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Учебно-методические материалы по теме "Юриспруденция" для студентов V курса (переводческого факультета)

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Учебно-методические материалы по теме "Юриспруденция" предназначены для студентов V курса английского отделения переводческого факультета. Материалы могут использоваться как на занятиях по практике английского языка, так и при самостоятельной подготовке студентов.

Материалы построены на основе методического принципа обучения языку через содержание и преследуют цель познакомить студентов со структурой и основными принципами юридической системы Великобритании и США и помочь студентам овладеть терминологией и тематической лексикой, необходимой для обсуждения тех или иных юридических вопросов, в том числе – контрактного права.

Основными источниками информации и текстового материала послужили книги: The Stateman’s year-Book 1976-1977 (edited by J. Parton); Martin J. Ross and Jeffrey Steven Ross. Handbook of Everyday Law, Fawcett Crest, New York, 1991; P.W.D. Redmond, General Principles of English Law (revised by I.N. Stevens and P.Shears), Longman Group UK Ltd, 1992. Peter Shears, Law for GCSE (Advisory Editor Paulene Collins), Pitman Publishing, 1994. Автор последней книги, в свою очередь, использует материалы книги Smith and Keenan’s English law, 10th edition, by Denis Keenan, Pitman Publishing, также приводимые в качестве иллюстрации в настоящих материалах. Тексты сопровождаются упражнениями и заданиями, призванными помочь организации как аудиторных занятий, так и самостоятельной работы студентов при изучении темы “Юриспруденция”.

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GENERAL PRINCIPLES OF ENGLISH LAW

W H A T I S L A W?

D e f i n i n g t h e L a w

It's a bit like defining an elephant. You may have trouble constructing an acceptable definition of law, but you would recognise a law if you saw one.

The law is a civilising influence within a society. Some writers have argued that the progress of a society towards a civilisation can be measured by the sophistication of its legal systems. As the society becomes more complex then the system of rules develops, along with the machinery for enforcing those rules effectively.

This is not to say that the rules necessarily reflect the developed wisdom or morality within society. Law and morality are not necessarily linked. Obviously, if there were little or no reflection of the popular view within the law, then respect for the law would be lost, but the great moral debates within a society do not necessarily result in legal reform.

One such issue centres on the "sanctity of life". This is reflected in debates on capital punishment and abortion, on suicide, euthanasia, on so-called mercy killings and on nuclear arms, chemical weapons and so on. Another emphasis lies on the "quality of life"; in discussions about family relationships, the ease and availability of divorce, adultery, "latch-key" children, pornography, the spread of video cassettes, child abuse and so on.

While a single debate might stimulate a reform of the law, the dynamic of discussion and debate within a society, continually developing, and re-evaluating moral standpoints, has no essential link with law and law reform. A definition of law ought to assist understanding of law. It ought to be an aid to elucidation. But there is no generally accepted definition. It could be

described as a set of rules we live by that prescribes rights and duties, responsibilities and obligations for every member of the society we live in. These rules not only provide 1imits to what we can and cannot do, but they also prescribe the manner in which various ends can be achieved, for example, making a will.

Tighter definitions abound. Each reflects the attitude of its author towards the function of the law. Examples include:
"a coercive order of human behaviour" (Kelsen), "a body of principles" (Salmond), "rules of action" (Blackstone), "prophesies of what the courts will do" (Holmes), "what officials do about disputes" (Llewellyn).

The law must have something to do with rules and the enforcement. Some of these rules rely for their effectiveness upon the individual involved. For instance, if a toaster does not work properly the buyer should assert his rights within the contract by means of which he acquired it. Thus if the person trying to make toast for breakfast was the recipient of the toaster as a birthday present the buyer should complain. Only the parties to a contract can enforce it. Other rules will be enforced no matter what the individual wants. The victim of incest will not have the final say as to whether the offender is prosecuted. The client after a successful, hygienic, but unlawful abortion may be the last person to wish the offender punished - but the decision rests elsewhere. These differing aspects of the nature and purpose of the law must each be appreciated clearly.

This book is about English law. The Scots are a law unto themselves, and the Scottish legal system is also different. So too, although to a lesser extent, is the legal system in Northern Ireland. There are considerable and increasing overlaps between these legal systems within the United Kingdom as a whole.

But for the purpose of this book no rule should be assumed to extend beyond England and Wales.

Classifying the law

To understand how the legal system fits together, it may be useful to examine a variety of ways in which it can be taken apart and each part examined. That is, there are several possible ways to classify the law.

Civil and Criminal Law

This is the most basic of classifications. Very broadly, criminal law is concerned with the general well being and civil law with individual rights and duties. It might be wrong, however, to classify an individual act as being either a civil or a criminal wrong. Many acts are both. For example, if you take your coat to be cleaned and the cleaner steals it then, clearly, the crime of theft has been committed. Furthermore there is a breach of the contract to clean and a tort of conversion (denial of your right to your property) has also been committed. It is not in the act itself that the distinction lies, but in the consequences which may follow from it. After you have been run over in a road accident the driver could be arrested and charged with the crime of reckless driving and he could be sued by you, the victim, in the tort of negligence. The act of driving so as to injure you was therefore a criminal offence and a civil wrong. This is sometimes called "dual liability".

There have been attempts made at defining crime generally, but the criminal law really comprises nothing more than the total of those activities which those responsible for creating and developing the criminal law have seen fit to include. Lord Atkin said (in *Proprietary Articles v. Attorney-General for* Canada *(1931):* The domain of criminal jurisprudence

can only be ascertained by examining what acts at any particular period are declared by the State to be crimes and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

The nature of criminal liability will be considered in more detail later, but the activities embraced by the criminal law extend from treason, murder and rape at one end to exporting antiques without a licence, flying a kite near an airfield, "feeding" parking meters, failing to sign your driving licence, sounding the car horn while the car is at rest and conversing with a bus driver at the other.

Similarly, various aspects of civil law will be drawn out in more detail in subsequent chapters, but it should be understood that while the criminal law comprises most of what the average citizen imagines as the law (at least at first), the civil law is a vast thing - a thousand years old and still growing! The more important areas within its scope include contract law, which in its applied aspects includes the sale of goods and services, credit, hire-purchase, agency, contracts of employment and landlord and tenant agreements - to name but a few. The civil law also includes the law of tort - an umbrella term for actions in negligence, nuisance, defamation, trespass and others. Further, it includes property law, the law of succession, most of family law and the law of trusts.

Later attention will be drawn to the nature of proceedings in civil and criminal law. They are easily distinguished: the procedure is different; the point of the proceedings is different; the outcome is different. These distinctions are marked with differences in the terminology used. It is an elementary error to confuse the terminology and say, for example, "trespassers

will be prosecuted" for they cannot be (except in rare instances such as squatting or where byelaws have made trespass criminal, e.g. on the railways). Trespass is (generally) a tort. Tort is civil law. In civil proceedings the plaintiff sues the defendant. If he succeeds he obtains judgment in his favour and he will be awarded a remedy, the point of which is to compensate him for the civil wrong which the defendant has been shown on a balance of probabilities to have done him. This remedy may take the form of an order that the defendant pay the plaintiff money (damages) or perform a contractual obligation (decree of specific performance) or desist from infringing the plaintiff's civil law rights (injunction) or transfer property to him. There are other civil remedies too.

Criminal proceedings, on the other hand, involve the prosecutor prosecuting the accused (or the defendant) so as to prove him guilty beyond reasonable doubt (so that the bench of magistrates or the jury, if there is one, are sure) and thus secure a conviction and a sentence, the point of which is to punish the convicted person and to deter him and others from such activity in the future. The range of punishment is wide. It extends from conditional discharges and even absolute discharges at the one end to life imprisonment at the other. (It might be an interesting exercise to check whether capital punishment has been completely abolished). The power of the court varies from offence to offence and indeed from court to court within the hierarchy of the court system.

Private and Public Law

Civil law is sometimes called private law for the obvious reason of its content. It is the law concerned with private individuals and their rights and

duties, voluntarily assumed or otherwise, towards other private individuals. In contrast is sometimes taken public law. This is a wider concept than criminal law, but it includes criminal law. Also included are constitutional, administrative and social welfare law. Together these four elements comprise that law which has a public, overall, character.

Constitutional Law

Constitutional law, the law of the British constitution, is often said to be unwritten in the sense that there is no single document in Britain called "The Constitution". However, every British protectorate and colony has one, and so does nearly every country in the world. The reasons for this state of affairs are historical. There has been no fresh start after a revolution or other landmark in our history, unlike in the United States or Malaysia. Nevertheless, there are many documents from which the British constitutional law can be collected. There are Acts of Parliament, like the Bill of Rights 1689, the Act of Settlement 1701, the Act of Union with Scotland 1707 and the European Communities Act of 1972, all of which contain major rules of constitutional law. Rules of more detailed importance are to be found in such statutes as the Representation of the People Acts 1983 and 1985, the Peerage Act 1963, the Parliament Acts of 1911 and 1949 and the Local Governmental Act 1988, among many others. It seems that every year Statutes are made which add to the constitutional law.

Further to this the law is found in common law rules such as the fundamental rule which pronounces that Parliament is sovereign, a rule now affected by the European Communities Act 1972. Furthermore there is a collection of conventions which applies to the constitution and there are the

residual powers within the royal prerogative. Finally there exists the law and custom of Parliament itself, concerning its functions, procedures, privileges and immunities. This, then, is the subject matter of constitutional law.

Administrative Law

Administrative law is concerned with public authorities. It comprises the law relating to the formation, powers and duties of such authorities and the procedures involved when they are formed or where their powers are exercised, or duties fulfilled. It is also concerned with the relationships between such public authorities, between the authorities and their employers and between them and the public at large.

Administrative law can be seen as a network of controls over the use of public powers, but it also provides the means by which the workload of public authorities can be successfully achieved. It provides the means for getting things done.

The public authorities in question extend from the Crown through the nationalised industries, the Commission for Racial Equality, ACAS (the Advisory, Conciliation and Arbitration Service), the BBC and Independent Broadcasting Authority, local government, the Equal Opportunities Commission, and many others, including the maze of administrative tribunals set up, among other things, to settle disputes about the use of public power.

Social Welfare Law

Social welfare law is a relatively recent arrival on the scene of public law. Lord Scarman has written:

Social security is now the subject of rights and duties.

Inevitably, therefore, it is a legal subject.

In 1942 the famous Beveridge Report on social insurance and allied services was published. It described the aims of the social security system as the fulfilment of need and the purpose of payments made within its stunningly detailed rules and regulations as being:

> ...to abolish want by ensuring that every citizen willing to serve according to his powers has at all times an income sufficient to meet his responsibilities.

The McCarthy Report in 1972 in New Zealand stated a slightly different aim for their social welfare law:

> ... to ensure that everyone is able to enjoy a standard of living much like that of the rest of the community, and thus is able to feel a sense of participation in and belonging to the community.

Whatever the aims, and whether or not it is successful as a means of achieving them, social welfare law is concerned with the nature of contributory and non-contributory benefits (i.e. whether or not the claimant is paid according to a record of input into the system), unemployment benefit and benefits for sickness, disability, invalidity, maternity, children, and death. It covers compensation for industrial injuries, pensions on retirement and for war service. Finally, it is concerned, increasingly these days, with the "topping up" of income by means of benefits such as income support and family credit.

Municipal and Public International Law

Another way of classifying the law is to split it between municipal and public international law. Municipal law is the law of one state - in our case the United Kingdom. Thus municipal law for this purpose would comprise the law of England and Wales taken together with that of Scotland and that of

Northern Ireland. The distinction is drawn between this, the law of a single state, and public international law which regulates dealings between different states and which is largely made up of treaties, conventions and international agreements.

