship between seller and user, and even though the seller has not been negligent. See warranty.

EXAMPLE: A manufacturer sells a food processor to a department store, which in turn sells it to Ann. The rotary mechanism in the machine has a tendency to engage when the top of the processor is off. Ann's finger is cut when this problem occurs. She can sue the manufacturer under a *products liability* theory.

PROFESSIONAL ASSOCIATION see professional corporation [ASSOCIATION].

PROFESSIONAL CONDUCT see code of professional responsibility; model rules of professional conduct.

PROFESSIONAL CORPORATION [ASSOCIATION]

a corporation formed for the purpose of engaging in one of the learned professions, such as law, medicine, or architecture. Traditionally, corporations were prohibited from engaging in such professions because they lacked the human, personal qualifications necessary to pursue them. However, within recent years most states have enacted a professional corporation or association act that allows professional persons to practice in the corporate form provided that all shareholders are members of the profession. A professional corporation has at least two advantages. First, it allows a professional to join together with one or more other professionals without assuming personal liability for the acts or omissions of the others. Second, it allows the professional to enjoy certain tax advantages not available to him or her as an individual taxpayer.

PROFESSIONAL RESPONSIBILITY see code of professional responsibility; model rules of professional conduct.

PROFFER

to offer evidence at trial. The admissibility of evidence so offered is governed by the appropriate jurisdiction's rules of evidence.

PROFIT

gain; the excess of an amount received over the amount paid for goods and services. See capital gains or losses; earnings and profits; paper profit; realization. See also profit à prendre.

PROFIT-AND-LOSS STATEMENT see income statement.

PROFIT À PRENDRE

(prō-fě ah prŏn-drè) Fr.: the right to take. In real property law, the right to take soil, gravel, minerals, and the like from another's land.

PRO FORMA

(prō fôr'-mâ) Lat.: for the sake of form; as a matter of form. 1. In practice, the term usually means that an appealable decree or judgment was entered by the court, not because of an intellectual conviction that the decision rendered was right, but merely to facilitate further proceedings. 2. In accounting, the term is used in reference to the presentation of financial statements that represent proposed events in the form in which they would appear if or when the event actually occurred. Examples include presentation of consolidated statements in connection with a proposed corporate merger and presentation of balance sheet data showing the effect of a proposed financing.

PROGRESSIVE TAX see tax [PROGRESSIVE TAX].

PRO HAC VICE

(*prō häk vē'-chā*) Lat.: for this turn; for this one particular occasion. The allowance of that which under ordinary circumstances is not permitted. Usually the term is used to describe the permission granted an out-of-state lawyer to appear in a particular case with the same standing as a local attorney admitted to practice in the jurisdiction.

PROHIBITION see writ of prohibition.

PROLIXITY

any unnecessary language or facts in pleadings or in evidence.

PROMISE

a declaration of one's intention to do or to refrain from doing something.

BREACH OF PROMISE see breach [BREACH OF PROMISE].

ILLUSORY PROMISE see illusory promise.

PROMISE, BREACH OF see breach [BREACH OF PROMISE].

COLLATERAL PROMISE see collateral promise.

GRATUITOUS PROMISE see gratuitous promise.

PROMISSORY ESTOPPEL

an equitable doctrine that declares that if injustice can be avoided only by enforcement of a promise, the pledge is binding, though there is no consideration for the promise and it cannot therefore be enforced as a contract. The promisor, having induced in the promisee reliance on the promise for certain action or forbearance, is said to be estopped to deny the existence of a contract, though in fact one has not been made. Compare *assumpsit*.

PROMISSORY NOTE

a kind of negotiable instrument wherein the maker agrees to pay a specific sum at a definite time.

PROMOTER

in corporate law, generally anyone who undertakes to form a corporation and to procure for it the rights, instrumentalities, and capital by which it is to carry out the purpose set forth in its charter. The Securities and Exchange Commission defines a promoter as any person who, acting alone or in conjunction with one or more persons, directly or indirectly takes initiative in founding or organizing the business or enterprise of an issuer of securities or any person who receives 10 percent or more of any class of securities of an issuer on the proceeds therefrom in consideration for services or property.

PROOF

the quantity or quality of evidence that tends to establish the existence of a fact in issue. See also burden of proof; inference; moral certainty; preponderance of the evidence; presumption; reasonable doubt.

PROOF BEYOND A REASONABLE DOUBT see reasonable doubt.

PROOF TO A MORAL CERTAINTY see moral certainty.

PROPER see necessary and proper clause.

PROPER LOOKOUT see lookout [PROPER LOOKOUT].

PROPER PARTY see party.

PROPERTY

every species of valuable right or interest that is subject to ownership, has an exchangeable value or adds to one's wealth or estate. Property describes one's exclusive right to possess, use and dispose of a thing, as well as the object, benefit or prerogative that constitutes the subject matter of that right.

COMMON PROPERTY 1. that which belongs to the citizenry as a whole; 2. property owned by TENANTS IN COMMON (see tenancy), or in some jurisdictions where designated by statute, that are owned by husband and wife. Compare community property.

PERSONAL PROPERTY see personal property.

REAL PROPERTY see real property.

PROPERTY SETTLEMENT

in marital law, the division of property owned or acquired by spouses during their marriage. Since a property settlement merely allocates the property between the parties and does not satisfy the obligation of either spouse to support the other, it is not subject to judicial modification if the circumstances of either spouse later change. See postnuptial agreement; prenuptial agreement; separation agreement.

PROPERTY TAX see tax [PROPERTY TAX].

PROPORTIONAL REPRESENTATION

a system of election designed to insure that different groups will have their interests represented, something that may not necessarily occur in a majority rule scheme.

EXAMPLE: A university faculty is comprised of 65 percent full-time and 35 percent part-time members. Under a *proportional representation* system for election of an appointments committee, each class will be able to have a voice on the committee.

PROPRIETARY

owned by a particular person. In trade secrets law, proprietary property is information or knowledge in which the person developing it has ownership rights. Such rights are usually protected by contract and have not been the subject of a patent application. In the law of municipal corporations, a proprietary function is

one that a government may undertake for the benefit of its citizens. Government activities fall into two general categories: those fundamental to its nature as a government, such as passing of legislation or providing police services, and those proprietary or done for the benefit of particular citizens, such as providing a swimming pool. Generally speaking, a government may not be held liable for the former, but it may be liable for negligence with regard to the latter. See governmental function; sovereign immunity; Tort Claims Act.

PROPRIETARY INTEREST

any right in relation to a chattel that enables a person to retain its possession indefinitely or for a period of time.

PROPRIETARY LEASE see lease [PROPRIETARY LEASE].

PROPRIETOR

owner; the person who holds title to property. See proprietary. See also sole proprietorship.

PRO RATA

(prō rā'-tā) Lat.: according to the rate, i.e., in proportion. According to a measure that fixes proportions. Thus, a lease terminated by agreement before the expiration of the full term may call for the payment of rent on a *pro rata* basis for the expired term of the lease.

PRO SE

(prō sā) Lat.: for himself; in one's own behalf. One appears *pro se* in a legal action when one represents oneself without aid of counsel.

PROSECUTION

1. the act of pursuing a lawsuit or criminal trial; 2. the party initiating a criminal suit, i.e., the state. Where the civil litigant, or the state in a criminal trial, fails to move the case towards final resolution or trial as required by the court schedule, the matter may be dismissed for WANT OF PROSECUTION or for FAILURE TO PROSECUTE.

PROSECUTOR

public official who prepares and conducts the prosecution of persons accused of crime. In certain cases, the legislature may appoint a SPECIAL PROSECUTOR to conduct a limited investigation and prosecution. The state prosecutors are usually called district attorneys or county prosecutors. The federal prosecutor is known as the United States Attorney for a certain federal district. The prosecutor is charged with the duty to see that the laws of his or her jurisdiction are faithfully executed and enforced.

PROSECUTORIAL DISCRETION see discretion.

PROSECUTORIAL MISCONDUCT see summation [summing up] [PROSECUTORIAL MISCONDUCT].

PROSPECTIVE

future, in the future. A law or decision that is to be applied "prospectively" is to be applied only after the date it was enacted or decided. Constitutional decisions in the area of criminal procedure are often applied prospectively only to minimize the disruptive effect on law enforcement and the administration of justice. If the new decision does not affect the integrity of the fact-finding process and represents a clear break from prior precedent, it will be applied prospectively only. Compare retroactive.

EXAMPLE: Richard's conviction for selling drugs in a school zone was overturned. In its opinion the court declared that in the future prosecutors must prove that the school was in session at the time of the offense. Loni was convicted before Richard under similar facts yet her conviction will not be overturned since the court specifically applied their ruling to only Richard's case and those that follow.

PROSPECTUS

a document that discloses financial information about a corporation to potential investors and explains the company's plans and objectives. Under federal securities acts, a corporation making a public offering of its securities must file a copy of its prospectus with the Securities and Exchange Commission and must provide a copy of it to each purchaser of securities.

PROSTITUTION

the giving or receiving of the body for sexual intercourse for hire. A person who sells his or her body for sexual intercourse is a PROSTITUTE. See pander; solicitation.

PRO TANTO

(*prō tān'-tō*) Lat.: for so much; to the extent, but only to the extent.

PROTECT [PROTECTION]

to preserve in safety; to keep intact; to take care of and to keep safe. "Protection" is any measure that attempts to preserve that which already exists. For instance, trade protection attempts to preserve domestic industry through the imposition of tariffs and custom duties on imported goods. See tariff [PROTECTIVE TARIFF]; see also consumer protection.

PROTECTIVE CUSTODY

the confinement of an individual by the state in order to protect the individual from being harmed either by himself or herself or some other person. For instance, a prisoner who is the subject of attack by other prisoners will be segregated from those prisoners and placed in protective custody.

PROTECTIVE ORDER

any order issued for the purpose of protecting a party from some abuse of the legal system. Under federal rules of civil procedure the court may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. The rule specifically

mentions various discovery matters, including the time, place, and subject matter of discovery, and the protection of trade secrets. Under federal rules of criminal procedure the court is specifically authorized to limit discovery in criminal cases as may be appropriate.

PRO TEMPORE [PRO TEM]

(*prō tēm'-pō-rā*) Lat.: for the time being.

PROTEST

1. a demand for payment of a note, its nonpayment, and consequent dishonor; 2. a formal certification by a consul, notary or the like that an instrument has been dishonored. A protest must identify the instrument and certify that due presentment has been made, or show why it has been excused, and that the instrument has been dishonored by non-acceptance or nonpayment.

EXAMPLE: Frank deposits one of his customer's checks in the bank, but the check is returned for lack of sufficient funds in the customer's account. Frank files a *protest* with the customer and demands that the debt now be paid in cash.

PROVISIONAL REMEDY see remedy.

PROVISO

a condition or stipulation. Its general function is to except something from the basic provision, to qualify or restrain its general scope, or to prevent misinterpretation.

PROXIMATE CAUSE see cause [PROXIMATE CAUSE].

PROXY

1. recipient of a grant of authority to act or speak for another; 2. one permitted to vote in place of a stockholder of a corporation, who is thereby presumably voicing the will of his or her principal. 3. the instrument used to grant this authority.

PRUDENT-MAN RULE

a flexible legal investment standard that allows a fiduciary to purchase securities that a person of discretion and intelligence would choose to earn a reasonable income and to preserve the principal. See also trustee.

EXAMPLE: A father sets up a trust for his two sons, naming a bank as trustee. The trust instrument provides no definition of how the trust principal should be invested. The trustee is bound by the *prudent-man rule* and must purchase securities that may not offer the highest return possible but are very safe investments.

PRURIENT INTEREST

shameful and morbid interest in nudity, sex, or excretion. It is one criterion in determining whether or not something is obscene. See obscenity.

PSYCHOTHERAPIST-PATIENT PRIVILEGE see physicianpatient privilege [PSYCHOTHERAPIST-PATIENT PRIVILEGE].

PTI see pretrial intervention.

PUBLICATION, SERVICE BY see service [SERVICE BY PUBLICATION].

PUBLIC CHARITY see charity [PUBLIC CHARITY].

PUBLIC CORPORATION see corporation.

PUBLIC DEFENDER

an attorney hired by the government to defend persons accused of crimes and unable to afford an attorney. Under the Sixth and Fourteenth Amendments, a defendant in a criminal proceeding who faces possible incarceration if convicted, is entitled to the assistance of counsel in conducting his or her defense, and an attorney must be provided at government expense if the defendant is indigent.

PUBLIC DOCUMENT see public record.

PUBLIC DOMAIN

1. all lands and waters in the possession of the United States, and all lands owned by the several states, as distinguished from lands possessed by private individuals or corporations; 2. information, the source of which is available to anyone and is not subject to copyright.

PUBLIC EASEMENT

any easement enjoyed by the public in general, such as the right of passage over the surface of streets and highways. Also called a DEDICATION, meaning that use of the land has been devoted for such purposes by the owner of the fee.

EXAMPLE: A developer wants to construct a tall office building but needs part of the sidewalk adjacent to the area. The city is willing to allow this infringement of a *public easement* if the builder will provide other access to the public, such as an open passageway through the building or an alternate facility for public usage.

PUBLIC FIGURE

in libel law, a person of general fame or notoriety in the community, and extensive involvement in the affairs of society. Under the First Amendment, a public figure is required to show actual malice before recovering damages for libel.

PUBLIC INTEREST

that which is best for society as a whole; a subjective determination by an individual such as a judge or governor, or a group such as a township committee or state legislature or what is for the general good of all people. Providing an adequate education and maintaining libraries, hospitals, and playgrounds are examples of concerns that are in the public interest.

AFFECTED WITH A PUBLIC INTEREST connotes the need for regulation. An example of a business affected with a public interest would be a

public utility. PUBLIC POLICY is virtually synonymous with public interest but tends to have more specific connotations. For example, police act in the public interest but public policy dictates that citizens shall not be subjected to undue detention or arrest. AGAINST PUBLIC POLICY is a determination that a specified act or course of conduct does not further society's best interests. Usage of drugs within a private residence is nonetheless illegal as against the public policy of a drug-free society.

PUBLIC NECESSITY see justification [PUBLIC NECESSITY].

PUBLIC NUISANCE see nuisance [PUBLIC or COMMON NUISANCE].

PUBLIC OFFERING see offer [OFFERING].

PUBLIC OFFICIAL

any elected or appointed person holding a public office and having duties relating to the sovereign powers of government. The term does not apply to public employees having purely ministerial duties.

PUBLIC POLICY see public interest [PUBLIC POLICY].

PUBLIC PROPERTY

that which is dedicated to the use of the public, or that over which the state has dominion; describes the use to which the property is put, or the character of its ownership. Compare public domain; public easement.

PUBLIC PURPOSE

generally, the goal of society to benefit its citizens. Specifically, the doctrine examining governmental action and measuring the ultimate benefit to the public, as with the taking of private property to build a private correctional facility. See eminent domain; public use.

PUBLIC RECORD

any record a governmental body is required by law to keep, and that must be filed and be accessible to the public.

PUBLIC SALE see sale.

PUBLIC SECURITIES see securities.

PUBLIC TRIAL see open court.

PUBLIC TRUST

1. CHARITABLE TRUST (see trust); 2. the public's confidence reposed in their elected officials and expectation that these elected officials will faithfully perform the duties of public office.

PUBLIC TRUST DOCTRINE A doctrine under which the state is said to own lands lying under navigable waters and to hold such lands in trust for the benefit of the people of the state. According to this doc-

trine, these submerged lands may not be sold or otherwise alienated by the state except in a manner that promotes the public interest.

PUBLIC USE

the public's right to use or to benefit from the use of property condemned by the government through the exercise of its power of eminent domain. One of the limitations upon the use of this power is that property so taken must be for a public use.

PUBLIC UTILITY

a company that, because of the nature of its business, has characteristics of a natural monopoly. For instance, an electric company will have a natural monopoly over the sale of electricity to that area, since having a single supplier of electricity for any given area is the most efficient method of producing and distributing electricity. Because no free market or competition exists for the services or goods sold by public utilities, they are subject to government regulation of the price they may charge and the means in which they may distribute their goods.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 see securities act [PUBLIC UTILITY HOLDING COMPANY ACT OF 1935].

PUBLISH

to make known to the general public. In the law of torts, a statement does not constitute defamation unless it is published, that is, made known to some third party other than the party making the statement or the party defamed. In the law of wills, a will is not valid unless the testator publishes it, by informing the witness that he or she is signing the document as his or her will. In civil practice, service of process may be effected by publication, usually in a local newspaper, when notice of a lawsuit cannot be given by any other means.

PUFFING

a statement of belief not meant as fact; a seller's extravagant statements, made to enhance his or her wares and induce others to enter into a bargain. Salesmanship talk, characterized as puffing, cannot be the basis of a charge of fraud or express warranty, since the buyer is said to have no right to rely on sales talk.

EXAMPLE: Tim *puffs* his cooking utensils by stating that they are the best quality utensils money can buy or the easiest to clean or the least expensive compared to other brands. A purchaser of these utensils then finds a nearly identical set that costs a few dollars less. Tim's comments cannot be taken as facts and do not give rise to a cause of action against Tim by the customer for misleading advertising or the like.

PUNISHMENT

sanctions imposed on a person because that person has been found to have committed some act. Historically, punishment for various acts has included fines, prison sentences, loss of rights or privileges, banishment or deportation, physical dismemberment, and

execution. Some forms of punishment, such as banishment and dismemberment, have fallen into disuse. The Constitution specifically forbids cruel and unusual punishment. This prohibition has been held to apply to torture or other treatment beyond the limits of civilized standards. However, courts have generally had difficulty in defining the exactness of the constitutional limitation. See also capital punishment; corporal punishment.

PUNITIVE DAMAGES see damages [EXEMPLARY DAMAGES].

PUR AUTRE VIE see per autre vie.

PURCHASE

the acquisition of property by furnishing valuable consideration.

PURCHASE-MONEY SECURITY INTEREST see security interest.

PURCHASER

one who acquires property by giving valuable consideration for it. See bona fide purchaser.

PURCHASER IN DUE COURSE see holder in due course.

PURCHASE, WORDS OF see words of purchase.

PURLOIN

to steal; to commit larceny.

PURPOSELY

deliberately or intentionally. As used in criminal statutes to define murder, *purposely* means intentionally, and as an act of the will, not accidentally. In the Model Penal Code it is one of the four defined mental states, along with knowingly, recklessly, and negligently. A person acts purposely with respect to a material element of an offense when it is his or her conscious object to engage in conduct or cause a result. See mens rea.

PURSUIT OF HAPPINESS

one of the "unalienable rights" of people enumerated in the Declaration of Independence, along with "life" and "liberty." The right of persons to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment. Because the right is not set forth in the Constitution, it is not enforceable by the courts. However, the right to the pursuit of happiness is often raised in arguments against government regulations, because its mention in the Declaration of Independence gives it a degree of forcefulness.

PURVIEW

the enacting part of a statute distinguished from other parts, such as the preamble. Conduct is WITHIN THE PURVIEW of a statute when such conduct properly comes within the statute's purpose, operation or effect.

EXAMPLE: The legislature passes a statute prohibiting the possession of burglar's tools. Workmen such as locksmiths or window repairmen commonly have these tools as part of their trade. Their possession of the tools would not come *within the purview* of the statute.

PUTATIVE

alleged; supposed. Thus, a putative marriage is one that is actually void, but that has been contracted in good faith by the two parties, or by one of the parties. The putative father in a paternity suit is the person alleged to have fathered the child whose parentage is at issue in the suit.

PUT OPTION see stock option [PUT OPTION].

PYRAMIDING

the use of paper profits from an investment to finance purchases of additional investments. Compare margin.

Q

QDRO see Qualified Domestic Relations Order.

QSBS

qualified small business stock. See capital [CAPITAL GAINS OR LOSSES].

QUAERE

(kwē'-rē) Lat.: a query.

QUALIFIED DISCLAIMER see disclaimer [QUALIFIED DISCLAIMER].

QUALIFIED DOMESTIC RELATIONS ORDER [QDRO]

any judgment, decree, or order that grants to a person the right to participate in another's pension. The person who is granted a specific participation in the other person's pension must be a spouse, a former spouse, or a dependent child. This person is called an ALTERNATE PAYEE and the original sole owner of the pension being divided is called a PARTICIPANT. The pension itself is referred to as a PLAN. A QDRO is an exception to the antialienation provision of the federal law governing pensions, known as ERISA.

QUALIFIED PENSION OR PROFIT-SHARING PLAN see retirement plans [QUALIFIED PENSION OR PROFIT-SHARING PLAN].

QUALIFIED SMALL BUSINESS STOCK see capital [CAPITAL GAINS OR LOSSES].

QUANTUM MERUIT

(kwän'-tūm mē'-rū-īt) Lat.: as much as he deserved. 1. Historically, it was a common count in the action of *assumpsit*, allowing recovery for services performed for another on the basis of a contract implied in law or an implied promise to pay the performer for what the services were reasonably worth.

2. It refers today to a theory under which a plaintiff may recover for reasonable value of services or materials furnished to another who has enjoyed those materials or services under circumstances that reasonably notified him or her that the plaintiff expected to be paid. The doctrine imposes liability for a contract implied by law, which arises not from the consent of the parties but from the law of natural justice and equity, and which is based on the doctrine of unjust enrichment. See quasi [QUASI CONTRACT].

EXAMPLE: A physician renders emergency services to an unconscious accident victim. Consent to those services by the injured party is implied in law, so that the physician may bring an action in *quantum meruit* to recover the reasonable value of the services.

QUANTUM VALEBANT

(*kwän'-tūm vāl-ē'-bānt*) Lat.: as much as they were worth. A common law action of assumpsit for goods sold and delivered, founded on an implied assumpsit or promise by the defendant to pay the plaintiff as much as the goods are reasonably worth.

QUARE CLAUSUM FREGIT

(*kwä'-rā klaiu'-zūm frā'-gīt*) Lat.: wherefore he broke the close. An early form of trespass designed to obtain damages for an unlawful entry upon another's land. The form of action was called trespass quare clausum fregit, or trespass qu. cl. fr. BREAKING A CLOSE was the technical common law expression for unlawful entry upon land. Even without an actual fence the complainant would plead that the "defendant with force and arms broke and entered the close of the plaintiff," since in the eyes of the common law every unauthorized entry upon the soil of another was a trespass.

QUASH

to annul, overthrow or vacate by judicial decision.

QUASI

(*kwā'-zi; kwä'-zē*) Lat.: as it were, so to speak; about, almost, like.

QUASI CONTRACT one that, unlike a true contract, is not based on the apparent intention of the parties to undertake the performances in question, but is an obligation created by law for reasons of justice and fairness. The doctrine of quasi contract is based upon the principle that a party must pay for a benefit he or she desired and received under circumstances that render it inequitable for him or her to retain it without making compensation. See quantum meruit; unjust enrichment.

EXAMPLE: A car owner brings his car in for brake repairs. The mechanic fixes the brakes and in doing so he also fixes a separate part of the axle that has a direct relationship to the car's ability to brake correctly. Although the axle repair was not specifically contracted for, a *quasi contract* is implied for which the owner must pay the mechanic.

QUASI CORPORATION see corporation.

QUASI-CRIMINAL describes a proceeding that, though not actually a criminal prosecution, is sufficiently similar in terms of the substantial sanction (civil fine, loss of employment, loss of license, suspension from school, etc.) or the stigma attached to warrant some of the special procedural safeguards of a criminal proceeding. See also due process.

QUASI IN REM describes proceedings that are not purely in rem but that are brought against the defendant personally, although the real object is to deal with particular property; refers to actions for money damages begun by attachment, garnishment or other seizure of property, where the court has no jurisdiction over the defendant but has jurisdiction over a thing belonging to the defendant or over a person who is indebted or under a duty to the defendant.

QUEEN'S BENCH see King's Bench.

QUERY

question; indicates that the proposition or rule it introduces is unsettled or open to some question.

QUESTION, LEADING see leading question.

QUESTION OF FACT

disputed factual contention that is traditionally left for the jury to decide, unless the judge is serving as TRIER OF FACT (see fact finder) in the case.

EXAMPLE: The jury is asked to decide if Fred developed a product while he was employed by his company or after he was fired. That issue is a *question of fact*, and the legal significance of the answer (who is entitled to what) is for the judge to determine.

Compare question of law.

QUESTION OF LAW

disputed legal contentions that are traditionally left for the judge to decide. The occurrence or nonoccurrence of an event is a question of fact; its legal significance is a question of law.

EXAMPLE: Two parties stipulate [agree] on the facts of the situation in which they are involved. The judge is then asked to only rule on the *question of law* that those facts present.

QUESTION, POLITICAL see political question.

QUIA EMPTORES, STATUTE OF

(*quī'-ă ěmp-tō'-rēz*) Lat.: an act passed by Parliament in 1290 that abolished the restraint upon alienation or transfer of land that had been imposed under the feudal system. The process of subinfeudation [creation of new manors by the subject of a lord] was terminated, and after that date only the king was able to infeudate. The statute's practical effect on land transactions and ownership was that after the land was sold, the seller had no further connection with it. Thus, subinfeudation was replaced by strict alienation.

QUIA TIMET

(*quī'-ă tī'-mēt*) Lat.: because he fears. A type of injunction sought in a court of equity to restrain an anticipated (feared) damage. Such a remedy would be granted only upon a showing of imminent and irreparable harm.

QUICK

alive, living.

QUICKENING

the point at which a fetus first moves within the womb. The term VITALIZED[alive] applies to the fetus both before and after quickening.

QUID PRO QUO

(kwĭd prō kwō) Lat.: something for something. In some legal contexts, synonymous with consideration; sometimes referred to as the quid and always indicating that which a party receives or is promised in return for something he or she promises, gives or does.

QUIET ENJOYMENT

the right to unimpaired use and enjoyment of property. For leased premises, a guarantee of quiet enjoyment is usually expressed by a COVENANT OF QUIET ENJOYMENT in a written lease, but such a covenant may be implied today from the landlord-tenant relationship, even where it is not so expressed. This covenant is violated if the tenant's enjoyment of the premises is substantially disturbed either by wrongful acts or omissions of the landlord or by persons claiming a superior title against the landlord.

EXAMPLE: A company agrees to lease a warehouse owned by a landlord. When the company's lease is to begin, the tenants who were in the warehouse are still there. Their presence violates the company's right to *quiet enjoyment*. A few states may place the burden of removing the tenants on the company, but most states place the burden on the landlord. In that majority of states, if those tenants do not leave after a certain amount of time, the company can rescind the lease without penalty.

The covenant may be and often is included in a deed conveying title to property. If it is present in a deed, the grantor is obligated to protect the estate of his grantee against lawful claims of ownership by others.

QUIET TITLE

a suit in equity brought to obtain a final determination as to the title of a specific piece of property. A quiet title action is distinguished from an action to REMOVE CLOUD ON TITLE, which is brought to determine and resolve problems of instruments conveying a particular piece of land, rather than to resolve the actual claims to that land.

EXAMPLE: Evan believes he is the rightful owner of a parcel of land, but there is a question concerning the transfer of the land 25 years ago. In order to satisfy any doubts so that he may sell the property, Evan brings a *quiet title* action to confirm his ownership by judicial decree.

QUI TAM

(quī tām) Lat.: who as well. A *qui tam* action is a lawsuit under a statute, which gives to the plaintiff bringing the action a

part of the penalty recovered and the balance to the state. The plaintiff describes himself as suing for the state as well as for himself.

QUITCLAIM DEED

a deed that conveys only that right, title or interest that the grantor has, or may have, and that does not warrant that the grantor actually has any particular title or interest in the property. The grantor under a quitclaim deed represents merely that whatever interest he may have he conveys to the grantee.

QUORUM

the number of members of any body who must necessarily be present in order to transact the business of that body.

QUOTATION

1. in commercial usage, a statement of the price of an item; 2. the price stated in response to an inquiry.

QUOTIENT VERDICT see verdict [QUOTIENT VERDICT].

QUO WARRANTO

(kwō wär'-rān-tō) Lat.: by what right or authority. An ancient common law writ that was issued out of chancery on behalf of the king against one who claimed or usurped any office, franchise or liberty, to inquire by what authority he asserted such a right, in order that the legitimacy of the assertion might be determined. Formerly a criminal method of prosecution, it has long since lost its criminal character and is now a civil proceeding, expressly recognized by statute, and usually employed for trying the title to a corporate franchise or to a corporation or public office.

Quo warranto proceedings may be brought against corporations where the company has abused or failed for a long time to exercise its franchise. In the case of an official, it may be brought to cause him or her to forfeit an office for misconduct. If in these cases a quo warranto proceeding determines that a company no longer properly holds a franchise or that an officer no longer properly holds his or her office, it will oust the wrongdoer from enjoying the franchise or office. The purpose of the writ is not to prevent an improper exercise of power lawfully possessed; its purpose is to prevent an official, corporation or persons acting as such from usurping a power that they do not have.

R

RACE

a term commonly used in antidiscrimination statutes that refers to ancestry, as opposed to national origin. For use in a property law context, see recording acts.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT [RICO] see racketeering.

RACKETEERING

originally, an organized conspiracy to commit extortion. Today, punishable offenses created by Congress aimed at eradicating organized crime by providing for enhanced sanctions and new remedies to be used in dealing with the illegal activities of persons involved in organized crime.

RADAR

an electrical device used for determining the speed, direction, or range of an object. The term stands for Radio Detection and Ranging. Radar was developed during World War II and since the late 1940s has been used by police to monitor the speed of motor vehicles. Radar is generally admissible in court as probative evidence that a person was driving in excess of the speed limit. However, the accuracy of a particular radar reading may be attacked on the grounds of the inadequacy of the training of the police officer operating the unit, whether the unit has been recently tested for accuracy or is properly calibrated, and whether it was operated properly on a given occasion. Furthermore, the type of radar device used may affect whether the evidence produced by it is admissible.

RAISED CHECK

a check whose face amount has been increased from the amount for which the check was originally issued. That change constitutes a material alteration under the Uniform Commercial Code and discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense. A holder in due course of the raised check may enforce it for its original amount.

RANSOM

1. money or other consideration paid for the release of a kidnapped or otherwise captured person or thing; 2. to redeem from captivity by payment.

RAPE

act of unlawful sexual intercourse accomplished through force or threat of force by one party and implying lack of consent and resistance by the other party.

CARNAL KNOWLEDGE was the original term for the act itself and is retained in many statutes that proscribe "carnal knowledge of a child," regardless of purported consent. This offense is often called STATUTORY RAPE.

RAPE CRISIS COUNSELOR PRIVILEGE

privilege against disclosure of records and notes afforded by some states to professionals who give victims of sexual assault counseling and emotional support. The privilege is usually available in both civil and criminal proceedings. The privilege is relatively novel and is presently recognized in only a small number of jurisdictions. Where it has been adopted, its availability represents a judgment that the confidentiality of a rape victim and a rape crisis counselor is sufficiently important to justify limiting the right of the criminal defendant to confront the witnesses against him or her under the Sixth Amendment.

RAPE SHIELD LAWS see shield laws.

RAP SHEET see criminal record.

RATABLE

proportional, capable of estimation; taxable. Thus, a ratable estate is a taxable estate. In bankruptcy, a ratable distribution is a pro rata share of the bankrupt's assets. Ratable does not mean equal, but rather pro rata according to some measure fixing proportions.

RATE

a stated or fixed price for some commodity or service measured by a specific unit or standard or that may be stated as a percentage of a fixed figure, such as a percentage of profits; an amount of charge or payment with reference to some basis of calculation.

RATE OF RETURN

a return on investment, frequently used to describe the rate that a utility, such as an electric company or telephone company, is entitled to earn on its investment, and is determined by combining the capital structure of the utility with the proper cost of capital. It is expressed as a percentage of the utility's rate base.

RATE OF TAX see tax rate.

RATIFICATION

to sanction or affirm confirmation of the act of another regardless of whether the act was originally authorized. The process by which society approves a fundamental change in the law. Congress may, by a two-thirds vote, propose a constitutional amendment or call for a convention to propose amendments to the Constitution. Any proposed amendment must then be ratified either by the legislature or by conventions in three-fourths of the states before they become effective.

RATIO DECEDENDI

(*rä'-shē-ō dā-sā-dēn'-dē*) Lat.: the reason for the decision; the principle that the case establishes.

RATIO LEGIS

(*rä'-shē-ō lā'-gīs*) Lat.: legal reasoning or grounds; the underlying principle; theory, doctrine or science of the law.

EXAMPLE: A loitering statute permits law enforcement officers to disperse crowds of people rather than arrest each person and go through a series of formalities not actually necessary in the circumstances. The *ratio legis* of the statute is to allow the officers more latitude in attempting to prevent crime rather than to rely solely on apprehension and sentencing as a deterrent.

RATIONAL BASIS TEST

a method of constitutional analysis under the equal protection clause used to determine whether a challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective.

RAVISH

generally, synonymous with rape. Literally, to ravish is to seize or snatch by force. Traditionally, a valid indictment for rape required the use of the term ravished, which implied force or violence; it would thus constitute an essential word in all indictments for rape, importing not only violence on the part of one party but resistance on the part of the other.

RE see in re.

READY WILLING AND ABLE

to be prepared to act, and capable of acting, in a given situation, such as the buyer or seller in a real estate transaction.

REAL CHATTEL see chattel [REAL CHATTEL].

REAL ESTATE

every possible interest in land, except for a mere chattel interest.

REAL ESTATE INVESTMENT TRUST [REIT]

a specialized investment organization that functions as a financial intermediary in the real estate debt market and that qualifies under Internal Revenue Code requirements to act as a conduit with respect to income distributions. The Massachusetts Trust is a popular legal form for REITs. Trusts fall into two basic categories: equity trusts, which invest in income properties under terms that provide equity ownership and/or participation in income, and mortgage trusts that lend funds on a short-term basis for development and construction and on a long-term basis for first and second mortgages.

REAL EVIDENCE

an object relevant to facts in issue at a trial and produced for inspection at trial rather than described by a witness.

Real evidence may include any object produced for inspection at a trial, from the murder weapon to a tape recording of a telephone conversation or a photograph of where an event occurred to the exhibition of a physical injury. Real evidence is one type of demonstrative evidence.

REALIZATION

1. the conversion of an asset into money; 2. in tax law, the occurrence of a transaction deemed to be a sufficiently substantial economic change for the taxpayer to warrant imposition of INCOME TAX(see tax). If the tax is imposed, the event gives rise to recognition.

GAIN OR LOSS REALIZEDthe difference between the amount realized on a sale or exchange of an asset and the taxpayer's basis in such asset.

EXAMPLE: A taxpayer buys stock for \$5 a share. Ten years later, he sells the stock for \$15. The taxpayer has a *realization* of \$10 on each share and must pay tax on the total gain. If the stock is sold at \$1, he has a loss of \$4 a share, and his income is reduced by that amount before his tax liability is calculated.

REAL PARTY IN INTEREST

the person who will be entitled to the benefits of the legal action if it is successful; one who is actually and substantially interested in the subject matter, as opposed to one who has only a nominal, formal or technical interest in it. For example, if an insurance company pays its insured for damage done to his automobile under a collision insurance provision of his policy and if the insurance company attempts to collect its loss from the responsible party, the suit may be brought in the name of the insured, but the real party in interest will be the insurance company.

REAL PROPERTY

1. land and whatever is erected or growing on it, or affixed to it; 2. rights issuing out of, annexed to, and exercisable within or about, the land. Compare chattel.

REAL TIME TRANSCRIPT see court reporters [REAL TIME].

REALTY

an interest in land; another word for real property.

REAPPORTIONMENT

changing of a legislative district or of the number of seats a state is entitled to in the Congress to more clearly reflect the population of that district or state; an attempt to meet the right of every person to vote on a one-person, one-vote basis. Compare gerrymander.

EXAMPLE: Each legislative district elects one person to represent them in Congress, but one district has only 10,000 people whereas another district covers 20,000 people. *Reapportionment* will attempt to make each district equal in size.

REARGUMENT

the oral presentation of additional arguments to a court after it has already heard argument, for the purpose of demonstrating that there is some decision or principle of law that would have a controlling effect and that has been overlooked, or that there has been a misapprehension of facts. Reargument usually occurs prior to the court rendering a decision in a matter and may be distinguished from a rehearing that also presents some new or overlooked principle of law or fact but that usually occurs after the court has rendered its decision.

REASONABLE see unreasonable.

REASONABLE BELIEF

1. in criminal law, similar to the probable cause standard in that it is a subjective standard used to validate a warrantless search and seizure or arrest and that considers whether an officer acted on personal knowledge of facts and circumstances that are reasonably trustworthy, and that would justify a person of average caution to believe that a crime has been or is being committed; 2. in insurance law, a subjective standard used to determine the extent to which an automobile insurance policy covers a driver, based on the reasonableness of the driver's belief that the owner's permission had been granted to use the vehicle, whether or not such permission was directly granted.

REASONABLE CARE

that degree of care that under the circumstances would ordinarily or usually be exercised by or might be reasonably expected from an ordinary prudent person. The exercise or absence of reasonable care, which is a jury question, is often dispositive of tort cases or of cases involving injury to others. See reasonable man [or person].

REASONABLE DILIGENCE see diligence.

REASONABLE DOUBT

refers to the degree of certainty required of a juror before he or she can make a legally valid determination of the guilt of a criminal defendant. These words are used in instructions to the jury in a criminal trial to indicate that innocence is to be presumed unless the jury can see no reasonable doubt of the guilt of the person charged. The term does not require that proof be so clear that no possibility of error exists; it means that the evidence must be so conclusive that all reasonable doubts are removed from the mind of the ordinary person. See also moral certainty.