COMMON LAW AND STATUTES

The whole of the law of England and Wales can be split according to where it arose, that is, classified by source. The law is either made by the judges - developing principles case by case, by analogy with earlier cases, along fairly settled lines, or it is made in a broad sweep by Parliament by means of statutes (Acts of Parliament). There is a prescribed method for the creation of a statute. Judge-made law is called common law. In theory it is comprised of rules which already exist and simply require pronouncement by the Judge. In fact, of course, judicial creativity does exist, although it varies between judges. Acts of Parliament (statutes) sometimes enable others (e.g. ministers, local authorities) to make laws on a very restricted basis. These laws appear as "rules" or "regulations" or "byelaws" and while they are made by others they possess the delegated authority of Parliament. All this law made by or on behalf of Parliament, taken together, is called legislation. Contract law and the law of tort are almost entirely common law while company law and the law of employment have been created almost entirely by means of legislation.

COMMON LAW AND EQUITY

"Common law" is a slippery phrase. It is used to distinguish judge-made law from law made by Parliament. It is also used to distinguish that law originating from the English system as exported to other nations and law made along the lines of Roman law, called civil or civilian law. It is essential to be

careful with terminology; not just with the terms used but also with their context. This classification takes the phrase "common law" yet again and uses it to distinguish the law developed by the judges (as opposed to legislation) and to pick out the law which dates back across the centuries to the old common law courts and that law which (although developed by the judges) dates back to the Court of Chancery (the court from which the modern Chancery Division was developed). This is a body of law called "equity". It is important to be able to spot equitable rules and principles and to be able to distinguish them from common law rules and principles.

QUESTIONS AND TASKS

1. What is the law? Why is it so difficult to define it?
2. How can the law be classified?
3. What is common law? How is it different from statutes?
4. What is equity?
5. What is the role of the law in society?

THE JUDICIAL SYSTEM OF GREAT BRITAIN

The Legal System of England and Wales, divided into civil and criminal courts has at the head of the Superior courts, as: the ultimate court of appeal, the House of Lords, which hears each year a number of appeals in civil matters, as well as some appeals in criminal cases. An appeal can be brought from decision of the Court of Appeal or the Divisional Court of the Queen's Bench Division of the High Court[1] in a criminal case provided that the Court is satisfied that a point of law "of general public importance" is involved, and

[1] Divisional Court of the Queen's Bench Division of the High Court - апелляционное присутствие (заседание) Отделения Королевской Скамьи Высокого Суда

either the Court or the House of Lords is of the opinion that it is desirable in the public interest that a further appeal should be brought. As a judicial body, the House of Lords consists of the Lord Chancellor, the Lords of Appeal in Ordinary[2], commonly called Law Lords, and such other members of the House as hold or have held high judicial office. The final court of appeal for certain of the Commonwealth countries is the judicial Committee of the Privy Council.

Civil Law. The main courts of original civil jurisdiction are the county courts for less important cases, and the High Court for the more important cases.

There are about 340 county courts located throughout the country grouped in districts, and each presided over by a circuit judge, sitting as a county court judge. They have general jurisdiction to determine all actions founded on contract or tort involving sums at not more than £1,000. Certain matters, such as actions of libel and slander are entirely reserved for the High Court. In addition, certain designated county courts have jurisdiction in matrimonial proceedings. Divorce proceedings must now commence in these courts and. subject to being defended, are determined in the County Court.

The High Court has both appelate and original jurisdiction, covering virtually all civil cases not determined in the county court. The judges of the High Court are attached to one of its divisions: Chancery[3], Queen's Bench and Family[4], each with its separate field of jurisdiction. For the hearing of cases at first instance, the High Court judges sit singly.

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[2] Lords of Appeal in Ordinary (Law Lords) - лорды-судьи
[3] Chancery Division - канцелярское отделение
[4] Family Division - отделение по делам о наследстве, разводах и опеке

Appelate Jurisdiction is usually exercised by Divisional Courts consisting of 3 (sometimes 2) judges, though in certain circumstances a judge sitting alone may hear the appeal.

The Court of Appeal (Civil Division) hears appeals in civil actions from both the High Court and County Courts. It includes the Lord Chancellor, who is President of the Chancery Division, and the heads of the other 2 divisions of the High Court.

Civil proceedings are instituted by the aggrieved person, but, as they are a private matter, they are frequently settled by the parties to a dispute through their lawyer before the matter actually comes to court. In some cases, at the instance of either party, a jury may sit to decide questions of fact and award of damages.

Criminal Law. At the base of the system of criminal courts are the lay justices who try the great proportion of minor offenders (over 98% of all criminal cases); they also undertake a small proportion of civil work. Magistrates' courts are comprised of 3 lay justices who are unpaid and need not posses legal qualifications (though they undergo a course of training), though they do have the assistance on points of law of a professional Clerk to the Justices. In central London and large cities there exist stipendiary magistrates, paid for their duties. These are professional lawyers and usually sit alone. Exercising summary jurisdiction in petty session, justices have power to pass sentences of imprisonment up to, in general, 6 months, and to impose fines up to, in general, £.400. One of their functions is to examine persons charged with indictable offences and to determine whether they

should be committed for trial at the Crown Court. Justices deal each year with almost 2 milliondrug abuse, breaches of licensing laws, etc.

Specially qualified Justices sit in juvenile courts to deal with cases involving persons under 17 years of age charged with criminal offences (other than homicide and other grave offences). These courts normally sit with 3 justices, including 1 woman, and are accommodated separately from other courts.

Above the magistrates' courts is the Crown Court. This was set up by the Courts Act 1971 to replace quarter sessions and assizes. It has power to deal with all trials on indictment and has inherited the Jurisdiction of quarter sessions to hear appeals, and certain original proceedings on civil matters.

Appeals from magistrates' courts go either to a Divisional Court of the High Court (when a point of law alone is involved) or to the Crown Court which is empowered to deal with appeals against conviction and on sentence.

There remains as a last resort the invocation of the royal: prerogative exercised on the advice of the Home Secretary. In 1965 the death penalty for murder was abolished.

All contested criminal cases, except those which come-before the magistrates' courts are tried by a judge and a jury consisting of 12 members. The Jury decides whether the accused is guilty or not. The Judge is responsible for summing up on the facts and explaining the law; he sentences convicted offenders. If, after at least 2 hours of deliberation, a jury is unable to reach a unanimous verdict it may, provided that in a full jury of 12 at least 10 of its members are agreed, bring in a majority verdict. The failure of a jury to agree on a unanimous verdict or to bring in a majority verdict involves the retrial of the case before a new jury.

COURTS AND CRIMES

All criminal cases start in the magistrates' courts. The minor cases stay there, with the magistrates deciding on guilt or innocence and then sentencing the criminal. Serious cases are referred by the magistrates to the Crown court - this is called "committal". In committals, all the magistrates do is hear the outline evidence and decide whether there is a case to answer. Crown court judges have power to sentence more heavily than magistrates.

On committal the accused is either released ("bailed") by the magistrates, or - if the police think there is danger he might disappear or threaten prosecution witnesses - held in prison until the trial.

Whether the case is committed to the Crown court depends on the seriousness of the crime. The most minor crimes, such as most motoring offences, are known as summary offences, and they are always dealt with by magistrates. The most serious crimes such as murder and armed robbery are called indictable offences, and are always committed to the Crown court.

There are many crimes known as "either way" offences, which as the name implies, may be tried by magistrates or in the Crown court. Sometimes the decision is up to the accused himself, but he should listen carefully to the advice of his lawyer: he may decide that he stands a better chance of being acquitted by a sympathetic jury than by a panel of stern magistrates, but he runs the risk of a higher sentence from a Crown court, judge if the jury do find him guilty.

Sentencing

The most common sentences are fines, prison and probation. Probation is used often with more minor offences. A person on probation must report to a local police station at regular intervals, which restricts his or her movement.

Magistrates and judges may also pass suspended sentences, in which case the person will not serve the sentence unless he or she commits another crime, when it will be implemented without more ado. A sentence of community service means that the convicted person has to spend several hours a week doing useful work in his locality.

Appealing

People who have been convicted can appeal if their lawyer can either show that the trial was wrongly conducted or produce new evidence. Appeal can also be made against the severity of a sentence. Appeals from a magistrates' court is to the Crown court and then up through the courts system to the Judicial Chamber of the House of Lords, the highest court in the land. From there, appeal is to the European Court of Justice.

QUESTIONS AND TASKS

1. Describe the system of British courts.
2. Characterize different types of courts from the point of view of their functions and jurisdiction.
3. What is a magistrate?
4. What are the most common sentences in Great Britain?
   What does the choice depend on? Do you know any alternative punishments?

THE PERSONNEL OF THE LAW

THE LEGAL PROFESSION

The legal profession in England and Wales is divided into barristers, solicitors, legal executives and licensed conveyancers. The general term lawyer can be taken to mean any of these or indeed just to indicate that

someone knows some law! The main division, into barristers and solicitors, dates back to about 1340, although the title of "solicitor" only dates from the fifteenth century. Before then, their work was done by three groups - solicitors, attorneys and proctors. They fused in 1831 when the Law Society was created, and all the remaining distinctions were removed by the Judicature Act 1873. Legal executives, as a separate branch, date only from 1963 when their Institute was set up.

Barristers

There are about 7000 "Barristers-in-law". They conduct cases in court. Their main role is one of advocacy. They have exclusive right to be heard in the House of Lords, the judicial Committee of the Privy Council, the Court of Appeal, the three divisions of the High Court, except in circumstances such as those in *Abse v. Smith* (1986), the Crown Court (except where cases have come to it on appeal from the magistrates, or where the accused has been committed to the Crown Court for sentence) and the Employment Appeal Tribunal. (Both barristers and solicitors can appear in the county court and magistrates' courts). This exclusive "right of audience" has been part of the wide debate about the future of the legal profession, which resulted in the Courts and Legal Services Act 1990. It is certain that solicitors will be exercising rights of audience in the higher courts as and when they are given advocacy certificates. The process began in the Scottish courts in May 1993 when 21 solicitors were sworn in as solicitor advocates. It has often been argued that solicitors might welcome the reform in rights of audience but choose not to take much advantage of it. Whether or not this is true in England, it is known that of the 5000 solicitors in Scotland only 250 expressed

an interest in becoming solicitor-advocates. Of these only 50 applied. 21 have been approved for criminal work, and 3 for civil work.

Barristers belong to one of the four Inns of Court, i.e. Lincoln's Inn, Gray's Inn, the Inner Temple and the Middle Temple. These Inns are unincorporated societies governed by the Masters of the Bench, who themselves are judges or senior barristers. A person wishing to become a barrister must apply first to become a student at one of the Inns. He must keep terms, i.e. dine at his Inn a certain number of times (usually twenty-four) and pass the necessary professional examinations before being called to the Bar. He must then become a pupil in chambers with a qualified barrister (a "pupil master") for one year. After six months he is allowed to present minor cases on his own in court, provided that, he has completed an approved practical training course. A barrister's work also consists of paper-work, e.g. advising solicitors on legal problems (called "giving counsel's opinion") and drafting pleadings for use in litigation.

The principal governing body of the Bar is the General Council of the Bar. This body lays down general policies and is concerned to promote and uphold the standards, honour and independence of the Bar. It has certain disciplinary powers. Training and education matters are shared between the Senate and the Inns of Court.

Barristers and their clients are not bound in contract. Your barrister cannot sue you for his fees. You cannot sue him for negligence in the conduct of your case, except for work done in chambers (his office).