EXAMPLE: Jay is charged with first degree murder, which requires that he intentionally planned the death. At his trial, he attempts to show that the killing occurred on the spur of the moment in a fit of rage. He is trying to create in the jurors a *reasonable doubt* that he

planned the murder. If he is successful in that effort, he may lower the degree of his guilt to manslaughter.

REASONABLE MAN [OR PERSON]

a phrase used to denote a hypothetical person who exercises qualities of attention, knowledge, intelligence and judgment that society requires of its members for the protection of their own interest and the interests of others. Thus, the test of negligence is based on either a failure to do something that a reasonable person, guided by considerations that ordinarily regulate conduct, would do, or on the doing of something that a reasonable and prudent person would not do.

REASONABLE TIME

a subjective standard based on the facts and circumstances within a particular case, with applicability in a variety of contexts. Within commercial law, the term applies to the amount of time in which to accept an offer, to inspect goods prior to payment or acceptance, to await performance by a party who repudiates a contract, or the time in which a seller may substitute conforming goods for goods rejected by a buyer as nonconforming. If not governed by statute, the term may also refer to the time allowed to set aside a default judgment, to inform an insurance company of an accident, to file certain claims, and to make various motions. Compare time is of the essence.

REBUTTABLE PRESUMPTION see presumption.

REBUTTAL

generally, the time either party is given to refute or oppose a claim or claims made by the opposing party that would not otherwise belong in that party's case in chief. Also refers to the time given to the party who presented the first closing argument to rebut any claims made by the opposing party in the closing argument, which followed. This rebuttal can only attack those claims made in the opposing party's argument and cannot raise any new issues.

REBUTTAL EVIDENCE

any evidence that refutes, counteracts or explains away evidence given by a witness or an adverse party. Rebuttal evidence is offered to contradict other evidence or to rebut a presumption of fact.

REBUTTER

a form of common law pleading that was a defendant's answer of fact to the plaintiff's response to the defendant's rejoinder.

RECALL

a method of removing a public official from office by submitting to popular vote the issue of whether the official should continue in office. In insurance law, the invalidation of an insurance policy before it becomes effective. Under the federal Consumer

Safety Act, a recall is the process by which a manufacturer is required to replace or repair potentially defective products in order to bring them into conformity with consumer product safety rules.

RECALL A JUDGMENT

reverse or vacate a decision based on a matter of fact, as opposed to a matter of law.

RECAPITALIZATION

a recasting of the capital structure of a corporation. A typical capitalization will contain bonds (called funded debt), preferred stock and common stock. Voluntary recapitalization could involve exchanging an existing bond issue or exchanging a preferred stock issue for bonds.

EXAMPLE: A corporation finds that the amount of its outstanding loans to banks is greater than the corporation wants. The directors *recapitalize* the corporation by exchanging shares of the corporation's stock for money to repay the loans. The corporation thus receives additional equity investors in return for reduction of its debt.

Recapitalizations are common when public companies emerge from bankruptcy.

See refinancing.

RECAPTURE

a term generally applied when an event or transaction requires a taxpayer to repay earlier tax savings by payment of additional tax in the present taxable year. Thus, upon a sale or exchange of property that constitutes a CAPITAL ASSET (see capital), the gain realized on such sale or exchange constitutes capital gain. However, under certain circumstances, if the taxpayer has taken excess depreciation (ACCELERATION DEPRECIATION over STRAIGHT LINE DEPRECIATION) with respect to real property or any depreciation with respect to personal property, to the extent of such depreciation the gain realized on the sale or exchange of that property is taxed as ORDINARY INCOME (see income) and not as capital gains. This taxation of the proceeds of the sale or exchange of the capital asset as ordinary income is recapture.

RECEIVABLES see accounts receivable; balance sheet.

RECEIVER

1. a neutral person appointed by the court to receive and preserve the property that is the subject of litigation during the period of litigation, or to manage and dispose of the property as the court or officer may direct. The court takes possession of the property in controversy through its agent, the receiver, during the litigation or after the decree or judgment, for the benefit of the people entitled to the property, when the court does not deem it proper that either party have control of it during that time. Although the assets involved in the litigation are in custody of the receiver, title to the

assets remains in the owners who are parties to the litigation, and the receiver manages the property for the benefit of the parties.

A receiver is frequently appointed in insolvency proceedings to manage the property of the insolvent for the benefit of his creditor.

2. In criminal law, one who obtains possession of property that he or she knows or believes to have been stolen is a receiver of stolen property and commits an offense thereby.

RECEIVERSHIP

1. an equitable remedy whereby property is by order of the court placed under the control of a receiver so that it may be preserved for the benefit of affected parties. A failing company may be placed in receivership in an action brought by its creditors. The business is often continued but is subject to the receiver's control. A receivership is ancillary to or in aid of the main relief sought in an action; it is sometimes used to carry out an order or decree but is generally used for the purpose of preserving property during litigation involving rights in the property. 2. the status of property affected by this remedy; property is said to be in receivership.

EXAMPLE: The Antique Furniture Company is heavily indebted to several creditors and is only showing average sales. In a court-approved agreement between the owners of the company and the creditors, Antique is placed in *receivership*. The court appoints a receiver to oversee Antique's expenditures and orders. At the same time, the creditors settle for a partial payment of the debt and dismiss the rest of the debts against Antique.

Compare bankruptcy.

RECEIVING STOLEN PROPERTY

a crime at common law, and under most modern statutes, requiring as its elements, that property be stolen by someone other than the person charged with receiving it; that the person receiving it has actually received the property or aided in concealing it; that the person has knowledge that the property has been stolen; and, in some jurisdictions, that the person received it with wrongful intent. The receiver is popularly known as a fence, and his or her blameworthiness is sometimes considered greater than the thief's since the fence has induced the thief to commit the crime. The crime may be a felony or misdemeanor, or its degree may vary, depending on the value of the property received. See fence.

RECESS

1. temporary adjournment of a trial or hearing after commencement of the trial or hearing. The recess may be short, for lunch, overnight or for a few days. If it amounts to a substantial delay in the proceedings, it is called a continuance. 2. the intermission between sittings of the same legislative body at its regular or adjourned session,

but not the interval between the final adjournment of one body and the convening of another at the next regular session. Compare sine die.

RECIDIVIST

a second offender or habitual criminal, who is often subject to extended terms of imprisonment under habitual offender statutes. See criminal.

RECIPROCAL NEGATIVE EASEMENT see easement [RECIPROCAL NEGATIVE EASEMENT].

RECIPROCITY

generally, a relationship between persons, corporations, states, or countries whereby privileges granted by one are returned by the other. Compare comity.

RECISSION see rescission.

RECKLESS

careless, inattentive to duty; foolishly heedless of danger; rashly adventurous; indifferent to consequences; mindless; very negligent.

In criminal law, the term connotes conscious disregard of a substantial and unjustifiable risk, a gross deviation from the standard of care that a reasonable person would observe in the actor's situation, a wanton indifference to the consequences of one's acts.

RECKLESS DISREGARD

refers to conduct without concern for consequences or danger. Compare negligence.

EXAMPLE: Fully aware that his conduct creates a risk of harm, Richard lights a pack of firecrackers and throws them into a crowd. Regardless of whether anyone is hurt, Richard has acted with *reckless disregard*.

RECKLESS NEGLIGENCE see negligence [WANTON NEGLIGENCE].

RECOGNITION

imposition of tax under the federal income tax system. Income or loss that the taxpayer has realized is recognized when it is subject to tax.

RECOGNIZANCE

an obligation of record, entered into before a court or other officer duly authorized for that purpose, with a condition to do some act required by law, upon failure of which the recognizer is obligated to pay a specific sum to the court or a party. For instance, in criminal law, a recognizance is an undertaking entered into before a court of record by the defendant and his or her sureties by which they bind themselves to pay a sum of money to the court unless the defendant appears for trial. See bond, release on own recognizance [R.O.R.].

RECOGNIZANCE, ONE'S OWN see release on recognizance [R.O.R.].

RECORD

1. to preserve in writing, printing, on film, tape, etc.; 2. a precise history of a suit from beginning to end, including the conclusions of law thereon, drawn by the proper officer to perpetuate the exact facts.

EXAMPLE: A court rule provides that a judge must inform a person convicted of a crime of his or her right to an attorney to pursue an appeal if he or she so desires. Since all comments by the judge are transcribed, a *record* is produced that will eliminate any question whether the person was informed of his or her rights.

The RECORD ON APPEAL consists of those items introduced in evidence in the lower court, as well as a compilation of pleadings, motions, briefs and other papers filed in the proceeding in the inferior court. 3. in real property law, to enter in writing in a repository maintained as a public record any mortgage, sale of land or other interest affecting real property located within the jurisdiction of the government entity maintaining the public record.

RECORD DATE

the date on which a shareholder must be registered on the books of a corporation in order to receive dividends and other distributions or to vote on company business. See ex-dividend.

RECORDING ACTS

in real property law, statutes that afford a means of giving CONSTRUCTIVE NOTICE (see notice) to others of ownership respecting estates or interests in land, by providing for recording the existence of that estate or interest. These statutes generally provide for recording deeds, mortgages, EXECUTORY CONTRACTS (see executory) of sale and leases of specified duration. When one's interest or ownership in land is recorded, the recording prevents a subsequent purchaser or mortgagee of the land from qualifying as a bona fide purchaser for value without notice, because the instrument recorded would provide at least constructive notice of another's prior ownership or interest in the land.

Under a RACE type of recording act, the first person who records takes in preference to other persons who receive an interest from the same source, even if the first recorder had notice of a prior unrecorded conveyance. A RACE-NOTICE type of act operates like the race statute, but only if the first recorder had no notice of the prior unrecorded conveyance. NOTICE type recording acts provide that a bona fide purchaser is favored even though a prior purchaser is the first to record, so long as the second purchaser had no knowledge of the prior conveyance at the time he made his purchase.

Where there is a GRACE PERIOD provided by a recording act, a prior conveyee is protected against a subsequent conveyee even if he or she doesn't record first, as long as he or she records within the period of grace defined by the recording act. See also chain of title.

RECORD OWNER

the owner of real estate or other property, such as stocks, bonds, etc., at the time in question as revealed by public records. The term is frequently found in tax statutes, and therefore has importance in terms of which party is liable for a certain tax. It also may permit a party to have notice of certain events, such as land foreclosure.

RECOUPMENT

1. the right of defendant to have plaintiff's award of damages against defendant reduced; 2. a right of deduction from the amount of the plaintiff's claim by reason of either a payment thereon or some loss sustained by the defendant because of the plaintiff's wrongful or defective performance of the contract out of which his or her claim arose; 3. a withholding, for an equitable reason, of something that is due. The word is nearly synonymous with discount, deduction or reduction. Compare counterclaim; cross-claim.

RECOURSE

the act of satisfying a claim, i.e., "recourse in the courts." If persons fail to obtain a desired result in court, they might claim that they will seek "recourse in the legislature." In financing, the ability to pursue a judgment for a default on a note not only against the property underlying the note, but against the party or parties signing the note. In nonrecourse financing, only the property used as collateral for the underlying loan may be reached to satisfy a default judgment. See also without recourse.

RECOVERY

1. the establishment of a right by the judgment of a court, though recovery does not necessarily imply a return to whole or normal; 2. the amount of the judgment; 3. the amount actually collected pursuant to the judgment.

RECOVERY OF BASIS see basis [RECOVERY OF BASIS].

RECUSAL

disqualification of a judge, jury or administrative officer for prejudice or interest in the subject matter. A judge may be recused as a result of objection by either party, or may voluntarily disqualify himself or herself if he or she fears that he or she may not act impartially, or that some circumstance will lead to a suspicion of bias.

EXAMPLE: Jerry has been before a judge several times on criminal charges and has been acquitted each time. After each trial, the judge makes certain disparaging comments indicating to the press that he believes Jerry is guilty. When Jerry comes before the judge again,

Jerry seeks a *recusal* based on the earlier comments. Jerry contends that the comments indicate prejudice on the judge's part and will prevent his getting a fair trial.

In most states, a judge may also be disqualified because he is related within certain degrees to a party litigant.

REDEEMABLE BOND

a bond that is callable for payment by the issuer.

REDEMPTION

a regaining of possession by payment of a stipulated price; especially, the process of annulling a defeasible title, such as is created by a mortgage or tax sale, by paying the debt or fulfilling other obligations.

For tax purposes, a redemption is any purchase by a corporation of its own stock.

RIGHT OF REDEMPTION statutory right in some jurisdictions to redeem property that has been forfeited because the mortgagor had defaulted on the mortgage payments. It can be exercised only after the foreclosure and sale of the property, by paying the amount due on the mortgage, plus interest. It is a personal privilege and not an interest or estate in land, and it can be exercised only by the persons and on the condition named in the statute that grants the right. This right arises only after the equity of redemption period ends. It frequently applies to foreclosure under tax foreclosure statutes.

RED HERRING

an issue, whether legal or factual, raised in a case or law school exam that may be important generally but that has no relevant importance to the question at hand. Also, a preliminary prospectus, concerning a future stock issue, distributed during the **WAITING PERIOD** the period from the filing date to the effective date of a registration statement.

RE-DIRECT EXAMINATION see cross-examination [**REDIRECT EXAMINATION**].

REDLINING

an unlawful credit discrimination based on the characteristics of the neighborhood surrounding a would-be borrower's dwelling.

REDRESS

relief or remedy. It may be damages or equitable relief. See recovery; restitution.

REDUCTIO AD ABSURDUM

(rā-dūk'-tē-ō äd äb-sûr'-dŭm) Lat.: to reduce to the absurd. To disprove a legal argument by showing that it ultimately leads to an absurd position.

REENTRY

the resumption of possession pursuant to a right reserved when the former possession was surrendered. It was a remedy given

by the feudal law for nonpayment of rent, and also refers to a right reserved in the conveyance of a fee that is subject to a **CONDITION SUBSEQUENT**(see condition). See conditional fee. Compare ejectment; quiet title.

REFEREE

a quasi-judicial officer appointed by a court for a specific purpose, to whom the court refers power and duty to take testimony, determine issues of fact and report the findings for the court to use as a basis for judgment.

REFERENDUM

referring of legislative acts to the voters for final approval or rejection.

REFINANCING

refunding existing elements of the capital structure; usually implies selling a new bond issue to provide funds for redemption of a maturing issue. See recapitalization.

REFORM

to correct, modify, or rectify; synonymous with amend.

REFORMATION

an equitable remedy consisting of a revision of a contract by the court, in cases where the written terms of the contract do not express what was actually agreed upon. Thus, reformation is generally only decreed upon a clear and convincing showing of **MUTUAL MISTAKE**(see mistake); if only one party was mistaken, reformation is not appropriate unless the mistake of one party resulted from the other party's fraud.

EXAMPLE: Two parties negotiate a contract that inadvertently calls for a delivery date that predates the signing of the contract. Neither party realizes this mistake at the time, but, subsequently, one of the parties tries to use this fault as a reason for cancelling the contract. Since a delivery date can never come before a contract is completed, the court *reforms* the contract and does not permit the one party to cancel.

REFUND see claim for refund; tax [**TAX REFUND**].

REFUNDING

the process of selling a new issue of securities to obtain funds needed to retire existing securities. Debt refunding is done to extend maturity and/or to reduce debt service cost. See refinancing.

REFUSAL

the rejection of something to which a person is entitled, such as the rejection of goods under a contract; the denial of an obligation to perform a legal duty such as the refusal to complete a contract.

A refusal may be an affirmative act, or it may be the mere failure or neglect to perform an act that one is obligated to do without a demand therefore, such as the payment of money.

REGIONAL STOCK EXCHANGE

a domestic exchange located outside New York City. See stock exchange.

REGISTER

to record formally and exactly; to enroll; to enter precisely in a list or the like. For corporations, to record the names of stock and bond holders on the books of the company. The REGISTRAR may be an agent, such as a bank, or it may be the corporation. The registrar is responsible for preventing unauthorized issuance of stock by a company.

REGISTERED BOND see bond.

REGISTERED COUPON BOND see bond.

REGISTERED REPRESENTATIVE

a commission sales person who is qualified to take orders for securities from the general public. A securities sales trainee must be trained in the securities trade for at least six months and must pass tests prepared by the National Association of Securities Dealers [NASD] and the New York Stock Exchange; when training and testing are successfully completed, the trainee is registered with the Securities and Exchange Commission, the NASD, the American and New York Stock Exchanges and regional exchanges, and is registered in the various states in which the sales person intends to do business.

REGISTRAR see register.

REGISTRATION OF OFFENDERS

statute requiring lifetime registration of convicted sex offenders (including those found not guilty by reason of insanity) with law enforcement, and allowing law enforcement to notify the community of the sex offender's known address and vehicle. Failure to register is punishable as a criminal action. Federally, and in many states, such a statute is called MEGAN'S LAW. The provision of COMMUNITY NOTIFICATION is intended to prevent tragedies such as the sexual assault and murder of a seven-year-old girl (Megan) at the hands of her next-door neighbor, a twice-convicted sex offender whose past status was not known by the community.

REGISTRATION STATEMENT

a document that must be approved by the Securities and Exchange Commission [SEC] before a company makes a public offering of new securities through the mails or in interstate commerce. The registration statement must describe the securities and must disclose in detailed information on the nature of the business, including accounting statements, the identity of the management and key stockholders, the purpose of the offering, and the use to be made of the proceeds.

REGISTRY (OF DEEDS)

an officially maintained book that provides a place and mechanism for registering evidences of conveyances of interests in real property, so that notice may be available to all third parties that there has been a change in the ownership of property effected by a conveyance of that property.

REGULAR COURSE OF BUSINESS see ordinary course of business.

REGULATION A

the "small-issues" exemptions governing the sale of securities that are exempt from registration filing requirements.

REGULATION D see private offering [placement] [REGULATION D].

REGULATIONS

rules or other directives issued by administrative agencies to implement laws. These agencies must have specific authorization to issue directives and must usually adhere to prescribed procedures and conditions. See Administrative Procedure Act [APA].

REGULATION T

a regulation of the Securities and Exchange Commission that governs the maximum amount of credit that securities brokers and dealers may extend to customers for the initial purchase of regulated securities.

REGULATION U

a rule of the Securities and Exchange Commission that governs the maximum amount of credit that banks may extend for the purchase of regulated securities.

REGULATION Z

the body of regulations promulgated by the Federal Reserve Board pursuant to the federal Truth in Lending Act that entrusts that administrative agency with supervision of compliance by all banks in the Federal Reserve System with the cost of credit disclosure requirements established under the Act.

REGULATORY AGENCY

a government body responsible for control and supervision of a particular activity or area of public interest. For example, the Federal Communications Commission (FCC), in addition to its other duties, administers the laws regulating access to communication facilities such as television and radio airwaves. Regulatory agencies are also called ADMINISTRATIVE AGENCIES.

EXAMPLE: The Environmental Protection Agency was created by Congress to protect the quality of the nation's air, water and land. Pursuant to that goal, the agency monitors air pollution in cities, sewage treatment plants, chemical landfills, etc. The Federal Trade Commission regulates commercial practices and takes action against deceptive advertising and monopolistic activity. There are

many federal and state *regulatory agencies* that enforce federal and state policies in particular areas of governmental regulation.

REGULATORY OFFENSE

a deed that is not inherently evil but is a crime only because prohibited by legislation, i.e., *malum prohibitum*. Regulatory offenses are also called **STATUTORY OFFENSES** and may impose strict liability upon defendants for their violation.

REHABILITATION

restoration of good repute; reformation. The term has many specific connotations. In the context of a witness it means restoring a witness' credibility after cross-examination has successfully impeached it. In bankruptcy it means the reorganization of a business or an arrangement with creditors that will restore solvency to the corporation. In matrimonial actions, the term **REHABILITATIVE ALIMONY** refers to temporary spousal support necessary to train a divorced person in useful skills so he or she will become employed and self-supporting and not be dependent upon society for financial survival. In criminal contexts, the term refers to efforts to become drug- or alcohol-free, to perform community service, to obtain educational or vocational training, or to otherwise demonstrate that the circumstances that were underlying the criminal behavior are not likely to recur and the person having bettered his or her situation can now be a productive member of society. Judges and parole boards look at rehabilitative efforts in sentencing and paroling criminals. See *mitigating circumstances*.

REHEARING

a retrial, a new hearing and a new consideration of the case by the court (or other body) in which the suit was originally heard, and upon the pleadings and depositions already in the case.

REHEARING EN BANC see *en banc*.

REINSTATE

restore to a former state, authority, station, or status from which one has been removed; as applied to insurance, to restore all benefits accruing under a policy. As applied to employment practices, if the former position no longer exists or is occupied by another with senior service, an obligation to reinstate may be satisfied by placing the person on a preferential employment list rather than by restoring the person to active employment.

REIT see *real estate investment trust [REIT]*.

REJOINDER

in pleadings, in common law, an answer to plaintiff's replication by some matter of fact, in an action at law.

RELATION BACK

the principle that an act done at a later time is deemed by law to have occurred at a prior time, often for purposes

of the statute of limitations or rules of procedure permitting amendment of pleadings.

RELATIVE

refers to relationships by blood (consanguinity), marriage (affinity), or adoption.

RELATOR

the real party in interest in whose behalf certain suits are brought by the state or the Attorney General when the right to sue resides solely in that official; the real party in interest in an ex rel. suit; also a person in whose behalf certain writs are issued, such as informations in the nature of quo warranto. Thus, a habeas corpus action is styled "United States ex rel. [defendant] vs. [warden]."

RELEASE

a written document or the act of writing by which some claim, right or interest is given up to the person against whom the claim, right or interest could have been enforced.

In the law of property, the holder of a fee simple may convey to another a term of years and then subsequently release his or her reversionary interest (LEASE AND RELEASE) to the possessor of the term of years.

RELEASE ON RECOGNIZANCE [R.O.R.]

a method by which an individual is released in lieu of providing bail, upon his or her promise to appear and answer a criminal charge. The R.O.R. procedure permits release on nonmonetary conditions, generally involving only the promise to appear, but sometimes involving special conditions (e.g., remaining in the custody of another, abiding by travel restrictions).

RELEVANCY

a test concerning the admissibility of evidence.

Evidence is relevant if it has a logical tendency, however slight, to prove a fact in issue.

RELEVANT MARKET

a term used by the courts in determining whether a violation of an antitrust statute has occurred. Identification of the relevant market of a product takes into account not only the product but also its geographic area of distribution. Compare monopoly.

RELIANCE

dependence, confidence, repose of mind upon what is deemed sufficient authority.

DETRIMENTAL RELIANCE reliance by one party on the acts, representations, or promises of another, which causes the first party to allow or to effect a worsening change in his position.

RELICITION

gradual and imperceptible withdrawal of water from land that it covers, by lowering of the water's level from any cause. If the retreat of the waters is permanent, not merely seasonal, the

owner of the contiguous property acquires ownership of the dry land thus created. Compare avulsion; dereliction.

RELIEF

the redress or assistance awarded to a complainant, by the court, especially a court of equity, including such remedies as specific performance, injunction, rescission of a contract, etc.

EXAMPLE: Carl ordered 200 items at a set price from a company that happens to be the only manufacturer of the item. Although his order has been produced, the company refuses to deliver unless Carl pays a price increase. Carl seeks *relief* from a court, which in this instance should be to order delivery since the item cannot be purchased elsewhere.

The term generally does not comprehend an award of money damages. Thus the term AFFIRMATIVE RELIEF is often used to indicate that the gist of relief is protection from future harm rather than compensation for past injury.

RELIEF TO LITIGANTS see contempt of court.

RELINQUISHMENT see abandonment.

REMAINDER

that part of an estate in land that is left upon the termination of the immediately preceding estate (often a life estate or estate for a term of years) and that does not amount to a reversion to the original grantor or his or her heirs. The remainder must be created by the same conveyance and at the same time, as the preceding estate; the remainder must vest in right during the continuance of the preceding estate; and no remainder can be created in connection with a fee simple.

CONTINGENT [EXECUTORY] REMAINDER any remainder subject to a CONDITION PRECEDENT (see condition), created in favor of an unborn person, or in favor of an existing but unascertained person. Such an interest was not, according to the older common law definition, an estate, but the possibility of an estate. A contingent remainder becomes a vested remainder only if any condition precedent is fulfilled and the remainderman is identified prior to the termination of the preceding estate.

EXECUTED REMAINDER a remainder interest that is vested as of the present time, though the enjoyment of it may be withheld until a future date.

VESTED REMAINDER a remainder created in favor of an existing and ascertained person who has the right to immediate possession at the termination of the preceding estate, or estates, subject only to another person's prior right to possession.

EXAMPLE: A grandfather conveys a house to his son for life, then to his oldest grandson. The grandson has a *vested remainder* in the house since he is entitled to it at the son's death. If the grandson predeceases the son, the house is distributed according to the provisions of the grandson's will.

REMAINDERMAN

one who has an interest in the estate that becomes possessory in futuro, after the termination, by whatever reason, of a present possessory interest. Remainderman usually refers to one who holds an interest in a remainder whether vested or contingent.

REMAND

to send back, as for further deliberation; to send back to the tribunal (or body) from which the matter was appealed or moved. When a judgment is reversed, the appellate court usually remands the matter for a new trial to be carried out consistent with the principles announced by the appellate court in its opinion ordering the remand.

REMEDY

the means employed to enforce or redress an injury. The most common remedy at law consists of money damages.

EXTRAORDINARY REMEDY a remedy not usually available in an action at law or in equity, and ordinarily not employed unless the evidence clearly indicates that such a remedy is necessary to preserve the rights of the party. Examples include the appointment of a receiver, a decree of specific performance, the issuing of a writ of mandamus or writ of prohibition or of an injunction.

PROVISIONAL REMEDY one provided pursuant to a proceeding incidental to and in connection with a regular action, invoked while the primary action is pending, to assure that the claimant's rights will be preserved or that he or she will not suffer irreparable injury. Its connection to the primary action is termed collateral. Examples include attachment, temporary restraining orders, preliminary injunctions, appointment of receivers.

REMEDY, MUTUALITY OF see mutuality of remedy.

REMITTER

the act by which a person, who has a good title to land, and enters upon the land with less than his or her original title, is restored to his or her original good title; the doctrine whereby the law will relate back from a defective title to an earlier valid title.

REMITTITUR

(rē-mī'-tī-tūr) Lat.: reduction. The procedural process by which the verdict of a jury is diminished; describes any reduction made by the court, without the consent of the jury, to decrease an excessive verdict.

EXAMPLE: A jury awards several million dollars to a small electronics corporation as compensation for anticompetitive practices by a multinational company. The judge is unsure whether the evidence supports a finding against the large company but is not willing to overturn the jury's decision on that issue. Still, he feels that the award is much too great and by *remittitur* reduces the award to one million dollars. If the reduction is not accepted by the plaintiff, the judge will set the entire verdict aside and order a new trial.

REMOTE CAUSE see cause [REMOTE CAUSE].

REMOVAL

1. a change in place or position, as the removal of a proceeding to another court, especially from state to federal court; 2. the process by which a public official is stripped of office for cause.

REMOVE CLOUD ON TITLE see quiet title.

RENDER

to officially announce a decision, either orally in open court or by memorandum filed with the clerk.

RENEWAL

continuation in force and effect of a previously existing arrangement for a new period, as a lease or a note, on the same or different terms. Insurance policies are renewed from term to term.

RENOUNCE

an affirmative declaration of abandonment; giving up of a title or claim. See renunciation.

RENT

a profit in money, goods, or labor issuing periodically out of land and tenements, constituting a return for the privilege of use.

RENUNCIATION

in criminal law, the voluntary and complete abandonment of criminal purpose prior to the commission of a crime, or an act otherwise preventing its commission. In some jurisdictions it is an affirmative defense (see defense) to inchoate, or incipient, offenses such as attempts, conspiracy, solicitation or offenses dependent upon the conduct of another (i.e., accessory crimes).

EXAMPLE: Eric devises an intricate plan to rob a bank, but, on the evening on which he plans to carry it out, he finds that workmen are redecorating the bank's interior. He postpones the robbery until he can formulate a new plan. He has not *renounced* the crime since he plans to rob the bank at another opportunity, even if that opportunity never arises or the new plan is not carried out. If he has a genuine change of heart and voluntarily destroys the blueprint of the bank, this might satisfy the requirements of *renunciation*.

Compare withdrawal.

RENVOI

(*rähn'-vwä*) Fr.: rule in some jurisdictions that in a suit by a nonresident upon a cause arising locally, his or her capacity to sue will be determined by looking to the law of his or her domicile rather than to the local law. The problem of *renvoi* is nothing more than the question whether the whole law including its conflict of laws of a foreign state is looked to for solution when a reference is made to the law of another state. If the reference is to the whole law, as is often the case, an application of the *renvoi* concept is involved. Take, for example, the case of a citizen of the United States permanently residing in France who dies leaving movables in New York. Assuming the New York conflict of laws rule to be that the law of the decedent's domicile will govern this matter, the New York forum would look to the "law" of France. If the forum should look to the law applicable to a French person dying in France leaving movables there, the court would be rejecting the use of *renvoi*. If, however, the forum looks to the whole law, i.e., including the French conflicts rule, this is using the *renvoi*.

REORGANIZATION

the transaction by which the stock of property of one corporation is exchanged for the stock or property of another corporation. The shareholders of the old corporation generally hold the same proportion of stock in the new corporation. The term is most often used to mean reorganization under Chapter X of the Federal Bankruptcy Act. See bankruptcy.

In corporate income tax law, a group of transactions including mergers, consolidations, recapitalizations, acquisitions of the stock or assets of another corporation, and changes in form or place of organization. The common element in each of these transactions is that if various technical requirements are met, the corporations or shareholders involved may not recognize any gain for income tax purposes, and the transaction will occur tax free.

REPAIR see tenantable repair.

REPEAL

abrogation or annulling of a previous law by the enactment of a subsequent statute, which either expressly declares that the former law shall be revoked, or contains provisions so irreconcilable with those of the earlier law as to abrogate the earlier law by necessary implication.

REPLEVIN

a legal form of action ordinarily employed only to recover possession of specific personal property unlawfully withheld from the plaintiff, plus damages for its detention. In this primarily possessory action, the issues ordinarily are limited to the plaintiff's title to the goods.

EXAMPLE: Arthur leaves a shipment of goods in a warehouse and prepays storage costs for three months. At the end of that time, he goes to pick up the goods, but the warehouse refuses to release them until he pays for the storage. Arthur sues for *replevin* to obtain the goods.

REPLEVY

to secure, especially by an action in replevin, redelivery of goods that have been kept from the rightful owner.

REPLICATION

the plaintiff's answer or reply to the defendant's plea or answer. See pleadings.

REPLY

a defensive pleading by one who has made a complaint; the sole purpose of reply is to interpose a defense to new matter pleaded in the answer. In modern practice a reply is an extraordinary pleading and is not permitted except to respond to a counterclaim or by leave of court to an answer or third-party answer.

EXAMPLE: A store owner sues Ed for failure to pay a debt. Ed files a counterclaim against the store owner claiming that the washer and dryer Ed purchased, which gave rise to the debt, have never worked properly. The store owner can *reply* to the counterclaim that he is not responsible for the problem or that Ed has not operated the machines correctly.

REPORTERS see court reporters; reports.

REPORTS

official published court or administrative agency decisions that are collectively grouped by date and court of issuance into bound volumes thus comprising the case law for that jurisdiction. The reports (also known as reporters) have headnotes written by the publisher. Some examples of reports are found in the Table of Abbreviations. The United States Supreme Court has three reporters: United States Reports, Supreme Court Reporter, and Lawyer's Edition Supreme Court Reports.

REPOSSESSION

seizure or foreclosure. Either by judicial action or self-help, the secured creditor, to satisfy the debtor's obligation, takes possession of the property after the debtor defaults on his payments.

REPRESENT [REPRESENTATION]

to stand in another's place; to speak with authority on behalf of another; to appear on one's behalf. As an element of actionable fraud, representation includes deeds or acts calculated to mislead another, as well as words or positive assertions. In insurance law, a representation is an oral or written statement preceding the insurance policy and, though not part of it, is used to enable the underwriter to form a judgment as to

whether he or she will accept the risk. Only a false misrepresentation that materially affects the risk will permit the insurer to rescind the policy. In commercial law, a representation is anything short of a warranty and is sufficient to create a distinct impression of fact conducive to action.

In constitutional law, the Sixth Amendment's right of assistance of counsel in a criminal case includes the right to adequate and effective representation. This standard includes the right to an attorney who knows the relevant law, does not have any conflicts in the case at hand, adheres to all legal procedural requirements so as not to forfeit any rights, and vigorously pursues a client's case at trial through direct and cross-examinations, the filing of motions, and the raising of objections. Representation so lacking in competence creates a duty on a trial judge to correct such to prevent a mockery of justice.

In property law, "representation" permits children or more remote lineal descendants of a predeceased relative of the intestate to stand in their predeceased ancestor's shoes for purposes of inheritance. Representation is equivalent to *per stirpes* (meaning by the stock or roots). Compare *per capita*. See *proportional representation*; *virtual representation*.

REPRESENTATIVE

agent; one who acts for another in a special capacity. One's status as a representative entitles the person to a number of rights including the right to discovery of trial preparation materials, and the right to bargain collectively on behalf of employees. See *personal representative*; *registered representative*.

REPRIEVE

in criminal law, the postponement of a sentence for an interval in which the execution is suspended. Compare *commutation*; *pardon*.

REPUBLICATION

an affirmative act of reviving a will after it has been destroyed or otherwise replaced by a subsequent will, and is frequently accomplished by use of a codicil. In those jurisdictions permitting republication, the mere revocation of the subsequent will shall not revive the earlier will without some type of affirmative act.

REPUDIATION

refusal by one party to perform a contractual obligation to another party. See *anticipatory breach*.

REPUTATION EVIDENCE see *witness* [CHARACTER WITNESS].

REQUIREMENTS CONTRACT see *contract* [REQUIREMENTS CONTRACT].

RES

(*rās*) Lat.: a thing. The subject matter of actions that are primarily in *rem*, i.e., actions that establish rights in relation to an object, as opposed to a person (*in personam*). For example, in an

action that resolves a conflict over title to real property, the land in question is the *res*. Tangible personal property can also be a *res*, as in the corpus of a trust.

EXAMPLE: A mother creates a trust for her children, providing that the rentals from an office building be distributed to each child every month. The office building is the trust *res* since it generates the income that is distributed to the children.

In a QUASI IN REM (see quasi) proceeding, land or chattels that are seized and attached at the beginning of the action, in order that they may later be used to satisfy a personal claim, are the *res* of such suits. The term refers as well to the status of individuals. Thus, in a divorce suit, the marital status is the *res*. The purpose of a *res* is to establish a court's jurisdiction: if the property lies within the state where the action is brought, or an individual in a divorce action is a domiciliary of the state, then jurisdiction is established.

RES AJUDICATA see res judicata.

RESCIND

to abrogate a contract, release the parties from further obligations to each other and restore the parties to the STATUS QUO ante, (see status quo) or the positions they would have occupied if the contract had never been made.

RESCISSION

cancellation of a contract and the return of the parties to the positions they would have occupied if the contract had not been made (see status quo [STATUS QUO ANTE]). Grounds for rescission may include original invalidity of the agreement, fraud, failure of consideration, or material breach or default. Rescission may be brought about by the mutual consent of the parties, by the conduct of the parties or by a decree by a court of equity.

RESCRIPT

a statement of the decision of the highest appellate tribunal; a direction from that tribunal to a lower court to enter a decree in accordance with that direction, in effect remanding the case to the lower court for the entry of a decree.

RESCUE

the act of aiding a person in imminent and serious peril, which, as a matter of law, cannot give rise to a charge of contributory negligence against the rescuer in risking his or her own life or serious injury in attempting to effect the rescue, provided the attempt is not made recklessly or rashly.

RESCUE DOCTRINE

tort rule that holds a tortfeasor liable to his or her victim's rescuer, should the latter injure himself or herself during a reasonable rescue attempt. The premise is that the wrong is not only to the imperiled victim, but also to the rescuer.

RESERVATION

1. a clause in any instrument of conveyance, such as a deed, that creates a lesser estate, or some right, interest or profit in the estate granted, to be retained by the grantor. 2. a tract of land, usually substantial, set aside for specific purposes such as military grounds, parks, Indian lands. Compare reversion.

RESERVE

funds kept available to meet future contingencies. Examples include funds banks must keep on hand to meet depositors' withdrawals, insurance company liabilities, and pension payments. The funds that must be presently retained are usually a percentage of the institution's full liability for the particular need. See depreciation reserve.

RESERVE CLAUSE

clause generally found in sports contracts, giving a team that first signs a player a continuing and exclusive right to that player's services, even beyond the length of the contract, and to the point of obligating other teams to respect and enforce those rights. Such clauses have less effect than they once did, and players in most sports are free to move to other teams after their contract expires.

RESERVED POINT see point reserved.

RESERVED POWERS see Tenth Amendment.

RES GESTAE

(*rās gěś -tí*) Lat.: the thing done. Spontaneous exclamations or statements so closely connected to an occurrence they are considered part of that occurrence. Declarations that are subject to the hearsay rule may be admissible if they qualify as *res gestae*; i.e., if they constitute a part of the thing done under a recognized exception to the hearsay rule.

RESIDENCE

broadly, any place of abode that is more than temporary. Compare domicile.

RESIDENT ALIEN see alien.

RESIDENTIAL COMMUNITY TREATMENT CENTERS see halfway houses.

RESIDUARY BEQUEST see bequest [RESIDUARY BEQUEST]; residuary legacy.