This exception was seen in *Saif Ali v. Sydney Mitchell and Co* (1978) which was about a car crash. A barrister advised suing only one defendant. By the time his error was noticed it was too late to sue another one. (There is a

statutory limitation period of three years during which personal injury claims must be brought). This common law immunity now appears in the Courts and Legal Services Act 1990, s.62.

The barrister gets paid when your solicitor pays him on your behalf, and adds the fee to your bill. A barrister cannot, in theory, refuse to represent a client. The barrister has a duty to respect the confidence of his client. He cannot take instructions directly; you must brief him via your solicitor, although some barristers have special permission to work in law centres directly with the public. Your solicitor is likely to have chosen counsel for you. This is said to be a good quality control of the Bar, since without a good reputation, a barrister is unlikely to get much work. In these days of citizen's charters and the like we find the Bar Council amending its code of conduct with regard to the acceptance of work. Before taking a case on, counsel must consider their own competence in the area concerned and whether the matter could be dealt with more appropriately or economically by another barrister or by a solicitor. The only criterion to be applied is the best interests of the client. Barristers cannot advertise, form partnerships or share profits. They usually share chambers and the services of a clerk with whom solicitors usually negotiate fees, etc. The White Paper proposes that the prohibition on mixed partnerships of solicitors, barristers and others should be removed.

Barristers have a divided loyalty. They must do their best for their clients, but they owe duties to the court as well. The proper development of the law requires that all relevant material is drawn to the attention of the court in all cases. The barristers have a duty to do this, even if such materials may sometimes adversely affect their client's cause.

If a barrister is successful over a number of years he might apply to the Lord Chancellor to be appointed Queen's Counsel. Sometimes QCs are referred to as "silks" because the gowns they wear in court are made of silk whereas "junior" barristers' gowns are made of "stuff". Becoming a QC is often referred to as taking silk. Incidentally, a junior barrister is one in practice but not a QC. During the year of practical experience required before becoming a junior, barristers are "pupils".

Having risen to the dizzy heights of the rank of QC a barrister is less likely to do anything but appear as an advocate and give opinions, although changes in the relevant rules enabled QCs to draft documents and removed the strictness of the old counsel rule which meant that if one briefed (employed) a QC then a junior had to be employed too. Although the rule is no longer strict, QCs still commonly appear in court with juniors.

Solicitors

There are around 76000 solicitors in England and Wales (70 percent are men). A "Solicitor of the Supreme Court" is a general practitioner in law. His main function is to advise clients on legal and financial matters. His work consists chiefly in conveying land and houses, checking title to land, drawing up wills, forming companies and advising on matrimonial matters and criminal law. This conveyancing work used to be a professional monopoly for solicitors; however, now, under the Courts and Legal Services Act 1990, building societies and banks offer conveyancing services. They are provided by "authorised practitioners" who can be solicitors, barristers, licensed conveyancers or notaries. There is a danger here that many smaller firms of solicitors may disappear, close or merge, as this traditional mainstay is removed, and that this will reduce proper access to legal services generally

outside large cities and towns. Solicitors in larger firms tend to specialise, e.g. one may specialise in taxation, whilst another may specialise in company law. Neither solicitors nor barristers can form themselves into limited liability companies. Solicitors practise either alone or in partnership. Many solicitors are employed in industry and local government jobs.

As far as court work or litigation is concerned, the solicitor prepares the case and ascertains the facts. He also arranges for witnesses to be present and documents to be submitted. Unlike a barrister, a solicitor has only a limited right of advocacy. He can appear in the country court and magistrates' court. He can also appear in the Crown Court on an appeal from the magistrates' court and where the accused has been sent by the magistrates for sentence to the Crown Court. In bankruptcy matters he can appear in the High Court. In addition, he may appear before an industrial tribunal. It seemed clear that he could not appear in the High Court, even to read out a formal and unchallenged statement. This was settled in *Abse v. Smith* (1986), where an apology was read to a court in part-settlement of a defamation action. It had been suggested that a solicitor should act in order to save costs. In accordance with a Practice Direction issued in May 1986, solicitors are allowed to perform functions just like this. Such is the pressure exerted by cases involving famous people! In December 1993 the Lord Chancellor and four "designated judges" approved the application for rights of audience in the higher courts for solicitors in private practice. The Bar has, not unnaturally, opposed this suggestion, but, as James Newton wrote: "Their monopoly of rights of audience will be broken in the next few years. Now like a defeated cyclist in a stage of the Tour de France they must seek to limit the damage so

their overall position can be maintained. They may lose that stage but not the race."

In order to become a solicitor it is necessary to pass the appropriate professional examinations. The papers taken will vary with the applicant's initial qualifications. It is usual for an applicant to have a degree. Naturally, greater exemptions are available to those who have degrees in law. It is also necessary to serve a period of apprenticeship (popularly called "articles" but properly called "a training contract") working in a solicitor's office. The usual period is two years. Having qualified in this way the candidate has his name entered onto the Roll (by the Master of the Rolls). It is not possible for a newly admitted solicitor to practise alone straightaway since for his first three years he must have an experienced supervising solicitor to oversee and vouch for his accounts. As a result, three years are normally served working in another practice. In fact few solicitors in general practice do not work within partnerships. Sometimes such firms can become very large.

The governing body of solicitors is the Law Society. Eighty-five percent of solicitors belong to it, but it has power, notably disciplinary, over all practising solicitors. It organises the admission, education and training of prospective solicitors. It represents solicitors in dealing with the public. It maintains a Compensation Fund to which all solicitors contribute annually and from which clients can be repaid losses caused by the default or neglect of solicitors. Discipline is regulated by the Solicitors Disciplinary Tribunal. It stands apart from the Law Society. In 1974 in response to complaints that claims against solicitors were dealt with by other solicitors this body took over the work earlier undertaken by a Disciplinary Committee which had been set up in 1919. The Tribunal sits with two solicitor members and one lay person.

It has the power to fine solicitors (up to 5000 on each allegation), to suspend from practice (usually for between 6 months and 5 years), or to strike a solicitor from the Roll. That is to remove a solicitor from practice. In 1991 the Tribunal dealt with 201 applications. Orders were made in respect of 163 solicitors. 48 were struck off.

The activities of such a powerful body will inevitable tested from time to time. For example, in *Re A Solicitor* (1992) it was held that it had the power to admit evidence that might not be admissible in court, because it can regulate its own procedure.

In September 1986 a Solicitors Complaints Bureau was opened for business. It describes itself as "a separate organisation set up by the Law Society to investigate complaints against solicitors". Ole Hansen commented: "This is rather like saying the rear wheel is a separate part of a bicycle." In 1991 the Bureau adopted a formal "mission statement": to strengthen and maintain the confidence of public and the profession in the conduct and service solicitors. It regards itself as the policeman of the profession.

Since the implementation of the Court and Legal Services Act 1990, the emphasis has shifted from adjudication to conciliation. Over 80 per cent of the 17000 or so complaints registered in 1991 were settled in this way. (Complaints fell by about 1000 from the 1990 figure). All solicitors' firms now have to have an in-house complaints handling procedure (Solicitors Practice Rule 15). The Bureau steps in after failure of such procedures. (It has a helpline: 0926 822007). Should the work of the Bureau not satisfy a complainant, the matter can be taken to the Legal Services Ombudsman, Michael Barnes. Nearly 1000 such matters were referred to him in 1992.

Numbers of complaints nave fallen, but there remains a concern about the number of defaulting solicitors and the apparently unjustifiable delay in bringing them before the Disciplinary Tribunal. In May 1993 the Bureau announced its "Operation Crackdown". Chris Heaps is Chairman of the Bureau Adjudication and Appeals Committee. He said "new fast-track procedures will address much of the criticism levelled against the Bureau and form part of a campaign to identify and to bring defaulting solicitors to Justice quicker". He added "this will not infringe the rights of the solicitor to a fair hearing because Justice will still be done and will be seen to be done, before the Tribunal itself".

Solicitors are contractually bound to their clients. They can sue for their fees, and be sued for negligence. For example, in *Dickinson v. Jones, Alexander & Co* (1989), solicitors who made an inept bargain in a woman's divorce negotiations were told to pay 425,071 in damages and interest, and in *Corfield v. D S Bosher & Co* (1992) it was held that negligent failure by a solicitor to advise a client of the time limit for appeal following arbitration will entitle the client to recover damages for his lost chance of success. The solicitor/client relationship is basically one of principal and agent. Thus, the solicitor has the agent's right to indemnity for acts done and liabilities incurred within his authority as agent. Further to this, the relationship is regarded by equity as "fiduciary"; that is, both sides must show the utmost good faith. Each must disclose everything to do with the case: you must tell your solicitor everything, and he must respect your confidence. Indeed, he cannot be forced, even by a court, to reveal what you have told him. This is called privilege. Much of the law relating to solicitors, their status, discipline, remuneration, etc., is contained in the Solicitors Act 1974 (as amended by the Administration

of Justice Act 1985 and the Courts and Legal Services Act 1990). With regard to remuneration, you can always have your bill checked by the Law Society if you regard it as excessive.

Legal executives

The institute of Legal Executives was established in 1963 in order to give professional status to those people who work in solicitors' offices but who, for one reason or another, have not been admitted as solicitors. There are examinations to pass and a period of apprenticeship to serve in order to become a legal executive. This period can be as long as eight years before Fellowship of the Institute can be granted. Legal executives perform a variety of functions side by side with solicitors. Obviously, if a solicitor must be employed for a particular task (e.g. conveyancing, advocacy in the lower courts) then legal executives are excluded, but otherwise they have wide areas of experience and knowledge. Some specialise and achieve high levels of expertise.

The Lord Chancellor, using a power conferred by the Administration of Justice Act 1977, has granted a limited right of audience to legal executives. Thus, since the County Courts (Right of Audience) Order 1978 came into force, legal executives have been able to speak in the county courts for unopposed adjournments and applications for Judgement by consent. Under the Courts and Legal Services Act 1990 legal executives will be able to acquire wider rights of audience in court and be able to engage in more pre-trial work.

THE JUDGES

Professor Griffith (in his book, *The Politics of the Judiciary*)has written:

> The most remarkable fact about the appointment of judge is that it is wholly in the hands of politicians. High Court and circuit judges, recorders, stipendiary and lay magistrates are appointed by or on the advice of the Lord Chancellor who is a member of the Cabinet. Appointments to the Court of Appeal, to the Judicial Committee of the House of Lords, and to the offices of Lord Chief Justice and President of the Family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor, who himself consults senior members of the judiciary before making his choice or consulting with the Prime Minister.

It is interesting that the power to choose is vested in the politicians, but it is also important to observe that there are minimum qualifications which must be possessed by those from whom such choices can be made.

Law Lords

Properly called Lords of Appeal in Ordinary or members of the Judicial Committee of the House of Lords, they are usually chosen from the judges in the Court of Appeal but the minimum qualification is that the candidate should have been qualified as a barrister for fifteen years. On appointment they are created life peers. They also sit in the court called the Judicial Committee of the Privy Council.

Lords Justices of Appeal

They sit in the Court of Appeal, and are usually promoted from the High court, although the minimum requirement is qualification as a barrister for fifteen years.

High Court judges

Also called puisne judges, they are usually appointed direct from practising barristers, of at least ten years' standing. It is possible but rarely done for a circuit judge to be promoted to the High Court. In July 1993 the first solicitor, Michael Sachs, was appointed a High Court Judge.

Circuit judges

These are the judges who preside in county courts and the Crown Court and they are appointed from barristers or solicitors of long standing or from recorders of three years' experience.

Recorders

These are the part-time judges of the Crown Court and they are chosen from solicitors or barristers who have been professionally qualified for at least ten years and who are prepared to sit for at least one month each year.