RESIDUARY CLAUSE

clause in a will that conveys to the beneficiary of a residuary legacy (residuary legatee) everything in a testator's estate not devised to a specific legatee; a testamentary clause that includes in its gift any property or interest in the will that, for any reason, eventually falls into the general residue, because specific legacies were void, the disposition was illegal, or

because for any other reason it was impossible that the legacy should take effect; and it includes such legacies as may lapse by events subsequent to the making of the will. It operates to transfer to the residuary legatee such portion of his or her property as the testator has not perfectly disposed of.

EXAMPLE: In his will Manny leaves his antique car to a cousin who predeceases him. He also provides a *residuary clause* that leaves any of his property not already disposed of in the will to his oldest son. In addition to receiving all of Manny's property not left to others, the son, as the residuary legatee, also receives the antique car.

RESIDUARY ESTATE

that part of a testator's estate that remains undisposed of after all of the estate has been discharged through the satisfaction of all claims and specific legacies with the exception of the dispositions authorized by the residuary clause.

RESIDUARY LEGACY

a general legacy into which all the assets of the estate fall after satisfaction of other legacies, payment of all debts of the estate and all costs of administration.

RESIDUUM

the substance or part remaining after some other part has been taken away.

RESIDUUM RULE In administrative law, the principle that a decision rendered by an administrative agency and based in part on incompetent evidence will be upheld on judicial review if it is supported by a residuum of competent evidence. The federal courts have rejected the residuum rule.

RES IPSA LOQUITUR

(rās ĩp'-sā lō'-kwĩ-tũr) Lat.: the thing speaks for itself. Refers to a rule of evidence whereby negligence of the alleged wrongdoer may be inferred from the mere fact that the accident happened, provided (1) that in the absence of negligence the accident would not have occurred and (2) the thing that caused the injury is shown to have been under the exclusive control of the alleged wrongdoer. The procedural effect of successful invocation of the doctrine is to shift the burden of going forward with the evidence, normally borne by the plaintiff, to the defendant, who is thereby charged with introducing evidence to refute the presumption of negligence that has been created.

EXAMPLE: An accident occurs when the brakes of a new car fail on its first trip from the dealer. The victim claims negligence on the part of the car manufacturer and points to the failed brakes as evidence. Under the doctrine of *res ipsa loquitur*, the manufacturer must now provide evidence to show that some cause other than its negligence is responsible for the accident.

RESISTANCE see utmost resistance.

RESISTING ARREST

common-law offense involving physical efforts to oppose a lawful arrest.

RES JUDICATA

(*rās jŭ-dĭ-kä'-tä*) Lat.: a thing decided; a matter adjudged. The phrase reflects a rule by which a final judgment by a court of competent jurisdiction is conclusive upon the parties in any subsequent litigation involving the same cause of action.

EXAMPLE. Two parties litigate an issue in one federal district court, and the defendant loses. Under the principle of *res judicata*, the defendant could not then go to another federal district court and litigate the same issue a second time.

Compare collateral [COLLATERAL ESTOPPEL].

RESPITE

1. a delay, postponement or forbearance of a sentence, not comprehending a permanent suspension of execution of the judgment; 2. a delay in repayment, granted to a debtor by his creditor. See relieve.

RESPONDEAT SUPERIOR

(*rā-spôn'-dā-ät sū-pĕr'-ē-ôr*) Lat.: let the superior reply. This doctrine is invoked when there is a master- servant relationship between two parties. The premise is that when an employer (master) is acting through the facility of an employee or agent (servant), and tort liability is incurred during the course of this agency because of some fault of the agent, then the employer or master must accept the responsibility. Implicit is the common law notion that everyone must conduct his or her affairs without injuring another, whether or not he or she employs agents or servants.

EXAMPLE: A truck driver employed by a manufacturing company causes an accident while delivering a shipment to a buyer. The doctrine of *respondeat superior* allows the victims to sue the company for any injuries caused by the driver. Under normal principles of tort responsibility, the driver can also be sued. Since it is unlikely that he has the money to pay a damage award, the doctrine acts to assure that the victims will be paid the full amount of the award because the company by law will be required to carry adequate insurance or have sufficient assets for such contingencies. Absent this doctrine, companies would be able to hire judgment-proof drivers and in that fashion avoid all liability for injuries caused by such drivers.

RESPONDENT

1. in equity, the party who answers a pleading. 2. the party against whom an appeal is prosecuted.

RESPONSIBILITY

the obligation to answer for an act and to repair any injury caused by that act; the state of being answerable

for an obligation. As used in statutes such as those governing awards of local public contracts to RESPONSIBLE BIDDERS, the term refers to the characteristic the absence of which would cause fair-minded and reasonable persons to believe it was not in the best interest of the municipality to award the contract to the lowest bidder, and may involve experience, financial ability and adequate facilities.

RESPONSIBILITY, DIMINISHED see diminished capacity.

RESPONSIVE PLEADING see answer.

RESTATEMENT

an attempt by the American Law Institute to present an orderly statement of the general common law of the United States, including not only the law developed by judicial decision, but also the law that has evolved from the application of statutes by the courts. Restatements are compiled according to subject matter: contracts, torts, property, trusts, agency, conflict of laws, judgments, restitution, security and foreign relations.

RESTITUTION

act of making good or of giving the equivalent for loss, damage or injury. As a remedy, restitution is available to prevent unjust enrichment, to correct an erroneous payment and to permit an aggrieved party to recover deposits advanced on a contract. As a contract remedy, restitution is limited to the value of a performance rendered by the injured party, and ordinarily requires that both parties to a transaction be returned to the STATUS QUO (see status quo).

In criminal law, restitution is sometimes ordered as a condition of a probationary sentence. Compare indemnity.

RESTRAINING ORDER

an order granted without notice or hearing, demanding the preservation of the status quo until a hearing can be held to determine the propriety of injunctive relief, temporary or permanent. A restraining order is always temporary, since it is granted pending a hearing; thus it is often called a T.R.O., a temporary restraining order.

EXAMPLE: A federal agency grants a lumber company permission to cut wood on federal lands. An environmental group immediately goes to court and seeks a *restraining order* prohibiting the cutting of any trees until the validity of the grant is determined. The order probably will be issued since irreparable damage will be caused by cutting the trees, provided the group can produce a minimum of evidence that their position as to the illegality of the grant is correct.

RESTRAINT, JUDICIAL see judicial restraint.

RESTRAINT OF TRADE

in common law and as used in the antitrust laws, illegal restraints interfering with free competition in

commercial transactions, which tend to restrict production, affect prices or otherwise control the market to the detriment of consumers of goods and services.

RESTRAINT ON ALIENATION

restriction on the ability to convey real property interests, any attempt at which is in derogation of the common law policy in favor of free alienability. Such restrictions often are void or voidable as unlawful restraints on alienation.

RESTRAINT, PRIOR see prior restraint.

RESTRICTED SECURITIES

securities acquired from an issuer in a nonpublic transfer, that is, on terms and at a price not offered to the general public through an underwriter. Since the securities were not part of a public offering and thus not subject to the safeguards of the Securities Act of 1933, such as the registration of the securities and the issuing of a prospectus, their sale to the public is restricted. Under S.E.C. rules, restricted stock must be held at least two years prior to its sale on an established securities market, and may only be sold in small amounts. Restricted stock is often referred to as LETTER STOCK since the certificate must bear a legend reciting the restrictions to which it is subject. It is also known as INVESTMENT STOCK.

RESTRICTIVE COVENANT

a promise as part of an agreement, restricting the use of real property or the kind of buildings that may be erected. The promise is usually expressed by the creation of a covenant, reservation or exception in a deed. In order for a grantor to enforce the covenant against remote grantees [subsequent owners who take title from the first grantee], the covenant must run with the land.

EXAMPLE: When Marshall sells a plot of land next to his house, he includes a *restrictive covenant* with the deed that no structure over two and one-half stories will be constructed on the land. Since the covenant is included with the deed, it is valid against any and all other purchasers of the land.

RESTRICTIVE INDORSEMENT see indorsement.

RESULTING TRUST see trust [RESULTING TRUST].

RESULTING USE see use.

RETAIL INSTALLMENT CONTRACT

generally, a contract consisting of a promissory note and a chattel mortgage; a contract whereby the seller retains title to, or a security or property interest in, goods purchased by a buyer who is obligated to make periodic payments for the goods. In some states, the term also includes certain types of leases. See installment contract.

RETALIATORY EVICTION see eviction [RETALIATORY EVICTION].

RETAINER

compensation paid in advance to an attorney for services to be performed in a specific case. A retainer may be the whole sum to be charged (plus expenses) but more often is a deposit, with the attorney furnishing a periodic or final statement of how much the client owes for services rendered.

RETIRE

1. in reference to bills of exchange, to recover or redeem by payment of a sum of money; to withdraw from circulation or from the market.

2. A jury is retired when the judge has submitted the case for its consideration and verdict.

RETIREMENT PLAN

a plan provided by an employer or a self-employed individual for an employee's or self-employed individual's retirement. Because of the tax advantages, most retirement plans are designed to insure a present deduction to the employer while the employee is permitted to avoid recognizing the income until he or she has actually or constructively received it.

DEFERRED COMPENSATION a plan under whose terms an employee defers payment of a portion of his or her salary in return for the employer's promise to pay the employee the salary at some time in the future. Generally, if such plan is not financed by irrevocably setting the fund aside for the employee or guaranteed by insurance, the employee will not recognize income from such plan until he or she is actually paid, and the employer does not obtain a deduction under such plan until the employee recognizes the income.

INDIVIDUAL RETIREMENT ACCOUNT [IRA] an account to which the employee pays a specified tax-exempt sum, whose earned income is also tax-exempt when specified limitations upon withdrawal are adhered to.

KEOGH PLAN a pension or profit-sharing plan set up by a self-employed individual.

NON QUALIFIED PENSION OR PROFIT-SHARING PLAN a plan created by an employer for an employee that does not qualify for a present deduction to the employer and deferral of income recognition to the employee. In such cases the employer is generally not permitted to take a deduction for the amount set aside until the employee recognizes such amount as income.

QUALIFIED PENSION OR PROFIT-SHARING PLAN a plan set up by an employer for an employee or a group of employees that allows the employer to pay into a trust a certain sum or percentage of

compensation for the employees. The employer obtains a present deduction for the contributions but the employee does not recognize the income until it is actually paid to him.

ROLLOVER a method whereby an employee converts from one qualified plan to another without the recognition as income of the sum rolled over.

RETIREMENT SECURITY ACT see ERISA.

RETRACTION

the withdrawing of a plea, declaration, accusation, promise, etc.

RETRAXIT

a voluntary renunciation by a plaintiff in open court of his or her suit and cause of action and that bars a second action between the same parties on the same grounds; it is dismissal with prejudice, equivalent to a verdict and judgment on the merits of the case.

RETREAT, DUTY TO

a duty found in some jurisdictions obligating a person to retreat from a dangerous situation rather than employ self-defense and injure another. However, one is not usually required to retreat when attacked in one's own home. In tort law, the failure to exercise one's duty to retreat may create liability in the party who could have retreated. In criminal law, the failure to retreat except from one's home or from a robber will foreclose the defense of self-defense in a minority of states.

RETRIAL

a new trial in which an issue or issues already litigated, and as to which a verdict or decision by the court has been rendered, are reexamined by the same court for some sufficient reason, such as a recognition that the initial trial was improper or unfair as a result of procedural errors. Compare mistrial.

RETROACTIVE

refers to a rule of law, whether legislative or judicial, that relates to things decided in the past. "Retroactive" includes both retrospective and ex post facto, the former technically applying only to civil laws, the latter to criminal or penal laws. A **RETROSPECTIVE LAW** is one that relates back to a previous transaction and gives it some different legal effect from that which it had under the law when it occurred. A retrospective law is constitutionally objectionable if it impairs vested rights acquired under existing laws, or creates a new obligation or attaches a new disability with respect to past transactions. Similarly, an ex post facto law retroactively imposes criminal liability on behavior that took place prior to enactment of the criminal statute. State constitutions may prohibit their legislatures from enacting retrospective laws; ex post facto laws are prohibited by the Constitution of the United States.

Judicially created law (common law) is often retroactive in its effect, since the court's decision is made on the basis of old facts as to which the litigants could not possibly have predicted at the time of their actions the court's eventual interpretation of the law; nevertheless they are bound by it.

In constitutional law, decisions announcing new or different rights favoring criminal defendants are often given full retroactive effect so as to permit a COLLATERAL ATTACK(see *collateral*) on previously finalized judgments.

EXAMPLE: The state supreme court rules that any person affected by the use of a particular police procedure can exclude evidence so obtained. The court also rules that this right is only available after the date of this decision. The latter ruling means that the law is prospective only and has no *retroactive* effect and that any person already tried cannot take advantage of the new rule. If the decision had retroactive effect, every person who has been convicted or whose trial is in progress and who has not been permitted to challenge the legality of the evidence used against him could now raise the issue.

Compare statute of limitations.

RETROSPECTIVE see retroactive.

RETURN

1. a report from an official, such as a sheriff, stating what he or she has done in respect to a command from the court, or why he or she has failed to do what was requested. See false return.
2. a report from an individual or corporation as to its earnings, etc., for tax or other governmental purposes.

RETURN, INCOME TAX

a document by which a taxpayer or his representative provides information to the Internal Revenue Service relevant to the determination of the taxpayer's tax liability for a specified period.

AMENDED RETURNa return by which a taxpayer or his or her representative corrects information contained in an earlier return. An amended return may require an additional payment of tax (possibly with interest and/or penalties) or be accompanied by a claim for refund.

DECLARATION OF ESTIMATED TAXa return required of those taxpayers who do not regularly withhold income, as in the case of self-employed taxpayers, who expect that the total amount of their withholdings will not cover their tax liability for the tax year, and whose filing is accompanied by payments of estimated tax.

INFORMATION RETURNany of a number of returns that only communicate information to the Service relevant to tax liability but that

do not compute the actual liability of any taxpayer or accompany the actual payment of tax.

JOINT RETURN a return filed by a husband and wife, setting forth tax information concerning each of them, and computing a joint tax liability.

REVALUATION SURPLUS see unearned surplus [REVALUATION SURPLUS].

REVENUE

income from whatever source derived; that which returns or comes back from an investment.

REVENUE BILLS

bills that levy taxes. Federal revenue bills are required to originate in the House of Representatives. Many states have similar constitutional provisions requiring that such bills originate in a particular house of a legislature, or that the bills shall not be passed in the last five days of the legislative session.

REVENUE RULING

a published decision by the Internal Revenue Service in the Internal Revenue Bulletin applying the federal tax laws to a particular set of facts. Revenue Rulings (as opposed to PRIVATE RULINGS) may be relied upon by taxpayers in determining the tax impact upon them of a similar set of facts.

PRIVATE RULING a determination by the Internal Revenue Service issued to a taxpayer who has asked for a determination as to the tax impact upon such taxpayer of a particular transaction. The determination is binding with respect to that taxpayer only and may not be relied upon by other taxpayers. These private rulings are published with the identifying characteristics of the taxpayer and the transaction deleted.

REVERSAL

as used in opinions, judgments and mandates, the vacating or changing to the contrary the decision of a lower court or other body. Compare overrule; remand.

REVERSE DISCRIMINATION

a term referring to the practice of excluding a classification or race of people who have not been historically discriminated against, usually whites, from positions that are made available exclusively to persons or groups that have traditionally been the subject of discrimination, or who otherwise benefit from affirmative action programs. The term has been applied to the practice of reserving positions for minorities in school admissions programs, corporate promotions, and rehiring of blacks with less job seniority than whites. The contention that affirmative action violates the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, has been the cause of differing opinions by members of the Supreme Court.

REVERSIBLE ERROR

error substantially affecting appellant's legal rights and obligations that, if uncorrected, would result in a miscarriage of justice and that justifies reversing a judgment in the inferior court; synonymous with PREJUDICIAL ERROR. See plain error; harmless error.

EXAMPLE: In his summation to the jury, a prosecutor makes disparaging remarks concerning the defendant Jim's failure to take the stand, thus violating the defendant's constitutional right to remain silent. The defendant objects and the judge tells the jury to disregard the remarks. The jury finds Jim guilty. On appeal, the appellate court finds the prosecutor's remarks so blatant that no amount of instructions by the judge could eliminate the prejudice that was caused. The remarks constitute *reversible error*, and Jim is granted a new trial.

REVERSION

an interest created by operation of law by a conveyance of less than an absolute interest in property, thus leaving in the grantor some present or future right or interest in the property; a FUTURE ESTATE (see estate) created by operation of law to take effect in possession in favor of a lessor or a grantor or his or her heirs, or the heirs of a testator, after the natural termination of a prior particular estate leased, granted or devised. Compare remainder.

REVERTER see possibility of a reverter.

REVEST

returning to the possession of the donor or the former proprietor.

REVIEW

judicial reexamination of the proceedings of a court or other body; a reconsideration by the same court or body of its former decision; also, an appellate court's examination of the record of a lower court or agency's determination that is on appeal to the appellate court.

REVISED STATUTES

statutes that have been altered, reorganized or reenacted. Their enactment is generally regarded as repealing and replacing the former laws.

REVOCABLE

able to be terminated at the maker's discretion. See revocation.

REVOCATION

1. recall of authority conferred; 2. cancellation of an instrument previously made; 3. cancellation of an offer by the offeror, which, if effective, terminates the offeree's power of acceptance.

EXAMPLE: Steel Pipe Company offers to buy used pipe from a supplier at 15 cents a foot. Before the supplier responds, Steel realizes it has offered to buy the wrong type of pipe and *revokes* its offer. Since the supplier has not acted, the revocation is effective.

REVOCAION OF PAROLE [PROBATION] see probation [REVOCAION OF PAROLE; REVOCATION OF PROBATION].

REVOCATION OF WILL

an affirmative act, such as writing "annulled" or "void" across the face of the will, or other marks on the words of the instrument and not just on the margin; or by tearing off the signatures at the end of the will, all of which operate to render the instrument invalid for purposes of probate. Some courts require that the markings must affect the entire will or there is not revocation, while others allow particular names to be eliminated, although attempts to write in a new name will not be effective unless independently signed and witnessed.

REVOKE

1. to recall a power previously conferred; 2. to vacate an instrument previously made; 3. to annul, repeal, rescind or cancel privileges, e.g., parole, probation, driver's license.

EXAMPLE: Eric is involved in numerous accidents and moving violations and accumulates enough points on his driving record for Massachusetts to revoke his driving privileges.

REVOLVING CREDIT

renewable credit line over a set period of time. The term refers generally to credit extended by a banker or merchant for a certain amount that can be paid off periodically.

REV. STAT. see revised statutes.

RFLP see DNA testing [RFLP].

RICO see Racketeer Influenced and Corrupt Organizations Act [RICO].

RIDER

1. an amendment or addition attached to a document usually found as an attachment to an insurance policy identifying changes or increases in coverage; 2. in the legislative process, a provision in a bill that is not germane to the main purpose of the law.

EXAMPLE: The president wants to increase the federal excise tax on gasoline five cents to raise revenues needed to repair the nation's roads and bridges. Knowing that the president is anxious to approve the bill, a senator attaches to it a rider providing for an unrelated measure he was having difficulty getting support for by itself.

RIGGED ORDERS see manipulation [RIGGED ORDERS].

RIGHT see claim of rights; rights.

RIGHTFUL HEIRS see heirs.

RIGHT OF ACTION see cause of action.

RIGHT OF ELECTION

in probate law, the statutory right of a surviving spouse to elect to take either what the deceased spouse gave under the will, or a share of the deceased spouse's estate as set forth by statute. Compare dower.

RIGHT OF FIRST PUBLICATION see copyright.

RIGHT OF PRIVACY see privacy, right of.

RIGHT OF REDEMPTION see redemption.

RIGHT OF REENTRY see reentry.

RIGHT OF WAY

1. in property law, an easement to use another's land for passage; 2. in the context of vehicular traffic, the right of a vehicle or pedestrian to proceed on the road, while others yield.

RIGHT OR WRONG TEST see M'Naghten Rule.

RIGHTS

1. individual liberties in a constitutional sense; 2. proprietary, contractual or legal rights. 3. in the context of securities trading, a negotiable privilege to buy a new issue of stock at a subscription price lower than the market price of outstanding stock. Compare stock option. See also constitutional rights; vested [VESTED RIGHTS].

RIGHT TO CONVEY see covenant [COVENANT OF SEISIN AND RIGHT TO CONVEY].

RIGHT TO COUNSEL

Sixth Amendment guarantee that an accused person shall have effective legal counsel for his or her defense to a criminal charge. Indigent persons are entitled to have an attorney appointed to represent them. See public defender.

RIGHT TO DIE see euthanasia [PASSIVE EUTHANASIA].

RIGHT TO REMAIN SILENT see Miranda rule.

RIGHT TO WORK LAWS see open shop.

RIGHT, WRIT OF see writ of right.

RIGOR MORTIS

(rĭ-gôr môr'-tĭs) Lat.: stiffness of death. Medical terminology depicting the rigidity of the muscles after death.

RIPARIAN RIGHTS

rights that accrue to owners of land on the banks of bodies of water, such as the use of such water, and ownership of soil under the water. The lands to which these natural rights are attached are called in law RIPARIAN LANDS.

RIPE FOR JUDGMENT

the point in a case when everything seems to have been done that ought to be done before entry of a final

adjudication upon the rights of the parties. See also ripeness.

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RIPENESS

doctrine in constitutional law under which courts will not decide cases in advance of the necessity of deciding them, i.e., in advance of their being ripe for decision. Compare justiciable; moot case.

RISK

hazard, danger, peril, exposure to loss, injury, disadvantage or destruction. In tort law, the risk that should be reasonably perceived and avoided defines the common law duty concerning the probability or foreseeability of injury to another. See assigned risk; obvious risk.

RISK ASSUMPTION see assumption of the risk.

RISK CAPITAL

money invested in a business venture for which stock is issued; in security law, a security transaction whereby an investor subjects money to the risks of an enterprise over which he or she exercises no managerial control. If a transaction is so characterized, it is subject to the various securities laws.

RISK, FORESEEABLE see foreseeability [FORESEEABLE RISK].

RISK OF LOSS

1. a phrase used to signify who bears the financial risk of damage or destruction when property is being transferred from a buyer to a seller.

EXAMPLE: In a contract between Dynamic Boat Company and a buyer, the buyer agrees to assume *risk of loss* only when the boat is in his or her possession. Therefore, if anything should happen to the boat after its completion but while it is being transported to the buyer, from the buyer's point of view Dynamic must take responsibility for the damage.

2. In insurance law, the term refers to the contingencies or unknown events that are contemplated by the insured and that are covered by the insurance.

RISK OF NONPERSUASION see burden of proof.

ROBBERY

forcible stealing; the felonious taking of property from the person of another by violence or by putting him in fear.

ARMED ROBBERY robbery aggravated by the fact that it is committed by a defendant armed with a dangerous weapon, whether or not the weapon is used in the course of committing the crime. Compare burglary.

ROBERT'S RULES OF ORDER see parliamentary law.

ROBINSON-PATMAN ACT

section 2(a) of the Clayton Act, the Robinson-Patman Act, also known as the ROBINSON-PATMAN ANTIDISCRIMINATION ACT, prohibits price discrimination between pur-

chasers of commodities of like grade and quality, where the effect of the discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The illegal discrimination may include payment or acceptance of commissions, brokerage fees, or other compensation, payment for services or facilities for processing or sale, furnishing services or facilities for processing or handling, knowingly inducing or receiving discriminatory price, or the discriminatory use of rebates, discounts, advertising service charges, or underselling in particular localities. See antitrust laws.

ROGATORY LETTERS

a formal communication from a court in which an action is pending, to a foreign court, requesting that the testimony of a witness residing in such foreign jurisdiction be taken under the direction of the court, addressed and transmitted to the court making the request.

ROLLOVER see retirement plan.

ROR see release on own recognizance [ROR].

ROUND LOT SHAREHOLDERS

shareholders holding blocks of 100 shares per block. The term also refers to bondholders holding bonds with a \$1,000 par value.

ROYALTY

a share of the product or of the proceeds therefrom, reserved by an owner for permitting another to exploit and use his or her property; the rental paid to the original owner of property, based on a percentage of profit or production. The term is employed with respect to mining leases, conveyances, literary works, inventions and other intellectual productions. Compare commission.

R.S. see revised statutes.

RUBRIC

the title of a statute; a statute regarded as authoritative.

RULE

prescribed guide for action or conduct, regulation or principle; includes commands to lower courts or court officials to do ministerial acts. If a standard or directive by a governmental agency is characterized as a rule, it must be promulgated in accordance with the procedures set down in the Administrative Procedure Act. A rule of a court, such as a federal rule of civil or criminal procedure, is adopted by the court itself and is subject to legislative action.

RULE AGAINST PERPETUITIES

the rule that no contingent interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. The rule against perpetuities is directed against the remoteness of vesting of

estates or interests in property, and against unreasonable restraints of the power of alienation.

RULE IN SHELLEY'S CASE

when in the same conveyance, an estate for life is given to the ancestor with remainder to the ancestor's heirs, then the ancestor takes the fee simple (or fee tail) remainder estate and the heirs take nothing. If, for example, A, fee owner, conveys "*to B for life, then to the heirs of B,*" then B takes both the life estate and the remainder in fee simple. The rule, created in 1324, has been abolished in England and in a majority of American jurisdictions.

RULE IN WILD'S CASE

a rule of construction by which a devise to "B and his children," where B has no children at the time the gift vests in B, was read to mean a gift to B in fee tail, the words "and his children" thus being construed as words of limitation and not words of purchase. The popularity of the fee tail has declined, and most American jurisdictions have repudiated the Rule in Wild's Case, so that such conveyances are construed to be a gift of a life estate to B, with a remainder to his children.

RULE NISI

procedure by which one party by an ex parte application or an order to show cause calls upon another to show cause why the rule set forth in his or her proposed order should not be made final by the court. If no cause is shown, the court orders the rule absolute (final), thereby requiring whatever was sought to be accomplished.

RULE OF AVOIDABLE CONSEQUENCES see mitigation of damages.

RULE OF CAPTURE see capture.

RULE OF LAW see question of law.

RULE OF REASON

in antitrust law, the principle first enunciated by the Supreme Court in 1911 that the law is to be applied only to "unreasonable" restraints of trade. Since then, the rule of reason has evolved into a complex set of factors that may be considered in resolving an antitrust case. The rule of reason has been rejected for certain types of business conduct such as price fixing agreements, which have been found to be illegal per se, that is, likely to harm competition and so lacking in potential benefit that they are illegal in and of themselves. See Sherman Antitrust Act.

RULES OF PROFESSIONAL CONDUCT see Code of Professional Responsibility; Model Rules of Professional Conduct.

RUN WITH THE LAND

a phrase used with respect to covenants in the law of real property to mean that the burdens and/or the benefits of the covenant pass to the persons who succeed to the interests of the original contracting parties. Covenants so characterized bind the owners of the property to which they attach (with which they "run"), no matter who those owners are; such covenants therefore represent an essentially permanent limitation upon the estate held by the owner of the "burdened" property, and an enhancement of the estate held by the owner of the "benefitted" property.

EXAMPLE: Chris divides a large building so that he can sell one-half to another businessman. There is only one alley through which deliveries can be made, but the alley is on Chris's side of the property. In the deed of sale, Chris includes a covenant that allows the other businessman to use the alley. That covenant *runs with the land* so that anyone who buys the store from the other businessman can enforce the covenant against any owner of the other half of the building.

Compare chain of title.

S

SAILOR'S WILL see military will.

SALABLE

merchantable; an item fit for sale in usual course of trade, at usual selling prices. The item salable shall be of ordinary marketable quality, bring the average price, be lawful merchandise, be good and sufficient of its kind, and be free from any remarkable defects.

SALARY, FIXED see fixed salary.

SALE

a contract by which property, real or personal, is transferred from the seller (vendor) to the buyer (vendee) for a fixed price in money, paid or agreed to be paid by the buyer. This is in contrast to BARTER, which is an exchange of goods or services for another's goods or services. See also arm's length.

ABSOLUTE SALE^a a sale whereby the property passes to the buyer upon completion of the agreement between the parties.

AUCTION SALE^a a public sale of goods or real property to the highest bidder, by public outcry and competitive bidding.

CONDITIONAL SALE¹ a sale in which the vendee receives possession and right of use of the goods sold, but transfer of title to the vendee is dependent upon performance of some condition, usually full payment of purchase price. The conditional sale becomes absolute on fulfillment of the condition. ² a purchase accompanied by an agreement to resell upon particular terms. See also SALE ON APPROVAL.

EXECUTED SALEⁱⁿ contrast to an EXECUTORY SALE, one wherein nothing remains to be done by either party to effect delivery and complete transfer of title.

EXECUTION SALE^{see} sheriff's sale.

EXECUTORY SALEⁱⁿ contrast to an EXECUTED SALE, an agreement to sell wherein something remains to be done by either party before delivery and passing of title.

FORCED SALE^a a sale that the seller must make immediately, without opportunity to find a buyer who will pay a sum approaching the reasonable worth of the item (often land). The phrase is synonymous

with JUDICIAL SALE(see sheriff's sale), whereby the court forces the sale of property as a result of a prior adjudication.

EXAMPLE: Bob owes money to several creditors as a result of work they performed on a building he owns. He avoids the creditors, and they obtain a judicial order demanding payment. His continued refusal to pay results in a *forced sale* of the building. The excess of the sale price over the money owed is returned to Bob.

PUBLIC SALE a sale upon notice to the public and in which members of the public may bid.

SALE IN GROSS sale of land by the tract or as a whole, without warranty of quantity (acres); sometimes referred to as a **CONTRACT OF HAZARD**.

SALE BY SAMPLE a sale of goods in existence in bulk, but not present for examination, where it is mutually understood that the goods not exhibited will conform to the sample. Such a sale carries with it an implied warranty that the goods purchased conform to the sample.

SALE ON APPROVAL a transaction in which goods delivered primarily for use may be returned if the buyer is unsatisfied with them, even though they may conform to the contract. If the goods are delivered primarily for resale, rather than for use, the transaction is termed a **SALE OR RETURN**, or the arrangement is termed a **CONSIGNMENT**.

SALE OR EXCHANGE see sale or exchange.

SALE WITH RIGHT OF REDEMPTION sale where seller reserves the right to take back title to property he has sold upon repayment of the purchase price.

SHERIFF'S SALE see sheriff's sale.

TAX SALE a sale of land for the nonpayment of taxes.

SALE AND LEASEBACK

a procedure whereby an owner of property sells it to another party who immediately leases the property back to the original owner. This method is frequently employed for tax purposes or for situations where the original owner needs cash rather than property.

SALE IN INSTALLMENTS see installment sale.

SALE OR EXCHANGE

disposition of property in a value-for-value exchange, as opposed to a disposition by gift, contribution or the like. For income tax purposes, the realization of gain or loss on the disposition of property is based on the sale or exchange of that property.

SALES TAX see tax [SALES TAX].

SALVAGE

generally, the value of property following its destruction or loss. In maritime law, a service rendered to a vessel that removes it from some distress; to be entitled to a salvage award, the distressed vessel must be in impending peril of the sea from which it is rescued by the voluntary efforts of others. In insurance law, the value of the property following a loss, which can be deducted from the amount recovered by the insured. In tax law, the amount, determined at the time of the acquisition, which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's business and is to be retired from service. That amount is then calculated into a taxpayer's permissible depreciation of the asset.

The accelerated cost recovery system does not provide for salvage value. **EQUITABLE SALVAGE** is an equitable right of the last person to preserve a property's value to have priority over others in either that property or its value upon realization, since without that person's actions the property would be worthless.

SALVAGE VALUE see depreciation [**SALVAGE VALUE**].

SAMPLE

that which is taken out of a large quantity as a fair representation of the whole; a part shown as evidence of the quality of the whole. Under the Uniform Commercial Code, any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

SANCTION

1. to approve; 2. to reward or punish; 3. a consequence of punishment for violation of accepted norms of social conduct, which may be of two kinds: those that redress civil injuries (civil sanctions) and those that punish crimes (penal sanctions).

SANE [SANITY]

the state of sound mental condition; all persons are presumed sane until the opposite is demonstrated. All jurisdictions require the defendant in a criminal case to produce some evidence to challenge this presumption. In some jurisdictions, the burden of persuasion is borne by the state; in others, the defendant carries the ultimate burden of proof. The allocation of this burden is apparently within the individual state's rules of procedure and placing the burden on the defendant does not violate the presumption of innocence. Compare insanity.

SANITY HEARING a proceeding authorized by statute for investigating the sanity of a person accused of a felony. Such a hearing is not a trial placing the accused in jeopardy, but is a "collateral inquiry" in the nature of an inquest to determine the competency of a person to stand trial.

SATISFACTION (OF A DEBT)

a release and discharge of the obligation in reference to which performance is executed. See also accord and satisfaction.

SAVE HARMLESS

protect from loss or liability; indemnity; guarantee.

In contract law, signifies a commitment by one party to repay another party to an agreement in the event of a specified loss.

EXAMPLE: A lease provides that the tenant shall *save harmless* the landlord against claims for injuries to persons on the premises. As a result of this clause, the tenant is required to reimburse the landlord in the event such a claim is successfully prosecuted and damages are recovered against the landlord.

SAVING CLAUSE

a clause in a statute restricting the scope of the repeal of prior statutes; language inserted in a statute to maintain existing rights provided in the repealed law. See also grandfather clause.

SAVINGS AND LOAN ASSOCIATION see bank [SAVINGS AND LOAN ASSOCIATION].

SAVINGS BANK see bank [SAVINGS BANK].

SCHOLARSHIPS AND FELLOWSHIPS

tuition or subsistence aid given to an individual for participation in an educational program. In general, a fellowship or scholarship grant at an educational institution is not subject to income taxes. However, it must not constitute compensation for services primarily for the benefit of the grantor of the fellowship or scholarship unless the employment is required in order for the taxpayer to obtain a degree. If the individual receiving the grant is not a candidate for a degree, the grantor must be a tax-exempt educational organization or a governmental unit. The amount excludable in any one year is \$300 multiplied by the number of months for which the recipient received amounts under the scholarship or fellowship grant during the taxable year.

SCIENTER

(*sī'-ĕn-târ*) Lat.: knowledge. Previous knowledge of operative facts; frequently signifies guilty knowledge. As used in pleadings, the term signifies that the alleged crime or tort was done designedly or with guilty knowledge. The term is usually employed in relation to fraud, and means a person's knowledge that he was making false representations, with intent to deceive.

EXAMPLE: A corporation files a registration statement, containing false representations, with the Securities and Exchange Commission so that the corporation may sell stock to the public. Applicable law

holds a party liable if with *scienter* he or she signs a statement that contains false representations. The requirement of *scienter* means that the party must know of the false representations and know that the statement will be used to deceive others into purchasing stock.

See also *mens rea*.

SCINTILLA (OF EVIDENCE)

evidence that is speculative and conjectural and is something less than substantial evidence. If at least a scintilla of evidence is presented, some courts have held that the party against whom the evidence is offered should not be granted a summary judgment.

SCOPE OF AUTHORITY

in the law of agency, those acts proper for the accomplishment of the goal of the agency, including not only the actual authorization conferred upon the agent by his or her principal, but also that which has apparently or impliedly been delegated to the agent. As applied to doctrine of *respondeat superior*, masters are liable civilly for damages occasioned by the torts of their servants and agents committed while acting within the scope of their authority. The proper inquiry is whether the act was done in the course of the agency and by virtue of the authority as agent. See also *apparent authority*.

SCOPE OF EMPLOYMENT

those acts done while performing one's job duties. The phrase was adopted by the courts for the purpose of determining employer's liability for the acts of his or her employees. The master (usually, the employer) is said to be vicariously liable only for those torts of the servant (employee) that are committed within the range of his or her job activities. See *respondeat superior*; *employee's liability acts*.

EXAMPLE: A professional driver employed by Escort Service, Inc., decides to stop home and see his wife while he is driving from one job to another. As he drives to his home, he hits a child playing in the street. Escort will not be responsible for the injury to the child if the driver was not in the *scope of his employment*.

S CORPORATION see corporation [S CORPORATION].

SCRIP DIVIDEND see dividend.

SCRIVENER

1. an old English term referring to a writer or scribe, particularly one who draws legal documents; 2. one who acts as agent for another, investing and managing that other's property for a fee.

SCRUTINY see strict scrutiny.

SCUTAGE

in feudal law, a tax imposed on landholders to help pay for the king's army.

SEAL

in common law, an impression on wax or other substance capable of being impressed. The purpose of a seal is to attest to the execution of an instrument. The word seal or the letters L.S. (LOCUS SIGILLI, place of the seal) have the same significance and are commonly used for the same purpose today.

A seal of a corporation is sometimes called a COMMON SEAL.

SEALED INSTRUMENT

one that is signed and has the seal of the signer attached. To render a contract a sealed instrument, it must be so recited in the body of the instrument and a seal must be placed after the signature. In common law, a sealed contract was a FORMAL CONTRACT (as opposed to a contract without a seal, called a SIMPLE CONTRACT) and is often called a CONTRACT UNDER SEAL; such a contract or a deed under seal did not require consideration. Today any symbol, even the printed word seal or the letters L.S. will, if so intended, constitute the necessary seal. In most states, statutes have eliminated most of the special effects of sealed instruments in common law.

SEALING OF RECORDS

the sealing of criminal records, permitted in some states with respect to youthful offenders, so that such records may be examined only by court order.

SEARCH AND SEIZURE

a police practice whereby a person or place is searched and evidence useful in the investigation and prosecution of crime is seized. The search and seizure is constitutionally limited by the Fourth Amendment and Fourteenth Amendment to the United States Constitution and by provisions in the several state constitutions, statutes and rules of court. See also probable cause; search warrant.

SEARCH, CONSENT FOR see consent search.

SEARCH OF TITLE see title search.

SEARCH WARRANT

an order issued by a judge or magistrate authorizing certain law enforcement officers to conduct a search of specified premises for specified things or persons. In those cases where warrants are required, only a judge or magistrate who has not previously considered the facts giving rise to the application can issue a search warrant, and only upon a showing of probable cause that the described item is located in the designated place and that it was involved in the planning or commission of a crime.

SEASONABLE

timely; in due season or time; the time in which action is appropriate and can be effective. The word *seasonably* has

been used synonymously with *reasonably* to mean in a timely manner. See time is of the essence.

SEASONAL

relating to a specific time of the year. Seasonal employment is the kind of occupation that can be performed only during certain periods of the year, and does not include such occupations that may be carried on throughout the entire year. Compare seasonable.

S.E.C. see Securities and Exchange Commission [S.E.C.].

SECOND AMENDMENT

the provision in the U.S. Constitution that gives each state the right to maintain a "well regulated Militia" and "the people to keep and bear Arms." The debates that led to the adoption of the Second Amendment indicate that its purpose was to prevent federal interference with state militia and the creation of a national army that would destroy local autonomy. The Second Amendment thus does not apply to private conduct, to state action, or to federal gun control laws that do not interfere with state militia.

SECONDARY AFFINITY see affinity [SECONDARY AFFINITY].

SECONDARY BOYCOTT see boycott [SECONDARY BOYCOTT].

SECONDARY DISTRIBUTION

an organized offering of stock that is already issued and outstanding, usually distributed by a syndicate. Typical sources of large blocks of stock for redistribution are founders, insiders and major investors.

SECONDARY LIABILITY see liability [SECONDARY LIABILITY].

SECONDARY PARTY

a person obligated to pay a debt if the person incurring the debt fails to pay the creditor. The parties to whom the creditor may then go for repayment are secondarily liable.

EXAMPLE: Abe receives a check for a debt owed to him. He signs the check and turns it over to a friend to whom he owes money. Abe is *secondarily liable* on the check, so that if the check is dishonored, the friend can look to Abe for payment.

SECOND-DEGREE see murder [SECOND-DEGREE MURDER]; principal [PRINCIPAL IN THE SECOND-DEGREE].

SECOND MORTGAGE

a mortgage without intervening liens between it and the first mortgage; one that does not contemplate a mortgage on a buyer's interest in a land contract.

SECRETS OF TRADE see trade secrets.

SECTION 1231 PROPERTY see capital [&1231 PROPERTY].

SECUNDUM

(*sě-kūn'-dŭm*) Lat.: immediately after; next to.

SECURED CREDITOR

a creditor who holds security that will cover the amount the debtor owes him or her. Among these securities may be mortgages, deeds, bills of sale, liens upon goods, etc. The definition in the Bankruptcy Act is narrower in that it applies only to those creditors who hold security for the debt on property belonging to the bankrupt. See credit, security interest.

SECURED TRANSACTIONS see security interest.

SECURITIES

stock certificates, bonds, or other evidence of a secured indebtedness or of a right created in the holder to participate in profits or assets distribution of a profit-making enterprise; more generally, written assurances for the return or payment of money; instruments giving to their legal holders the right to money or other property. As such, securities have value and are used in regular channels of commerce. The basic purpose of the sale of securities is to raise capital for businesses and government. Historically, securities have been an area of major investment and speculation by banks and individuals. Unbridled trading by unscrupulous speculators that led to inflated securities markets and contributed to the great financial crash of the late 1920s resulted in the passage of the Securities Act of 1933, and the Securities Exchange Act of 1934 (see Securities Acts), both of which strictly regulate the buying and selling of securities. Securities are also regulated by state laws known as Blue Sky laws.

The most common types of securities are:

BLUE CHIP STOCK see blue chip stock.

BOND essentially, a loan agreement representing a debt. In return for the capital given to a corporation or a government entity, the bondholder gets a promise of repayment of principal and interest over time, instead of ownership rights. Since the holder of a bond is a creditor instead of an owner, his or her claims against the assets of a corporation are satisfied first in case of a failure of the business venture. Most bonds are secured by some kind of collateral, so that in case of default, the debt might still be satisfied. Consequently, bonds are generally a lower risk investment. Unsecured bonds are called debentures. Bonds raise money commonly known as DEBT CAPITAL. See bond.

BONUS STOCK see bonus stock.

CAPITAL STOCK see capital [CAPITAL STOCK].

CLASSIFIED STOCK see classified stock.

COMMON STOCK see stock.

CONVERTIBLE SECURITYsee convertible securities.

DEBT CAPITALsee bond (above).

DIVIDENDsee dividend.

EQUITY CAPITALsee stock.

GROWTH STOCKsee growth stock.

GUARANTEED SECURITYsee guaranteed security.

INVESTMENT STOCKsee restricted securities.

JOINT STOCK COMPANYsee company [JOINT STOCK COMPANY].

LETTER STOCKsee restricted securities.

LISTED STOCKsee listed stock.

NONASSESSABLE STOCKsee nonassessable stock.

NONSTOCK CORPORATIONsee nonstock corporation.

NO-PAR [NONPAR] STOCKsee no-par [nonpar] stock.

PREFERRED STOCKsee stock.

PUBLIC SECURITIESthose certificates and other negotiable instruments evidencing the debt of a governmental body.

RESTRICTED SECURITIESsee restricted securities.

STOCKan equity or ownership interest in a corporation, usually created by a contribution to the capital of the corporation. Its unit of measurement is the share, and the owner of one or more shares of stock in a company is entitled to participate in the company's management and profits, and in distribution of assets upon dissolution of the company. Ownership of stock may be evidenced by a written instrument known as a stock certificate. Distribution of profits to stockholders occurs through the payment of dividends. However, for tax purposes, not all corporations pay dividends to their stockholders, but rather reinvest profits in the business, thereby increasing the value of the stock to the investor.

There are two general types of stock. COMMON STOCKis the ordinary stock of the corporation that entitles the owner to pro rata dividends without any priority or preference over any other shareholders or class of shareholders but equally with all other shareholders except preferred stockholders. PREFERRED STOCKis a class of stock entailing certain rights beyond those attached to common stock; corporate stock having preference rights over other kinds of stock in the payment of dividends. It represents a contribution to the capital of the corporation and is in no sense a loan of money. The dividends come out of earnings [income] and not out of capital. Unless there are net earnings there is no right to dividends.

Other rights that may be attendant to preferred stock are limitless; however, whatever rights are given must be clearly noted. It is part of the capital stock of a corporation that enjoys priority over the remaining stock, or common stock, in the distribution of profits and, in the event of dissolution of the corporation, in the distribution of assets as well. The issuance of stock raises money commonly known as EQUITY CAPITAL.

STOCK ISSUEsee issue [STOCK ISSUE].

TREASURY STOCKsee treasury stock.

UNLISTED STOCKsee unlisted security.

WATERED STOCKsee watered stock.

WHEN ISSUED SECURITIESsee when issued securities.

SECURITIES ACT OF 1933 see Securities Acts [SECURITIES ACT OF 1933].

SECURITIES ACTS

popular name of the two primary federal statutes regulating the issuing of and market trading in corporate securities. The Securities Act of 1933 deals primarily with initial distribution of securities by the issuer: its objective is to provide full disclosure of material facts about securities for sale so that investors may be able to make informed investment decisions. The Securities Exchange Act of 1934 is designed to regulate postdistribution trading in securities and provides for the registration and regulation of securities exchanges, as well as for the prohibition of fraud and manipulation in sale or purchase of securities.

SECURITIES AND EXCHANGE COMMISSION [SEC]

the federal agency empowered to regulate and supervise the selling of securities, to prevent unfair practices on security exchanges and over-the-counter markets, and to maintain a fair and orderly market for the investor. See also Administrative Procedure Act; proxy.

SECURITIES EXCHANGE ACT OF 1934 see Securities Acts [SECURITIES EXCHANGE ACT OF 1934].

SECURITIES INVESTOR PROTECTION ACT OF 1970 see Securities Acts [SECURITIES INVESTOR PROTECTION ACT OF 1970].

SECURITIES INVESTOR PROTECTION CORPORATION [SIPC]

a nonprofit corporation supported by its membership of securities brokers and dealers, developed to protect their customers and to promote confidence in the securities markets. In principle, SIPC provides certain amounts of insurance on cash and securities left on deposit in a brokerage account.

SECURITY

protection, safety; the instrument of protection or safety; a person who becomes the surety for another. Generally, instruments for the payment of money, or evidencing title or equity, with or without some collateral obligation, and which are commonly dealt in for the purpose of financing and investment. Also, an investment in some private or public business enterprise. Components of a security are: (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits solely from the efforts of others. See Bankruptcy; Securities Exchange Act of 1934. See generally Securities; Securities Acts.

SECURITY DEPOSIT

money that a tenant deposits with the landlord to assure that the tenant will abide by the lease agreements; a fund from which the landlord may obtain payment for damages caused by the tenant during his or her occupancy.

SECURITY INTEREST

an interest in real property or personal property that secures the payment of an obligation. In common law, security interests are either consensual (by agreement) or arise by operation of law, as in the case of judgment liens and statutory liens.

EXAMPLE: In order to obtain a loan from a bank, Oscar uses a very valuable painting as collateral. The bank has a *security interest* in the painting and can acquire ownership of it if the loan is not repaid.

PURCHASE-MONEY SECURITY INTERESTOne taken or retained by the seller of the collateral to secure all or part of its price.

SEDITION

illegal action that tends to cause the disruption and overthrow of the government.

EXAMPLE: Cathy sabotages a Federal Bureau of Investigation computer that lists the names of all of the most wanted criminals, thus committing a *sedition* act. Liability for such an act extends beyond a mere charge of destroying government property.

See treason. Compare clear and present danger.

SEDITIONOUS LIBEL

in English law a misdemeanor involving the publishing of any words or document, with an intention to promote feelings of ill will or contempt between the classes or towards the government. The law of seditious libel is not severely circumscribed in the United States by the First Amendment to the Constitution. See freedom [FREEDOM OF PRESS]; [FREEDOM OF SPEECH].

SEDUCTION

inducing a chaste, unmarried woman, by means of temptation, deception, acts, flattery or a promise of marriage, to engage in sexual intercourse. Compare rape.

SEGREGATION

setting apart; the separation of some persons or things from others. For instance, a contract may require a party to keep certain funds segregated so that they will be available for payment.

In constitutional law, segregation is the maintenance of separate facilities and institutions for people of different races. The racial segregation that prevailed in this country until the 1950s was based on the theory that separate but equal facilities met the constitutional requirements of the equal protection clause. In the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), segregation resulting from state action was held to be violative of the equal protection clause. After a period of 15 years, the deliberate speed with which all vestiges of public school segregation was to end was rejected in favor of a standard of immediate implementation. See de facto [DE FACTO SEGREGATION].

SEIGNEUR [SEIGNIOR]

(*sē'-nyôr*) generally, Fr.: master, lord; more specifically, the lord of a fee or of a manor.

SEISED

the condition of legally owning realty. The phrase imports legal title as opposed to beneficial ownership.

EXAMPLE: A father owning apartment houses that are fully rented conveys the houses to his son. The son is thus *seised* of the buildings. He has legal title to them, but, because the tenants have leases that allow them to remain in their apartments, he cannot do with the buildings as he pleases until all the leases expire.

SEISIN

in early English property law, the term to describe the interest in land of one who held a freehold estate. The term ownership was not used, since the sovereign (king) was technically owner of all lands in England; a landholder was instead said to be seised of his estate. A voluntary transfer of the holder's interest was accomplished by livery of seisin. Today, seisin is generally considered synonymous with ownership.

SEISIN, COVENANT OF see covenant [COVENANT OF SEISIN AND RIGHT TO CONVEY].

SEIZURE

1. the act of forcibly dispossessing an owner of property, under actual or apparent authority of law; 2. the taking of property into the custody of the court in satisfaction of a judgment, or in consequence of a violation of law. See also search and seizure.

SELECTIVE ALLOCATION see marshaling [MARSHALING ASSETS].

SELECTIVE INCORPORATION

the process by which certain of the guarantees expressed in the Bill of Rights become applicable to

the states through the Fourteenth Amendment. Under the TOTAL INCORPORATION APPROACH, an approach never adopted by a majority of the Supreme Court, all the Bill of Rights and the attendant case law interpreting them, are applied to the states. Under the selective incorporation approach, select guarantees in the Bill of Rights and their related case law are applied to the states.

SELECTIVE SERVICE SYSTEM

the system established under the Selective Service Act by which persons are selected to serve in the armed forces in order to ensure the security of this country. Every male citizen or resident of the United States who is between the ages of 18 and 26 years is required to register for potential selection to serve in the armed forces. The requirement that only men and not women register does not violate the Fifth Amendment. Since women are not eligible for combat duty and the purpose of the registration system is to ensure the availability of combat troops, the statute has been found to bear a reasonable relationship to a legitimate legislative purpose. While males are required to register, none has been drafted into the armed forces since the end of the Vietnam War. See also military law.

SELF-DEALING

type of securities trading in which a party acts upon secret information obtained by his or another's special position in the corporation. It may involve sale or purchase of stock by the director, officers and majority shareholders of a corporation. See also fiduciary; insider.

SELF-DEFENSE

the self-protection of one's person, or preservation of members of one's family, and, to a lesser extent, one's property, from harm by an aggressor, in a way and under circumstances that the law recognizes as justifying the protective measures. It is a valid defense to a criminal charge or to tort liability.

EXAMPLE: Ken is assaulted and in an act of *self-defense* hits the mugger. Even if that blow was strong enough to knock the mugger unconscious, Ken still has a valid defense for his assault against the mugger. If the mugger is unconscious and Ken then hits him with a brick and kills him, Ken would not be able to assert he was acting in selfdefense since the mugger was no longer in a position to harm him. Ken would be liable in that circumstance to prosecution for murder.

SELF-HELP

the right or fact of redressing or preventing wrongs by one's own action, without resort to legal proceedings, but without BREACH OF THE PEACE(see breach).

EXAMPLE: Tim's car is stolen. Two weeks later he sees the car in a downtown auto repair shop. Tim can employ *self-help* and drive the

car away without calling the police to aid him if he so desires. Likewise, if Tim had been behind in his car payments, the creditor could come and take the car to satisfy the debt without legal process so long as there is no breach of the peace.

SELF-INCRIMINATION, PRIVILEGE AGAINST

the constitutional right of a person to refuse to answer questions or otherwise give testimony against himself or herself that will create substantial likelihood of criminal incrimination.

The privilege can be displaced by a grant of USE IMMUNITY, which guarantees that neither the compelled testimony nor any fruits will be used against the witness. Given such immunity, the witness is no longer exposed to the hazard of self-incrimination and thus must respond to questions or provide evidence. Some states still give such witnesses a broader form of immunity known as TRANSACTIONAL IMMUNITY, which protects the witness not merely from use of his or her testimony but from any prosecution relating to transactions about which relevant testimony was elicited. It should be emphasized that the privilege against self-incrimination, like all constitutional rights, may be waived. Miranda warnings are generally necessary before such a waiver will be found to qualify a confession as admissible evidence in a criminal trial.

See Fifth Amendment. Compare contempt of court; immunity.

SELLER

n commercial law, a person who sells or contracts to sell goods; in securities law, entities who conduct is a substantial factor in causing a purchaser to buy a security. Compare merchant.

SELLING SHORT

the selling of securities, commodities or foreign currency that are not actually owned by the seller. In making the short sell, the seller hopes to cover that is, buy back sold items at a higher price and thus earn a profit.

COMMODITY SHORT SALES short sales accomplished in the futures market. A speculator wishing to take advantage of an expected decline in a commodity can sell a large quantity of the commodity for future delivery. Compare margin.

SENILE DEMENTIA

insanity that occurs as the result of old age, progressive in character, and resulting in collapse of mental faculties that, in its final state, deprives one of testamentary capacity because of loss of power to reason or act sanely.

EXAMPLE: Warren had a valid will, but as he neared death, he changed certain provisions. When the will was read subsequent to Warren's death, there was a challenge as to Warren's capacity to change it. After hearing evidence that Warren claimed he spoke to dead people and was

king of a nonexistent country, the court found that he had suffered from *senile dementia*, and therefore disallowed the changes.

See competent; incompetency.

SENTENCE

punishment ordered by a court for a person convicted of a crime, usually either a NONCUSTODIAL SENTENCE such as probation or a fine, or a CUSTODIAL SENTENCE such as a term of imprisonment.

CONCURRENT SENTENCE a sentence that overlaps with another as opposed to a consecutive [cumulative] sentence, which runs by itself, beginning after or ending before the running of another sentence.

CONDITIONAL DISCHARGE SENTENCE see SUSPENDED SENTENCE.

CONSECUTIVE [or CUMULATIVE] SENTENCE a sentence that runs separately from one or more other sentences to be served by the same individual. The sentence is cumulative to the extent that it begins after an existing sentence has terminated either by expiration of the maximum term of the existing sentence, or by release from the present sentence through parole. If the consecutive sentence is a custodial one, the parole will be "to the cell" (called CELL PAROLE), so that the consecutive sentence may be served during the period of the parole.

INDETERMINATE SENTENCE a sentence for the maximum period prescribed by law for the particular offense committed, subject to the provision of the statute that the custodial portion may be terminated sooner by the board of parole any time after the expiration of the minimum period required for parole eligibility.

EXAMPLE: Jim, a youth, is given an *indeterminate sentence* for burglary. Since the maximum sentence for any youth in Jim's state is three years, his punishment will not exceed that length. But, as an indeterminate sentence, the time he actually serves will be determined by the prison authorities based on his adjustment at the prison. He is thereby encouraged to make a positive adjustment.

INTERLOCUTORY SENTENCE 1. a temporary or provisional sentence, pending the imposition of a final sentence; 2. a sentence on a supplementary question derived from the main cause of action.

SPLIT SENTENCE a sentence part of which is served in jail and the remainder of which is served on probation.

SUSPENDED SENTENCE one whose imposition or execution has been withheld by the court on certain terms and conditions. An implied condition is always that the defendant not commit further violation of the law during a fixed period. Where no such period is fixed by the court, the practical effect of the suspended sentence is similar to an

UNCONDITIONAL DISCHARGE sentence, i.e., the matter is terminated without conditions. A CONDITIONAL DISCHARGE is a suspended sentence on particular conditions for a period that is expressly fixed by the court or by statute. See also pretrial intervention.

SEPARABLE CONTROVERSY

within removal statute, a claim or cause of action that is part of the entire controversy yet by its nature can be severed from the whole. For a case to present a separable controversy within the statute providing for removal of causes to the federal court, federal statute provides that whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

SEPARATE BUT EQUAL

a doctrine under which equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities are separate. Although the doctrine has not been per se eliminated from American jurisprudence, its application to most aspects of society has been found to violate the equal protection clause of the Fourteenth Amendment. The violation is not so much directed toward the physical aspects of separate facilities, but rather the intangible harm that results from the segregation that is a by-product of the doctrine. For example, the Supreme Court has found that the mere segregation of minority and white students in public education creates a sense of inferiority that significantly impedes the educational and mental development of minority children.

SEPARATION see divorce [SEPARATION [DIVORCE A MENSA ET THORO]].

SEPARATION AGREEMENT

a written agreement by a husband and wife who are separated or about to separate or divorce; provides for the distribution of marital property and, when applicable, support by one spouse for the other. See divorce [SEPARATION].

SEPARATION OF POWER

the doctrine prohibiting one branch of government, at any level, federal, state or local, from infringing or encroaching upon or exercising the powers belonging to another branch.

SEQUESTER

to separate from; to hold aside.

SEQUESTRATION

1. in equity, the act of seizing property belonging to another and holding it until profits have paid the demand for which the property was taken.

2. In common law, juries (at least in capital cases) were always sequestered, i.e., kept together throughout the trial and jury deliberations, and guarded from improper contact until they were discharged. This common law right to demand jury sequestration has been replaced in most jurisdictions with discretion in the trial court to grant sequestration in the interests of justice.

3. Sequestration of witnesses is frequently ordered by the court at the request of one of the parties to insure that in-court testimony of each witness not be colored by what another witness said.

EXAMPLE: The prosecutor was aware that defense witnesses might alter their versions of the facts if they were permitted to hear the State's witnesses testify. To avoid that problem, he asked for the *sequestration* of all witnesses. The judge agreed and excluded all potential witnesses from the courtroom until they were called to testify.

SERIAL BOND see bond [SERIAL BOND].

SERIATIM

(*sĕr'-ĕ-ă'-tĭm*) Lat.: in due order; in succession; one by one.

SERVANT

one who works for, and is subject to, the control of his master; a person employed to perform services for another and who in the performance of the services is subject to the other's control or right to control.

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business. A master is in many instances liable, under the theory of respondeat superior, for the torts of his servant, but not for those of an independent contractor. Compare agent; contractor [INDEPENDENT CONTRACTOR].

SERVE see service.

SERVICE (OF PROCESS)

delivery of a pleading, notice or other paper in a suit, to the opposite party, to charge that party with receipt of it and subject him or her to its legal effect; communication of the substance of the process to the defendant, either by actual delivery or by other methods, whereby defendant is furnished with reasonable notice of the proceedings against him or her, to afford defendant the opportunity to appear and be heard.

EXAMPLE: Al files a lawsuit against a company, but the company never responds. Before entering a default judgment against the company, the judge demands proof that the company was *served* with notice of the suit. Without such proof, the judge cannot be sure that the company knows there is a suit against it.

PERSONAL SERVICE actual delivery to the party to be served.

SERVICE BY PUBLICATION constructive service accomplished by publishing the notice in a newspaper designated by the court, and in some jurisdictions, by mailing that newspaper to the last-known address of the party.

SUBSTITUTED SERVICE constructive service accomplished by service to a recognized representative or agent of the party to be served.

SERVICES

at common law, the acts done by an English feudal tenant for the benefit of his lord, which formed the consideration for the property granted to him by his lord. Services were of several types, including knight's service, military service, and the more varied kind of certain and determinate service called socage. See also tenure.

SERVIENT ESTATE

in relation to an easement, an estate that is burdened by the **SERVITUDE**, i.e., an estate that is subject to some use by the owner of the dominant estate; also called **SERVIENT TENEMENT**.

SERVITUDE, EQUITABLE see equitable servitude.

SERVITUDES

in constitutional law, a condition of enforced compulsory service of one to another that is prohibited by the U.S. Constitution, Thirteenth Amendment, except as punishment for a convicted criminal; charges or incumbrances that follow the land, and are distinguishable from easements in that easement usually refers to a right enjoyed whereas servitudes refer to a burden imposed.

SESSION LAWS

laws bound in volumes in the order of their enactment by a state legislature, before possible codification.

SET ASIDE

to annul or make void. See also reversal.

SETBACK

legal minimum distance between new construction and an existing structure or the street. Setbacks are regulated by ordinances and building codes.

SETOFF

1. a counterclaim by defendant against plaintiff that grows from an independent cause of action and diminishes the plaintiff's potential recovery; a counterdemand arising out of a transaction different from that on which the plaintiff's cause of action is based. It does not deny the justice of the plaintiff's claim but seeks to balance it in whole or in part by a counterobligation alleged to be due by the plaintiff to the defendant in another transaction.

2. In tax law, setoff allows the amount of refund that a taxpayer could claim to be offset against the amount of deficiency that could be properly assessed; conversely, the amount of deficiency the government could assess can be offset by the amount the taxpayer could properly claim as a refund for the same taxable year.

SETTLEMENT

conclusive resolving of a matter; especially, a compromise achieved by adverse parties in a civil suit before final judgment, whereby they agree between themselves upon their respective rights and obligations, thus eliminating the necessity of judicial resolution of the controversy.

EXAMPLE: A company is accused of discriminatory hiring practices by the Equal Employment Opportunity Commission (EEOC). The Commission will usually file with the company a notice of its accusations and will attempt to reach a *settlement* before looking to the courts. That method generally gives each party more flexibility. In certain instances, a judge may have to approve the settlement.

Compare plea bargaining.

SETTLOR [DONOR; TRUSTOR]

one who creates a trust by giving real or personal property in trust to another (the trustee) for the benefit of a third person (the beneficiary). One who gives such property is said to settle it on, or bring title to rest with, the trustee.

SEVENTH AMENDMENT

the amendment to the U.S. Constitution that guarantees the right to a jury trial in any civil case before a federal court if the amount in controversy exceeds \$20. Each civil litigant in a federal court is entitled to a jury of 6 to 12 persons before a judge capable of instructing them on the law, and a unanimous verdict. However, trial by jury is not automatic; rather a party must specifically request it. A litigant is not entitled to have a jury decide equitable claims. However, when a case includes both legal and equitable causes of action, each litigant is entitled to have the legal issues decided by the jury prior to the resolution of the equitable issues.

SEVER see severance.

SEVERABLE CONTRACT

one that, in the event of a breach by one of the parties, may be justly considered as several independent agreements expressed in a single instrument. Where a contract is deemed severable, a breach thereof may constitute a default of only part of the contract, saving the defaulting party from the necessity of responding in damages for breach of the entire agreement.

A severable contract may in fact be a series of **DIVISIBLE CONTRACTS** so that each part may be supported by a separate consideration and involve separate suits for breach of contract.

SEVERABLE STATUTE

one the remainder of which is still valid when a portion has been declared invalid, because the parts of the statute are not wholly interdependent. If the remaining part of the statute is capable of separate enforcement, the statute is said to be severable. The legislature may express its intent in a **SEVERABILITY CLAUSE** at the end of the act.

EXAMPLE: Congress passes a comprehensive piece of legislation attacking racial discrimination in all areas. If the Supreme Court finds a part of the legislation unconstitutional, the Court will eliminate it. Since the legislation is *severable*, the rest of the provisions remain in force.

SEVERAL

separate. 1. In a note, each who severally promises to pay is responsible separately for the entire amount. 2. In a judgment against more than one defendant, arising out of one action, each may be liable for the entire amount of the judgment, thereby permitting the successful plaintiff to recover the entire amount of the judgment from any defendant against whom he chooses to institute a suit. See contribution; joint and several; joint tortfeasors.

SEVERALTY

refers to the sole holding of property. A tenant in severalty holds land exclusively for the duration of his or her estate without any other person holding joint rights.

SEVERANCE

act of separating; state of being disjoined. 1. a process for selecting a particular charge against the defendant, so that only one charge or only properly joined charges are before the jury in one trial. 2. the disjoinder, for separate trials, of two or more defendants named in the same indictment or information; a useful device where prejudice might arise to one or more of the defendants if they were tried together.

EXAMPLE: Ned is on trial with two other well-known criminals. He feels that the association between him and the others will sway a jury

to convict him regardless of the evidence. Ned asks the trial judge for a *severance* so that he will have a better opportunity for a fair trial.

3. Severance of claims is also available in civil trials to prevent prejudice or for the convenience of the parties. A court may sever the issue of liability from the issue of damages and direct that the question of liability be determined first. Once liability is established the parties may agree upon the damages, avoiding a lengthy trial on that issue.

SEVERE

of an extreme degree, beyond endurance. For example, in determining whether a plaintiff has succeeded in showing severe emotional distress, both the intensity and duration of the emotional distress suffered must be considered in determining whether the distress is of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it.

SEX OFFENDER

person convicted of a sexual offense such as rape (sexual assault), sexual contact, or lewdness. In some states sexual activity between consenting adults of the same sex is classified as criminal. Some states house sex offenders together and offer specialized counseling programs in an effort to successfully treat such offenders and thus prevent recidivism. Many states require lifetime registration of offenders with law enforcement.

SEXUAL ASSAULT see rape [SEXUAL ASSAULT].

SEXUAL CONTACT see rape [SEXUAL ASSAULT].

SEXUAL HARASSMENT see harassment [SEXUAL HARASSMENT].

SHAM PLEADING

one so clearly false that it presents no issue of fact to be determined by a trial. A complaint or answer will be stricken as sham only when it is undisputed that the alleged claim or defense is wholly unsupported by facts.

SHAM TRANSACTION see transaction [SHAM TRANSACTION].

SHARE

a portion of something; an interest in a corporation. See stock; stock certificate.

SHARE AND SHARE ALIKE

in equal shares. The phrase is normally used to describe the division of property among a class of persons on a per capita basis; however, other language in the controlling legal document, such as a will or a trust, may require the property to be divided per stirpes.

SHARE, ELECTIVE see widow's election.

SHAREHOLDER

proprietor of one or more shares of the stock of a corporation. A stockholder possesses the evidence, usually stock certificates, of real ownership of a portion of the property in actual or potential existence held by the company in its name for the common benefit of all the owners of the entire capital stock of the company.

EXAMPLE: Grace feels that a small company named Venta has a great future profit potential. She has some money that she can afford to risk so she becomes a *shareholder* in Venta. By purchasing shares, she becomes a part owner of the company and is entitled to share in dividends and to vote on certain company affairs.

SHAREHOLDERS' DERIVATIVE ACTION see stockholders' derivative action.

SHAREHOLDER'S EQUITY see equity.

SHELLEY'S CASE, RULE IN see Rule in Shelley's Case.

SHELTER see tax shelter.

SHERIFF'S SALE [JUDICIAL SALE]

a sale of property by the sheriff under authority of a court's judgment and writ of execution in order to satisfy an unpaid judgment, mortgage, lien or other debt of the owner (judgment debtor). See sale.

SHERMAN ANTITRUST ACT see antitrust laws.

SHIELD LAWS

in the case of news persons, laws designed to protect a journalist's confidential sources of information and to protect other information, notes and materials from disclosure. In the case of rape victims, laws that limit the questions a defendant may ask about the lifestyle of the victim unless those questions can be shown to be essential for a fair trial. See privileged communication.

SHIFTING INTEREST see interest [SHIFTING INTEREST].

SHIFTING THE BURDEN OF PROOF

transferring to the other party in a litigation the burden that one party has in producing evidence to support his or her claim; requires that the person who originally had the burden make out a prima facie case or defense by some minimum of evidence. See burden of proof.

SHIFTING USE see use. See also interest [EXECUTORY INTEREST].

SHIPMENT CONTRACT see tender [TENDER OF DELIVERY].

SHOP see closed shop; open shop; union shop.

SHORT AGAINST THE BOX see selling short [SHORT AGAINST THE BOX].

SHORT RATE

in insurance law, a term applied to a mutual rescission of insurance by both parties, who then contract for a new policy that is identical with the original except for a shortened term and lower earned premium.

SHORT SELLING see selling short.

SHORT SWING PROFITS see insider [SHORT SWING PROFITS].

SHORT-TERM CAPITAL GAIN see capital gains or losses.

SHORT YEAR see taxable year [SHORT YEAR].

SHOW CAUSE ORDER

an order, made upon the motion of one party, requiring a party to appear and show cause (demonstrate) why a certain thing should be permitted or not permitted. It requires that party to meet the prima facie case made by the applicant's verified complaint or affidavit. An order to show cause is an accelerated method of beginning a litigation by compelling the adverse party to respond in a much shorter period of time than he or she would normally have to respond to a complaint.

EXAMPLE: A group of prisoners petitions a court to allow them greater visitation rights than their present one-visit-a-month allotment. The judge is inclined to agree with them and orders prison officials to *show cause* why greater visitation privileges should not be granted immediately. The officials must then provide at least some rationale for the limit, or the court will order a change, pending a trial on the petition.

Compare restraining order; summons.

SHOW UP

a one-to-one confrontation between a suspect and a witness to a crime. Although the term is frequently used interchangeably with lineup, the two are distinguishable in that lineup refers to a group of persons being shown to a witness.

SICK PAY

refers to compensation an employee receives while away from a job due to illness or injury. In general, when an employee receives payments as reimbursement for medical care or for permanent injury, such payments constitute an exclusion from gross income. If an employee receives wages or payments in lieu of wages under a disability plan provided by the employer, of which payments are made to the employee on account of permanent and total disability, a portion of such payment is not subject to income taxes.

SIDE-BAR

the area of the courtroom that is within the hearing of the judge but out of the hearing of the jury and the witness. When court is in session and the attorneys must discuss with the judge

issues that are not appropriate for the jury to hear, the attorneys and the judge will hold a conference at side-bar. Such side-bar conferences are preserved by the stenographer and appear in the transcript for purposes of appeal.

SIGHT DRAFT

a bill of exchange for the immediate payment of money. See demand note; draft [SIGHT DRAFT].

SIGNATURE

a writing or other mark that is placed upon an instrument for the purpose of authenticating it or giving it legal effect. Statutes define *signature* differently in different contexts, such as in corporate documents, wills, books, etc. For instance, under the Uniform Commercial Code, a signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

SILENT PARTNER

an investor in a business enterprise who either does not take an active role in the management of the business, or whose identity is not revealed to third parties; a principal whose identity is not disclosed by his or her agent. While the identity of a silent partner may or may not be disclosed, the silent partner, nonetheless, participates in the profits or losses of the enterprise. See principal [UNDISCLOSED PRINCIPAL].

SILVER PLATTER DOCTRINE

the doctrine, now discredited, that allowed evidence seized by state officers in an illegal search and seizure to be used against the defendant in a federal criminal trial. It was subsequently declared unconstitutional.

SIMPLE CONTRACT see sealed instrument.

SIMPLE NEGLIGENCE

the failure to exercise ordinary care; to be distinguished from gross negligence. See negligence.

SIMPLE TRUST see trust [SIMPLE TRUST].

SIMPLICITER

simply, directly, summarily.

SIMULTANEOUS DEATH ACT

a uniform state law passed in most states providing for the distribution of property when distribution depends upon the time of death of more than one person and it cannot be determined that the persons died other than simultaneously. In cases governed by the Act, the law presumes each person died before the other, with the effect that one half of the property of each passes to the estate of the other.

SINE DIE

(*sē'-nā dē'-ā*) Lat.: without day, without time. A legislative body adjourns *sine die* when it does not set the next date of assembly.

SINE QUA NON

(*sē'-nā kwä nŏn*) Lat.: without which not. That without which the thing cannot be, i.e., the essence of something. Compare cause.

EXAMPLE: Betty purchases a new refrigerator. She puts the old one on the street to be carted away but does not remove the door or lock it shut. A child is severely injured when he is trapped inside the refrigerator. The *sine qua non* is Betty's failure to do something about the door, which made the refrigerator an attractive nuisance.

SINKING FUND

an accumulation, by a corporation or government body, of money invested to repay a debt.

EXAMPLE: Auniversity borrows money from a bank to build a library. In its appeal to alumni, the school stresses that it wants to develop a *sinking fund* to pay off the loan. It is hoped that the fund will generate enough interest income so that the principal is never touched.

In government bodies, a sinking fund, whose sources are taxes, imposts or duties, is appropriated toward payment of interest on a public loan and for eventual payment of the principal.

S.I.P.C. see Securities Investor Protection Corporation [S.I.P.C.].

SISTERN

(awkward) term for a female member of the United States Supreme Court. Prior to the appointment of female Justices, the reference brethren (brothers) was used.

SITUS

the location or place of a thing. The situs of real property and of tangible personal property is determined by its physical location. The situs of intangible property, such as a debt or note, is more theoretical and may depend upon the location of the debtor, creditor or other variables. This determination frequently becomes one of jurisdiction, that is, whether a particular court has the power to issue an order affecting the rights or interests of the parties in such property, and whether such an order can be enforced.

SIXTH AMENDMENT

the amendment to the U.S. Constitution that entitles the accused in a criminal trial the right to a speedy trial by an impartial jury, to be informed of the charges against him or her, to be confronted with witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, and to have effective assistance of counsel.

Through the process of selective incorporation, each of these rights has been applied to the states under the due process clause of the Fourteenth Amendment. While these rights form the foundation of the accused's right to a fair trial, the accused has been accorded additional rights, such as the right to conduct his or her own defense as necessary to a fair trial under the due process clause.

SKYJACKING see hijacking.

SKY LAWS see blue sky laws; sunshine laws.

S.L.

session or statute laws.

SLANDER

to engage in defamation orally; spoken words that tend to damage another's reputation. If defamatory meaning is apparent on the face of the statement, it is said to be SLANDEROUS PER SE. If the defamatory meaning is not self-evident, but arises only from extrinsic facts, the statement is SLANDEROUS PER QUOD. Compare libel.

SLANDER OF GOODS [TITLE] see bait and switch.

SLIGHT CARE see care [SLIGHT CARE].

SLIGHT NEGLIGENCE see negligence [SLIGHT NEGLIGENCE].

SLIP OPINION see advance sheets.

SMALL CLAIMS COURT

a court of limited jurisdiction, usually able to adjudicate claims of \$500 or less, depending on statute. Proceedings are less formal than in other types of courts and parties usually represent themselves.

SOCAGE

in feudal England, a type of tenure founded upon certain and designated services performed by the vassal for his lord, other than military or knight's service. Where the services were considered honorable it was called FREE SOCAGE and where the services were of a baser nature it was called VILLEIN SOCAGE. By statute, most all tenures by knight-servants were converted into FREE AND COMMON SOCAGE. See also homage.

SOCIAL GUEST see guest [SOCIAL GUEST].

SOCIAL SECURITY

federal legislation known as the Social Security Act, which provides a national program of contributory social insurance and is administered by the Social Security Administration. Employees, employers, and the self-employed pay involuntary contributions during their years of employment in the form of a tax on payroll earnings, known as F.I.C.A. Upon death, disability, or retirement the worker or the worker's family is provided monthly cash benefits. The Act also provides assistance in the form of AID TO FAMILIES WITH DEPENDENT CHILDREN [A.F.D.C.], which provides poor parents with funds for food and shelter for their children and SUPPLEMENTARY SECURITY INCOME [S.S.I.], which provides minimum monthly income to persons who are at a certain retirement age, blind, or disabled and have income below a specified level.