District judges

These work in the county courts. They act as clerk to the court, and have the "power to try certain cases - broadly, those involving matters worth up to 5000. As the need and workload requires, assistant and deputy district judges can also be taken on. All these can be appointed from amongst those who have held advocacy qualifications for seven years.

THE JUDICIAL OFFICERS

The Lord Chancellor

The Lord Chancellor is the head of the legal profession and judiciary and nominal head of the House of Lords sitting as a court. The office involves a political as well as a legal appointment, in that he is a member of the government and Speaker of the House of Lords. Appointment is by the Prime Minister and the Lord Chancellor is a Cabinet minister. In addition to being head of the judiciary, he is Chairman of the Judicial Committee of the Privy Council. He advises the Queen on the appointment of High Court and circuit judges, justices of the peace, stipendiary magistrates and recorders. He is the keeper of the Great Seal of the Realm - which is the signature of the Crown in its corporate capacity. The Lord Chancellor changes with a change of government. The Lord Chancellor is also actively concerned with law reform. The Law Commission, which was set up in 1965 to promote law reform, has its members appointed by the Lord Chancellor.

There is a theory called the separation of powers which holds it to be a sound organisation for a state where the judiciary, the legislature and the executive are kept apart. In Britain this is seen to some extent, but nothing like completely. Here, for instance, is the Lord Chancellor with a place in the judiciary (a judge), the legislature (a speaker in the House of Lords in Parliament) and the executive (a member of the Cabinet).

The Attorney-General

He is a legal adviser to the government. As such he is a practising barrister and head of the English Bar; points of professional etiquette are referred to him. He is also a Member of Parliament (usually in the House of

Commons) and the appointment changes with change of government. His role in advocacy is to prosecute in important criminal cases and represent the Crown in civil matters. In addition he brings cases on behalf of the general public, e.g. cases of public nuisance.

The Solicitor-General

He is the deputy of the Attorney-General and assists him in his work. He is a practising barrister and normally a Member of Parliament. The appointment changes with a change of government. Both the Attorney-General and the Solicitor-General are called the Law Officers of the Crown and as such both are barred from private practice.

Director of Public Prosecutions

The Director of Public Prosecutions is a senior civil servant and therefore remains when governments depart. Appointment is by the Attorney-General and, in order to qualify, the DPP must be a barrister or solicitor of at least ten years' standing. The DPP is concerned only with criminal matters. The DPP's functions are set out in the Prosecution of Offences Act 1985, s.3, as including the conduct of virtually all criminal proceedings. This is done by using the Crown Prosecution Service, unless the case is particularly important or difficult, when the DPP's own Treasury Counsel will act. The DPP has overall responsibility for the operation of the Crown Prosecution Service.

Sometimes the consent of the Attorney-General is necessary before prosecutions can be initiated by the DPP, e.g. under the Official Secrets Acts 1911 to 1989.

Masters

There are various matters which must be dealt with between the commencement of a legal action (the serving of documents etc) and the actual

hearing. They are sometimes called interlocutory matters, and include the production of documents and decisions on the best place and date for the hearing.

In the High Court there are Queen's Bench Masters (appointed from barristers of at least ten years' standing) and Chancery Masters (appointed from solicitors of at least ten years' standing). There are also officers called Taxing Masters who deal with the assessment of costs in court actions. They too are appointed from solicitors of at least ten years' standing.

The Official Solicitor

This is an officer of the court who appears on behalf of those unable to help themselves namely:

* the mentally ill;

* children being adopted;

* people in prison for contempt of court.

Official Referees

These are specialist circuit judges who deal with cases requiring detailed scrutiny of books and documentation, like alleged accounting frauds.

Circuit administrators

When the circuit system was last considered, when the Crown Court network was devised in 1971, officers called circuit administrators were appointed to each of the six circuits. They deal with the efficient management of the circuit for which they are responsible. All administrative difficulties are referred to them.

On each circuit there are also presiding judges, of High Court rank, who are responsible for the efficient use and availability of judges. They liaise with the circuit administrator.

LAYMEN AMONGST THE PERSONNEL OF THE LAW

Lay magistrates

These were considered in the last chapter when we dealt with magistrates' courts. There are over 29000 lay justices - paid only expenses. About 95 per cent of criminal trials are dealt with by them. The Judicial system, at least at the petty end of criminal justice, could not be run without them.

Tribunal panel members

The tribunal network is large and developing. The use of laymen in the administration of justice there is essential. Their expertise and practical experience is of central importance in the handling of the matters referred to tribunals.

Lay assessors

In the same way as lay panel members assist tribunals with expertise, lay assessors assist certain courts. They are professional or scientific experts who provide their knowledge and experience to assist the judge. They are most often found in the Admiralty Court, which is technically part of the Queen's Bench Division of the High Court. Here they advise the judge in cases concerning collision at sea, poor seamanship, navigational error and so on. They can also be found in other courts within the QBD, when matters involving detailed scientific investigation are being dealt with.

Juries

Anyone between 18 and 70 years old can be summoned to sit as a juror, unless he is among those excluded - such as lawyers, judges, policemen, the mentally ill and certain convicted criminals. There is also a category of people who can be excused jury service - like MPs, medical practitioners and members of the armed forces. If a good enough reason can be given to the

officer of the court who (representing the Lord Chancellor) summons a panel of jurors, then they might avoid serving. The most common excuse is a long-standing holiday booking. There was a Practice Declaration on excusal from jury service published in late 1988. It makes plain sense: "jury service is an important public duty which individual members of the public are chosen at random to undertake. The normal presumption is that, unless a person is excusable as of right for jury service... he or she will be required to serve when summoned to do so." The direction goes on to envisage excusal on grounds such as personal hardship, conscientious objection and so on and adds: "Each such application should be dealt with sensitively and sympathetically". Patricia Wynn Davies wrote: "Trial by jury is one of the few instances in which ordinary people are called upon to make truly momentous decisions about their fellow citizens. But for far too many, including large numbers of people with wise heads on middle-aged shoulders, the first instinct is to figure out a way of avoiding that responsibility." Individuals can be called to serve more than once. It is an offence not to attend. At the trial the jurors are sworn in. The defendant can no longer challenge potential jurors without giving reasons (Criminal Justice Act 1987). The whole panel can be challenged (very rare), for example, on the basis that a proper selection has not been made from the electoral roll. This is called challenging the array. In the rare instance of insufficient jurors having been summoned, any eligible person passing by the court can be required to attend. Such activity is called praying the tales, and the unlucky stroller is called a "talesman". The theory is that jurors are randomly selected. However this has been challenged. Baldwin and McConville demonstrated in 1979 that immigrants are under-represented. Twenty-eight out of 3912 jurors selected for 326 juries in Birmingham were of

Asian or West Indian origin, whereas the census figures indicated then that ten times that number ought to have been present. In the "Bradford 12" case in 1982 there were no Asians in the panel of 56 names, and in a London case in 1989 only one member of an ethnic minority appeared among the 25 jurors selected. The proportion of blacks and Asians in greater London is 15 per cent. The machinery for producing juries must be better designed if public confidence is to be maintained.

The function of a jury is to decide upon matters of fact. Juries are found every day in the Crown Court. They are also in coroners' courts. It is possible, but very rare to find them in county courts and the High Court (e.g. 1 per cent of. QBD cases). Here, they deal with defamation, malicious prosecution, false imprisonment and some fraud cases.

Verdicts are usually unanimous. However, majority verdicts are acceptable to the judge after two hours and ten minutes of jury deliberation. The majority must be at least ten where the jury consists of twelve. Only 6 or 7 per cent of jury verdicts are by majority in criminal cases. There are more in civil cases, but civil juries are very rare. Most of the law about juries has been consolidated into the Juries Act 1974. The crime of threatening or bribing jurors is called embracery.

The report of the Royal Commission on Criminal Justice which was published in July 1993 made 25 recommendations about juries. They extend from reforms on selection such as disqualification for those on bail, inclusion of representation from ethnic minorities In some cases, on guidance and assistance such as the provision of writing materials and some relaxation of court hours, and on increased protection for jurors from intimidation.

QUESTIONS AND TASKS

1. How is the legal profession in England and Wales divided?
2. What is the major difference between barristers and solicitors?
3. How can a person become a barrister?
4. How do they become solicitors?
5. Are solicitors and barristers similarly bound to their clients? How do they get paid?
6. What other judicial officers do you know?
7. What is the function of a jury? Who can be summoned to sit as a juror?
8. Why is jury service an Important public duty?

BRINGING A CASE IN THE CIVIL COURTS

C I V I L A C T I O N S

Where one party sues another for an alleged breach of the civil law then a civil action takes place. The parties are plaintiff and defendant. Should an appeal against the decision be lodged later, they would be called appellant and respondent. The parties might be individuals, or companies or partnership firms. The purpose of the action is to obtain a civil remedy. There is a variety of remedies, but the most common is damages - money - assessed as compensation.

AN ACTION IN THE HIGH COURT

The jurisdiction of the civil courts has already been considered. Obviously, the case would be brought initially in a court of first instance. The best-known first instance civil courts are the county courts - which deal with small cases, and the High Court - which deals with larger ones. This is a very broad generalisation.

We will consider the procedures followed in the High Court. As an example we will follow an action for alleged negligence, resulting in serious personal injuries to the plaintiff. We will assume that the plaintiff can afford to bring the action - i.e. that he can pay his costs. If he wins he may recover them from the defendant. If he loses he may have to cover his and the defendant's costs. It is a risky and expensive business and whether the plaintiff wins or loses his case he may still have to pay some of his own legal costs. If he has insufficient resources, but a good case, then he may qualify for legal aid. He will get "legal assistance" anyway. We will consider these topics later. Even if the plaintiff can afford to sue, he ought to do his best, through his solicitor if need be, to settle without litigation. A famous cartoon called "Litigation" portrays a farmer pulling on the horns of a cow, with another pulling on the tail. Underneath there is a barrister milking the cow. It is as well to remember this when trying to find enough common ground to settle an action. However, if the plaintiff cannot settle, and he can afford to sue, the following is the usual procedure.

The plaintiff serves the writ

A writ is obtainable from the Central Office of the Supreme Court in London or from the district registry. The plaintiff briefly outlines his claim in he writ (i.e. negligence) and the remedy sought (i.e. unliquidated damages). Next the writ is served on the defendant, i.e. he is given a sealed copy, or, alternatively (and more usually) his solicitor accepts service of the writ on his behalf.

The defendant acknowledges service of writ

Acknowledgment is made by the defendant returning an acknowledgement form to the court office from which the writ was issued.

Pleadings

Pleadings are then delivered by one party to another; this can take a very long time. Pleadings are drafted by counsel and cover all material facts. They consist of the following:

The statement of claim

This is sent by the plaintiff to the defendant and sets out his cause of action (e.g. negligence), losses incurred and injuries suffered. It is important that this be drafted with care, since at the trial the plaintiff will not be able to make any allegation of which the defendant has no knowledge. If the statement lacks detail the defendant can ask for "further and better particulars".

The defence

This is sent by the defendant to the plaintiff. In the defence the defendant's version of the events is set down and any specific denials of allegations made by the plaintiff. If the defendant does not specifically deny an allegation, he will be taken to have admitted it by the court. The plaintiff can require "further and better particulars" of the defence. If the defendant feels that he has an action against the plaintiff he can issue a counterclaim.

The reply

This is not always used but enables the plaintiff to answer any new point raised by the defendant in his defence document.

Preparing the evidence

Once the pleadings have been exchanged (often only a statement of claim and a defence will appear), the parties are in a position to build their cases. Evidence will be crucial. Any relevant documents held by either party must be disclosed to the opponent. It is called discovery of documents and it can be ordered by the court if necessary. The idea is to confine the trial, when it happens, to clearly disputed issues. Surprise documents are not encouraged.