SODOMY

crime against nature, including bestiality, buggery (copulation per anus) and, in many jurisdictions, other acts of unnatural sexual intercourse as defined and proscribed by statute. Sodomy was a common law felony in the United States.

SOLDIER'S WILL see military will.

SOLEMNITY OF CONTRACT

the concept that two persons are free and entitled to make whatever contract or agreement they wish, and that if the requisite formalities are observed and no defenses exist, their contract should be respected and enforced.

SOLE PROPRIETORSHIP

a business or financial venture that is carried on by a single person and that is not a trust or corporation.

SOLICITATION

an offense developed by later common law courts to reach conduct whereby one incited another to commit a felony or certain misdemeanors injurious to public welfare. If the actor agrees to join the other in an offense, conspiracy can be established. Compare aid and abet; pander.

SOLICITOR see barrister.

SOLICITOR GENERAL

person appointed by the President to assist the Attorney General in performing his or her duties. The Solicitor General may attend to the interests of the United States in any court, and except when otherwise authorized, only the Solicitor General or the Attorney General shall conduct and argue suits and appeals in the Supreme Court and suits, in which the United States is interested, in the court of claims.

SOLVENCY

1. ability to pay all debts and just claims as they come due; 2. term to signify that property is adequate to satisfy one's obligations when sold under execution. 3. In certain contexts, solvency is an excess of assets over liabilities.

SOUND

good physical condition; free from defects. See sane.

SOUND AND DISPOSING MIND AND MEMORY language often used in a will as a declaration by the testator that he or she had testamentary capacity when he or she executed the will.

SOUND BODY free from disease or infirmity.

SOUND MIND able to know and understand the nature of one's acts; synonymous with testamentary capacity.

SOUNDS IN has a connection with. Thus, though a party to a lawsuit has pleaded damages in tort, it may be said that the action nevertheless *sounds in* contract if the elements of the offense charged appear to constitute a contract, rather than a tort, action.

SOVEREIGN

that which is preeminent among all others; the King; the State.

EXAMPLE: A state wants to build a highway that requires the use of private property. Negotiations with the property owners fail to persuade them to sell to the state. The state can then use its *sovereign* power of eminent domain over all property within the state to take private property and put it to public use upon payment of just compensation.

SOVEREIGN IMMUNITY

immunity precluding suit against the sovereign (government) without the sovereign's consent when the sovereign is engaged in a government function. Compare Federal Tort Claims Act.

SPACE ARBITRAGE see arbitration [SPACE ARBITRAGE].

SPECIAL APPEARANCE see appearance [SPECIAL APPEARANCE].

SPECIAL ASSUMPSIT see assumpsit [SPECIAL ASSUMPSIT].

SPECIAL CONTRACT see sealed instrument; specialty.

SPECIAL COURT-MARTIAL see court-martial; military law [COURT-MARTIAL].

SPECIAL DAMAGES see damages [CONSEQUENTIAL DAMAGES].

SPECIAL DEMURRER see demurrer [SPECIAL DEMURRER].

SPECIAL INDORSEMENT see indorsement [SPECIAL INDORSEMENT].

SPECIAL JURISDICTION see limited jurisdiction.

SPECIAL LEGISLATION

acts of the legislature for the benefit of a certain individual or group, as opposed to general legislation enacted for the general population. Special laws may be constitutional if there is a rational basis for limiting application of the statute to the special group, such as small municipalities.

EXAMPLE: A state legislature passes a law requiring all municipalities to provide sewage systems. Because of the peculiarities of the soil in one municipality, *special legislation* is passed postponing the requirements until appropriate technology can be developed.

SPECIAL MASTER see master [master in chancery; special master].

SPECIAL POWER OF APPOINTMENT see power of appointment [SPECIAL POWER].

SPECIAL PROSECUTOR see prosecutor [SPECIAL PROSECUTOR].

SPECIAL TRAVERSE see traverse [SPECIAL TRAVERSE].

SPECIALTY

common law category of formal contracts that were valid without consideration. It is synonymous with SPECIAL CONTRACT. The usual form of the formal contract that was called a *specialty* was an instrument under seal. Other examples include recognizances, negotiable instruments and documents, and letters of credit. See sealed instrument.

SPECIE

money with intrinsic value, e.g., gold and silver coins.

SPECIFIC BEQUEST see bequest [SPECIFIC BEQUEST].

SPECIFIC DENIAL see denial [SPECIFIC DENIAL].

SPECIFIC INTENT see intent [SPECIFIC INTENT].

SPECIFIC MENS REA see mens rea [SPECIFIC MENS REA].

SPECIFIC PERFORMANCE

an equitable remedy available to an aggrieved party when remedy at law is inadequate. A decree of specific performance requires the party guilty of BREACH OF CONTRACT (see breach) to complete performance of his or her obligations under the contract on pain of punishment for contempt. Money damages, in contrast, are enforceable only by a judgment against property. Specific performance is available only where the subject matter of the contract is unique such as a particular parcel of real property or a rare painting, or in other unusual circumstances.

SPECIFIC RELIEF see specific performance.

SPECULATION

purchase of property with the expectation of obtaining a quick profit as a result of price change.

SPEECH, FREEDOM OF see freedom [FREEDOM OF SPEECH].

SPEECH OR DEBATE CLAUSE

constitutional provision that protects members of Congress from prosecution "for any speech or debate in either House." The clause was designed to assure Congress wide freedom of speech, debate, and deliberation without intimidation or threats from any other branch of government, and to protect members of Congress against prosecutions that directly impinge upon or threaten the legislative process.

SPEED see controlled substances.

SPEED, DELIBERATE see deliberate speed.

SPEEDY TRIAL

constitutional guarantee that anyone accused of a crime is entitled to a trial conducted according to prevailing rules,

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regulations and proceedings of law, free from arbitrary, vexatious or oppressive delays.

SPENDING POWER

in the U.S. Constitution the power of Congress to spend money in order to provide for the general welfare of the United States. At least since 1936, this power has been recognized not only to apply to purposes other than those specifically enumerated in Article I of the Constitution, but to include purposes such as Social Security, desegregation, and environmental control.

SPENDTHRIFT TRUST

a trust to provide a fund for maintenance of a beneficiary that is so restricted that it is secure against the beneficiary's improvidence, and beyond the reach of his creditors.

EXAMPLE: Nathan is well-known for his ability to spend large sums of money quickly and foolishly. Fearful that his habits may one day leave him without enough to live on, his mother creates a *spendthrift trust* with Nathan as beneficiary. The trust is restricted so that he receives only income and cannot invade the principal except with special permission.

SPLIT SENTENCE see probation [SPLIT SENTENCE].

SPLITTING A CAUSE OF ACTION

impermissible practice of bringing an action for only part of the cause of action in one suit, and initiating another suit for another part. Under the policy against splitting of causes of action, the law mandates that all damages accruing to one as a result of a single wrongful act be claimed in one action or not at all.

EXAMPLE: Matt develops a new product and obtains a patent for it. Two months later, one of Matt's assistants goes to work for a company that introduces the exact same product. Matt sues the company but *splits his cause of action* by filing one suit for copyright infringement and another for profits derived from the sale of his product. The court does not permit this and forces Matt to combine both suits at the same time in one action.

Compare multiplicity of suits; joinder; misjoinder.

SPOT ZONING see zoning [SPOT ZONING].

SPOUSAL DISQUALIFICATION

common law rule that disqualified the husband or wife from testifying either for or against the spouse in any civil or criminal case. Today, statutes generally consider a husband or wife fully competent to testify either for or against a spouse, subject to the limitations of the marital communications privilege. The witness-spouse alone has a privilege to

refuse to testify adversely. The witness may be neither compelled to testify nor foreclosed from testifying.

SPRINGING INTEREST see interest.

SPRINGING USE see use. See also interest [EXECUTORY INTEREST].

SQUEEZE-OUT

in corporate law, any transaction engaged in by the parties in control of a corporation for the purpose of eliminating minority shareholders. The use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or to reduce to relative insignificance their voting power or claims on corporate assets. Furthermore, it implies a purpose to force upon the minority shareholder a change that is not incident to any other business goal of the corporation. Although the form of such freeze-out transaction may vary and is not confined to merger or consolidation, the policy considerations are generally the same.

S.S.I. see social security [SUPPLEMENTARY SECURITY INCOME].

S.S.N.

social security number. See social security.

STAKEHOLDER

a third party chosen by two or more persons to keep in deposit property whose title is in dispute, and to deliver the property to the one who establishes his right to it.

STALKING

persistent, distressing, or threatening behavior consisting of at least two elements: the actor must repeatedly follow the victim and must engage in conduct that annoys or alarms the victim and serves no legitimate purpose. Constitutionally protected activities such as picketing are not intended to be covered by such statutes. Compare the charge of harassment, which is generally considered less serious than stalking.

STANDARD DEDUCTIONS see deductions [STANDARD DEDUCTIONS].

STANDARD OF CARE

the uniform standard of behavior upon which the theory of negligence is based. The standard of care requires the actor to do what the "reasonable person of ordinary prudence" would do in the actor's place. If the actor's conduct falls below the standard that a reasonable person would conform to under like circumstances, the actor may be liable for injuries or damages resulting from his or her conduct.

STANDING

the legal right to challenge in a judicial forum the conduct of another. In the federal system, litigants must satisfy constitutional standing requirements in order to create a legitimate case or

controversy within the meaning of Article III of the Constitution. In construing this language, courts have held that the gist of the question of standing is whether the party seeking relief has alleged a personal stake in the outcome of the controversy so as to insure that real, rather than remote or possible, adverseness exists to sharpen the presentation of issues.

EXAMPLE: Payne, a resident of one state, files a suit claiming that another state prevents its own citizens from voting. Since Payne is not affected by the fact that citizens of another state may not be getting the opportunity to vote, he has no *standing* to bring this challenge. There are procedures whereby a court has the discretionary power to allow Payne to participate in a suit if someone files it who does have standing. Payne might also have standing in the suit first referred to if the challenged state action adversely impacts on a national election that affects Payne.

STANDING MUTE

in a criminal trial, refusing to plead; today equivalent to a plea of not guilty. Compare self-incrimination, privilege against.

STANDING ORDER see order [STANDING ORDER].

STAR CHAMBER

an ancient court of England that received its name because the ceiling was covered with stars. It sat with no jury and could administer any penalty but death. The Star Chamber was abolished when its jurisdiction was expanded to such an extent that it became too onerous for the people of England. The abuses of the Star Chamber were a principal reason for the incorporation in the federal constitution of the privilege against self-incrimination.

STARE DECISIS

(stā'-rā dē-sī'-sīs) Lat.: to stand by that which was decided. Rule by which common law courts are reluctant to interfere with principles announced in former decisions and therefore rely upon judicial precedent as a compelling guide to decision of cases raising issues similar to those in previous cases.

EXAMPLE: A state supreme court rules that a person's privacy interests demand court protection of telephone toll records from police investigations. Several years later, the issue is brought back to the court. The prosecutor claims that other states allow the records to be used without interference in privacy and that other privacy protections can be employed if necessary. Even if some new members of the court agree with the prosecutor, the court most likely will apply *stare decisis* and abide by the previous decision.

STATE ACTION

generally, term used to describe claims arising under the due process clause of the Fourteenth Amendment and

the Civil Rights Act for which a private party is seeking damages or other proper remedy because the state has violated that party's civil rights. See color of law.

STATEMENT

a declaration of fact; an allegation by a witness. See also prior inconsistent statement; registration statement.

CLOSING STATEMENT in litigation, a summation made by the attorney, at the end of the case, which sets forth that client's case. In real estate law, a document prepared in the closing of a sale of real estate that summarizes the transaction and sets forth its financial terms.

OPENING STATEMENT in litigation, a statement made by the attorney for each party after the jury has been selected and before any evidence has been presented. A defendant may reserve an opening statement until after the conclusion of the plaintiff's case. An opening statement outlines for the jury the evidence that each party intends to present and informs the jury of the party's theory of the case.

STATE OR MUNICIPAL BONDS

state or municipal bonds are debt instruments issued by state or local governments. The interest paid or accrued on such bonds is generally an exclusion from gross income, and thus not subject to income tax.

STATE REMEDIES see exhaustion of remedies [EXHAUSTION OF STATE REMEDIES].

STATU QUO see in statu quo.

STATUS CRIME

an offense where there is no wrongful deed that would render the actor criminally liable if combined with mens rea. The imposition of any punishment for such an offense violates the cruel and unusual punishment prohibition of the Eighth Amendment. For example, although one may be convicted for the use of drugs one may not be convicted for the mere status of addiction to drugs. See also vagrancy.

STATUS QUO

(stă'-tūs kwō) Lat.: the positions or conditions that exist.

STATUS QUO ANTE the situation that existed at the inception of a contract.

See injunction; rescission; restraining order.

STATUTE

an act of the legislature, adopted under its constitutional authority, by prescribed means and in certain form, so that it becomes the law governing conduct within its scope. Statutes are enacted to prescribe conduct, define crimes, create inferior government bodies, appropriate public monies, and in general to promote

the public welfare. Compare common law; judge-made law; ordinance; police power.

STATUTE OF DESCENT AND DISTRIBUTION see descent and distribution [STATUTE OF DESCENT AND DISTRIBUTION].

STATUTE OF FRAUDS

statutory requirement that certain kinds of contracts be in writing to be enforceable. Contracts to answer to a creditor for the debt of another, contracts made in consideration of marriage, contracts for the sale of land or affecting any interest in land and contracts not to be performed within one year from their making normally must be evidenced by a written memorandum and be signed by the party sought to be bound by the contract.

STATUTE OF LIMITATIONS

any law that fixes the time within which parties must take judicial action to enforce rights or else be thereafter barred from enforcing them. Equity proceedings are governed by an independent doctrine called laches.

The enactment of such laws and invocation of the doctrine of laches to bar suits in equity derives from the belief that there is a point beyond which a prospective defendant should no longer worry about a future possibility of an action against him or her, that the law disfavors "stale evidence," and that no one should be able to "sit on his (her) rights" for an unreasonable time without forfeiting claims.

STATUTE OF QUIA EMPTORES see Quia Emportes, Statute of.

STATUTE OF USES

an English statute, enacted in 1536, to prevent separation of legal and EQUITABLE ESTATES(see estate) in land, a separation that arose whenever a use was created at common law. The purpose was to unite all legal and equitable estates in the beneficiary (the holder of the equitable estate) and to strip the trustee (the holder of the legal title) of all interest.

STATUTE OF WILLS

an early English statute prescribing conditions necessary for valid disposition through a will. Today the term is used broadly to refer to the statutory provisions of a particular jurisdiction relating to requirements for valid testamentary dispositions.

STATUTE, TITLE OF A see title [TITLE (OF A STATUTE)].

STATUTORY ARSON see arson [STATUTORY ARSON].

STATUTORY CONSTRUCTION

the process by which one determines the meaning of statutes by drawing conclusions with respect to matters that lie beyond the direct expression of the text from elements known and given in the text. The meaning of a law may be ascertained from examining extraneous connected circumstances, laws, writings

or legislative history bearing on the same or connected matter, and seeking therefrom the probable aim and purpose of the statute.

STATUTORY EXCEPTIONS see exceptions [STATUTORY EXCEPTIONS].

STATUTORY OFFENSE see regulatory offense.

STATUTORY RAPE see rape.

STAY

a halt in a judicial proceeding where, by its order, the court will not take further action until the occurrence of some event.

STAY OF EXECUTION process whereby a judgment is precluded from being executed for a specific period.

EXAMPLE: An apartment dweller is found in default under his lease. He seeks a *stay of execution* of the eviction order until he can make new living arrangements. A stay may be granted, but not for an excessively long time.

STEP TRANSACTION see transaction [STEP TRANSACTION].

STEP-UP BASIS see basis [STEP-UP BASIS].

STIMULANTS see controlled substances [STIMULANTS].

STIPULATION

an agreement or concession made by parties in a judicial proceeding or by their attorneys, relating to a matter before the court.

EXAMPLE: Two parties in a contractual dispute agree as to most of the facts except those occurring immediately prior to the breach of contract. To avoid unnecessary delays in proving facts that the parties agree on, they enter a *stipulation* with the court as to those facts. If one of those facts is actually a legal conclusion based on the facts, the court will not accept that part of the stipulation.

STIRPES see per stirpes.

STOCK

1. a merchant's inventory; 2. the capital of a corporation, consisting of proceeds from the sale of shares and evidenced by the total number of shares issued; 3. the number of shares owned by an individual shareholder and the proportionate equity interest in the corporation represented thereby. See also securities.

BONUS STOCK see bonus stock.

COMMON STOCK see common stock.

PREFERRED STOCK see preferred stock.

NO-PAR STOCK see par.

STOCKBROKER see broker or registered representative.

STOCK CERTIFICATE

written instrument evidencing a share in the ownership of a corporation.

STOCK CLEARING

a so-called "back office" function in the securities trade that involves physical delivery of securities and money payments between buyers and sellers. Members of the New York Stock Exchange and the American Stock Exchange have established an efficient, automated stock clearing organization that, through its various subsidiaries, provides depository, delivery, and computerized bookkeeping entries that have greatly reduced the physical movement of stock and money between member firms. Various subsidiaries involved are the Securities Industry Automation Corporation [SIAC], the Depositor Trust Company, [DTC], the Central Certificate Service, and Stock Clearing Corporation.

STOCK CORPORATION see nonstock corporation.

STOCK DIVIDEND see dividend.

STOCK EXCHANGE

a place where the business of buying and selling securities is transacted.

STOCKHOLDER see shareholder.

STOCKHOLDERS' DERIVATIVE ACTION

a suit by the corporation in which the grievance to be redressed has been suffered primarily by the corporation, conducted by the shareholders as the corporation's representative. The shareholder is only a nominal plaintiff, and the corporation is the real party in interest. Where the corporation itself fails or refuses to act after a demand that it do so by the shareholders, their ultimate interest in the corporation is sufficient to warrant the prosecution of an action on behalf of the corporation that will ultimately recover for the corporation the rights or property of which it has been deprived by the wrongdoer.

Such suits are the only civil remedy a stockholder has for breach of a fiduciary duty by those entrusted with the management of their corporation.

EXAMPLE: The shareholders of a corporation believe that the corporation is not pressing a debt owed to it by another company. The shareholders bring a *stockholders' derivative action* to force the officers to take steps against the other company to secure payment of the debt.

STOCK ISSUE see issue [STOCK ISSUE].

STOCK MARKET

an organized market, such as a stock exchange or an over-the-counter market, where stocks and bonds are actively traded.

STOCK OPTION

the granting to an individual of the right to purchase a corporate stock at some future date at a price specified at the time the option is given rather than at the time the stock is obtained. The option may be purchased or sold, as in a CALL OPTION, or may be granted to an individual by the company as is an EMPLOYEE STOCK OPTION. The option will always involve a specified number of shares, state a time period within which it may be exercised and state a price to be paid upon exercise. A PUT OPTION is the reverse of a call option in that the holder has a right to compel the seller of the option to purchase his shares at a fixed price during a set time period for a predetermined price per share.

EXAMPLE: Art acquires the right to buy x number of shares of corporate stock in two months at \$20 a share. The price of the *stock option* depends on the price of the stock at the time the option is purchased. Art hopes that the stock will be worth over \$20 in two months. If it is worth \$25 at that time, he may decide to exercise his option to purchase at \$20 and then choose to sell the stock immediately at a profit for its market value of \$25. If it is worth less than \$20 in two months, however, Art will probably not exercise his option and will only lose whatever he paid for the option. At any time before expiration, Art can sell the option for its then market value.

STOCK RIGHTS see subscription rights.

STOCK SPLIT

a dividing up of the outstanding shares of the corporation into a greater number of units without disturbing the stockholder's original proportional participating interest in the corporation. Stock split involves no change in the capital account, while a stock dividend involves a transfer of accumulated earnings to the capital account. In the event of a corporate *stock split*, no change is made in any corporate accounts, and although more shares are issued to present holders by reducing par (or stated) value, there is no distribution in any sense.

STOLEN PROPERTY see receiving stolen property.

STOP AND FRISK

in reference to police conduct on the street, a limited search for weapons confined to outer clothing.

EXAMPLE: A policeman observes two men walk in front of a jewelry store several times and discuss what they see after each trip. The policeman is permitted to *stop* the men and question them until the purpose of their activity is sufficiently explained. He can *frisk* them if he sees a bulge that appears to be a weapon or if he otherwise has a reasonable belief that one of them possesses a weapon. To do any-

thing beyond this "stop and frisk" requires a more concrete belief that the pair will commit or have committed a crime.

Compare search and seizure.

STRADDLE

in the securities trade, refers to an option position in which a holder has both a put (contract to sell) and a call (contract to buy) on the same stock or commodity at the same or nearly the same exercise price. Profit is gained if the optioned stock has a large price movement in either direction. If the price remains stable, a loss results. Thus, straddles are of interest when the underlying stock or commodity is very volatile, but the direction of the next move is uncertain. See also hedging.

STRAIGHT-LINE METHOD see depreciation.

STRAW MAN

1. a colloquial expression designating arguments in briefs or opinions created solely for the purpose of refuting them. Such arguments are like straw men because they are, by nature, insubstantial.
2. In commercial and property contexts, the term may be used when a transfer is made to a third party, the straw man, simply to retransfer to the transferrer or to transfer to another in order to accomplish some purpose not otherwise permitted.

STREET NAME

refers to securities held in the name of a broker or the broker's nominee instead of the name of the owner. This is required when securities are purchased on margin. Many cash buyers leave their securities with their broker, who normally holds them in street name, although arrangements can be made to hold the securities as custodian in the customer's name.

STRICT CONSTRUCTION

1. adherence to the literal meaning of the words in statutes or contracts; 2. an interpretation that confines a statute or instrument to subjects or applications obviously within its terms or purposes.

STRICT LIABILITY

in tort and criminal law, liability without a showing of fault, or the need to show fault. See ultrahazardous activity.

EXAMPLE: Adrienne harbors wild animals on her estate. A child accidentally enters the estate and is harmed by one of these animals. Adrienne will usually be held *strictly liable* for the injury regardless of the fact that the child did not belong there or that the child scared the animal. Society imposes that cost on Adrienne merely for keeping the animals.

STRICT SCRUTINY

a test to determine the constitutional validity of a statute that creates a category of persons, including classifica-

tions based upon nationality or race. Under this test, if a grouping scheme affects fundamental rights such as the right to vote it requires a showing that the classification is necessary to, and the least intrusive means of achieving, a compelling state interest.

STRIKE

a concerted action or combination effort by a group designed to exert pressure on an individual or entity to accede to certain demands. For instance, the mass refusal to work overtime by a group of employees constitutes a strike. The right to strike by employees is generally governed by the National Labor Relations Act. However, the use of the term *strike* is not limited to the labor context. For instance, the refusal of a group of tenants to pay rent until the landlord makes improvements in the rented property is commonly referred to as a RENT STRIKE. See no strike clause.

STRIKE SUIT

a suit brought primarily for its nuisance value by a small shareholder whose interest in the corporation is insignificant. Knowing that the cost of defending such a suit is high, the shareholder sues hoping for a private settlement. These suits are also called BLACKMAIL SUITS and HOLDUP SUITS. Compare stockholders' derivative action.

SUA SPONTE

(*sū'-á spŏn'-tā*) Lat.: of itself or of one's self.

Without being prompted; refers especially to a court's acting of its own volition (on its own motion), without a motion being made by either of the adverse parties.

EXAMPLE: A party files a lawsuit and the opponent replies, so that both parties are prepared to litigate the issue. If the judge realizes for some reason that he has no jurisdiction over the case, he will on his own initiative dismiss the case. His action is taken *sua sponte*.

SUBCHAPTER S CORPORATION see corporation [SUBCHAPTER S].

SUBCONTRACTOR

one to whom a principal (general) contractor or other subcontractor sublets part or all of a contract.

SUBDIVISION

any reduction in size of a parcel or tract of land by division into two or more smaller parcels. See zoning.

SUBINFEUDATION

the process that developed under feudal law whereby the grantee of an estate in land from his lord granted a smaller estate in the same land to another. In 1066, William the Conqueror claimed all the land of England for the crown. Subsequently, he granted land to barons for their use in exchange for services, but retained ultimate ownership, this grant process being called infeudation. Such barons held land in capite. Subinfeudation

was the process by which barons further divided the land by making grants to knights in return for knight services, and the term also includes all subsequent grants and subdivisions by knights and their grantees. Owners under subinfeudation held land "in service" to their grantor and owed nothing directly to the king.

Subinfeudation was made illegal by the statute of Quia Emptores and was replaced by the modern concept of alienation. See also servitudes.

SUBJACENT SUPPORT

the support of the surface by the underlying strata of the earth. Compare lateral support.

SUBJECT MATTER

the thing in dispute; the nature of the cause of action; the real issue of fact or law presented for trial; also, the object of a contract.

SUBJECT MATTER JURISDICTION see jurisdiction.

SUBJECT TO MORTGAGE see mortgage [SUBJECT TO MORTGAGE].

SUBJECT TO OPEN

describes the future interests of a class of persons in real property or a trust when the number of persons who could comprise the class may increase or decrease. For example, A, fee owner, conveys to B for life, remainder to B's children. At the time of the grant, B has a child C. C has a vested remainder subject to open to let in later born children. Thereafter, children D and E are born to B and upon their births the remainder opens and vests in C, D, and E as cotenants. The term is also known as SUBJECT TO PARTIAL DEFEASANCE.

SUB JUDICE

(*sūb jū'-dī-sā*) Lat.: under a court. Before a court or judge for consideration.

EXAMPLE: Two attorneys are arguing their respective positions before a judge. One attempts to prove his point by using related examples. The other, seeking to weaken his opponent's tactic, reminds the judge that the facts of the case *sub judice* are sufficiently different from the examples to warrant a different outcome.

SUBLEASE

a transaction whereby a tenant (one who has leased premises from the owner, or landlord) grants to another an interest less than his or her own in the leased premises. Compare assignment [ASSIGNMENT OF A LEASE].

EXAMPLE: Mary has two years remaining on her rental agreement when she marries her boyfriend and moves into his apartment. Except in rare circumstances, Mary will be able to *sublease* her apartment to someone else. But unless the landlord makes a different arrangement, Mary is still responsible for seeing that rent is paid each month.

SUBLET

to make a sublease.

SUBMIT

to yield to the will of another. In mediation procedures, committing to discretion of another or presenting for determination.

SUB MODO

(sūb mō'-dō) Lat.: under a qualification. Subject to a condition.

SUB NOMINE

(sūb nō'-mē-nā) Lat.: under the name; often abbreviated *sub nom*. Indicates that the title of a case has been altered after the beginning of the proceedings.

SUBORDINATION

establishment of priority of one claim or debt over another. A **SUBORDINATION AGREEMENT** is one in which a creditor agrees in a contract that claims of other creditors must be fully paid before there is any payment to the subordinated creditor.

EXAMPLE: A company wants to borrow money from a lender, but it runs into difficulty because of two outstanding debts, both of which are owed to company directors. In order to obtain the money, the directors sign a *subordination agreement*, which provides that the lender will be fully repaid before the directors receive any money toward their loans.

In real estate law, subordination refers to the establishment of priority between different existing interests, claims, liens and encumbrances on the same parcel of land.

SUBORNATION OF PERJURY

a crime consisting of encouraging and persuading another to make a false oath. See also false swearing.

SUBPOENA

(sū-pē'-nā) Lat.: under penalty. A writ issued under authority of a court to compel the appearance of a witness at a judicial proceeding; disobedience may be punishable as contempt of court.

SUBPOENA AD TESTIFICANDUM (*äd tēs-tī-ft-kän'-dūm*) subpoena to testify. Technical name for the ordinary subpoena.

SUBPOENA DUCES TECUM (*dū'-chēs tā'-kūm*) under penalty you shall bring it with you. Type of subpoena issued by a court at the request of one of the parties to a suit. A witness having under his or her control documents relevant to the controversy is enjoined to bring such items to court during the trial or at the deposition.

EXAMPLE: Several years ago, Martin was a marketing consultant to a large firm. The firm is being sued by a company that claims the firm gave it false information. Martin is not personally being sued, but he is issued a *subpoena duces tecum* to testify at the trial and bring with him any papers relevant to the firm's relationship with the company.

SUBROGATION

the substitution of another person, the subrogee, in the place of the creditor, to whose rights to the debt the other person succeeds.

Subrogation typically arises when an insurance company pays its insured under the provisions of an insurance policy; in that event the company is subrogated to the cause of action of its insured against the one responsible for the damage for which the insurance company has paid.

EXAMPLE: While making a delivery, a home fuel oil company negligently performs its task and a home burns down as a result. If the home is protected by fire insurance, the insurance company will pay for the damages. The homeowner's claim against the oil company is then *subrogated* to the insurance company.

SUBROGEE

one who, by subrogation, succeeds to the legal rights or claims of another.

SUBROGOR

one whose legal rights or claims are acquired by another through subrogation.

SUB ROSA

literally "under the rose"; secretly, covertly, privately.

SUBSCRIBER

a person who has agreed to take and pay for the original unissued shares of a corporation.

SUBSCRIPTION RIGHTS

the contractual right of an existing shareholder to purchase additional shares of stock of the same kind as that already held when and if new shares are issued by a corporation. Also called STOCK RIGHTS. Compare stock option; warrant [STOCK WARRANT].

SUBSEQUENT CONDITION see condition subsequent.

SUBSIDIARY

an inferior portion or capacity; usually describes a relationship between corporations.

SUBSIDIARY CORPORATION one in which another corporation owns a majority of shares and thus has control. It has all normal elements of a corporation (charter, bylaws, directors), but its stock is controlled by another corporation known as the PARENT CORPORATION.

SUB SILENTIO

(sūb sĭ-lĕn'-shē-ō) Lat.: under silence; silently. When a later opinion reaches a result contrary to what would appear to be controlling authority, the later case, by necessary implication, overrules *sub silentio* the prior holdings.

EXAMPLE: An early case holds that a homeowner has no obligation to remove the snow in front of his or her house. A later case ruled upon by a higher court then decides that the homeowner does have

that obligation. The later case does not make specific reference to the earlier case. By necessary implication, the later case overrules *sub silentio* the prior case.

SUBSTANTIAL COMPLIANCE see substantial performance [compliance].

SUBSTANTIAL PERFORMANCE [or COMPLIANCE]

performance of a contract that, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the one who has promised to perform the full contract price, subject to the right of the one who agreed to pay for that performance to recover whatever damages may have been occasioned him or her by the promisor's failure to render full performance.

EXAMPLE: A student contracts to paint a neighbor's house during the summer. He has almost completed the task when he is overwhelmed by the desire to spend the rest of the summer at the shore. The only part of the house unpainted is the window moldings, which are the same color as the house but lack a fresh coat. The student is entitled to payment since there is substantial performance of the contract, but there will be a slight reduction in the price because of the unfinished moldings.

Compare breach [BREACH OF CONTRACT].

SUBSTANTIVE DUE PROCESS see due process of law.

SUBSTANTIVE LAW

the positive law that creates, defines and regulates the rights and duties of the parties and that may give rise to a cause of action, as distinguished from adjective law that pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.

SUBSTITUTED BASIS see basis [SUBSTITUTED BASIS].

SUBSTITUTED SERVICE see service [SUBSTITUTED SERVICE].

SUBSTITUTION

putting in place of another thing, serving in lieu of another. In respect to wills, the putting of one person in the place of another so that he or she may, on failure of the original devisee or legatee or after such person, have the benefit of the legacy, particularly, the act of the testator in naming a second legatee who is to take the legacy on failure of the original legatee or after such person.

SUBTENANT

one who leases all or part of rented premises from the original lessee for a term less than that held by the original lessee; the original lessee becomes the sublessor. Most leases either prohibit subletting or require the lessor's permission in advance.

The original lessee remains responsible for the subtenant's obligations to the lessor.

EXAMPLE: A supplier rents space in a warehouse but finds that he does not need the full amount that he rented. He then leases part of the space to a large retail discount store that needs some extra storage space. The discount store, which is the *subtenant*, may pay rent to the supplier or to the warehouse owner. The supplier, though, is still liable for the full rent unless some other agreement with the warehouse owner is reached.

Compare assignment [ASSIGNMENT OF A LEASE].

SUCCESSION

refers to the process by which the property of a decedent is inherited through descent or by will. See intestate succession.

SUCCESSIVE TERMS

a series of terms where one term follows the term immediately preceding it.

SUCCESSOR

one who succeeds to the role, rights, duties or place of another.

SUCCESSOR ADMINISTRATOR see letters of administration [SUCCESSOR ADMINISTRATOR].

SUE OUT

to apply for and obtain a writ or court order, as to sue out a writ in chancery.

SUICIDE

the voluntary and intentional killing of oneself.

EXAMPLE: Suzanne is very upset over the loss of a boyfriend, so she goes out and drinks heavily. When she comes home, she decides to take some aspirin in the hope that there will be no hangover in the morning. Unfortunately, she never wakes up. Suzanne is not a victim of *suicide* because she had no intention of killing herself.

SUI GENERIS

(*sū' ē jĕn'-ĕr-ĭs*) Lat.: of its own kind; unique; in a class by itself. See also ejusdem generis.

SUI JURIS

(*sū'-ĕ jūr'-ĭs*) Lat.: of his own right. Describes one who is no longer dependent, e.g., one who has reached majority, or has been removed from the care of a guardian. Compare emancipation; incompetency.

SUIT

any proceeding in a court of justice by which an individual pursues a remedy that the law affords.

CLASS SUIT see class action.

[STOCKHOLDERS'] DERIVATIVE SUIT see stockholders' derivative action.

SUITOR

a claimant; a litigant. A party to an action in a court of law.

SUM CERTAIN

any amount that is fixed, settled, stated or exact. It may refer to the value of a negotiable instrument, to a price stated in a contract, or to a measure of damages. The sum must be ascertainable at the time the instrument is made and computable solely from examination of it.

EXAMPLE: Along-term contract includes a very technical formula for determining the cost of wheat. The formula allows for fluctuations in the market place, weather, demand and other factors. Although the price can therefore vary each time a price is paid, the fact that there is a formula means that the contract includes a *sum certain*.

SUMMARY COURT-MARTIAL see court-martial; military law [COURT-MARTIAL].

SUMMARY JUDGMENT

preverdict judgment of the court in response to a motion by plaintiff or defendant, rendered when the court perceives that only questions of law are in dispute, or that the court's decision must be the same regardless of which party's version of the facts is accepted. It is a device designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial.

EXAMPLE: Dale erects a structure on his property that almost completely blocks the sun from the pool area that his neighbor just built, and the neighbor sues Dale to remove the structure. Dale and the neighbor agree on that set of facts. The only question is whether Dale may do as he wants, which in this instance is a question of law. Both parties, therefore, seek a *summary judgment* supporting their respective positions.

Compare directed verdict.

SUMMARY PROCEEDING

a method by which the parties to a legal controversy may achieve a more prompt disposition of their case by use of simplified procedural rules, usually involving more limited discovery or fact finding than is normally permitted in the particular type of proceeding. Summary proceedings have been commonly used in arbitration, bankruptcy, landlord-tenant and unlawful entry and detainer cases.

SUMMATION [SUMMING UP]

the final step in a trial, wherein each party's counsel reviews the evidence that has been presented and attempts to show why its position should prevail; also known as CLOSING ARGUMENTS. In a jury trial, this step immediately precedes a judge's instructions to a jury. The party with the burden of proof always closes or sums up last. Therefore, in a civil case, the defendant

closes first and then the plaintiff follows. In criminal cases, the procedure varies among jurisdictions. Federal rules of criminal procedure provide that the prosecution closes first the defendant following. In most cases, the prosecution is also afforded an opportunity to rebut the defendant's closing as well.

A prosecutor has the special burden to prove the state's allegations beyond a reasonable doubt. During summation a prosecutor must not: comment on a defendant's failure to testify, refer to evidence not in the record, interject personal opinions concerning the veracity of witnesses, appeal to a jury based on passion or prejudice rather than facts, or imply that the prosecutor believes that the defendant is guilty of the crime charged. In addition, a prosecutor cannot be argumentative in his or her closing. It is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Failure of the prosecutor to comply with the above is referred to as PROSECUTORIAL MISCONDUCT and may result in a mistrial. Still, the prosecutor is entitled to a certain degree of latitude in summation, and his or her closing must be viewed in the context of the entire trial rather than in the abstract.

SUMMONS

a mandate requiring the appearance of the defendant under penalty of having judgment entered against him or her for failure to appear. The object of the summons is to notify the defendant that he has been sued.

EXAMPLE: Nick sues a landscaper for installing a defective sprinkler system. His attorney prepares a *summons* notifying the landscaper of the court action. The clerk of the court stamps the summons, and it is then issued.

See process; service. Compare subpoena.

SUNDAY CLOSING LAWS

any state or local laws that restrict activities on Sunday, as for instance forbidding the sale of goods on Sunday. Compare blue laws.

SUNSHINE LAWS

laws requiring that government agencies and departments permit the public to attend their meetings. Often called OPEN PUBLIC MEETING LAWS.

SUO NOMINE

(sū'-ō nō'-mē-nā) Lat.: in his own name.

SUPERIOR COURT see inferior court [SUPERIOR COURT].

SUPERSEDEAS

(sū-pēr-sē'-dē-ās) Lat.: you shall forbear. A writ commanding a "stay of proceedings." The purpose of such a writ is to maintain the status quo that existed before the entry of a judgment or decree of the court below.