If one side has knowledge which is essential evidence to the other then, and again in the interests of clarifying the issue, questions are formally asked (and replies can be ordered). Such questions are called interrogatories. A simpler exercise is the notice to admit. If our negligence action concerned a faulty repair on a vehicle, then the defendant might be required to admit that the signature on a repair bill was his. This reduces the mass of evidence which the plaintiff has to take into court to prove his case. If he intends to refer to a document which is in the possession of the defendant he might issue a notice to produce a document. This will put the defendant on notice to have the paper with him in court, where the plaintiff intends to refer to it in the contested evidence.

Once the "paper-chase" is complete, the case is "set down" for trial. When the day of the trial arrives the parties may be kept waiting. A list of cases is prepared in advance and backlogs are common. This might provide a last chance to settle out of court.

When the case is eventually "called on" the plaintiff's counsel speaks first. The disputed issues are outlined to the judge (and in the rare event of one having been sworn in for a civil trial, the jury). Then the plaintiff's witnesses are called and examined, cross-examined (by the counsel acting for the

defendant) and, if cross-examination has weakened any of the original answers, the witness is re-examined.

Incidentally, although witnesses usually attend willingly (their expenses are paid) if they are reluctant to do so they can be forced to by a "subpoena". Ignoring this amounts to contempt of court: a fine - or even imprisonment - could follow. The evidence is given on oath or affirmation. If a witness produces a story remarkably different from what the plaintiff expected, then the judge can give permission for him to be treated as a "hostile witness", and questions can be put to destroy the credibility of the evidence brought out by the party who called the witness. Naturally, cross-examination by the defence counsel is always designed to do this. Technology marches on. In *Garcin* v. *Amerindo* (1991) it was held that evidence can be given by means of television linkage. This was a case where the required evidence could, so it was held, be given more effectively by video link from New York than by the witness in person, in the UK.

Once the plaintiff's counsel has finished presenting his case it is the turn of the defence to seek to refute it. If the case seems extremely thin, then the defence might submit that there "is no case to answer", and if the judge agrees, then the case is dismissed.

If the defence calls witnesses then the plaintiff's counsel will cross-examine, seeking to undermine the evidence they give. Once both sides have presented their evidence each will sum up to the judge; first the defence, then the plaintiff. Naturally, the burden of proving the case usually lies on the party who brought it, the plaintiff. He must prove his case "on a balance of probabilities" - he must show that his evidence is more likely than not to be correct. As there is usually no jury, the judge will decide both matters of fact

and of law and deliver his judgment. If he decides to take time to consider and delivers it later, it is referred to as a "reserved" judgment. He always gives the legal reasoning behind his decision. This is called the *"ratio decidendi"* and it forms the essence of the case for the purpose of the doctrine of precedent.

The losing party may wish to appeal. If it is the defendant who has lost, an application for a "stay of execution" might be made to delay the implementation of the judgement pending the appeal.

The appeal route would, of course, be to the Court of Appeal (Civil Division). If there are grounds to appeal against the final decision (as opposed to a decision on an intermediate, perhaps procedural, matter) then there is generally a right to appeal. No leave to appeal need be sought. These grounds for appeal must be more than just disappointment at the result of the case. The loser might feel that the trial judge was mistaken in the view he took of the law in question, or in his understanding of the weight arid nature of the evidence or in that he refused to admit admissible evidence or refused to exclude inadmissible evidence. If there was a jury, the ground for appeal might be that the judge misdirected it.

This action was brought in order to obtain monetary compensation for injuries caused by negligence - called damages. The idea of damages is to compensate the party who has suffered financial loss or physical injury. That is, to restore him financially to the position he would have been in were it not for the defendant's wrongful conduct. Damages can be general and special, liquidated and unliquidated. Incidentally, under the Courts and Legal Services Act 1990, the Court of Appeal can substitute an award of damages where a civil jury has awarded an excessive or inadequate sum.

We have considered the procedure in the High Court. However, personal injury cases where the claim is for less than 50000, as most claims are, will be brought in the County Court.

General and special damages

Suppose that David, while on his way to work, is knocked down by a bus driven negligently by Charlie, a bus driver employed by Greerminster County Council. If David can show that Charlie was negligent. David is entitled as of right to:

1 general damages in respect of the injury (to cover pain and sufferings); and

2 special damages to compensate him for loss of earnings, if the injury has prevented him from going to work.

Liquidated and unliquidated damages

Liquidated damages arc ascertainable or fixed damages and are most common in the event of a breach of contract. Here both parties agree that, if a certain eventuality takes place or does not take place, one shall pay to the other an agreed sum of money, e.g. a builder might agree with a building owner that if a certain section of work is not handed over by a certain date, damages will become payable to reimburse the building owner for his loss. If the fixed sum is greatly in excess of the loss which was or might have been suffered as a result of the breach of contract, then it might be seen as a "penalty" clause. The court ignores penalty clauses and awards the loss sustained.

Unliquidated damages are damages whose amount is not agreed upon in advance, i.e. unquantified damages. This is the normal remedy in tort where the judge determines how much a defendant should pay to a plaintiff.

On very rare occasions a court might award "exemplary" damages, if they have been applied for, and if the wrong done to the plaintiff is sufficiently outrageous. In *Sutcliffe v. Pressdram* (1989), however, the Court of Appeal reduced an award of 600000 because exemplary damages had not been claimed and the award far exceeded the amount needed to compensate the plaintiff.

ENFORCEMENT

If the plaintiff is successful and is awarded damages he becomes a judgment creditor and the defendant a judgment debtor. If the money is not paid, then the judgment debtor must return to court to have the judgment enforced. The civil courts do not do so unless asked. The possible ways of enforcement include sending the bailiffs to take goods belonging to the judgment debtor, selling them at public auction and giving the amount due to the judgment creditor and any balance back to the judgment debtor. In the High Court this is done by means of a writ called "*fieri facias*" -commonly called "fi.fa." Another way is to have an "attachment of earnings order" made. Then the defendant's employers will deduct instalments at source. A "garnishee" order could be made, instructing someone who owes the judgment debtor money to pay it direct to the judgment creditor. A charging order could be made over the judgment, debtor's property, which, if pressed, could result in it being sold. There are other possibilities too, but each has its limitations.

The initial step in civil litigation is for the prospective plaintiff to ask himself "if I win could he pay me?" If he could not it will be an elaborate waste of a lot of time. Such an impecunious defendant is called "a man of straw". Never sue a man of straw.

QUESTIONS AND TASKS

1. Describe the procedure of bringing a case in the civil courts.
2. Give Russian equivalents for the following:

   plaintiff, defendant, writ, pleadings, the statement of claim, defence, evidence, testimony, witness, cross-examination, allegations, oath, damages, enforcement.

LEGAL AID AND ASSISTANCE

INTRODUCTION

Lord Denning summed up the impact of the various forms of financial assistance on the availability of legal advice when he said:

> I have often said that since the Second World War the greatest revolution in the law has been the system of legal aid. It means that in many cases the lawyers' fees and expenses are paid for by the state: and not by the party concerned.
>
> The key to understanding here is to spot the different ways in which the poor and rather poor can (in theory at least) get the help of a solicitor at a low price or at no cost at all, namely:
>
> * legal advice and assistance - the "Green Form" scheme;
> * legal advice and assistance - "assistance by way of representation";
> * legal aid for civil court proceedings;
> * legal aid for criminal court proceedings.

Until quite recently there was a formal system of "fixed fee" interviews where for £ 5 a solicitor would provide only advice for half an hour. The practice, however, is to give a potential client an initial interview for free anyway. The "fixed fee" scheme died a natural death. It may be worth noting that free advice on legal problems is available at Citizens' Advice Bureaux

(many have a rota of solicitors who give their time and effort free), neighbourhood law centres and similar places.

LEGAL ADVICE AND ASSISTANCE

The "Green Form" scheme

This scheme covers practical help from a solicitor: advice, writing letters, negotiating on a client's behalf, obtaining the specialist opinion of a barrister, preparing a case, for example, if his client has been called to an industrial tribunal hearing where he claims to have been unfairly dismissed from his job. In fact this system provides full legal service up to, but not including representation in court or before a tribunal or arbitrator. Most problems can be solved without the need for representation: consumer grievances, landlord and tenant problems, divorce, maintenance and so on. Under this scheme a client can obtain the services of a solicitor for nothing or for a contribution (explained below), if he satisfies the means test (below) until the solicitor has performed work for which he would otherwise have charged for 2 hours. In the case of an undefended divorce or judicial separation the limit is 3 hours. Note, however, that the figures are revised from time to time. Under the Legal Aid Act 1988 the scope of the "Green Form" scheme has been reduced. It no longer covers the making of wills or conveyancing, although there are some exceptions.

In order for a potential client to avail himself of the benefit of this scheme he should patrol the high street until a solicitor's office is found that displays the legal aid sign. It is purple in colour and resembles two people playing chess.

Having made an appointment with the client the solicitor will conduct the means test and give an instant reply about whether the applicant qualifies under the scheme. From 12 April 1993 the Green Form scheme has been available only to those in receipt of income support, family credit, or disability working allowance, or with a weekly disposable income not exceeding £ 61. There used to be a contribution system for those slightly above these levels, but reform has overtaken provision, for better or worse.

The calculation of disposable income relies upon deductions from gross figures reflecting obligations towards dependants: £ 25 is deducted for a partner, £ 15.05 for dependants under 11, £ 22.15 for those between 11 and 15, £ 26.45 for those aged 16 or 17, and for those aged 18 and over - £ 34.80. There is also a capital limit, so that even if the income hurdle is cleared the applicant can fall at the next test for having too many savings. Again, deductions are made, so that with no dependants the capital limit is £1000, it is £ 1335 with one, £ 1535 with two, and £ 100 more for each additional dependant.

The solicitor requires permission from the Legal Aid Board before he can exceed the 2 hours (or 3 hours) limit of work, or where the applicant has already been given assistance under this scheme, on the same matter, by another solicitor.

Assistance by way of representation

This is an extension of the Green Form scheme. With the Green Form another is completed by the solicitor, and if the Legal Aid Board feels that it would be reasonable for the client to obtain assistance by way of representation then the solicitor is able to prepare the case and represent his client.

To qualify for what is known as ABWOR the same income levels apply, except that the calculated disposable income can be up to £ 147. With an income of between £ 61 and £ 147 a contribution system survives the reforms. Broadly, those within these limits pay a contribution of one third of the excess over £ 61.

There is a capital hurdle for ABWOR too. The limits are: £ 3000 with no dependants, £ 3335 with one, £3535 with two and £100 more with each additional dependant.

LEGAL AID FOR CIVIL COURT PROCEEDINGS

Legal aid, if you qualify, covers work leading up to and including civil court proceedings and representation by a solicitor and/or a barrister, as necessary.

Legal aid covers the House of Lords, Court of Appeal, High Court, county courts, the Employment Appeal Tribunal, the Lands Tribunal, and others, but it does not coyer coroners' courts, defamation actions or any other tribunal work (although legal advice and assistance, above, covers virtually everything, so some help may still be available). In the magistrates' courts legal aid certificates are rare nowadays. The "assistance by way of representation" scheme (noted above) is replacing them in practice.

It can take weeks to obtain a legal aid certificate. The solicitor cannot act until it is granted; neither can it be backdated. There is provision for emergency legal aid it the case is very urgent which can be granted at once, but it lasts only until the full application for legal aid has been dealt with. The applicant must agree to co-operate fully with the DSS assessment officer. Furthermore, the full cost of the case must be paid if it is found that the

applicant does not qualify for free legal aid, or if an offer of legal aid with a contribution payable is turned down by the applicant.

The solicitor, in normal cases, fills in and sends off the application form. An assessment officer from the local DSS usually interviews the applicant to assess financial resources - a means test.

The local Legal Aid Office assesses the chances of the case succeeding. Legal aid will only be granted if it would be reasonable to do so, i.e. the case has a reasonable chance of success. The financial and quality tests have both to be passed. The financial test involves the calculation of savings and income. Savings (disposable capital) are all added together. The lower capital limit is £ 3000. The upper limit is £6750 (£8560) for personal injury). Gross income is scaled down to reflect dependants as follows: £ 1304 for the partner, £785 for dependants under 11, £ 1155 for those between 11 and 15, £1379 for those aged 16 or 17, and £ 1815 for those aged 18 and over. The lower income limit is £2294 and the upper limit is £ 6800 (£7500 for personal injury). Contributions are required if the capital exceeds £ 3000. A monthly contribution from income is required of l/36th of income over £ 2294 for the lifetime of the certificate. Those on income support qualify free of contribution.

Once the applicant has satisfied the DSS of his (lack of) means, and the Legal Aid Office about the quality of his case, then if he is to be awarded free legal aid he is issued with a certificate to that effect. If he is to be expected to contribute towards the costs of his actions, he is offered a certificate.

If the action proceeds and is successful then the property or money recovered can be affected by the controversial statutory charge under which

the Legal Aid Office can deduct the costs of having aided the applicant. This would not happen if the losing party were ordered to pay both parties' costs.

LEGAL AID FOR CRIMINAL COURT PROCEEDINGS

The defendant in a criminal case may obtain legal guidance from a legal advice centre of some kind (e.g. a Citizens' Advice Bureau) or under the Green Form scheme. Many magistrates' courts also have a system of duty solicitors who are able to take instructions from defendants who realise they need legal advice only after they arrive at court.

In any event, there is a special scheme of legal aid in criminal cases which was significantly revised in early 1984.

QUESTIONS AND TASKS

1. Who can get the help of a solicitor at a low price or at no cost at all? Who pays the lawyers' fees and expenses in such cases? Why?
2. What are the forms of legal advice and assistance paid for by the state?
3. What is the difference between legal aid for civil and criminal court proceedings?

FREEDOM UNDER THE LAW

RIGHTS OR LIBERTIES?

In English law there is no written constitution nor any Bill of Rights to enshrine individual freedoms. Indeed, the idea of rights may not be entirely appropriate here. It is a matter of liberties rather than rights. Professor Williams wrote:

> A liberty...means any occasion on which an act or omission is not a breach of a duty... A right exists where there is a positive law on the subject; a liberty where there is no law against it.

Furthermore it is tempting to examine the topic of civil liberties from a comfortable point of view. Professor O'Higgins wrote:

> A basic question is whether the effectiveness with which civil liberties are protected should be assessed from the point of view of a conventional middle-class citizen comfortably employed with conventional politics or whether it should be assessed from the point of view of the black; the poor; the subversive; the atheist; the "lunatic fringe" etc.

So while it is true to say that all societies require limitations upon total individual freedom to do, say, write, meet, etc., and it is also true that any civilised society will attempt to maximise the liberty and minimise the restriction upon an individual's freedom, it must be borne in mind that such pure theory may not be reflected every day, on the streets. Moreover, whereas our discussion centres upon civil liberties in the United Kingdom there is an international context into which our liberties must be placed. Since the Second World War a number of international agreements, treaties, conventions and so on have been drawn up to protect, stabilise and increase civil liberties.

As examples, consider the following:

1 the Universal Declaration of Human Rights - United Nations Organisation. This was adopted by the General Assembly on 10 December 1948;

2 the European Convention on Human Rights and Fundamental Freedoms 1950 - Council of Europe. This is not an institution of the European Community, but an international organisation of twenty-one

west European states which was formed in 1949; it was the first post-war attempt at unifying Europe. Twenty of the twenty-one are parties to the convention - Liechtenstein being the exception. The convention came into force on 3 September 1953.

PERSONAL LIBERTY

An individual is allowed to move freely. His personal liberty can only be curtailed on specific and narrowly defined grounds:

1 he is unfit to plead to a criminal charge in court, or is detained otherwise through mental illness;

2 he has been sentenced to imprisonment;

3 he has been committed to jail for contempt of court;

4 he is detained in pursuance of another court order;

5 he is detained in order to bring him before a court (i.e. arrested and not granted bail);

6 he has been granted bail but neglected to present himself at the appointed hour (see warrant above);

7 he is a minor under a care order;

8 he is detained to prevent the spread of serious illness;

9 he is an illegal immigrant or awaiting deportion or extradition.

A person wrongly detained can sue for false imprisonment and/or malicious prosecution as appropriate. These are essentially actions which follow the event. During wrongful imprisonment the prerogative writ called habeas corpus may be applied for. This was considered when we were dealing with the supervisory jurisdiction of the Divisional Court of the Queen's Bench Division. It is to this court that applications for habeas corpus are made.

QUESTIONS AND TASKS

1. Rights and liberties - what is the difference between the two notions?

2. How is personal liberty affected by Law?

THE LAW OF CONTRACT

INTRODUCTION

1. A simple contract. A contract is a legally binding agreement, that is, an agreement - imposing rights and obligations on the parties which will be enforced by the courts.

Y is a newsagent. Z goes into his shop and offers him 30p. Y accepts the money and gives Z his newspaper. We have here the elements of a contract:

(a) the offer;

(b) the acceptance; and

(c) the 30p, which is called the consideration.

It is a simple contract, imposing straightforward rights and obligations.

(a) Suppose Z only has a £ 5 note. Y has no change; Y says "You can owe it me," and hands over the newspaper: Z then has an obligation to pay 30p.

(b) Suppose Z opens the paper and finds that the printing has missed the inside pages: Z then has a right to return the incomplete paper and to be given, a complete copy or, if Y has sold out, to be returned his 30p.

A right enjoyed by one party implies an obligation owed by the other. We can express the same thing either way round.

After he has bought his newspaper Z gets on the bus to work. This time he is accepting an implied offer by the bus company. Z must pay the fare to

the conductor (as agent for the bus company) in return for being taken to his destination. That is the consideration.

Formalities

2. Formal requirements. As we have seen Z enters into a series of binding contracts as he walks down the street, buying a newspaper and travelling in the bus, without any formalities. Z enters into these contracts orally, and they are therefore called parol contracts. Most contracts can be made in any way: orally, in writing, by telephone, telex, or using a fax machine.

A few contracts require a particular form, usually to provide better evidence of the terms and so to prevent disputes. Some contracts must be:

(a) under seal;

(b) in writing;

(c) evidenced by writing.

3. Contract under seal. A contract under seal is called a deed or a specialty contract. A document becomes a deed if it is:

(a) signed;

(b) sealed. Sealing is now usually effected by affixing a disc or wafer of red paper at the bottom of the deed. In many cases it will not be vital for the seal actually to be used, provided it was intended that a deed should be made *(First National Securities v. Jones (1978) CA*);

(c) delivered. Delivery is largely a matter of intention, and a deed may be delivered (by constructive delivery) even though it remains in the possession of the maker. A deed by a corporation does not need to be delivered.

When a deed is signed, sealed and delivered it is executed. *An escrow* is a deed executed subject to a condition that it is not to become operative until a

certain contingency is satisfied, for example the occurrence of a certain event or the expiry of a period of time.

Deeds are of two kinds:

(a) *a deed poll*, to which there is only one party, for example a deed or gift; or

(b) *an indenture*, to which there are two or more parties.

A deed does not need to be supported by consideration, and can therefore be sued to make a gratuitous promise binding. A deed must be used:

(a) to confer or create a legal interest in land;

(b) to transfer a British ship or any share in a British ship.

If a deed is not used the contract is void.

A deed is subject to a longer period of limitation and makes certain additional defences available:

(a) *non est factum:*

(b) *estoppel by deed*;

(c) *merger*.

4. Contracts in writing. Some contracts are required to be in writing. The consequences if they are not in writing vary.

Contracts which are void if not in proper written form include:

(a) a bill of sale; and

(b) a hire-purchase or other regulated consumer credit agreement if not in the statutory written form.

On the other hand there are such contracts as a bill of exchange, which is defined by the Bills of Exchange Act 1882, s.3(l), as an "unconditional order in writing". If it is not in writing it still takes effect as a simple contract.

5. Contracts evidenced by writing. Some contracts are required to be evidenced in writing. If there is not sufficient evidence, then the contract will not be enforced in the courts. Examples are:

(a) contracts of marine insurance;

(b) moneylenders' contracts;

(c) assignments of copyright;

(d) contracts of guarantee

(e) contracts for the sale or other disposition of land.

The minimum of necessary written evidence suffices: any signed note or memorandum of the material terms of the contract on any scrap of paper. It must contain:

(a) the signature of the party to be charged or his agent. The party to be charged is the party against whom an action on the contract is brought. The note need not be signed by the plaintiff.

(b) all material terms of the contract:

(i) the names or sufficient identification of the parties;

(ii) a description of the subject matter;

(iii) the price or other consideration;

(iv) all other material terms, e.g. covenants in a lease.

The memorandum can be made at any time after the contract is agreed, provided it is made before the contract is disputed in court. It may consist of several separate documents, provided there is sufficient evidence to connect them beyond reasonable doubt. A letter headed "Dear Sir" could be linked to the envelope which contained it, so providing the name and address of the recipient: *Long* v. *Millar* (1879).

6. Contracts of guarantee. There is an important distinction between a guarantee and an indemnity.

(a). A guarantee is a contract "to answer for the debt, default, or miscarriage of another": Statute of Frauds 1677, s.4. The primary liability.

(b) An indemnity is itself the assumption of a primary liability.

"If two come to a shop and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will"; this is a collateral undertaking. But if he says, "Let him have the goods, I will be your paymaster", or "I will see you paid", this is an undertaking as for himself": *Birkmeyr v.Damell* (1704) per Hold CJ.

The first is a guarantee; the second an indemnity: *Lakeman v.MountStephen* (1874).

Being a primary obligation, an indemnity does not need to be evidenced in writing. A guarantee requires a written memorandum with two exceptions.

(a) The consideration need not be stated in the memorandum: Mercantile Law Amendment Act 1856.

(b) There is no need for a memorandum where the guarantee is part of a larger transaction, for example a guarantee given by a *del credere* agent.

7. Contracts for the sale of land. A contract for the sale or other disposition of land or of any interest in land is normally supported by a memorandum in writing because the Law of Property Act.1925, s.40, provides that contracts which are not so evidenced may not be enforced by court action. Even if there is no such memorandum, however, the parties retain other rights: for example, if a deposit has been paid the court will not assist the purchaser to recover it from the vendor: *Monickendam v. Leanse* (1923).

The only exception to this is the doctrine of part performance. If A has performed his part of the contract, and B then refuses to perform his, the court will intervene to save A from hardship by ordering B to perform his side of the contract.

The court has a discretion whether to apply the doctrine of part performance and will do so when four conditions are satisfied.

(a) The contract must be one for which damages would be inadequate and of which specific performance can be ordered.

(b) The act of part performance must be referable solely to the contract alleged. X orally promised a woman to leave her his house in his will if she gave up her own house and came to keep house and care for him until his death. She did so, but paid for her own board. When he died his will made no mention of the bargain. She sought to enforce the bargain and it was held that her actions had been sufficiently clear part performance of the oral contract: *Wakeham* v. *McKenzie* (1968). The categories of act which will be regarded as constituting performance are not closed: *Steadman* v. *Steadman* (1974), S*utton v.Sutton* (1984).