SUPERSEDING CAUSE see cause [SUPERSEDING CAUSE].

SUPERVENING CAUSE see cause [INTERVENING [SUPERVENING] CAUSE].

SUPPLEMENTAL

something added to cure a deficiency or otherwise complete a document or act. Compare amendment.

SUPPLEMENTAL ACT that which supplies a deficiency, adds to or completes, or extends that which is already in existence without changing or nullifying the original; an act designed to improve an existing statute by adding something thereto without changing the original text.

SUPPLEMENTAL AFFIDAVIT a subsequent affidavit in addition to the original one. Generally used to explain or correct the original affidavit, but may also be used to set up a new and different defense.

SUPPLEMENTAL ANSWER an answer in addition to the original answer that corrects, enhances, or explains the original one.

SUPPLEMENTAL BILL in equity, a bill in addition to the original bill, that brings into controversy some matter that occurred after the original bill was filed, or that corrects a defect in the original bill.

SUPPLEMENTAL CLAIM a filed claim seeking additional relief after the filing of the original claim.

SUPPLEMENTAL PLEADING [COMPLAINT] see pleading [SUPPLEMENTAL PLEADING].

SUPPLEMENTAL PROCEEDING a proceeding in an action against a judgment debtor to discover property of the debtor subject to execution and apply such property to the satisfaction of the judgment. Such a proceeding is separate from the original action and is generally governed by the rules of the court.

SUPPLEMENTARY SECURITY INCOME see social security [SUPPLEMENTARY SECURITY INCOME].

SUPPORT see alimony. See also lateral support; subjacent support.

SUPPRESS

to effectively prevent; to restrain; to end by force. See suppression of evidence.

SUPPRESSION OF EVIDENCE

the refusal to produce evidence or to allow evidence to be produced for use in litigation. Suppression of evidence refers most commonly to the sanction in a criminal case for an unreasonable search or seizure that violates a defendant's constitutional rights. In 1914, the U.S. Supreme Court held that illegally seized evidence must be excluded from use in fed-

eral criminal trials. In 1961, the Court expanded the exclusionary rule to include state criminal trials.

Suppression of evidence also refers either to a party's refusal to produce evidence or to interference by a party with the production of evidence when another party seeks the evidence pursuant to the law. In civil cases, the failure to produce evidence may constitute an admission that the evidence is unfavorable to the party refusing to produce it.

SUPRA

(sū-prá) Lat.: above. In a written work, refers to a part preceding that which is presently being read.

SUPREMACY CLAUSE

popularized title for Article VI, Section 2 of the United States Constitution, which is the main foundation of the federal government's power over the states, providing that the acts of the federal government are operative as supreme law throughout the union.

EXAMPLE: The United States Supreme Court rules that no person can be arrested in his or her home without an arrest warrant issued by a judge. Regardless of the procedures the various states used before the Supreme Court decision, the *Supremacy Clause* mandates that the Supreme Court's decision govern future police practice.

SUPREME COURT

the highest appellate court in most jurisdictions and in the federal court system. It is usually the appellate state court of last resort, and in the absence of a federal question, its decisions cannot be reviewed by other courts and must be respected. In some states this court is an inferior court and not the court of last resort.

In the federal court system, the United States Supreme Court is expressly provided for in the Constitution, which vests judicial power in "one Supreme Court" and such inferior courts as Congress shall establish. It consists of a Chief Justice and eight Associate Justices appointed by the President with the advice and consent of the U.S. Senate.

SUPREME COURT OF APPEALS

West Virginia's highest state court.

SUPREME COURT OF ERRORS

Connecticut's highest state court.

SUPREME JUDICIAL COURT

Massachusetts' and Maine's highest state courts.

SURCHARGE

1. an additional charge that has been omitted from an account stated; 2. a penalty for failure to exercise common prudence and common skill in the performance of a fiduciary's duties.

3. SURTAX is a tax added to the normal tax, imposed on certain kinds of income.

SURETY

one who undertakes to pay money or perform other acts in the event that his or her principal fails therein. See also indorsement.

EXAMPLE: A corporation wants to issue bonds so that it has sufficient money to develop a new product. If the reputation of the corporation is such that people are unwilling to buy the bonds without some guarantee, the corporation will seek a *surety* who in fact guarantees payment of the corporate bonds.

SURETY BOND see bond [SURETY BOND].

SURPLUS

the remainder of a fund appropriated for a particular purpose. In corporations, surplus denotes assets left after liabilities and debts, including capital stock, have been deducted.

EARNED SURPLUS the portion of surplus derived from the net earnings, gains or profits retained by a corporation rather than paid to shareholders as dividends.

PAID-IN SURPLUS the portion of surplus derived from the sale, exchange or issuance of capital stock at a price above the PAR VALUE (see par) of the stock. Thus, the difference between par value and the actual price received is the paid-in surplus. In the case of no-par stock, it is the amount received that has been allocated to paid-in surplus. The term is sometimes used interchangeably with capital surplus, although the latter term is often used to denote the entire surplus of a corporation other than its earned surplus.

SURREBUTTER

in common law pleading, a plaintiff's answer to the defendant's rebuttal (rebutter).

SURREJOINDER

in common law pleading, a plaintiff's answer to the defendant's rejoinder.

SURRENDER

the yielding or delivery of possession in response to a demand. In property law denotes the yielding of the leasehold estate by the lessee to the landlord, so that the TENANCY FOR YEARS (see tenancy) merges in the reversion and no longer exists.

SURROGATE

a judicial officer of limited jurisdiction, who administers matters of probate and intestate succession and, in some cases, adoptions.

EXAMPLE: After the father's death, his will is submitted to a *surrogate*, who oversees the distribution of the estate. A question arises concerning a fraudulent transfer of money outside the estate, giving rise to possible criminal and civil liability. Since the surrogate is

limited in what he can rule on, the question must be raised in a court that has broader jurisdiction.

SURROGATE MOTHER

one who bears a child for a person or a couple unable to have children, usually for monetary compensation. The surrogate mother often uses her own egg and is impregnated with the semen of the future father, but she may have a fertilized egg from the future parents implanted in her uterus. Upon the child's birth, the surrogate mother relinquishes all rights, duties, and responsibilities to the child. Various states have adopted statutes specifically regulating this relationship. Surrogate parenting contracts were previously held to be illegal under laws prohibiting baby selling.

SURROGATE PARENT

one who is not a child's parent, but who stands in the place of the parent and is charged with a parent's rights, duties, and responsibilities, either by virtue of voluntary assumption or court appointment. See guardian; in loco parentis.

SURROGATE'S COURT see court [SURROGATE'S COURT].

SURTAX see surcharge.

SURVEILLANCE

oversight or supervision. In criminal law, an investigative process by which police gather evidence about crimes or suspected crime through continued observation of persons or places. Wiretapping, electronic observation, tailing or shadowing are examples of this type of law enforcement procedure.

SURVIVAL STATUTE

a statute that preserves for his or her estate a decedent's cause of action for infliction of pain and suffering and related damages suffered up to the moment of death. Compare wrongful death statute.

SURVIVORSHIP

a right whereby a person becomes entitled to property by reason of having survived another person who had an interest in it. It is one of the elements of a JOINT TENANCY (see tenancy).

EXAMPLE: A husband and wife own a house as tenants by the entirety. When the husband dies, the wife acquires full ownership of the house by her right of *survivorship*.

SUSPECT

as a verb, it is to have a slight or even vague idea concerning, but not necessarily involving knowledge or belief or likelihood; ordinarily used in place of the word "believe." As a noun, a person reputed to be involved in crime; a broad term for anyone being investigated by law enforcement authorities. If the individual is formally charged with an offense, the reference is generally to a defendant, rather than a suspect.

SUSPECT CLASSIFICATION see equal protection of the laws.

SUSPENDED SENTENCE see sentence.

SUSTAIN

to support; to approve; to adequately maintain.

SWEARING, FALSE see false swearing.

SWEEPSTAKES see lottery [SWEEPSTAKES].

SWITCH see bait and switch.

SYLLABUS

a headnote preceding a reported case and summarizing the principles of law established in that case. Under the practice of the United States Supreme Court, the headnotes are prepared for the convenience of readers by the Reporter of Decisions; as such, the syllabus constitutes no part of the opinion of the Court.

SYMBOLIC DELIVERY see delivery [SYMBOLIC DELIVERY].

SYMBOLIC SPEECH

conduct or activity expressing an idea or emotion without the use of words. Some forms of speech, such as flag burning or the wearing of black armbands to protest war have been held to be protected under the First Amendment; however, other forms, such as the burning of draft cards have not been held to be protected due to the government's substantial interest in the regulation of the draft.

SYNDICATE

a group of individuals or companies who have formed a joint venture to undertake a project that the individuals would be unable or unwilling to pursue alone.

EXAMPLE: A large corporation frequently offers stock for sale. An underwriting *syndicate* made up of investment bankers and stockbrokers will first buy the stock, a step made possible by the fact that the syndicate can pool the resources of its individual members. The syndicate will then use the combined strength of its members to market the stock and sell it to the public.

T

TACIT

implied or indicated, but not actually expressed; arising without express contract or agreement. Compare latent.

TACKING

adding together; 1. in property law, the uniting of the periods of possession of successive holders to complete the period necessary to establish title by adverse possession, which is possible provided that there is privity of estate between the successive adverse possessors. Thus, the original adverse possessor must transfer the property either by a voluntary conveyance or by inheritance for tacking to be permitted. 2. As a legislative phrase, tacking designates the practice of adding a measure that is of doubtful strength on its own merits onto a general appropriations bill in order to compel the legislature to vote for it. 3. As applied to mortgages, tacking is joining of a third purchaser's encumbrance with his original mortgage debt so as to close out the second mortgagee.

TAFT-HARTLEY ACT

the popular name for the Labor-Management Relations Act of 1947, whose stated purpose is to protect employers' rights by broadening their rights to free speech on unionization; by permitting them to disregard unions formed by supervisory personnel; by outlawing the closed shop; by permitting employees to refrain from union activity; by limiting employee elections on whether to unionize to one per year; by prohibiting unions from forcing employees to join, from forcing an employer to discriminate against nonunion employees, from refusing to bargain collectively with the employer, from engaging in wildcat strikes, from charging discriminatory membership fees, and from extracting favors or kickbacks from employers.

EXAMPLE: A construction company is not allowed to send any trucks onto a construction site unless the driver is a union member. The company therefore cannot hire any drivers unless they belong to a union. The company has the right to bring a suit for a violation of the *Taft-Hartley Act*.

TAIL see fee tail.

TAIL, ESTATE IN see fee tail.

TAINTED EVIDENCE [TAINT] see fruit of the poisonous tree doctrine.

TAKING THE FIFTH

the popular term given to a person's assertion of his Fifth Amendment right not to give evidence that will incriminate himself. See self-incrimination, privilege against; Fifth Amendment.

TANGIBLE PROPERTY

property, either real or personal, capable of being possessed. Tangible property is capable of being perceived by the senses, as distinguished from intangible property or incorporated rights in property, such as franchises, copyrights, easements. For taxation purposes, tangible property generally refers to (personal property) personalty, and is that movable property that has a value of its own, rather than merely the evidence or representation of value.

TARGET CORPORATION see corporation [TARGET CORPORATION].

TARGETED JOBS CREDIT see tax credit [TARGETED JOBS CREDIT].

TAX

a rate or sum of money assessed on a citizen's person, property or activity for the support of government, levied upon assets or real property (property tax), upon income derived from wages, etc. (income tax), or upon sale or purchase of goods (sales tax).

AD VALOREM TAXsee VALUE ADDED TAX.

CAPITAL GAINS TAXsee capital [CAPITAL ASSETS]; capital gains or losses.

ESTATE TAXstate death taxes imposed upon the net value of a decedent's estate. The same tax result is accomplished in some jurisdictions through imposition of a TRANSFER TAX, which is a tax upon the transfer of the property from the estate to the beneficiary.

ESTIMATED TAXincome taxes that are paid periodically by a taxpayer on income that is not subject to withholding taxes, in an amount that represents a projection of ultimate tax liability for the taxable period.

EXCISE TAXsee excise.

FRANCHISE TAXa tax generally imposed by the states upon corporations, often divided into two components: (1) a tax upon the net income of the corporation attributable to activities within the state, and (2) the tax on the net worth of the corporation located in the state.

EXAMPLE: A state imposes a tax on "the privilege of doing business" in the state. As long as the tax is only imposed on the income that the corporation earns in the state or on the value of the corporation's assets in the state, the tax is a valid *franchise tax* on the corporation.

INCOME TAXa tax imposed upon value received by the taxpayer, reduced by the allowable deductions and credits. See return, income tax.

POLL TAXsee poll tax.

PROGRESSIVE TAXa tax whose rate increases as the amount subject to tax increases.

PROPERTY TAXa tax imposed by municipalities upon owners of property within their jurisdiction, based upon the assessed value of such property.

REGRESSIVE TAXa tax whose rate of tax remains the same regardless of the amounts involved, or decreases as the amount to which the tax is applied increases.

SALES TAXa tax imposed on the retail sale of certain items.

UNIFIED ESTATE AND GIFT TAXa federal tax imposed upon the net value of an estate and on gifts of certain amounts. Usually, the transferor is liable for gift taxes, but if the transferor fails to pay, the transferee may be held liable for payment.

USE TAXa tax imposed upon property when it is brought into the taxing jurisdiction, usually because the taxing jurisdiction has no jurisdiction over the sale and therefore cannot impose a sales tax.

EXAMPLE: A state requires a bus company to obtain certificates of title to operate their buses in that state. The certificates will not be issued until a tax is paid, based on the fair market value of the buses. The tax is permitted as a *use tax* to offset the cost of maintaining the state highways.

VALUE ADDED TAX [AD VALOREM TAX] a tax imposed upon the difference between the cost of an asset to the taxpayer and the present fair market value of such asset.

WITHHOLDING TAXthe amount of income taxes that an employer is required to withhold from an employee's salary when the salary is paid. The amount withheld is a credit against the amount of income taxes the employee must pay on his or her income earned for the taxable year.

TAXABLE ESTATE

the amount to which the rate of estate tax is applied in order to determine the amount of estate tax payable. For federal estate tax purposes, it is the decedent's gross estate, i.e., all

property in which the decedent had an interest at the time of death as well as specified other property, less the estate tax deductions, such as marital and charitable deductions. See tax [ESTATE TAX].

TAXABLE GIFT

the amount to which the rate of gift tax is applied in order to determine the amount of gift tax payable. For federal gift tax purposes, it is the total amount of gifts made, less the gift tax deductions allowed, such as the marital and the charitable deductions. The aggregate of all lifetime gifts that are taxable is added to the decedent's estate to determine the applicable estate tax under the unified estate and gift tax.

TAXABLE INCOME

the amount applied to the rate of income tax in order to determine the income tax payable. For federal income tax purposes, it is defined differently for corporations and individuals. The taxable income of a corporation is its gross income less its income tax deductions. The taxable income of an individual is gross income, less the deductions allowed in computing the adjusted gross income, less the excess of itemized deductions over the zero bracket amount. See deductions [ZERO BRACKET AMOUNT].

TAXABLE YEAR

the period during which the tax liability of an individual or entity is calculated, or, in the case of certain nontaxable entities, the period for which tax information is provided. Compare fiscal year.

TAX BENEFIT DOCTRINE

a theory that provides for the inclusion in GROSS INCOME (see income) of amounts deducted in earlier taxable years and recovered in later years, but only to the extent that the earlier deductions resulted in a reduction in income tax liability for the earlier years.

TAX COURT

an independent 16-judge federal administrative agency that functions as a court to hear appeals by taxpayers from adverse administrative decisions by the Internal Revenue Service. Although such suits may be considered in federal district courts or in the Court of Claims, the Tax Court does not require the taxpayer to pay the alleged deficiency prior to suit. Headquartered in Washington, D.C., the Tax Court holds hearings in several principal cities as well. Tax court trials are de novo and an adverse decision may be appealed as of right to the Court of Appeals and in rare cases to the United States Supreme Court.

TAX CREDIT

a dollar-for-dollar reduction in the amount of tax that a taxpayer owes. Unlike deductions or exemptions, which reduce the amount of income subject to tax, a credit reduces the actual amount of tax owed.

INVESTMENT TAX CREDIT tax credit allowed for investments in personal property devoted to business or income-producing activity, when certain specific requirements are met.

TAX DEDUCTION

an item that may be deducted from a gross amount subject to tax, in order to yield the net amount. By reducing the amount subject to tax, a tax deduction will usually reduce the amount of tax imposed. See deductions.

TAX EVASION

the fraudulent and willful underpayment of or nonpayment of taxes. The term is usually applied to activities that constitute criminal tax fraud. Evasion is to be distinguished from tax avoidance, whereby proper interpretation or relevant tax law is made to minimize tax liability legally.

TAX EXEMPT

not subject to tax. Most commonly used to describe tax exempt interest, which is interest paid by the states or their subdivisions and is exempt from federal income taxes. Interest paid by the states was initially exempted from federal income taxation in 1913 under the belief that taxing such interest would unconstitutionally interfere with the state's ability to raise funds. The exemption is now retained by Congress as a form of revenue sharing with the states.

TAX EXPENDITURE

revenue losses that are suffered by the federal government as a result of provisions of the Internal Revenue Code that grant special tax benefits to certain kinds of taxpayers or certain activities engaged in by taxpayers.

TAX EXPENDITURE BUDGET a compilation of various tax expenditures inherent in the tax system for the year in question.

TAXING POWER

under the U.S. Constitution, the power of Congress to lay and collect taxes, duties, imports, and excises provided that all duties, imports, and excises shall be uniform throughout the United States, and to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumerations. The taxing power is used primarily to raise revenue. However, some taxes, such as the estate, gift, and generation-skipping taxes attempt to affect social policy, while other taxes, such as the excise tax on gambling and marijuana are used to regulate or deter certain activities.

TAXPAYER

the person who is determined to bear the tax liability for a given transaction, activity or status.

TAX PREFERENCE ITEMS

those items of income, deduction or tax credit deemed to reflect a preference in the tax law for the taxpayer benefited by the preference item. Since it is thought that these

items result in preferential treatment that may result in minimal tax liability for certain taxpayers, notwithstanding substantial GROSS INCOME (see income), a minimum tax is imposed on the aggregate of the tax preference items in an attempt to insure a minimum tax liability for each taxpayer.

TAX RATE

the percentage rate of tax imposed. Tax liability is computed by applying the applicable tax rate to the tax base.

MARGINAL TAX RATE the highest percentage at which any part of the taxpayer's income is taxed.

EFFECTIVE TAX RATE the rate at which the taxpayer would be taxed if his or her tax liability were taxed at a constant rate rather than progressively. This rate is computed by determining what percentage the taxpayer's tax liability is of the taxpayer's total taxable income. See tax [PROGRESSIVE TAX].

TAX RETURN see return, income tax.

TAX SALE see sale [TAX SALE].

TAX SHELTER

any device by which taxpayers can reduce their tax liability by engaging in activities that provide them with deductions or credits that they can apply against their tax liability. In such cases, the activities engaged in are said to shelter taxpayers' other income from tax liability.

EXAMPLE: An individual in a high tax bracket may choose to make an investment in real estate or oil and gas in order to take advantage of tax losses that these investments create. The investor, in effect, uses money he or she would have paid in taxes to offset part of his or her investment. And if the investment is a good one, he or she may also make a profit when he or she sells the interest. These types of investments are referred to as *tax shelters*.

TEMPORARY

that which is to last for a limited time; ephemeral; transitory. Temporary has no fixed meaning in the sense that it designates a fixed period of time, but is used in contradistinction to permanent. See injunction; interim financing; interim order; restraining order.

TEMPORARY INJUNCTION see injunction; restraining order.

TEMPORARY RESTRAINING ORDER see restraining order.

TEMPORE

(tĕm'-pō-rā) Lat.: for the time of; thus, the "President pro tempore" of the United States Senate is the Senate President for the present time (when the Vice President is not presiding over the Senate).

TENANCY

a tenant's right to possess an estate, whether by lease or by title; 1. refers generally to any right to hold property; 2. refers to holding in subordination to another's title, as in the landlord-tenant relationship.

HOLDOVER TENANCY see TENANCY AT SUFFERANCE.

JOINT TENANCY a single estate in property, real or personal, owned by two or more persons, under one instrument or act of the parties, with an equal right in all to share in the enjoyment during their lives; and on the death of a joint tenant, the property descends to the survivor or survivors and at length to the last survivor. Joint tenancy originally was a technical feudal estate in land, but now also applies, through statutes, to personal property (stocks, bonds, bank accounts, with right of survivorship).

PERIODIC TENANCY in landlord-tenant law, a tenancy for a particular period (a week, month, year or number of years), plus the expectancy or possibility that the period will be repeated. In contrast to a TENANCY FOR YEARS, a periodic tenancy must be terminated by due notice by either the landlord or the tenant, unless one party has failed to perform some part of his obligation. A periodic tenancy is considered a form of TENANCY AT WILL and is created either by express agreement or by implication from the manner in which rent is paid. A periodic tenancy is alienable.

TENANCY AT SUFFERANCE [HOLDOVER TENANCY] a tenancy that comes into existence when one at first lawfully possesses land, as under a lease, and subsequently holds over beyond the end of one term of the lease or occupies it without such lawful authority. A tenancy at sufferance therefore cannot arise from an agreement, distinguishing it from a TENANCY AT WILL. A tenant at sufferance differs from a trespasser only in that he originally entered with the landlord's permission. The landlord has a right to establish a landlord-tenant relationship (i.e., extend the lease) of a tenant at sufferance.

EXAMPLE: Lance has completed the one-year lease on his apartment. He continues to reside there although the landlord does nothing to acknowledge that he is there, including not accepting rent checks. Lance is a *tenant at sufferance*. He may have certain rights, though, depending on the state he is in, possibly including a right to one week's or thirty days' notice before eviction.

TENANCY AT WILL a leased estate that confers upon the tenant the right to possession that both parties agree is for an unpredetermined period and that either party may terminate upon proper notice. A tenancy at will may arise out of an express contract or by implication. Because a tenancy at will is determinable at any time, the tenant cannot assign or grant his estate to another.

TENANCY BY THE ENTIRETY ownership of property, real or personal, tangible and intangible, by a husband and wife together. Neither husband nor wife is allowed to alienate any part of the property so held without consent of the other. The survivor of the marriage is entitled to the whole property. A divorce severs the tenancies by the entirety and usually creates a tenancy in common. Under the **MARRIED WOMAN'S ACT** each tenant by the entirety is a tenant in common of the use, and is therefore entitled to one half of the rents and profits while both are alive.

TENANCY FOR YEARS an estate in land created by a lease that is limited to a specified and definite term, whether in weeks, months or years. If the tenant stays beyond expiration of the term, the tenancy may be converted into a **TENANCY AT SUFFERANCE**, **TENANCY AT WILL**, or a **PERIODIC TENANCY**. A tenancy for years is alienable, subject to lease restrictions against assignment or sublease.

TENANCY FROM MONTH TO MONTH see **PERIODIC TENANCY**.

TENANCY FROM YEAR TO YEAR see **PERIODIC TENANCY**.

TENANCY IN COMMON an interest held by two or more persons, each having a possessory right, usually deriving from a title (though perhaps also from a lease) in the same piece of land. Tenancy in common also applies to personalty. Though co-tenants may have unequal shares in the property, they are each entitled to equal use and possession. Thus, each is said to have an undivided interest in the property. An estate held as a tenancy in common may be partitioned, sold or encumbered.

TENANT

1. one who holds land by any kind of title or right, whether permanently or temporarily; 2. one who purchases an estate and is entitled to possession, whether exclusive or to be shared with others; 3. one who leases premises from the owner (landlord) or from a tenant as his subtenant. See also tenancy.

TENANTABLE REPAIR see good tenable repair.

TENANT FOR LIFE see life tenant.

TENANT IN FEE (SIMPLE)

a tenant in fee simple who has lands, tenements, or hereditaments to hold to him or her and the heirs forever. The word *fee* alone, without any qualifying words, serves to designate a fee simple estate, and is not frequently used in that sense.

A tenant in fee simple or fee simple absolute holds the greatest estate known to law. The word *simple* is used to indicate that there are no restrictions with respect to the inheritance characteristics of the estate. The word *absolute* emphasizes that the estate is not defeasible upon the happening of any event.

TENANTS IN TAIL see failure of issue [TENANTS IN TAIL].

TENDER

an unconditional offer to pay or perform in full an obligation owed to another, together with either actual presentation of the thing or sum owed, or some clear manifestation of present ability to pay or perform.

LEGAL TENDER any kind of currency or other such medium of commerce designated by law as one that must be accepted in satisfaction of monetary debt.

TENDER OFFER a publicly announced effort to purchase the stock of a company, not through open market transactions but through direct dealings with present shareholders, for the purpose of acquiring controlling ownership of that company.

TENDER OF DELIVERY

the seller's placement at the buyer's disposal of goods sold to him or her. A seller's failure to tender delivery at the proper place, according to contract, may constitute a breach unless he or she has a lawful excuse; a buyer's refusal to take delivery at the proper place may constitute a breach on his or her part.

EXAMPLE: Scholarly Book Publishers contracts with a book wholesaler to distribute its books nationwide. Scholarly arranges to have the books shipped to the wholesaler's main warehouse on a specific date, and the wholesaler agrees to pick them up there. Scholarly fulfills its obligation, but the wholesaler does not take the books on the date agreed upon. Two days later, the books are destroyed by fire. Since Scholarly completed its *tender of delivery*, the wholesaler must pay for the damage.

TENDER OFFER

a public offer made to shareholders of a particular corporation to purchase from them a specific number of shares of stock at a specific price. The price quoted in such an offer is payable only if the offeror is able to obtain the total amount of stock specified in the offer. The number is usually sufficient to give the offeror control of the corporation.

TENEMENT

permanent and fixed property including both corporeal and incorporeal real property. In modern usage, tenement applies to any structure attached to land, and also to any kind of dwelling inhabited by a tenant. Tenement is frequently used to indicate dilapidated apartment dwellings.

TENTH AMENDMENT

the amendment to the U.S. Constitution, referred to as the RESERVED POWERS AMENDMENT, that reserves to the states or the people any powers not delegated to the United States nor prohibited to the states by the Constitution. It expresses the original framers' intent that the central government be a government of

limited powers and was included in the Bill of Rights to prevent the federal government from attempting to exercise powers it was not specifically given. Traditionally, the Tenth Amendment has been viewed as a mere truism that restates the relationship between the states and the federal government. However, the Supreme Court has held that the amendment bars Congress from exercising power that impinges directly upon state functions essential to the states' separate and independent existence.

TENURE

right to hold; 1. in real property, an ancient hierarchical system of holding lands. 2. a statutory right of certain civil servants, teachers in the public schools and other employees to retain their positions permanently, subject only to removal for adequate cause or economic necessity.

TENURIAL OWNERSHIP see ownership.

TERMINABLE INTEREST

an interest in property that will fail or terminate on the lapse of time, on the occurrence of an event or a contingency, or on the failure of an event or a contingency to occur. The term is used to describe a class of property that generally does not qualify for the marital deduction for federal estate and gift tax purposes.

TERMINER see oyer and terminer.

TERM INSURANCE see insurance [TERM INSURANCE].

TERM OF ART see words of art.

TERM OF COURT

a definite time period prescribed by law for a court to administer its duties. Term and session are often used interchangeably, but, technically, term is the statutory time prescribed for judicial business and session is the time a court actually sits to hear cases. In general, terms of court no longer have any special significance, fixed periods of days having replaced the stated terms of court.

TERRITORIAL COURT

a court established by Congress under the Constitution, which gives Congress the power to make all needful rules and regulations respecting the territory or other property belonging to the United States.

TERRITORIAL JURISDICTION

the territory over which a government or a subdivision thereof has jurisdiction; relates to a tribunal's power with regard to the territory within which it is to be exercised, and connotes power over property and persons within such territory.

TERRITORIAL WATERS

all inland waters, waters between the line of mean high tide and mean low tide, and all waters seaward to a line three geographical miles from the coastline generally constitute the territorial waters of a country.

TERRORUM see in terrorem.

TESTACY

the condition of leaving a valid will at one's death.

Compare intestacy.

TESTAMENT

strictly, a testimonial or just statement of a person's wishes concerning the disposition of his personal property after death, in contrast to a will, which is strictly a devise of real estate. Commonly, however, will and testament are considered synonymous.

TESTAMENTARY CAPACITY

the mental capacity that a person must have at the time of the execution of his or her will in order for the will to be valid. Testamentary capacity usually requires that the person comprehend the nature and extent of his or her property, the persons who are the natural objects of his or her bounty, and the dispositive effect of the act of executing the will. It is synonymous with sound mind.

TESTAMENTARY DISPOSITION

a gift of property that vests (takes effect) at the time of the death of the person making the disposition. It can be effected by deed, by an inter vivos transaction or by will. All instruments used to make testamentary dispositions must comply with the requirements of the statute of wills.

EXAMPLE: A father owns 100 shares of stock. He makes a gift to his son as follows: "To myself for life, then to my son." The gift to the son is a *testamentary disposition* since it does not take effect until the father's death.

TESTAMENTARY INTENT

a determination that must be made by a probate court that the document was intended by the writer to be a will and as such reflects his or her true wishes. If fraud or undue influence is found, then the will is not admitted to probate. See testator [TESTATRIX].

TESTAMENTARY TRUST see trust.

TESTATOR [TESTATRIX]

one who makes and executes a testament or will, testator applying to a man, testatrix to a woman.

TEST CASE [ACTION]

a lawsuit that tests the validity of a law or a legal principle. Usually, the case is one of many similar cases pending, and is chosen for decision prior to the others because its facts are most representative of the issue. Often the case is brought

about intentionally by a group interested in determining the validity of the law.

Such cases are limited by the case or controversy doctrine that prohibits parties from bringing collusive suits before the court. See controversy [CASE OR CONTROVERSY].

TESTIFY

the making of a statement under oath or affirmation in a judicial proceeding; to make a solemn declaration under oath or affirmation for the purpose of establishing proof of some fact to the court. See examination; false swearing; perjury; testimony; witness.

TESTIMONIAL IMMUNITY see self-incrimination, privilege against [TESTIMONIAL [USE] IMMUNITY].

TESTIMONY

statement made by a witness, under oath, usually related to a legal proceeding or legislative hearing; evidence given by a competent witness under oath or affirmation, as distinguished from evidence derived from writing and other sources.

THEFT see larceny.

THING IN ACTION see chose [CHOSE IN ACTION].

THIRD PARTY see party.

THIRD PARTY BENEFICIARY

a person having enforceable rights created by a contract to which he or she is not a party and for which he or she gives no consideration. The third person is a **DONEE BENEFICIARY** if the promisee expressed an intention to confer a benefit upon the third person as a gift in the form of the promised performance. He or she is a **CREDITOR BENEFICIARY** if the promisee, or some other person, is under an obligation under the contract, or the making of the executory contract itself, will satisfy and discharge that obligation. To be enforceable by the third party beneficiary, the contract must be primarily for his or her benefit.

THIRD PARTY PLAINTIFF see plaintiff [THIRD PARTY PLAINTIFF].

THIRTEENTH AMENDMENT

the amendment to the United States Constitution that prohibits slavery and involuntary servitude and empowers Congress to enforce the amendment by appropriate legislation. The Thirteenth Amendment was passed in 1863 during the Civil War. It not only prohibits slavery but also forbids **PEONAGE**, which is a condition of involuntary servitude based on indebtedness. The Thirteenth Amendment is self-enacting as regards slavery, and permits Congress to pass legislation forbidding badges of slavery such as all forms of racial discrimination, private and

public, in the sale and rental of property. Further, a state may not enact laws designed to force employees to stay on their jobs by, for example, making it a crime to terminate private employment. However, a state may punish a crime through forced labor, and may compel labor on behalf of the government, such as highway labor.

THREAT

a declaration of an intention or determination to inflict punishment, loss, or pain on another, or to injure another by some wrongful act. A threat may be made by means of innuendo or suggestion as well as by express language. Threats may be the basis of criminal or civil liability. Mere words, however violent, have been held not to amount to an assault. See coercion; extortion; fighting words; mental cruelty.

THRIFT INSTITUTIONS

generic name for savings banks and savings and loan associations. See bank.

TIDE LAND

land covered and uncovered by ordinary tides. See also avulsion; reliction.

TIME see reasonable time.

TIME ARBITRAGE see arbitration [TIME ARBITRAGE].

TIME DRAFT see draft [TIME DRAFT].

TIME IS OF THE ESSENCE

a term used in contracts that fixes time of performance as a vital term of the contract, the breach of which may operate as a discharge of the entire contract. The phrase emphasizes that performance by one party at the time specified in the contract is essential in order to enable him to require performance from the other party.

TIME SHARING

an arrangement by which either (1) multiple owners (or long-term lessees) of a condominium unit agree contractually to reserve to one another exclusively the use of the unit (and of the common elements associated with unit ownership) for a portion of the year, at the same time each year, or (2) individual owners purchase an interest in the unit (and associated common elements) that is limited in duration to a specified portion of each year and thereby divide the ownership of the unit into intervals, also referred to as INTERVAL OWNERSHIP.

EXAMPLE: A group of friends purchase a condominium at a ski resort. They develop a *time-sharing* arrangement to fit each person's desire, with Bill reserving two weeks in the spring. Unless the agreement states otherwise, as an owner Bill can do whatever he wants with those weeks, including renting to others.

TIME, UNITY OF see unities [UNITY OF TIME].

TITHE

in old English law, a right of the clergy to exact for the use of the Church one-tenth of the produce of the lands and personal industry of the people.

TITLE

ownership; a term used in property law to denote the composite of facts that will permit one to recover or to retain possession of a thing.

EXAMPLE: Marty's car is stolen, and the thief sells it to another person who pays a fair value for the car and has no knowledge or suspicion that it is stolen. Marty still has superior *title* to the car over the other person even though the person paid money for the vehicle. As a basic principle of law, ordinarily one cannot take title from a thief.

ADVERSE TITLE^a title asserted in opposition to another; one claimed to have been acquired by adverse possession.

CLEAR TITLE^{see} clear title.

CLEAR TITLE OF RECORD^a title that the record shows to be an indefeasible unencumbered estate.

COLOR OF TITLE^{see} color of title.

EQUITABLE TITLE^{ownership} that is recognized by a court of equity or founded upon equitable principles, as opposed to formal legal title. The purchaser of real property can require specific performance of his contract for purchase and as a result, prior to the actual conveyance, he has an enforceable equitable title that can be terminated only by a bona fide purchaser.

MARKETABLE TITLE^{see} marketable title.

QUIET TITLE^{see} quiet title.

TITLE [OF A STATUTE] the heading of a statute or legislative bill, which introduces it by giving a brief description or summary of the matters it embraces.

TITLE JURISDICTION

a jurisdiction in which title to mortgaged premises passes to the mortgagee, and only passes back to mortgagor when full payment is made. See lien jurisdiction.

TITLE SEARCH

an investigation of documents in the public record office to determine the state of a title, including all liens, encumbrances, mortgages, future interests, etc., affecting the property; the means by which a chain of title is ascertained.

TITLE THEORY ^{see} mortgage; title jurisdiction.

TOLL

1. to bar, defeat. To toll the statute of limitations means to suspend the limitation.

EXAMPLE: State law provides that a person has 45 days to file an appeal from a conviction and that a judge must inform the person of that limit. At the end of Randolph's trial, the judge fails to inform him of the limit. When he is informed five months later, it is technically too late to file. A court may *toll* the 45-day limit until Randolph is informed of its existence, which in this case would be five months after the conviction. If an appeal is then not filed within 45 days, the opportunity will not be granted again.

2. charge for the use of another's property. 3. consideration for the use of roads, bridges, ferries or other public facilities.

TOMBSTONE AD

a common expression for a newspaper advertisement announcing the sale or purchase of securities in a corporation. The term derives from the fact that such advertisements usually consist of all copy and no illustrations, and thus look like a tombstone. A tombstone ad is merely a public announcement concerning such transactions and does not constitute either an offer to sell or to buy the securities. Such offers constitute and may only be made by a prospectus.

TONNAGE

in commercial usage, the weight (in number of tons) a ship or vessel will carry, as estimated by the official measurement and computation prescribed by public authority.

TONNAGE DUTY a tax imposed on ships that enter the United States; it is called tonnage duty since it is based upon the ship's tonnage.

TORT

a wrong; a private or civil wrong or injury resulting from a breach of a legal duty that exists by virtue of society's expectations regarding interpersonal conduct, rather than by contract or other private relationship. The essential elements of a tort are existence of a legal duty owed by defendant to plaintiff, breach of that duty and a causal relation between defendant's conduct and the resulting damage to plaintiff.

EXAMPLE: Henry places an object on a railroad track to see what happens when it is hit by an oncoming train. The train derails in a set of circumstances that would not have occurred if there had been no object on the track. Henry has committed an intentional *tort* against the railroad and its passengers. He committed a crime as well.

TORT CLAIMS ACT

statute passed by Congress and most states that waives sovereign immunity from liability in tort and allows a suit to be brought against a governmental entity under certain circumstances. See Federal Tort Claims Act.

TORTFEASOR

one who commits a tort.

JOINT TORTFEASORS those who act together or independently to commit a tortious act, causing a single injury. See contribution; joint tortfeasors.

TORTIOUS

describes conduct that subjects the actor(s) to tort liability; unlawful.

TOTAL DISABILITY

as used in insurance contracts, a person's inability to perform the material duties of some occupation for which he or she is qualified by experience or training. Absolute physical disability or helplessness is not necessary for "total disability" to exist. See workers' compensation acts.