(c) The act of part performance must be such that it would amount to fraud on the part of the defendant to take advantage of the absence of writing. A orally agreed to rent a flat from B, who at A's request made improvements to the flat. B's action was exclusively referable to the contract alleged and A was not allowed to refuse to take the flat: *Rawlinson* v. Ames (1925).

(d) There must be sufficient oral or other evidence of the material terms of the contract: *Parker* v. *Clark* (1960).

It is important not to confuse the doctrine of part performance with the remedy of specific performance.

Intention to create legal relations

8. Intention to create legal relations. For an agreement to be enforceable as a binding contract it must have been the intention of the parties to create legal relations. There is no exhaustive list of situations in which there is no such intention, but they mainly fall into three categories:

(a) *Social* and domestic *arrangements.* "There are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife": *Balfour v. Balfour* (1919) per Atkin LJ. This presumption may be rebutted. A husband's agreement to pay money to his wife may be a contract if the parties are separated: *Merritt v. Merritt* (1970). An agreement between relatives to share a house may be a contract if one party has in consequence sold her own house: *Parker* v. *Clark* (1960). A joint entry in a competition can be a contract: *Simpkin v. Pays* (1955).

(b) Intention to create legal relations expressly denied. The presumption that a contract is intended in a commercial agreement may be expressly rebutted:

(i) by a clause stating that the agreement "shall not be subject to legal jurisdiction in the law courts": *Rose & Frank v .Crompton Bros.* (1925)

(ii) by the words "subject to contract" on an agreement for the sale of land: *Tiverton Estates v. Wearwell* (1975).

(c) *Collective agreement.* A collective agreement between a trade union and an employer under the Trade Union and Labour Relations Act 1974, s.18, is not legally enforceable unless:

(i) it is in writing; and

(ii) it states that the parties intend it to be binding.

The trivial nature of an agreement is not relevant to whether it is intended to be binding: *Esso v. Commissioners of Customs and Excise* (1976). Nevertheless, the courts tend to treat the presence of consideration as an indication that a legal obligation is intended.

9. Consensus ad idem. The consent of the parties is necessary for a contract to be enforceable.

The classical nineteenth-century view was that there must be a *consensus ad idem*: the minds of the parties must meet and agree. In *Cundy v. Lindsay* (1878) Alfred Blenkarn ordered a consignment of handkerchiefs from P. Alfred signed himself "A. Blenkarn & Co. of 37 Wood Street". P. knew the respectable firm "W. Blenkiron & Sons of 123 Wood Street". Believing Alfred to be this firm, they sent the handkerchiefs to him as "Messrs. Blenkiron & Co. of 37 Wood Street". Alfred did not pay for the handkerchiefs but sold them to D. The House of Lords, as Lord Cairns LC observed, had "to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both must fall." Lord Cairns resolved the problem by applying the consensus test. Was it in P's mind to enter into a contract with Alfred? "Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him and as between him and

them there was no consensus of mind which could lead to any agreement or any contract whatever."

This approach works admirably where a man sells something to another man. One man makes an offer; the other accepts; consideration changes hands. But in modern life contracts may arise in many other ways.

(a) *By conduct.* A contract is concluded as soon as money is put into an automatic ticket machine. "The offer is made when the proprietor of the machine holds it out as being ready to receive money. The acceptance takes place when the customer puts his money into the slot": *Thornton v. Shoe Lane Parking* (1971) per Lord Denning MR. There is no consensus between the proprietor and the customer.

(b) *By operation of law.* Where there is a contract for the sale of goods in which no price has been agreed the buyer must pay a reasonable price: Sale of Goods Act 1979 s.8(2). This is one of many cases where the law intervenes and takes a matter out of the hands of the parties.

(c) *By inference. A* famous example is *Clarke* v. *Dunraven* (1897). The yachts *Satanita* and *Valkyrie* were entered for a race, each owner undertaking to observe the yacht club rules. The yachts collided, and the question arose whether the owners had entered into a contract with each other. The House of Lords decided that they had. "The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think to create a contractual obligation to discharge that liability": per Lord Herschell. The knowledge, of course, was that all competitors had undertaken to the yacht club to observe the rules; it does not follow that one competitor knew of the existence or identity of the others.

As Lord Wilberforce said in *The Eurymedon* (1975): "The precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g. sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of reward; acceptance by post; warranties of authority by agents; manufacturer's guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."

QUESTIONS AND TASKS

1. What is a contract? What are the elements of a contract?
2. What can be the formal requirements necessary for a valid contract?
3. What is the difference between a contract in writing and a contract evidenced by writing?
4. What is the difference between a guarantee and an indemnity?
5. What is the difference between a deed poll and an indenture?
6. What is a merger?
7. Why is the intention of the parties to create legal relations important? Why is it sometimes expressly denied?
8. How can contracts arise in modern life?

GENERAL PRINCIPLES OF AMERICAN LAW

WHY WE SHOULD KNOW LAW

We live in a complicated world. New scientific and social developments increase the tempo of our daily living activities, make them more difficult and more involved.

To keep abreast of our economic, social and scientific competition we must constantly replenish our store of information about the world around us.

We are now more than ever vitally concerned and actively interested in all community activities. We are better informed about local, national and world affairs. We read newspapers, magazines, books. We listen to the radio, we watch television. We hear contradictory opinions and varied points of view. We think and act for ourselves.

There is but one field of knowledge that we have sadly neglected. I refer to the Law, those rules and regulations which govern our every social move and action.

For too long now we have lived in general apathy concerning everything which even vaguely reminds us of the Law.

We need to reorganize our thinking and bring up to date our store of knowledge in this vital area of our day-to-day activities.

There is nothing mysterious, nothing awesome about the Law. It consists of the rules of community living. It may be more complicated, more inclusive, but it is not different in its way from the rules of our favorite game of cards or our favorite recreational activity.

We are a well-informed nation of well-informed citizens. Each one of us, regardless of the extent of his formal education, has an acquired, extracurricular reservoir of practical, day-to-day-living intelligence and skill. We must make a conscious effort to overcome our blind and unreasonable bias about the Law.

A knowledge of law with its basic principles and applications is a necessity. We meet it, in some form, in every one of our daily business and social experiences.

My purpose in this volume is twofold.

I want to show you that law is based on the reasonable needs of the community and I also want to show you the reasonable and simple basis for each legal principle.

This book contains law for laymen and not law for lawyers. The distinction is simple. Law for laymen is explanatory and informational. Law for lawyers is technical; it is, for the lawyer, the mechanics of his profession and the tool of his trade.

This book is not intended to produce lawyers, but merely well-informed laymen, who are aware of their legal rights and privileges. We should be able to recognize the problems which confront us. We should have the intelligence and the understanding to seek adequate legal guidance when we need it. Laws may very from state to state. The lawmakers in each jurisdiction have the duty to legislate according to their needs as they see them. Basically, however, the principles on which the laws are founded are the same. If we understand those principles, we can easily determine, in each situation, what the law is in our own state.

WHAT IS THE LAW? HOW DOES IT APPLY TO OUR EVERYDAY LIVING?

The law, as we know it, is a structure of rules, regulations and accumulated decisions of the courts. These have been compiled and organized into separate subjects according to their application to the needs of society.

There are, generally, four categories which we can establish. First, we have the vast subject of contracts, the basis of most of our daily activities since it relates to all of our agreements in our business and social relationships. Then we have the subject of personal rights, which includes marriage, family relations, torts, wrongful acts, and legal and civil rights. The third general topic is property rights. This includes wills, estates and real property. Finally, we come to criminal law, the principles and procedures which protect society and the community from the harmful and criminal acts of the individual. The criminal law also protects the defendant. It assures the person charged with a crime of a fair and speedy trial.

The law is based upon the recorded experiences of society and the community in their efforts to define and regulate the relationships between their members. It is intended by these rules to determine all disputes by the use of law.

The laws passed by the legislatures result from a need to correct existing conditions. The decisions of the courts, interpreting these statutes, protect the individual from injustice.

For example, when two people have conflicting claims of ownership in certain property, they come to the courts to have their rights determined in accordance with the law which applies to their particular situation.

The lawyer for each litigant "searches" the law applicable to the case. By referring to the legislative enactments and court decisions, in the state, indexed under the subject, he will find "the law of the case". He will find authority, based on statute or court decision, which may be in his favor or against him.

Each side will by means of a "brief" or a "memorandum of law" present all of the authority that is available to convince the court that it should support his contention. The court will base its decision in the case upon consideration of the proof as presented and the existing law as it is to be applied.

Illustration: Albert loaned $500 to Bart to be returned within a month. When the money was not repaid, Albert brought suit against Bart. Albert is the plaintiff and Bart is the defendant. At the trial Albert testified, under oath, about the loan. Bart, in his turn, claimed that it was a gift to him which was not to be returned. The court, after listening to the testimony of both slues and considering the law, decided that it was a loan and directed that judgement be entered in favor of Albert against Bart.

To give the proceedings of a court effect and meaning, powers are granted to the courts to enforce their decisions, by reimbursing the injured party for his loss and penalizing the party responsible.

To avoid injustice through human error, the law has established a procedure of appeal to a higher court with the opportunity for reconsideration. This gives the losing party another chance to convince a higher court, an appeals court, that due to an "error" in the lower court, the decision should be in his favor and not against him.

If he succeeds in his argument, the higher court may reverse the lower court and give him the decision. It may also recognize that an error was made and return the case to the lower court for a new trial.

If he fails to convince the appellate court, the judgement of the lower court will be affirmed and he will be compelled to comply with its decision.

SOME BASIC LEGAL DEFINITIONS

At this point in our discussion of the law, we should consider some definitions. As in any game, trade or activity, we must learn its language, its terminology, before we can properly understand it.

"Laws" are rules established by a governing power to maintain peace, secure justice for its members, define the legal rights of the individual and the community, and to punish offenders for legal wrongs.

The word "law" is used to mean many things. Generally, and all-inclusively, it is used to indicate all law, all authority. It is also used to mean a single enactment of a lawmaking body, a "statute".

There are many subdivisions of the main body of "law". The basic ones are "civil law" and "criminal law".

The "civil law" is the portion of the law which defines and determines the rights of the individual in protecting his person and his property.

The "criminal law" is that body of law specifically established to maintain peace and order. Its purpose is to protect society and the community from the injurious and harmful acts of individuals.

The same act causing injury to person or property, a civil wrong, also called a "tort", may also be a breach of the peace, a "crime". The wrongdoer may then be subject to both civil and criminal proceedings.

Illustration: In the heat of an argument, Carter hits Bruce over the head with a baseball bat. A civil suit, in tort, against Carter may result in Bruce recovering money damages for the injury he sustained. A criminal proceeding may, on Carter's conviction, result in his imprisonment.

The "common law" is the accumulated and organized body of previous court decisions, divided into categories according to subject matter.

The "statutory" or "statute law" is the body of legislative enactments. This also is "cited" or referred to as authority by the courts in arriving at their subsequent decision in the case.

Both the common law and the statutory law, dealing with civil and criminal matters, are further subdivided into "substantive" and "administrative" or "adjective" law.

Substantive law is concerned with those concepts which deal with the rights and duties of the individual.

Adjective law is procedural and concerns itself with the application and enforcement of the substantive law.

Most of our law, relating to business and commercial transactions, originated with the "law merchant". This was a body of regulations established through the centuries by merchants, mariners and businessmen of the trading world to carry on commerce with confidence and security. These rules were subsequently incorporated with the other branches of the substantive law into the English common law, and now adopted by most of the states as the Uniform Commercial Code.