TOTAL INCORPORATION see selective incorporation [TOTAL INCORPORATION APPROACH].

TOTALITY OF THE CIRCUMSTANCES TEST

a test used to determine whether certain constitutional rights of a defendant have been violated. The test looks to all the circumstances attending the alleged violation, rather than to any particular factors. While some factors may recur more frequently than others, the relative importance of any one factor depends upon the particular facts of a case. The test was originally used to determine whether a confession was coerced from a defendant in violation of his or her privilege against self-incrimination, until the Miranda case required that a defendant have his or her rights read to him or her. The test is currently used to determine whether a defendant consented to a warrantless search, and whether probable cause exists for the issuance of a search warrant.

TOTAL LOSS

in insurance contracts, the destruction of property such that it is no longer useful for its intended purpose, or that renders it of little or no value to the owner.

TOTO see in toto.

TOUCH AND CONCERN

in real property law, a requirement for a covenant that "runs with the land" is that it touch and concern the land involved. A covenant runs with the land when the rights or liabilities of the covenant pass to the succeeding owners with the title to the land. A covenant touches and concerns the land when it enhances the enjoyment of one parcel of real property by burdening the enjoyment of another. For instance, a covenant in a building development that each property owner paint his or her house a specific color would run with the land.

TO WIT

namely; that is to say.

TRACT INDEX see chain of title.

TRADE, FAIR see fair trade laws.

TRADE FIXTURE

property placed on or annexed to rented real estate by a tenant for the purpose of aiding the tenant in the conduct of a trade or business. The law makes provision for, and leases often expressly permit (or require), the tenant to remove such fixtures at the end of his or her tenancy, though the tenant is responsible to the landlord for any damage to the premises resulting from such removal. Other fixtures, which are considered improvements, the tenant must leave intact. Compare waste.

TRADEMARK

any mark, word, letter, number, design, picture or combination thereof in any form, which is adopted and used by a person to denominate goods that he or she makes, is affixed to the goods, and is neither a common or generic name for the goods nor a picture of them, nor is merely descriptive of the goods.

Protection from infringement upon a trademark is afforded by the common law action for unfair competition.

TRADE NAME

name under which a person identifies his or her business or vocation. A trade name or *commercial name* applied to the business and its good will. Compare trademarks, which apply only to vendable commodities and have different legal protections.

TRADE, RESTRAINT OF see restraint of trade.

TRADE SECRETS

any formula, pattern, machine or process of manufacturing used in one's business that may give the user opportunity to obtain advantage over competitors; a plan or process, tool, mechanism or compound, known only to its owner and those of the owner's employees to whom it is necessary to disclose it. A trade secret is distinguished from a patent in that the owner holds no exclusive rights to it as against the public, though the owner may seek an injunction or damages for trade secrets unlawfully obtained from him or her.

EXAMPLE: Ed works for a whiskey distilling company. There is no patent on the formula for making the liquor, although the formula has been used for over one hundred years. Ed leaves the company to work for someone else. The company can legally prevent Ed from using the formula since it is a *trade secret* that no one has ever been able to duplicate.

TRADE USAGE

a practice widely accepted and relied upon in numerous transactions in a particular trade or industry. A meaning given to language due to its general acceptance in a trade or industry and the reasonable reliance of the parties on such meaning. The Uniform Commercial Code uses the synonymous term USAGE OF

TRADE, which is defined as any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing, the interpretation of the writing is for the court.

A COURSE OF DEALING is to be distinguished from a trade usage in that the course of dealing is based upon a sequence of previous conduct between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. The express terms of an agreement and an applicable course of dealing or trade usage should be construed wherever reasonable as consistent with each other, but when such construction is unreasonable, express terms control both course of dealing and trade usage while course of dealing controls trade usage.

TRADITIONAL EVIDENCE

statements of fact based upon tradition, long-standing reputation, and statements made by deceased persons that are admissible to prove pedigree and ancient boundaries when no living witnesses are available to testify about such matters.

TRANSACTION

an event or series of events that have tax consequences.

CLOSED TRANSACTION a deal in which all events have occurred to allow the transaction to be subject to tax.

OPEN TRANSACTION a deal in which events have not occurred to allow the transaction to be subject to tax.

SHAM TRANSACTION one that will be ignored because it is deemed to have no substance.

STEP TRANSACTION one that consists of a number of interdependent steps and will, generally, be subject to tax based upon all the various steps rather than upon each intermediate step.

TRANSACTIONAL IMMUNITY see self-incrimination, privilege against.

TRANSACTIONS OR OCCURRENCE TEST

in civil practice, the requirement that a party must make a counterclaim for all causes of action arising from the same transaction or occurrence that is the subject matter of the opposing party's claim. The failure to bring the counterclaim may result in the party being barred from ever litigating his or her claim. See counterclaim [COMPULSORY COUNTERCLAIM]. The purpose of the rule is to avoid the expense that would result from

a multiplicity of lawsuits. *Transaction* is liberally construed to encompass any series of occurrences that are logically connected.

TRANSCRIPT

an official and certified copy of proceedings in court or at an out-of-court deposition. The transcript is usually prepared by a court reporter from shorthand notes made during the proceeding.

TRANSFER

to convey or remove from one person or place to another; to sell or give; specifically, to take over possession or control as in the transfer of title to land.

TRANSFER AGENT

individual or firm that keeps a record of the shareholders of a corporation by name, address, and number of shares owned. When stock is sold, the new owner through his or her agent presents the shares purchased to the transfer agent, who cancels the old certificates and issues new certificates registered in the name of the owner. Not every stock transaction results in a transfer, since a significant portion of most issues is held in street name to support margin or for the convenience of the owner.

TRANSFeree LIABILITY

a tax liability of a taxpayer that is imposed upon another person who is the transferee of property from the taxpayer under specified circumstances, in which the taxpayer is unable, because of the transfer, to pay tax liability. In general, the transferee can be liable only to the extent of the value of the property transferred, although the liability is personal and can be recovered from any assets of the transferee. Transferee, for purposes of imposition of this liability, includes heirs, donees of gifts and shareholders of dissolved corporations, but does not include people who act as mere agents for others.

TRANSFER IN CONTEMPLATION OF DEATH see cause [CAUSA MORTIS]; gift [GIFT IN CONTEMPLATION OF DEATH].

TRANSFERRED INTENT

a doctrine in tort law and criminal law that provides that if a defendant intends harm to A but harms B instead, the *intent* is said to be *transferred* to the harm befalling the actual victim as far as defendant's liability to B is concerned. This is only a *fiction*, or a legal conclusion, created in order to accomplish the desired result in terms of liability. The doctrine is applicable in criminal law and finds most frequent application in a homicide context (John shoots at Frank but misses and kills an innocent bystander).

TRAVERSE

a common law pleading that denies the opposing party's allegations of fact.

GENERAL TRAVERSEa blanket denial, stated in general terms, intended to cover all the allegations.

SPECIAL TRAVERSE^a denial that is not absolute, but that seeks to establish a denial through the presentation of supplementary facts (or new matter) that, if accurate, would render the allegations untenable.

TREASON

a crime defined by the Constitution: "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

EXAMPLE: The United States is engaged in war with another country. A U.S. arms manufacturer sells munitions to a private party but with the express knowledge that the munitions will be transferred to the other country at war. The manufacturer may be guilty of *treason*.

Compare sedition.

TREASURE TROVE

money, coin, gold, silver, plate, bullion, or any other item of value found hidden in the earth or in a private place, such as a house, whose owner is unknown. Treasure trove is distinguished from lost property in that it must have been hidden by the owner for safekeeping and not parted with voluntarily. In the absence of statute, the finder of treasure trove has a legal claim to it against all the world except the true owner. See also abandonment.

TREASURY

the subdivision of a government, corporation, or other entity that is responsible for its financial affairs. The United States Department of the Treasury includes the Bureau of Alcohol, Tobacco and Firearms, the Office of the Comptroller of the Currency, the United States Customs Service, the Bureau of Engraving and Printing, the Federal Law Enforcement Training Center, the Bureau of Government Financial Operations, the Internal Revenue Service, the Bureau of the Mint, the Bureau of the Public Debt, the United States Savings Bond Division, and the United States Secret Service. The basic functions of the Department of the Treasury are to develop and propose national and international economic and tax policies; to serve as the government's financial agent, to collect taxes, to disburse funds, and to manage the public debt; to produce currency and coins; and to enforce specific groups of laws.

TREASURY BILL

a U.S. government promissory note issued by the U.S. Treasury, having maturity periods up to one year. Notes having longer maturities are called Treasury notes and very long maturities are called Treasury bonds. Treasury bills are sold at a discount to face value, which is paid at maturity. Denominations are \$10,000 or multiples thereof, although smaller denominations are offered when money is in short supply. Money market trading is very active with large dollar amounts of Treasury bills, which are bearer instruments, changing hands daily.

TREASURY BOND

1. a long-term debt instrument issued by the U.S. Government. Issues of the U.S. Government have the highest rating among so-called fixed income or debt securities and, therefore, offer the lowest taxable yield of any bonds.
2. a bond that has been bought back by the issuing corporation. See treasury stock. Such Treasury bonds are usually retired as part of sinking fund requirements or held in the corporate treasury, which reduces interest expense.

TREASURY NOTE

an intermediate term (one to five years) obligation of the U.S. Government that bears interest paid by coupon. Like all direct U.S. Government obligations, Treasury notes carry the highest domestic credit standing and thus have the lowest taxable yield available at equivalent maturity.

TREASURY STOCK

common or preferred stock that had been issued by a company and later reacquired. The stock may be used for a variety of corporate purposes, such as a stock bonus plan for management and employees or to acquire another company, or it may be held indefinitely, resold or retired. While held in the company treasury, the stock earns no dividends and has no vote in company affairs.

TREATY

a compact made between two or more independent nations with a view to the public welfare: Under the Constitution, the President has the sole power to initiate and make treaties, which must be approved by the Senate before they become binding on citizens of the United States as law. An EXECUTIVE AGREEMENT is often substituted for a treaty and does not require the advice and consent of the Senate, though it may be entered into pursuant to formal authority delegated by the Congress in particular legislation. Executive agreements, however, are restricted to narrower topics. Trade agreements, for example, are often executive agreements rather than treaties.

TREATY CLAUSE

portion of the United States Constitution providing that the President shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

TREBLE DAMAGES

the amount of damages awarded to an injured party, whereby the judge triples the amount that the jury awards; it acts to punish the wrongdoer in addition to compensating the injured party. This is a statutory remedy most often awarded in antitrust violations. See damages [DOUBLE (TREBLE) DAMAGES].

TRESPASS

1. in common law, a form of action instituted to recover damages for any unlawful injury to the plaintiff's person, property or rights, involving immediate force or violence;
2. the violent act that

causes such injury; 3. most often connotes a wrongful interference with the possession of property and is applied to personal property (personalty) as well as to realty.

EXAMPLE: Len erects a fence that inadvertently crosses adjoining property. He *trespasses* on that property and is responsible for all damage that results from his action.

CONTINUING TRESPASS one that is not intermittent or transient, as where one dumps garbage upon the land of another. In such a case, there is a continuing wrong so long as the offending object remains.

TRESPASS DE BONIS ASPORTATIS (*dā bō-nīs äs-pôr-tä'-tīs*) Lat.: trespass for goods carried off. A common law action brought to recover damages from a person who has taken goods or property from the rightful owner.

TRESPASS ON THE CASE one of the two early English actions at common law dealing with what are now known as torts (the other being simply trespass). Trespass on the case afforded remedy against injury to person or property indirectly resulting from the conduct of the defendant. The action of trespass covered only directly resulting injury.

TRESPASS QUARE CLAUSUM FREGIT see quare clausum fregit.

TRESPASS VI ET ARMIS (*vē ēt ä'r'mīs*) Lat.: force and arms. 1. trespass with force and arms, or by unlawful means; 2. a remedy for injuries accompanied with force, or where the act done is itself an immediate injury to another's person or property.

TRESPASSER

one who enters or remains upon land of another without the owner's permission. The owner of the land has no duty to guard against injury of a trespasser and is not liable if a trespasser injures himself or herself unless an unjustified risk of injury to such persons is created, such as by the use of spring guns or human traps. See trespass. Compare invitee; licensee.

TRESPASS ON THE CASE see trespass [TRESPASS ON THE CASE].

TRIAL

an examination, usually involving the offering of testimony, before a competent tribunal according to established procedures, of facts or law put in issue in a cause for the purpose of determining such issue.

TRIAL DE NOVO historically described an appeal from a decision of a court of chancery. It signifies a proceeding in which both issues of law and issues of fact are reconsidered as if the original trial had never taken place. Appeals from probate court or from minor courts, such as local municipal courts, are often by trial de novo.

New testimony may be adduced or the matter may be determined de novo on the basis of the evidentiary record already produced. When the trial de novo is "on the record," no new evidence is taken by the reviewing court, but a fresh consideration of the law and facts is nevertheless undertaken without deference to the decision reached in the initial trial.

TRIAL COURT

court of original jurisdiction, where matters are to be litigated first and where all evidence relative to a cause is received and considered. All states differentiate between trial courts and appellate courts. The distinction is that it is the function of the trial court first to determine the facts and the law in a case, with the appellate court acting predominantly as a court of review of law, but not fact.

TRIBUNAL

an officer or body having authority to adjudicate matters. See also court; forum.

TRIER OF FACT see fact finder.

TRIPARTITE

having three parts.

T.R.O.

temporary restraining order.

TROVER

an early common law tort action to recover damages for a wrongful conversion of personal property or to recover actual possession of such property. Originally, the action was limited to cases in which lost property had been found and converted by the finder to his or her own use. Later the action was expanded to include property not actually lost and found, but only wrongfully converted. Compare detinue; replevin; tenancy [TENANCY AT SUFFERANCE]; trespass.

TRUE BILL see indictment.

TRUST

1. an entity that holds assets (the res or corpus) for the benefit of certain other persons or entities. The person holding legal title or interest, who has responsibility for the assets and distribution of the assets or distribution of the income generated by such assets, is the trustee. The CESTUI QUE TRUST, or beneficiary, for whose benefit the trust is created, holds the EQUITABLE TITLE(see title) or interest. 2. any relationship in which one acts as guardian or fiduciary in relation to another's property. Thus, a deposit of money in a bank is a trust, or the receipt of money to be applied to a particular purpose or to be paid to another is a trust.

SIMPLE TRUST^a a trust that is required, by the terms of its creation or under state law, to distribute all of its income currently.

COMPLEX TRUST^a a trust that under the instrument of its creation or under state law may either distribute or retain income.

CHARITABLE TRUSTA trust created to advance some public purpose, such as education, religion or science; also called a **PUBLIC TRUST**.

CONSTRUCTIVE TRUST [INVOLUNTARY TRUST] one that is found to exist by operation of law or by construction of the court, regardless of lack of express intent on the part of the parties. When one party has been wrongfully deprived, either by mistake, fraud or some other breach of faith, of some right, benefit or title to property, a court may impose upon the present holder of legal title to that property a constructive trust for the benefit of the wronged party. Thus, to prevent unjust enrichment of the legal holder, such person is deemed to hold the property as a trustee for the beneficial use of the party wrongfully deprived of rights.

EXPRESS TRUST [DIRECT TRUST] a trust created from the free and deliberate act of the parties, including affirmative intention of the settlor [the one granting the property] to set up the trust, usually evidenced by some writing, deed or will.

GRANTOR TRUSTA trust that has beneficiaries other than the grantor but, because of retention of certain interests or certain powers over the trust, all income of the trust is taxed to the grantor.

IMPLIED TRUSTone that is inferred from the parties' transactions by operation of law, in contrast to an **EXPRESS TRUST**that is created by the parties' deliberate acts or expression of intent. Implied trusts can be either **CONSTRUCTIVE**or **RESULTING**.

INVESTMENT TRUSTsee investment company.

LIVING TRUSTAn inter vivos trust; a trust established and in operation during the settlor's life. Compare **TESTAMENTARY TRUST**.

PRECATORY TRUSTone frequently created by a will, arising from words of expectation, request or recommendation that are expressed therein. Though they do not amount to actual directives, such words are effective to create a trust so long as they are not so modified by the context as to amount to no more than mere suggestions, to be acted upon or not, according to the caprice of the supposed trustee.

RESULTING TRUSTA trust arising by implication of law when it appears from the nature of the transaction that it was the intention of the parties to create a trust. Thus, a resulting trust involves the element of intent, which though implied, makes it more like an **EXPRESS TRUST**. A constructive trust, in contrast, is sometimes found contrary to the parties' intent, in order to work equity or frustrate fraud.

EXAMPLE: Mark purchases a piece of land, but the purchase agreement names a close friend as the purchaser. Since the friend is not considered a natural object of Mark's affection, which is usually a

family member or relative, a presumption arises that Mark did not make a gift to his friend. Unless other evidence is shown to invalidate that presumption, a court finds that the friend holds title to the property as a *resulting trust* for Mark.

TESTAMENTARY TRUST a trust that is established during the settlor's life but is contained in the settlor's will and does not take effect until the settlor's death; created with the formalities necessary for a will.

SPENDTHRIFT TRUST see spendthrift trust.

UNIT INVESTMENT TRUST see unit investment trust.

VOTING TRUST see voting trust.

TRUST CERTIFICATE

an instrument issued to finance the purchase of railroad equipment, under which the trustees hold title to the equipment as security for the load.

TRUST COMPANY

a financial organization that provides trust services such as acting in the capacity of trustee, fiduciary or agent for both individuals and companies; transfer agents are typically provided by trust companies. Duties include administering trust funds, acting as custodian for property held in trust, providing investment management for trust funds, executing wills. Trust companies often engage in banking activities as well, and are regulated by state law.

TRUST DEED see deed of trust.

TRUSTEE

1. one who holds legal title to property in trust for the benefit of another person, and who is required to carry out specific duties with regard to the property, or who has been given power affecting the disposition of property for another's benefit.

EXAMPLE: A father creates a trust for his children. He wants to control the disposition of the money generated by the trust, so he names himself as *trustee*. In that position, he can be sure that his desires in relation to the trust are carried out.

2. also used loosely as anyone who acts as a guardian or fiduciary in relationship to another, such as a public officer towards his or her constituents, a state toward its citizens, or a partner to his or her copartner.

TRUSTEE IN BANKRUPTCY an officer, elected and approved by the referee or judge of a bankruptcy proceeding, who takes legal title to the property or money of the bankrupt and holds it in trust for equitable distribution among the bankrupt's creditors.

TRUST FUND

real property or personal property held in trust for the benefit of another person; the corpus [res] of a trust.

TRUST INDENTURE

an instrument that states the terms and conditions of a trust, particularly a trust created as security for a bond issue.

TRUST INDENTURE ACT OF 1939 see Securities Acts [TRUST INDENTURE ACT OF 1939].

TRUSTOR

one who creates a trust; more often called the settlor.

TRUTH IN LENDING ACT

a federal law, the provisions of which assure individuals applying for commercial credit information relating to the cost of credit, enabling them to decide which credit source offers them the most favorable credit terms. Under this law, the commercial lender must inform the borrower of the dollar amount of the interest charges and the interest rate, computed on an annual basis according to the specified formula, and must afford borrowers who pledge real property as security for the loan a three-day period in which to rescind the transaction.

EXAMPLE: A merchant allows his customers to buy goods on credit. He does not force them to sign any papers evidencing the debt, but, in return, he charges a fluctuating interest rate. This practice may violate the *Truth in Lending Act*, and the merchant may be liable for penalties.

TRY TITLE

to submit to judicial scrutiny the legitimacy of title to property.

TUCKER ACT see court of claims.

TURNTABLE DOCTRINE see attractive nuisance.

TURPITUDE see moral turpitude.

TWO FUNDS DOCTRINE see marshaling [marshalling] [TWO FUNDS DOCTRINE].

TWO PARTY CONSENT see wiretap [TWO PARTY CONSENT].

TYING ARRANGEMENT

the sale of one product on the condition that the purchaser also buy another product, or agree to not buy the other product from anyone else. A tying agreement is a *per se* violation of the Sherman Antitrust Act, in that it allows the seller to exploit his or her control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. But, if a seller does not possess sufficient market power to cause an actual adverse effect on competition, a court will not find a tying arrangement and therefore the *per se* rule will not apply. See antitrust laws.

U

UBI

(*ū'-bē*) Lat.: where.

UBI SUPRA

(*ū-bē sū'prā*) Lat.: where stated above.

U.C.C. see Uniform Commercial Code [U.C.C.].

U.C.C.C. see Uniform Consumer Credit Code [U.C.C.C.].

ULTIMATE FACTS

the essential and determining facts on which the final conclusion of law is predicated. They are facts deduced by inference from evidentiary facts, which can be directly established by testimony or evidence. Compare mediate data.

ULTRAHAZARDOUS ACTIVITY

an uncommon activity, giving rise to strict liability, that necessarily involves risk of serious harm to the person, land or chattels of others.

EXAMPLE: As part of the demolition of a building, a construction company uses various methods of blasting. These methods are permitted even though they may cause damages elsewhere because of the need to use explosive devices. But since blasting is an *ultrahazardous activity*, the company must pay any damage that results, whether or not the damage was foreseeable.

ULTRAVIRES

(*ūl'-trū vī'-rēz*) Lat.: beyond, in excess of powers. That which is beyond the power authorized by law. 1. an action of a corporation that is beyond the powers conferred upon it by its charter, or by the statute under which it was created. 2. acts of public officials beyond their authority. See quo warranto.

UNAVOIDABLE ACCIDENT see accident [UNAVOIDABLE ACCIDENT].

UNCLEAN HANDS

one of the equitable maxims embodying the principle that a party seeking redress in a court of equity (equitable relief) must not have done any unethical act in the transaction upon which that party maintains the action in equity, since a court of conscience will not grant relief to one guilty of unconscionable conduct, i.e., to one with unclean hands.

UNCONDITIONAL DISCHARGE see sentence [SUSPENDED SENTENCE].

UNCONSCIONABLE

so unreasonably detrimental to the interest of one party to a contract as to render the contract unenforceable. The term refers to a bargain so one-sided as to amount to an absence of meaningful choice on the part of one of the parties (typically as a result of greatly unequal bargaining power), together with contract terms unreasonably favorable to the other party.

EXAMPLE: Fern needs money quickly to meet her monthly car payments. She contracts with a company to work at extremely low wages in return for their making her car payments. The contract may be declared *unconscionable* because Fern entered into it in a distressed state and the company took great advantage of her position.

UNCONSTITUTIONAL

conflicting with some provision of the Constitution. A statute found to be unconstitutional is considered void or as if it had never been, and consequently all rights, contracts or duties that depend on it are void. Similarly, no one can be punished for having refused obedience to the law once it is found to be unconstitutional.

UNDER COLOR OF LAW see color of law.

UNDER COLOR OF TITLE see color of title.

UNDERLEASE see sublease.

UNDER PROTEST

the making of a payment or the doing of an act under an obligation while reserving the right to object to the obligation at a later date. Typically, a party will make the payment or perform the act, but will at the same time inform the other party in writing that the performance is under protest. The statement *under protest, without prejudice, with reservation of right*, or the like will prevent an accord and satisfaction and will prevent prejudice to the rights reserved.

UNDER SEAL see seal; specialty.

UNDER THE INFLUENCE see driving while intoxicated [D.W.I.]

UNDER THE WILL, ELECTION see election under the will.

UNDERWRITE

to insure the satisfaction of an obligation, such as by an insurance contract or sale of bonds. To underwrite an insurance contract is to act as the insurer, or assume the risk for the life or property of another.

EXAMPLE: Nocturn Company transports highly flammable liquids across the country. It locates an insurance company to *underwrite* an insurance policy, thereby shifting the risk and consequences of an

accident onto another company. Nocturn will have to pay a high price for the underwriting, and the insurance company may require frequent supervision of Nocturn's safety practices.

To underwrite a stock or bond issue is to insure the sale of stocks or bonds by agreeing to buy the entire issue if they are not sold to the public before a certain date.

UNDISCLOSED PRINCIPAL see principal.

UNDIVIDED INTEREST

that interest or right in property owned by TENANTS IN COMMON, JOINT TENANTS or TENANTS BY THE ENTIRETY (see tenancy), whereby each tenant has an equal right to make use of and enjoy the entire property. An undivided interest may be of only a fractional share, e.g., "an undivided one-quarter interest," in which case the holder is entitled to one quarter of all profits and sale proceeds from the property but has a right to possession of the whole. See also partition; severalty.

UNDUE INFLUENCE

influence of another that destroys the requisite free will of a testator or donor and creates a ground for nullifying a will or invalidating an improvident gift. The exercise of undue influence is suggested by excessive insistence, superiority of will or mind, the relationship of the parties or pressure on the donor or testator by any other means to do what he or she is unable, practically, to refuse.

EXAMPLE: A mother has her son draft her will, which provides the son with most of her estate. The son is also her attorney. If the two other sons, both of whom had relationships with the mother equal to the attorney's, are virtually excluded from the mother's will, most courts will find *undue influence* on the part of the attorney and invalidate the gift to him.

Compare duress.

UNEARNED SURPLUS

in finance, surplus not part of earned surplus. It may include paid-in-surplus, REVALUATION SURPLUS, which arises upon the revaluation of assets above their cost, or DONATED SURPLUS, which arises from capital contributions other than for shares of stock.

UNETHICAL

not ethical; not in accordance with the standards followed in a business or a profession. See conflict of interest. See also Code of Professional Responsibility and Model Rules of Professional Conduct.

UNEXECUTED USE see use [UNEXECUTED USE].

UNFAIR COMPETITION

1. unfair, untrue or misleading advertising likely to lead the public to believe that certain goods are associated with

another manufacturer; 2. imitating a competitor's product, package or trademark in circumstances where the consumer might be misled; 3. representations or conduct that deceive the public into believing that the business name, reputation or good will of one person is that of another.

Unfair competition is a tort and a fraud for which the courts afford a remedy. Fraudulent or deceptive practices that are disparaging or injurious to the trade of a competitor may be enjoined.

UNFAIR LABOR PRACTICE

any activities by either a labor organization (union) or an employer that are unlawful under the National Labor Relations Act. Unions are specifically forbidden to engage in the following activities: restraint or coercion of employees or employers; coercion of employers to discriminate against employees; refusal to bargain; coercion or inducement of strikes or boycotts for a prohibited purpose; excessive or discriminatory initiation fees; featherbedding; picketing for organizational purposes under certain circumstances; in the health care industry, picketing or striking on less than ten days' notice.

Employers are specifically forbidden to engage in the following activities: interference with employees in exercise of their rights; domination of a labor organization; encouragement or discouragement of membership in labor unions through discriminatory terms and conditions of employment; discrimination against employees for filing labor grievances or testifying in regard to them; refusal to bargain collectively with the representative of a majority of the employees; entering into contracts that discriminate against other employers. See collective bargaining.

UNFIT

unsuitable, incompetent, or not adapted for a particular use or service. Compare warranty [WARRANTY OF FITNESS]. In the context of a parent child relationship the term *unfit* usually, although not necessarily, imports something of moral delinquency.

UNIFIED ESTATE AND GIFT TAX see tax [UNIFIED ESTATE AND GIFT TAX.]

UNIFORM ARBITRATION ACT see arbitrator [UNIFORM ARBITRATION ACT].

UNIFORM CODE OF MILITARY JUSTICE see military law [(UNIFORM) CODE OF MILITARY JUSTICE].

UNIFORM COMMERCIAL CODE [U.C.C.]

a code of laws governing various commercial transactions, including the sale of goods, banking transactions, secured transactions in personal property, and other matters, that was designed to bring uniformity in these

areas to the laws of the various states, and that has been adopted, with some modifications, in all states (except Louisiana) as well as in the District of Columbia and in the Virgin Islands.

UNIFORM CONSUMER CREDIT CODE [U.C.C.C.]

one of several uniform laws that states may or may not adopt, the U.C.C.C. was passed to simplify and further consumer understanding of all aspects of credit and credit transactions and to encourage the development of sound consumer credit practices. Sometimes called U.3C.

UNIFORM GIFTS TO MINORS ACT [U.G.M.A.]

a uniform law adopted by every state that creates a statutory method for making a gift in trust to minors.

The law usually applies only to certain types of personal property, such as securities, annuity, life insurance and endowment policies, partnership interests, or tangibles. The gift is made and the trust is created by the donor either by registering the property in the name of the custodian, followed by the language "as custodian for . . ." or by delivering the property to the custodian together with a statement that the property is to be held as custodian under the Uniform Gifts to Minors Act. The statutes set forth the terms of the trust, under which the custodian may apply the trust fund for the benefit of the minor and is obliged to pay over the funds upon the minor attaining age 18, unless the donor indicates at the time of the gift that it is to be held until age 21.

UNIFORM LAWS

laws that have been approved by the Commissioners on Uniform State Laws and are proposed to all state legislatures for their consideration and adoption. Some uniform laws are passed by only a few states; others are passed by all the states with minor differences in language.

EXAMPLE: The Uniform Commercial Code, a *uniform law*, has been adopted by almost all states, with some variations by several states. The U.C.C. governs banking and secured transactions, and sale of goods.

UNIFORM SYSTEM OF CITATION

a legal citation guide of accepted and standard rules of citation and style. Published by The Harvard Law Review Association in updated editions. It is a guide to citations related to cases, statutes, periodicals, debates, hearings, and other specific forms of authority; known as the BLUE BOOK for its blue cover. Properly cited briefs are said to be in blue book form.

UNILATERAL CONTRACT see contract.

UNILATERAL MISTAKE see mistake.

UNION see labor organization [UNION].

UNION SHOP

a workplace where all the employees are members of a union. Nonunion members may work in such shops provided they agree to join the union.

UNIT see commercial unit.

UNITED STATES ATTORNEY see district attorney.

UNITED STATES CLAIMS COURT see Court of Claims.

UNITED STATES CODE

the official codification of the federal statutes in a multivolume bound set that is issued every six years and supplemented during the intervening years. It is updated by the supplement, United States Code Congressional and Administrative News. The UNITED STATES CODE ANNOTATED (U.S.C.A.) includes case notes, historical references, and cross-references.

UNITED STATES COURTS see federal courts.

UNITED STATES MAGISTRATE see magistrate [UNITED STATES [FEDERAL] MAGISTRATE].

UNITED STATES TRUSTEE see bankruptcy [UNITED STATES TRUSTEE].

UNITIES

the common law requirements necessary to create a JOINT TENANCY or a TENANCY BY THE ENTIRETY (see tenancy). A joint tenancy requires the four unities of interest, possession, time and title, and a tenancy by the entirety requires, in addition to the four unities, unity of person. Tenants in common, as a result of the kind of estate they hold, have a unity of possession, but no unity is required to create such an estate.

UNITY OF INTEREST the requirement that interests of the co-tenants in a joint tenancy or tenancy by the entirety be equal. An individual joint tenant cannot encumber his or her share by mortgage without destroying this unity; to preserve the joint tenancy the mortgage must be agreed to by all. Tenants in common are not subject to this unity of interest rule and may have unequal shares in the same property. See tenancy [TENANCY IN COMMON].

UNITY OF POSSESSION the equal right of each co-owner of property to the use and possession of the whole property.

UNITY OF TIME the requirement that the interests of the co-tenants in a joint tenancy or tenancy by the entirety must commence (or vest) at the same moment in time.

UNITY OF TITLE the requirement that all tenants of a joint tenancy or both tenants of a tenancy by the entirety acquire their interests

under the same title. Thus, such co-tenants cannot hold by different deeds; their interests are created by the same instrument or event.

UNITY OF PERSON the common-law requirement for the creation of a tenancy by the entirety that the co-tenants be husband and wife, based on the conception that marriage created a unity of person.

UNIT INVESTMENT TRUST

an unmanaged portfolio of bonds that is sold to investors in units of \$1,000 each. A bank or trust company serves as custodian and trustee for the portfolio of bonds, and collects and periodically disburses interest payments and principal when bonds mature. Since the portfolio is fixed, the trust is self-liquidating because of both unit holder redemptions and bond maturities. Compare nondiscretionary trust.

UNIVERSAL AGENT

an agent authorized to transact all the business of his or her principal.

UNJUST ENRICHMENT

gain or benefit that is the result of another's efforts or acts but for which that other has received no recompense, and for which the one receiving the benefit has not paid. A person who is deemed by law to have been unjustly enriched at the expense of another is required to make restitution to the other. Restitution and unjust enrichment are modern designations for the older doctrine of quasi contracts, which are not true contracts, but are obligations created by the law when money, property or services have been obtained by one person at the expense of another under such circumstances that in equity and good conscience he or she ought not retain it. The law then may impose a duty to pay compensation in order to prevent unjust enrichment.

EXAMPLE: Bart plants shrubbery under a contract with Joan. Joan dies before Bart is paid, and Gail then buys Joan's house. Gail must pay Bart for the shrubbery, for if she does not, she will be *unjustly enriched* and Bart will be out the value of the plantings.

Compare quantum meruit.

UNLAWFUL ACT MANSLAUGHTER see manslaughter [UNLAWFUL ACT MANSLAUGHTER].

UNLAWFUL ASSEMBLY

1. a misdemeanor in common law consisting of a meeting of several persons with a common plan that, if carried out, would result in a riot; 2. a meeting of persons who intend to commit a crime by open force; 3. a meeting to execute a common design, lawful or unlawful, in an unauthorized manner that is likely to cause fear of a **BREACH OF THE PEACE** (see breach). Compare conspiracy.

UNLAWFUL DETAINER

the act of holding possession without right, as in the case of a tenant whose lease has expired. UNLAWFUL DETAINER STATUTES often create a right to oust, by summary process, a holdover tenant and to determine speedily the landlord's right to possession of real property. The summary proceeding determines only the question of possession; no ultimate determination of title or estate can be made in such a proceeding. See tenancy [TENANCY AT SUFFERANCE].

UNLAWFUL ENTRY

the statutory crime of entering onto someone else's property without their consent by fraud or force. Unlawful entry is broader than and should be distinguished from the common law crime of burglary that requires the breaking and entry of the dwelling of another at night and with felonious intent. Statutes prohibiting unlawful entry were passed to protect society from acts not prohibited by burglary. See trespass.

UNLAWFUL FORCE see force [UNLAWFUL FORCE].

UNLIQUIDATED see sum certain [UNLIQUIDATED].

UNLISTED SECURITY

a stock or bond that is not listed on a stock exchange and is therefore traded only in the over-the-counter market.

UNNATURAL ACT see crime against nature.

UNNECESSARY HARDSHIP

in zoning law, a permissible ground for a variance. Unnecessary hardship exists when the physical characteristics of the real estate are such that it cannot be used for a permitted purpose, or that it can only be used for a permitted purpose at a prohibitive expense.

UNREALIZED APPRECIATION see appreciation [UNREALIZED APPRECIATION].

UNREASONABLE

arbitrary, capricious, absurd, immoderate, or exorbitant; not conformable to reason, irrational, beyond bounds of reason or moderation.

UNREASONABLE PUNISHMENT see cruel and unusual punishment.

UNREASONABLE RESTRAINT OF TRADE see restraint of trade.

UNREASONABLE SEARCH AND SEIZURE

a search and/or seizure of a person, a house, papers or effects that are protected against it by the Fourth and Fourteenth Amendments and state

constitutions, where the basis for the search and/or seizure does not meet constitutional requirements.

EXAMPLE: An officer receives an anonymous tip that Sam is growing marijuana in his house. The officer waits until Sam leaves his house, and then the officer enters through an open window. Since the entry was conducted without a warrant and without probable cause, the *search and seizure* would be found *unreasonable* and evidence obtained thereby would be suppressed and would not be used to prove that Sam had marijuana in his house.

UNUSUAL PUNISHMENT see cruel and unusual punishment.

UP TICK [OR PLUS TICK]

indicates that the latest trade in a stock is at a higher price than the previous trade. A ZERO-PLUS TICK is a trade at the last price with the preceding different price registered as an up tick.

USAGE OF TRADE see trade usage.

USE

the right to enjoy the benefits flowing from real property or personal property; equitable ownership as distinct from legal title. Historically in the law of property the term referred to every form of beneficial ownership enforceable in the courts of chancery. Historically, uses have been created by provision in a deed, by implication to the conveyer when property is transferred without consideration [called a RESULTING USE]; by bargain and sale deed or by a covenant to stand seised. Under the Statute of Uses, the party in whom a use was created was deemed to be the owner of legal title to a like estate as he had in the use; hence "A to B for the use of C for life" was operative under the statute to convey to C a life estate.

An important effect of the Statute of Uses was the validation at law of executory interests (a species of future interests) that had previously been recognized only in equity. A SHIFTING USE is a use that arises in derogation of another, i.e., shifts from one beneficiary to another, depending on some future contingency. A SPRINGING USE is a use that arises upon the occurrence of a future event and that does not take effect in derogation of any interest other than one that results to the grantor, or remains in him or her in the meantime. Thus, a shifting use is one that cuts short a prior use estate in a person other than the conveyor; a springing use is one that cuts short a use estate in the conveyor.

In patent law, use refers to the rights of the licensee of the patent.

PUBLIC USE see public use.

USEFUL LIFE see depreciation [USEFUL LIFE].

USE IMMUNITY see self-incrimination, privilege against.

USE, PUBLIC see public use.

USUFRUCT

in civil law, the right to use and enjoy property vested in another, and to draw from it all the profit and utility it may produce, provided it be without altering the substance of the thing. See beneficial use.

USURIOUS CONTRACT

a contract that imposes interest on a debt at a rate in excess of that permitted by law. See loansharking; usury.

USURY

an unconscionable or exorbitant rate of interest; an excessive and illegal requirement of compensation for forbearance on a debt; a bargain under which a greater profit than is permitted by law is paid, or is agreed to be paid, to a creditor by or on behalf of the debtor for a loan of money, or for extending the maturity of a pecuniary debt. The state legislatures today determine the maximum allowable rates of interest that may be demanded in any financial transaction.

EXAMPLE: Don needs money but cannot obtain a loan from a bank. A close friend agrees to lend him what he needs but at an interest rate over the maximum allowed by law. Don agrees to the arrangement and in fact does not think it unfair. Still, the friend is guilty of *usury* and can be prosecuted for usury if the rate reaches a criminal level, which varies in each state. The friend may also be made to return any interest he has received. More importantly, the usurious rate of interest, and in some jurisdictions the debt as well, is not enforceable against Don in the event he has failed to make payments.

UTILITY see public utility.

UTMOST CARE

the highest degree of care. In tort law, such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances. See negligence.

UTMOST RESISTANCE

the degree of resistance that a woman traditionally has been required to offer her attacker in order to charge that she has been raped; the maximum resistance of which a woman is capable in resisting rape.

UTTER

to put forth, to execute; especially, to offer, whether accepted or not, a forged instrument with representations by words or acts, directly or indirectly, that the instrument is valid.

UXOR see et ux.

V

VACATE

1. to render void; to set aside; 2. to move out; to render vacant.

VAGRANCY

general term for a class of minor offenses such as idleness without visible means of support, loitering, wandering around from place to place without any lawful purpose.

VAGUENESS see void for vagueness.

VALUABLE CONSIDERATION see consideration [VALUABLE CONSIDERATION].

VALUATION

determination of the worth of real or personal property. See appraise, book value, face value, market value.

VALUE

the monetary worth of a thing; marketable price; estimated or assessed worth. The method of determining an object's value will vary depending upon the purpose for which it is being determined. For instance, for estate and gift tax purposes, value is the price a willing buyer would pay a willing seller if neither is compelled to buy or sell and both have reasonable knowledge of the relevant facts. However, for insurance purposes, value may refer to REPLACEMENT VALUE, that is, the cost of replacing an object, rather than its fair market value. See book value; capitalized value; cash surrender value; diminution in value; face value; going concern value; net asset value; par value; probative [PROBATIVE VALUE].

VALUE ADDED TAX see tax [AD ALOREM TAX].

VANDALISM see bias crime; criminal mischief.

VARIANCE

1. in procedure, a discrepancy between what is charged or alleged and what is proved or offered as proof. A FATAL VARIANCE is, in both civil and criminal cases, a material and substantial variance: in criminal cases, it must also tend to mislead the defendant in making his or her defense, or tend to expose the defendant to the injury of double jeopardy.

EXAMPLE: Alice files a lawsuit against a package delivery service for damaging a package they delivered to her. At the trial, she offers proof to show that she never received the package. The difference

between her original claim and the claim that she offers to prove constitutes a *fatal variance*, and Alice's case will probably be dismissed.

2. in zoning law, an exemption from the application of a zoning ordinance or regulation permitting a use that varies from that otherwise permitted. The exception is granted by the appropriate authority in special circumstances to protect against undue hardship wrought by strict enforcement. See nonconforming use.

VASSAL

at common law, a person who was granted real property in return for a promise to perform services for his or her grantor or lord. For instance, the king of England was the lord of the country and granted land to his nobles; the nobles were then obligated to perform various feudal services for the king, and were vassals to him. Upon a vassal's failure to perform the required services, the property reverted to the lord. While the nobles were vassals of the king, they also could grant land in return for feudal services, and thus be lords to other vassals. See subinfeudation. The abuses of the feudal system led the term to acquire a meaning similar to slave.

VEIL, PIERCING see piercing the corporate veil.

VEL NON

(vēl nōn) Lat.: or not.

VENAL

dishonest; readily bribed or corrupted.

VEND

the habit of selling and exposing to sale; to transfer to another for a pecuniary equivalent.

VENDEE

buyer, especially in a contract for the sale of realty.

VENDOR

seller, especially person who sells real property.

VENDOR'S LIEN

the right to enforce payment of the purchase price by suit against the vendee's equitable estate.

VENIRE

(vē-nē'-rā) Lat.: to come. Refers to the common law process by which jurors are summoned to try a case.

VENIRE DE NOVO *(dā nō'-vō)* Lat.: to come anew. Refers to summoning of a second jury for the purpose of proceeding to a second trial. Such a second trial is awarded where a verdict (by the jury) or finding (by the court) is so defective or ambiguous upon its face that no judgment can be rendered upon it. The term is sometimes used simply to denote a new trial.

VENUE

a neighborhood, a neighboring place; synonym for place of trial; refers to the possible or proper place for trial of a

suit, among several places where jurisdiction could be established. Venue essentially involves the right of the party sued to have the action

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heard in a particular judicial district, for reasons of convenience. In a criminal trial where publicity surrounding the crime would virtually preclude fair trial, the court will direct a CHANGE OF VENUE, or removal of the proceedings to a different district or county. See forum non conveniens.

VERACITY

honesty, truthfulness. See witness [CHARACTER WITNESS]. Compare credibility.

VERDICT

the opinion rendered by a jury, or a judge where there is no jury, on a question of fact. A verdict differs from a judgment in that a verdict is not a judicial determination, but rather a finding of fact that the trial court may accept or reject and utilize in formulating its judgment.

COMPROMISE VERDICT a verdict resulting from improper surrender of one juror's opinion to another on a material issue.

DIRECTED VERDICT see directed verdict.

GENERAL VERDICT ordinary verdict declaring simply which party prevails, without any special findings of fact.

PARTIAL VERDICT in criminal law, a finding that the defendant is guilty of certain charges but innocent of others.

QUOTIENT VERDICT improper and unacceptable kind of compromise verdict resulting from an agreement by the jurors that their verdict will be an award of damages in an amount to be determined by the addition of all jurors' computations of damages and its division by the number of jurors.

SPECIAL VERDICT one rendered on certain specific factual issues posed by the court. The special verdict requires the jury to make a specific finding on each ultimate fact put in issue by the pleadings rather than a general finding for one party or the other. The court will then apply the law to those found facts.

VERIFICATION

confirmation of correctness or authenticity of pleading or other paper affidavit, oath or deposition; an affidavit attached to a statement insuring the truth of that statement.

VERTICAL PRICE FIXING see price fixing [VERTICAL PRICE FIXING].

VERTICAL PRIVACY see privity [VERTICAL PRIVACY].

VESTED

fixed, accrued or absolute; not contingent; generally used to describe any right or title to something that is not dependent upon the occurrence or failure to occur of some specified future event (**CONDITION PRECEDENT** see condition).

VESTED ESTATE a property interest that either is presently in possession or will necessarily come into possession in the future merely upon the determination, or end, of the preceding estate.

EXAMPLE: Amother conveys a house to her son, who will keep it until he has his first child, at which time the house is to pass to her daughter. Not until the son's child is born can it be determined whether the daughter will get the house. But immediately upon the birth, the daughter's interest in the house vests, giving rise to a *vested estate*.

VESTED INTEREST a present right or title to a thing that carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future.

VESTED REMAINDER a remainder that is limited to an ascertained person whose right to the estate is fixed, certain and not dependent upon the happening of any future event, but whose enjoyment of the estate is postponed to some future time.

VESTED RIGHTS in relation to constitutional guarantees, a broad shield of protection that consists of a vested interest that the government should in equity recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The term is frequently used to designate rights that have become so fixed that the owner cannot be deprived of them without his consent.

VETO see pocket veto.

VEXATIOUS LITIGATION

civil action shown to have been instituted maliciously and without probable cause, and that may be protected against by injunction. See litigious; malicious prosecution.

VICARIOUS LIABILITY

liability imputed to one person for the actions of another, where the law contemplates that the other should be held responsible for a wrong in fact committed by someone else. Sometimes this doctrine is called **IMPUTED LIABILITY**.

EXAMPLE: Mel drives a truck for Speedy Delivery Service. While pulling out of a driveway, he hits a pedestrian. Speedy will be *vicariously liable* for the pedestrian's injuries under the doctrine of respondeat superior.

EXAMPLE: Sam agrees to drive the getaway car in a robbery. George, who enters the bank, kills a teller during the robbery. In most states, Sam is *vicariously liable* for the killing.

Compare strict liability.

VICE CRIMES

activities such as gambling, prostitution, and pornography that are illegal because they offend the moral standards of the community.

VICINAGE

neighborhood; vicinity. Contemporary meaning denotes a particular area where a crime was committed, where a trial is being held, or from which jurors are called.

VICTUALS

prepared food; food ready to eat.

VICTUALER [VICTUALLER]

one who sells food or drink prepared for consumption on the premises.

VIDELICET see viz.

VIDUITATE [VIDUITY]

widowhood.

VI ET ARMIS see trespass [TRESPASS VI ET ARMIS].

VIEW see plain view. See also lineup; show up.

VILLEIN SOCAGE see socage.

VILLENAGE

a menial form of feudal tenure in which the tenant [the villein] was required to perform all services demanded by the lord of the manor.

VIOLATION OF PROBATION see probation [VIOLATION OF PROBATION].

VIOLENCE [VIOLENT]

moving, acting, or characterized by physical force, especially by extreme and sudden or unjust or improper force. The degree of force implied by the word *violence* depends upon the context in which it is used. For instance, its use in an insurance policy may imply a lesser degree or a different type of force than its use in a criminal statute.

VIR

(*vīr*) Lat.: man.

VIRTUAL REPRESENTATION

representation in a lawsuit without being named as a party. A type of class action where nonparty members have a close relationship to the named parties and have similar interests such that a judgment is binding upon the nonparties. A preferable alternative is the appointment of a guardian ad litem to ensure that the nonparty interests will be adequately protected.

VISA

a recognition of the validity of a passport; issued by proper officials of the country that the bearer wishes to enter; more broadly, a symbol made on a document certifying that it has been examined and approved.

VISITATION, CONJUGAL see conjugal rights [CONJUGAL VISITATION].

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VISITATION RIGHTS

in family law, the right granted by a court to a parent or other relative who is deprived custody of a child to visit the child on a regular basis.

VIS MAJOR

(*vřz mā-yōr'*) Lat.: a greater force. In civil law denotes an act of God, an irresistible natural cause that cannot be guarded against by ordinary exertions of skill and prudence. Once treated as equivalent to act of God, *vis major* now includes any insuperable interference.

VITALIZED see quickening.

VITIATE

to void; to render a nullity; to impair.

VIZ

(*vřz*) Lat.: namely; that is to say; abbreviation of the Latin *videlicet*. Used in pleadings to specify or explain what goes before it.

VOICE EXEMPLAR

a recording of a person's voice made for the purpose of identification, usually in a criminal investigation. The Supreme Court has held that requiring a person to make a voice exemplar does not violate the privilege against self-incrimination, since it is used for identification purposes only, and that it does not constitute an unreasonable search or seizure.

VOID

empty, having no legal force, incapable of being ratified.

VOIDABLE

capable of being later annulled; refers to a valid act that, though it may be rendered void, may accomplish the thing sought unless or until the defect in the transaction has been effectively asserted or judicially ascertained and declared.

VOIDABLE PREFERENCE see preference [VOIDABLE PREFERENCE].

VOID FOR VAGUENESS

a doctrine that renders a criminal statute unconstitutional and unenforceable when it is so vague that persons of common intelligence must guess at its meaning and differ about its application. A statute is void when it is vague about either what persons are within the scope of the statute, what conduct is forbidden or what punishment may be imposed. The principle derives from the requirement of the due process clause of the Fifth Amendment that criminal statutes give reasonably certain notice that an act has been made criminal before the act is committed and a person is charged with a crime for having so acted.

VOID, NULL AND see nullity.

VOID ON ITS FACE see void for vagueness.

VOIR DIRE

(*vwōr dēr*) Fr.: to speak the truth. 1. A VOIR DIRE EXAMINATION by the court or by the attorneys of prospective jurors is to determine their qualification for jury service, to determine if there is cause to challenge (i.e., to excuse) particular jurors, and to provide information about the jurors so that the parties can exercise their statutory peremptory challenges (objections to particular jurors without need to state cause).

EXAMPLE: A doctor is on trial for performing an abortion. In a *voir dire* examination of potential jurors by counsel or the court, it is revealed that a prospective juror has strong religious beliefs concerning abortions that would bias any possibility of a fair and independent judgment. That juror will most likely not be used at the doctor's trial.

2. A voir dire examination during the trial refers to a hearing by the court out of the presence of the jury upon some issue of fact or law that requires an initial determination by the court or upon which the court must rule as a matter of law alone.

VOLENTI NON FIT INJURIA

(*vō-lēn'-tē nōn fēt ĩn jū'-rē-ā*) Lat.: the volunteer suffers no wrong. No legal wrong is done to one who consents. In tort law, the principle that usually damages cannot be claimed by one who has consented to the activity that caused the damages.

VOLUNTARY APPEARANCE see appearance.

VOLUNTARY DISABLEMENT see anticipatory breach.

VOLUNTARY DISSOLUTION see dissolution [VOLUNTARY DISSOLUTION].

VOLUNTARY MANSLAUGHTER see manslaughter [VOLUNTARY MANSLAUGHTER].

VOLUNTARY NONSUIT see nonsuit [VOLUNTARY NONSUIT].

VOLUNTARY WASTE see waste [VOLUNTARY WASTE].

VOTING see cumulative voting.

VOTING RIGHT

the right of a common shareholder to vote in person or by proxy on the affairs of a company.

VOTING RIGHTS ACT

the federal law passed in 1965 to effectuate the right of each citizen to vote under the Fifteenth Amendment to the U.S. Constitution. The law prohibits imposition of any qualification, prerequisite to voting or practice or procedure by any state or political subdivision to deny or abridge the right of any U.S. citizen to vote because of race or color. The law forbids restrictions, such as literacy, on the right to vote.

VOTING TRUST

The accumulation in a single hand, or in a few hands, of shares of corporate stock belonging to many owners, for the purpose of exercising control over the business of the company. A device whereby two or more shareholders divorce the voting rights of their stock from its ownership, retaining their ownership but transferring their voting rights to trustees in whom the voting rights of all the depositors in the trust are pooled.

W

WAGE EARNER'S PLAN see bankruptcy [WAGE EARNER'S PLAN].

WAGE, MINIMUM see minimum wage.

WAGER OF LAW

under early English law, the giving of a pledge or surety by a defendant to appear in court with the required number of COMPURGATORS[character witnesses] who would testify that they believed the defendant to be telling the truth. The number of compurgators was usually 11 but could vary. The form of the oath they had to recite was very strict. If one of them used the wrong word, the oath "burst" and the plaintiff won. In England, this procedure had largely died out by the thirteenth century but was still used occasionally as late as the eighteenth century in cases of debt and detinue.

Compurgation originally became the accepted mode of trial adapted to members of the church when the duel and ordeal lost favor. The defendant would then be expected to bring a required number of priests and/or kinsmen as compurgators because they should best know the defendant's character. Later, for practical reasons, neighbors became acceptable compurgators. The compurgators were not witnesses but merely expressed their confidence in the veracity of the defendant; therefore, a comparative value was attached to their oaths. For example, the oath of one competent witness may have outweighed the oaths of six compurgators. The defense of wager of law was much abused. Since it was only available in actions of debt, the courts permitted the creditor to sue in assumpsit, an action in which that defense was not available.

WAGNER ACT see labor organization [UNION] [NATIONAL LABOR RELATIONS ACT]; Taft-Hartley Act.

WAIT see lying in wait.

WAITING PERIOD

generally, any period of time that must expire before a party may attempt to pursue legal rights. For instance, most states require a waiting period after a blood test or the issuance of a marriage license before a marriage may occur. Awaiting period may be unconstitutional if it interferes with a citizen's right to travel freely. For instance, a law requiring that a person be a resident of the

state for one year before he or she may be eligible for welfare benefits was held unconstitutional on that ground. See also red herring [WAITING PERIOD].

WAIVER

an intentional and voluntary surrender of some known right, which generally may either result from an express agreement or be inferred from circumstances. See informed consent.

EXAMPLE: Spencer enters into a plea bargain with the prosecutor in the hope that he will receive a lighter sentence. Since the plea represents an admission of guilt and a *waiver* of the right to a jury trial, the judge must be sure that Spencer realizes the consequences of his actions. Therefore, the judge will inform Spencer that he has a right to have a trial and that there is no guarantee that a plea will necessarily result in any different sentence than from a trial. Without these precautions, the judge cannot be sure that Spencer's waiver is knowing and intelligent.

EXECUTORY WAIVER

one that affects a still unperformed duty of the other party to a contract.

WANT OF CONSIDERATION see consideration.

WANT OF PROSECUTION see prosecution [WANT OF PROSECUTION].

WANTON

grossly negligent or careless; with a reckless disregard of consequences.

WARD

1. a person whom the law regards as incapable of managing his or her own affairs, and over whom or over whose property a guardian is appointed. 2. one of the sections into which a town is divided for educational or election purposes.

WARDSHIP

the office of guardian. At common law, a form of guardianship. The guardian was entitled to the wardship of a male heir who was under age 21, or a female under age 14. The guardian had custody of both the body and the lands of the heir, and was not required to account to the heir for the profits derived from the land.

WAREHOUSEMAN'S LIEN see lien [WAREHOUSEMAN'S LIEN].

WAREHOUSE RECEIPT

a receipt issued by a person (bailee) engaged in the business of storing goods for hire. A warehouse receipt constitutes a document of title under the Uniform Commercial Code, which evidences that the person in possession of the document is entitled to receive, hold, and dispose of the document and the goods it covers. A warehouse receipt may be a negotiable instrument, depending upon its terms.

WARRANT

a written order from a competent authority directing the doing of a certain act, especially one directing the arrest of a person or persons, issued by a court, body or official. See also bench warrant; search warrant.

The word warrant is also used in commercial and property law to refer to a particular kind of guarantee or assurance about the quality and validity of what is being conveyed or sold.

WARRANT TO SATISFY JUDGMENT

an authorization issued by the judgment creditor's attorney to the clerk of the court directing the clerk to enter a satisfaction of the judgment in the official court records.

STOCK WARRANT a certificate that gives the holder the right to purchase shares of stock for a specified price and within a specified time. Unlike subscription rights, stock warrants offer the holder the right to purchase shares of a different kind from those already held. Thus a holder of common stock may purchase preferred stock. Stock warrants usually originate as a bonus with new issues of bonds, notes or preferred stock where they serve as an inducement to the buyer. Warrants so offered come attached to the new security and usually cannot be separated for a short period; once separated, the warrants can be traded like any other security.

WARRENTLESS ARREST

an arrest made without a warrant. At common law, an officer was justified in making an arrest without a warrant if the officer reasonably believed that the defendant had committed a misdemeanor in his or her presence or had committed any felony. There is a constitutional preference for arrest upon a warrant, however, and the Supreme Court has held that a warrantless arrest will be judged by a somewhat higher standard of probable cause than if the same arrest had occurred under the direction of a neutral and detached magistrate. While warrantless arrests in public places have been upheld, an arrest in a private residence requires an arrest warrant unless there are exigent circumstances. See search and seizure; warrant [ARREST WARRANT].

WARRANTY

an assurance by one party to a contract of the existence of a fact upon which the other party may rely, intended precisely to relieve the promisee of any duty to ascertain the fact for himself or herself; amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue. Such warranties are made either overtly (**EXPRESS WARRANTIES**) or by implication (**IMPLIED WARRANTIES**).

A **COVENANT OF WARRANTY** in real property is a covenant running with the land, insuring the continuing validity of title.

WARRANTY OF FITNESSa warranty that the goods are suitable for the special purpose of the buyer, which will not be satisfied by mere fitness for general purposes.

EXAMPLE: Constant Trucking Company orders a specially enforced truck for a new type of service it is starting. Constant places the order with a dealership with whom it has often worked in the past, and explains the need and purpose for the vehicle. The vehicle is delivered to Constant, which finds after one shipment that the truck is not built as specified. A warranty *of fitness*, which either is written in the contract between Constant and the dealer or is implied, has been breached. Constant can return the truck and demand its money back.

WARRANTY OF HABITABILITYa promise by the landlord that at the inception of a residential lease there are no latent defects in facilities vital to the use of the premises for residential purposes, and that these facilities will remain in usable condition for the duration of the lease.

WARRANTY OF MERCHANTABILITYa warranty that the goods are reasonably fit for the general purposes for which they are sold.

WARRANTY ACT see Magnuson-Moss Warranty Act.

WARRANTY DEED

a deed that warrants that the grantor has the title he or she claims to have. It purports to convey property free and clear of all encumbrances. As a guarantee of title, the warranty deed creates liability in the grantor if the title transferred is defective. Compare quitclaim deed.

WASH SALE

a sale or other disposition of stock or securities as to which no loss is recognized for tax purposes, because within 30 days before or after the date of sale or disposition the taxpayer purchased substantially identical stock or securities.

WASTE

generally, an act, by one in rightful possession of land who has less than a fee simple interest in the land, which decreases the value of the land or the owner's interest or the interest of another who has a future interest in the land (such as a remainderman, lessor, mortgagee, reversioner).

AMELIORATING WASTEa change in the physical structure of the occupied premises by an unauthorized act of the tenant that, though technically waste, in fact increases the value of the land.

EQUITABLE WASTEsuch acts as at law would not be deemed to be waste under the circumstances of the case but that in the view of a court of equity are so viewed because of their manifest injury to the property, although they are not inconsistent with the legal rights of the party committing them.

PERMISSIVE WASTEinjury to the inheritance caused by the tenant's failure to make the expected reasonable repairs to the premises.

VOLUNTARY WASTEinjury to the inheritance caused by an affirmative act of the tenant.

PHYSICAL WASTEin the law of oil and gas, a production practice that, in light of alternatives, reduces the quantity of hydrocarbons that may be produced from a reservoir.

ECONOMIC WASTEin the law of oil and gas, a production practice that, in light of alternatives, reduces net value of hydrocarbons that may be produced from a reservoir.

WASTING ASSET

an asset that will be consumed through its use; property exhausted over a period of years through the progressive loss of value or consumption of the property. For instance, a coal mine is a wasting asset, since it contains a limited amount of coal that will be exhausted by regular mining activity.

WATERED STOCK

a stock issue that is offered to public investors by founders and promoters of a company at a greatly inflated price compared to book value or cost; stock that a company issues for property that is worth less than the stock. Stock may be identified as watered stock by comparison of market or offering value to net asset value of a share.

WATERS see territorial waters.

WAY, RIGHT OF see right of way.

WEAPON see dangerous weapon [INSTRUMENTALITY]; deadly weapon; force; gun control law.

WEIGHT OF THE EVIDENCE

a phrase that indicates the relative value of the totality of evidence presented on one side of a judicial dispute, compared to the evidence presented on the other side; refers to the persuasiveness of the testimony of the witnesses.

WESTLAW see Lexis.

WHEN ISSUED

short for "when, as and if issued," which is a conditional trading basis for a new stock or bond issue that has been authorized for issuance but does not actually exist. **WHEN ISSUED SECURITIES** can be bought or sold like ordinary securities, except that transactions do not settle until the actual security is formally issued and the stock exchange involved or the National Association of Securities Dealers decides on a specific settlement date. The most common occasion for *when issued* trading is in connection with stock splits. After the split is announced but before the new shares

issue, the split stock may be traded on a when issued basis. Such trading has speculative appeal since a down payment of only 25 percent is required and since no margin or loan debt is required for the balance until settlement date, which might be weeks in the future.

WHIPLASH INJURY

neck injury commonly associated with rear-end automobile collisions. Caused by a sudden, unexpected forced forward movement of the body while the unsupported head of an automobile occupant attempts to remain stationary consistent with the laws of physics, subjecting the neck to a severe strain while in a relaxed position.

WHITE-COLLAR CRIME

a catch-all phrase connoting a variety of frauds, schemes and commercial offenses by business persons, confidence men and public officials; includes a broad range of nonviolent offenses that have cheating as the central element.

EXAMPLE: Directors of a bank arrange for friends of theirs to obtain large loans from the bank. The friends use fake names and businesses so that they cannot be traced when the loans are not repaid. The directors always approve the loans, and the money is split between the directors and friends. The scheme represents *white-collar crime* and each participant is liable for criminal prosecution.

Consumer fraud, bribery and stock manipulation are other examples of white-collar crime.

WHITE SLAVE TRAFFIC ACT see Mann Act.

WHOLE LIFE INSURANCE see insurance [WHOLE LIFE INSURANCE].

WHOLESALE

middleman; person who buys large quantities of goods and resells to other distributors rather than to ultimate consumers. Compare jobber.

WIDOW'S ALLOWANCE see family allowance.

WIDOW'S [WIDOWER'S] ELECTION see right of election.

WILDCAT STRIKE

unauthorized strike; strike for which the representing labor union disclaims responsibility.

EXAMPLE: Working conditions have always been poor at a certain train yard, but the workers' representatives have never been able to get improvements. Tired of waiting for the representatives to negotiate something, the workers engage in a *wildcat strike* and take matters into their own hands. The success of the strike depends on how long it lasts and how many people participate, although such strikes are generally illegal. Even if the strike does not change conditions

immediately, it indicates the workers' discontent and may prod both their representatives and their employer to change the conditions.

WILD'S CASE, RULE IN see Rule in Wild's Case.

WILL

a person's declaration of how he or she desires his or her property to be disposed of after death. A will may also contain other declarations of the testator's desires as to what is to be done after he or she dies so long as it disposes of some property. See codicil; cause [CAUSA MORTIS]. Compare gift; testamentary dispositive.

WILLFUL

intentional, as distinguished from accidental. In a criminal statute, the term signifies an act done with a bad purpose and without justifiable excuse.

WILLFUL NEGLIGENCE see negligence [WANTON NEGLIGENCE].

WILLIAMS ACT see tender offer.

WILLS, STATUTE OF see Statute of Wills.

WINDING UP

the process of liquidating a corporation. It consists of collecting the assets, paying the expenses, satisfying creditors' claims and distributing the net assets, usually in cash but possibly in kind, to shareholders, according to their liquidation preferences and rights. Compare dissolution.

WIRETAP

the acquisition of the contents of communication through the use of any electronic, mechanical or other device. Use of wiretaps by government authorities is subject to the constitutional prohibition against unreasonable search and seizure, and they can be used only after a finding of probable cause. Use of wiretaps by private citizens against other private citizens may constitute a tort based on invasion of privacy and thereby give rise to a claim for damages.

WITHDRAWAL

1. removal of money or the like from the place where it is kept, such as a bank; 2. separation of oneself from a criminal activity to avoid liability for conspiracy, by conduct evincing disapproval of or opposition to the criminal activities. Compare renunciation.

WITHHOLDING

that portion of wages earned that an employer retains, usually for income tax purposes, from each salary payment made to an employee. The amount so deducted is forwarded to the government to be credited against the total tax owed by the employee at the end of the taxable year. See tax [WITHHOLDING TAX].

WITHHOLDING TAX see tax [WITHHOLDING TAX].

WITHOUT FAULT [LIABILITY] see strict liability.

WITHOUT PREJUDICE see dismissal [DISMISSAL WITHOUT PREJUDICE].

WITHOUT RECOURSE

generally, without further rights in regard to some matter. In finance, without recourse, or *nonrecourse*, refers to the fact that the borrower is not personally liable on a loan, and that the lender must look to other security for repayment. See nonrecourse.

WITH PREJUDICE see dismissal [DISMISSAL WITH PREJUDICE].

WITH RESERVATION see under protest.

WITNESS

1. one who gives evidence in a cause before a court and who attests or swears to facts or gives testimony under oath; 2. to observe the execution of, as that of an instrument, or to sign one's name to it to authenticate it (attest it).

ADVERSE [or HOSTILE] WITNESS one whose relationship to the opposing party is such that his or her testimony may be prejudiced against that party.

CHARACTER WITNESS a witness who testifies at another person's trial, vouching for that person's high moral character and standing in the community, but who does not have knowledge of the validity of the charges against that person.

EXAMPLE: The preacher testified as a *character witness* at Brian's trial, giving many examples of Brian's service to the elderly and poor. Looking only at the charitable work Brian had done, the preacher could not believe Brian would burglarize a house.

MATERIAL WITNESS one who can give testimony that might have a bearing upon the outcome of a cause and that no one else is able to give. In criminal law, the term refers particularly to a witness about whom there is reasonable expectation that he or she can give testimony bearing upon the defendant's guilt or innocence.

WITNESS AGAINST ONESELF see self-incrimination, privilege against.

WORDS OF ART

words that have a particular meaning in a particular area of study and that have either no meaning or different meanings outside that field.

WORDS OF FIGHTING see fighting words.

WORDS OF LIMITATION

words used in an instrument conveying an interest in property that seem to indicate the party to whom

a conveyance is made, but that actually indicate the type of estate taken by the grantee. Compare words of purchase.

WORDS OF PURCHASE

words in a property transfer that indicate who takes the estate. The term designates the grantee of the estate, while words of limitation define the property rights given to the grantee.

WORKERS' COMPENSATION ACTS

statutes that in general establish liability of an employer for injuries or sicknesses that arise out of and in the course of employment. The liability is created without regard to the fault or negligence of the employer. Benefits generally include hospital and other medical payments and compensation for loss of income; if the injury is covered by the statute, compensation thereunder will be the employee's only remedy against the employer.

WORKHOUSE see jail [WORKHOUSE].

WORK PRODUCT

work done by an attorney in the process of representing his or her client that is ordinarily not subject to discovery. It encompasses writings, statements or testimony that would substantially reflect or invade an attorney's legal impressions or legal theories about a pending anticipated litigation, including the attorney's strategy and opinions.

EXAMPLE: Rob is charged with tax evasion. He hires an attorney to prepare the case, and the attorney hires an accountant to compute Rob's income. Because the attorney hires the accountant, the accountant is working for the attorney, not for Rob. The accountant's report is the *work product* of the attorney and therefore cannot be obtained by the Internal Revenue Service. If Rob hires the accountant and then presents the accountant's report to the attorney, the report would not be considered a privileged work product and would be discoverable by the IRS.

WORK RELEASE PROGRAM

program that allows a prisoner to work at paid employment or participate in a training program in the community on a voluntary basis while continuing as a prisoner of the institution or facility to which he or she is committed. A lawfully confined prisoner does not have a Fourteenth Amendment liberty interest in his or her continued participation in a work release program. State prisoners in a temporary release program may not be removed from the program unless a due process hearing is held concerning the inmate's eligibility in light of the threat that the inmate presents to the security of the community. Compare halfway house.

WORTH see net worth.

WORTHIER TITLE, DOCTRINE OF

early common law rule whereby a gift by devise (will) to one's heir that amounted to exactly what the heir would have taken under the statutes of descent and distribution had the ancestor died intestate, was disregarded and the heir took instead by descent, which was considered as conferring a worthier (better) title.

The rule also has an application to transfer of property inter vivos; thus, a grantor may not grant a limited estate to another, with a remainder to the grantor's own heirs. This has been recognized in many American jurisdictions as a rule of construction in fulfilling the intent of the grantor. Thus, a reversion in the grantor is preferred to a remainder in his heirs.

WRAPAROUND MORTGAGE

in real estate law, a second mortgage that allows the borrower to take advantage of a low interest first mortgage without being subject to the usual cash flow demands of carrying both a first and second mortgage. The face amount of the wraparound mortgage is the amount due on the first mortgage plus the amount due on the second mortgage. Annual payments are computed on this combined amount, and are applied to satisfy the payments due on the first mortgage before being applied to the wraparound mortgage. The wraparound mortgage is frequently used in the purchase and sale of realty when the seller's mortgage is at more advantageous terms than financing available to the buyer.

WRIT

a legal order issued by the authority and in the name of the state to compel a person to do something therein mentioned. It is issued by a court or other competent tribunal, and is directed to the sheriff or other officer authorized to execute it. In every case the writ itself contains directions for doing what is required.

WRIT OF ASSISTANCE

at common law, a general warrant under which an officer of the crown, such as a customs official, had blanket authority to search where he or she pleased for goods imported in violation of the British tax laws. Writs of assistance were greatly abused and hated in this country prior to the American Revolution, and ultimately resulted in the adoption of the constitutional ban against unreasonable searches and seizure and especially the requirement of particularization.

In modern practice, a writ of assistance is an equitable remedy used to transfer property where the title has been previously adjudicated. The issuance of a writ of assistance is a summary proceeding, not a new lawsuit, which is incidental or auxiliary to a prior judgment or decree and is issued to enforce such judgment or decree.

WRIT OF CAPIAS see capias.

WRIT OF CERTIORARI see certiorari.

WRIT OF CORAM NOBIS [WRIT OF ERROR CORAMNOBIS; CORAM NOBIS]

(kôr'-äm nō'-bīs) Lat.: before us; in our presence, i.e., in our court. The writ aims to bring the attention of the court to, and obtain relief from, errors of fact not appearing on the record. Knowing these facts in time would have prevented the judgment questioned. Thus, the writ does not correct errors of law. It is addressed to the court that rendered the judgment in which injustice was allegedly done, in contrast to appeals or review, which are directed to another court.

WRIT OF ERROR

an early common law writ issued by the appellate court, directing the trial judge to send up the record in the case. The appellate court reviews only alleged errors of law. It is similar to a writ of certiorari, except that a writ of error is a writ of right and lies only where jurisdiction is exercised according to the course of the common law.

WRIT OF EXECUTION

a routine court order by which the court attempts to enforce the judgment granted a plaintiff, by authorizing a sheriff to levy on the property belonging to the judgment debtor, which is located within the county, to satisfy the judgment obtained by the judgment creditor.

WRIT OF HABEAS CORPUS see habeas corpus.

WRIT OF MANDAMUS see mandamus.

WRIT OF NE EXEAT see ne exeat.

WRIT OF POSSESSION see writ of assistance.

WRIT OF PROHIBITION

a prerogative writ issued by a superior court that prevents an inferior court or tribunal from exceeding its jurisdiction or usurping jurisdiction it has not been given by law. It is an extraordinary writ because it issues only when the party seeking it is without other means of redress for the wrong about to be inflicted by the act of the inferior tribunal. Sometimes it is referred to simply as PROHIBITION.

WRIT OF QUO WARRANTO see quo warranto.

WRIT OF RIGHT

1. a writ generally issued as a matter of course or granted as a matter of right, in contrast to prerogative writs that are issued only at the discretion of the issuing authority; 2. the name of an ancient writ for the recovery of real property.

WRIT OF SUPERSEDEAS see supersedeas.

WRIT, PEREMPTORY see peremptory writ.

WRIT, PREROGATIVE see prerogative writ.

WRITTEN INSTRUMENT

anything reduced to writing; the agreement or contract the writing contains; a document or writing that gives formal expression to some act. Many acts are required to be set forth in a written instrument in order to have legal effect. See Statute of Frauds.

WRONG

generally, the violation of the legal rights of another; the breach of a legal duty. See crime; tort.

WRONGFUL ACT

any act that in the ordinary course will infringe upon the rights of another to his or her damage, unless the act is done in the exercise of an equal or superior right. Thus, the scope of the term is not limited to acts that are illegal, but includes acts that are deemed immoral, antisocial or tortious.

WRONGFUL DEATH STATUTE

a statute that provides relief from the common law rule that the death of an individual cannot be the basis of a cause of action in a civil suit. Every U.S. state has a wrongful death statute, providing that action for damages can be maintained by the executor, administrator or beneficiaries of the decedent for the wrongful act, neglect or default that caused his death.

WRONGFUL LIFE

a tort action concerning childbirth, such as the birth of a child after the negligent performance of an operation to sterilize the parent, or the birth of a child with serious defects due to the doctor's failure to advise the parents properly. Compare wrongful death statutes.

X

X

a mark that may be used as signature by one who is unable to write his or her name. The mark may be placed wherever the signature could be placed and does not have to be attested unless so required by statute. A name may accompany a mark, and the mark will be sufficient even if the name is invalid due to an incorrect spelling or other error.

Y

YEAR AND A DAY RULE

in criminal law, the common law rule that a death must occur within one year and one day of the act alleged to cause the death, for the death to constitute murder. The rule was not incorporated into the Model Penal Code and has been abandoned by most states.

YEARLY see per annum.

YELLOW DOG CONTRACT

an employment contract expressly prohibiting the named employee from joining labor unions under pain of dismissal. Most state constitutions guarantee the right to union affiliation and to collective bargaining. Federal and state statutes now generally declare that such contracts will not form the basis for legal or equitable remedies.

YIELD

the current return as a percentage of the price of a stock or bond.

YIELD-TO-MATURITY

a calculation of yield on a bond that takes into account the capital gain on a discount bond or capital loss on a premium bond. In the case of a discount bond, the yield-to-maturity, YTM, is higher than the current yield or the coupon yield. The reverse is true for a premium bond with YTM lower than both current yield and coupon yield.

YOUTHFUL OFFENDERS

youths accused of crime who are processed in the juvenile court system, and so are treated as delinquents rather than as adult criminals. The age beyond which an offender is considered an adult for prosecution and punishment purposes has not been uniformly established and so varies from state to state. See juvenile delinquency.

Z

ZONE OF EMPLOYMENT

that physical area within which injuries to an employee are compensable by workers' compensation laws; it denotes the place of employment and surrounding areas (including the means of entrance and exit) that are under control of the employer.

ZONING

legislative action, usually on the municipal level, that divides municipalities into districts for the purpose of regulating the use of private property and the construction of buildings within the zones established. Zoning is said to be part of the state police power, and therefore must be for the furthering of the health, morals, safety or general welfare of the community.