Another classification of the civil law is divided into "law" and "equity". The difference between the two consists basically in the relief which is sought

and obtainable. An action at "law" is brought when the violation of the right for which relief is demanded can be remedied by money damages.

Illustration: The damage to an automobile resulting from a two-car collision can be adequately remedied by payment of the repair bill, by the party responsible for causing it.

An "equity" action must be brought if there is no adequate remedy at law. The mere payment of money damages is not enough to give the injured party proper relief. The courts then have the power to compel the other side to do a specific act.

Illustration: The seller of a house refuses to go through with his deal. The buyer wants that house and no other. He may sue in equity to have the court compel the seller to go through with the deal. This is equitable relief and is called "specific performance".

When a partnership business is dissolved, an accounting may be compelled by the Court to determine the distribution of the partnership assets.

Except for the type of relief available, all other distinctions between actions at law and suits in equity have been eliminated in most states. In those where the formal separation is still retained, a suit in equity is brought in a court of equity, a court of chancery or a chancellor's court. It is more formal than an action at law and requires strict compliance with all procedural requisites.

WHAT IS JURISDICTION - FEDERAL, STATE AND LOCAL?

Jurisdiction is the legal authority of a public body to act. Thus, we have three jurisdictions of government in this country: The United States or federal, the state and the local governments.

Each of these, within its own sphere of authority, has the power to pass laws and to see that those laws are properly enforced.

Federal Jurisdiction

The law of the United States is based on the Constitution and the laws passed by Congress. This is the supreme law of our country. To enforce these laws, federal courts have been established by Congress with separate and special jurisdiction in their own field.

The United States Constitution vests judicial power in the Supreme Court and such inferior courts which Congress may establish.

State Jurisdiction

In accordance with the United States Constitution, the states have their own sovereign power in their intrastate activities. The states' constitutions and the laws passed by their legislatures are supreme within their borders, unless they are in contravention of the United States Constitution.

Each state has created its own courts in accordance with its state constitution and its legislative enactments. Each state is sovereign in its own right and territory. The legislature may pass any law necessary for the protection of its interests and the administration of its power. To overcome the effects of uncontrolled legislation in the various states, such organizations as the American Law Institute and the National Conference of Commissioners on Uniform State Laws have been created. Their purpose, by means of "model acts" and uniform acts, is to suggest to the state legislatures the need for greater uniformity in legislation among the states. There is thus a constant exchange of legislative information. Noticeable advances have been made in achieving greater uniformity of laws, among the states, as in the recently adopted Uniform Commercial Code to regulate transactions between

merchants. The Uniform Consumer Credit Code when adopted by a state expands consumer protection within the state jurisdiction to conform with the Federal Consumer Credit Protection Act, a portion of which is known as the Truth in Lending Act.

Local Jurisdiction

The day-to-day business of the local community is carried on by the city, town or village governments. Each, within its territorial limits, has its own equivalent of the three-branch system of government, recognized in this country: the executive, the legislative and the judicial. Each unit passes laws, called ordinances, pertaining to its own residents and its own area. These ordinances control electrical, plumbing and other regulations in construction of buildings; they control local zoning, traffic and police and fire requirements. The local courts and governmental agencies enforce these regulations for the protection of the community. Just as there are three jurisdictions in government, there are three classes of jurisdiction in the courts within every locality in the United States. Each court has its own authority to hear and determine cases brought before it according to its inherent powers.

THE COURTS - FEDERAL, STATE AND LOCAL

The Federal Courts

The residents of each state have access to a federal district court. The civil division handles matters involving contracts, torts, admiralty, bankruptcy and other matters of federal law.

The practice and procedure in the federal district court are essentially similar to those of the state court, except, of course, that they are governed by federal law.

There also are special federal courts created to handle special types of litigation. The Federal Court of Claims hears all cases where the United States is a party and claims are made against it. There are also a Tax Court, a Customs Court, Court of Customs and Patent Appeals and a Bankruptcy Court.

The United States Court of Appeals, of which there are 11 "branches", one in each circuit, entertains all appeals from the district courts.

The Supreme Court of the United States hears appeals from each of the circuit courts when the case involves the constitutionality of a federal or a state law. A matter of wide public interest or a point of law in conflict in the circuit courts, requiring an authoritative decision, will also be heard by this court.

The State Courts

Each state has courts on a state-wide basis, usually distributed in all the counties. They have the power to try civil and criminal cases relating to state laws and the rights of its citizens.

These state courts are divided into lower courts with trial jurisdiction and higher courts with appellate authority.

The trial court hears the testimony of witnesses in each case. On the basis of the proof presented at the trial, the court determines the rights of the litigating parties by a decision of the Court or by a verdict of the jury.

Here too there may be specialized courts with a specific jurisdiction. Some states have a Court of Claims, where all suits against the state are brought. Some may have courts with probate jurisdiction or with special authority to hear matrimonial actions. Each state allocates specific powers to its own courts.

The appeals courts hear all cases brought up on appeal from the lower trial courts, where an error in legal procedure is claimed to have been made.

An appeal is heard by the court on oral argument of the attorneys representing both sides, the appellant and the respondent. No witnesses are heard. No testimony under oath is taken. The transcribed record of the testimony given at the trial and all pertinent papers are submitted. Both counsel may also file briefs. There are written arguments of law in which each side quotes decisions of prior cases as authority intended to bolster his contention. The decision of the appeals court is based on consideration and study of all papers.

Local Courts

Each state also has local courts on a county and also on a town or village level. These courts are limited in their authority and in their jurisdiction. Their legal process cannot extend beyond the limit of their geographical borders. A summons from such a court cannot be served upon a person residing outside of its area. It may be served upon him and is effective if he is within the actual physical boundary of the court's jurisdiction. The civil courts are only authorized to try cases where the amount of relief demanded is below a stated maximum. Claims for a larger amount must be brought in a state court. The criminal jurisdiction of these local courts is limited to the trial of minor offenses.

WHAT IS THE LEGAL PROCESS?

The legal process can be defined as the procedure through which a person with a claim can institute an action in a court of law. If he proves that

he is entitled to it, he will have the facilities of the court's authority to obtain satisfaction.

A civil action is usually begun by the issuance of a summons or citation from the court in which it is to be heard. This is a direction to the defendant named in it to appear and answer the claim of the plaintiff.

A complaint may contain several "causes of action", independent claims for relief. They may each claim the same amount of money on different legal grounds, or they may be several separate claims.

> Illustration: John loaned $100 to Robert, and received a promissory note as evidence of the debt. When John did not get his money back, he sued Robert on two causes of action, on the loan and on the note. The complaint, however, demands $100.
>
> If in addition Robert owed John $250 from a previous transaction, the complaint would have three causes of action; the third would ask for the additional $250. Every cause of action is based on some legal authority.

The facts in each case must be proved, either by documentary evidence or by the sworn testimony of witnesses at the trial. If the plaintiff does not prove these necessary elements to the satisfaction of the court, then as a matter of law, he cannot win. He has not established a "prima facie" case. He has not shown that he is entitled to a trial of the issues. The court may then dismiss his complaint before the defendant introduces any evidence.

The bringing of a lawsuit is a technical and complicated procedure. A plaintiff must determine first against whom he wants to bring it. When several parties are involved, all indispensable and necessary parties must be made parties defendant.

The court in which the action is to be brought must have jurisdiction over the defendant and the subject matter of the lawsuit.

Illustration: Ellsworth, living in California, was sued by Preston in the Civil Court of the City of New York for $11,000. Unless Ellsworth is personally served with process in New York or has property there, he cannot be brought within the jurisdiction of the New York Courts. Furthermore, the New York Civil Court only has authority to try cases under $10,000.

Finally, of course, the complaint must allege all of the necessary elements which must be proved in that particular type of action. Only those facts which are alleged in the complaint will be eligible for argument at the trial. If a necessary element is excluded from the complaint, it cannot be brought up at the trial and there can be no recovery. The courts now tend to be lenient with mere irregularities, but
the correction of such errors may be costly and time-consuming.

A party is not compelled to have a lawyer and may proceed to try his own case. However, despite all of the leniency of the court, he will find himself at a disadvantage. The procedure of a trial is technical and requires a thorough knowledge of the rules of evidence. These are the rules which guide the court in determining which evidence is legally admissible. Evidence must be "relevant"; that is, it must bear a relationship to the fact that is to be proved. It must be "competent" in that it must be legally proper, not in violation of the rules of evidence. It must also be "material" so that it bears directly on the fact in issue and will tend to prove that fact.

Many jurisdictions have "small-claims courts," involving limited amounts. A party may safely try his own case there since the rules of evidence

are not strictly applied and substantial justice is rendered between the parties. Generally, the relief offered by these courts is not available to corporations.

When the defendant is served with a summons and complaint, he must serve an answer within the time required in the summons. If he fails to do so, a judgment by default may be entered against him. He may thus lose the benefit of a trial and the judgment may be enforced against him.

The defendant must not delay in getting legal advice when he is served with a summons. His answer must contain all defenses which will protect his rights and resist the plaintiff's claim. This may be done by a "general denial," also known as a "demurrer," by "affirmative defenses" or by a "counterclaim." If the answer contains a "counterclaim", the plaintiff has the right to respond by serving a reply to oppose that claim.

Both the plaintiff and the defendant have an opportunity to demand that a jury try the issues of fact between them. The side which makes the demand must pay the jury fee.

The case is now "at issue", meaning that it is ready for trial before a jury or before the court without a jury.

The plaintiff is usually anxious to get an immediate trial. He will file the necessary papers to get the case on the "calendar". A calendar is a list on which all cases are placed when they are ready for trial. Generally there are two such lists or calendars, one for cases in law and another for cases in equity. In areas where there is a great deal of litigation, the law calendar may be further subdivided into a "Tort" or "Personal Injury" calendar and a general calendar to include all other types of cases. Each of these will then be further subdivided into "Jury" and "Non-jury."

Preparation for Trial

While the case is on the calendar, waiting for trial, there are certain preliminary steps which must be taken by both sides to prepare for the day when all issues between them will be finally heard.

The defendant has the right to demand a "bill of particulars". This is a statement prepared by the plaintiff's attorney which elaborates on the facts presented in the complaint. In answer to specific questions submitted by the defendant, the bill of particulars contains more detailed information about the plaintiff's claim.

Each side may be allowed to examine the other under oath before trial. This "examination before trial" in an informal taking of testimony. Information may also be obtained by a deposition or affidavit, or it may be done by interrogatories. There are a series of questions presented to be answered by the party being examined for the purpose of making information available to the adverse party.

In an action for personal injuries, the defendant will be permitted to have a doctor examine the plaintiff to corroborate the claims of injury and permanent disability.

Many courts have instituted arbitration and pre-trial procedures to settle and adjust cases before trial in an effort to reduce the size of court calendars and the waiting time for trial. If no satisfactory adjustment can be reached, both sides will then proceed to trial.

Selection of a Jury

Jurors who will hear a case assigned from the "jury calendar" are usually selected by lottery from a list of qualified residents of the county. They are

chosen by lottery so that the persons selected will be a random sampling of the citizens. As an imposed civic duty, they are required to hear and decide matters in dispute between their fellow-citizens, without fear, favor or prejudice.

Generally, the qualifications of a juror are that he must reside in the county for a specified period, he must be of acceptable age, legally mature but under 70, he must own some property and be possessed of his natural faculties of health, sight and hearing.

A group of 20 to 30 prospective jurors are picked to constitute the "panel." From these the required number will be selected for the trial. Generally, 12 jurors are required. However, some states have reduced that number by appropriate legislation to 6 in civil actions.

Each potential juror is questioned first by the plaintiff's attorney and then by the defendant's. This is called the *voir dire.* Its purpose is to give each side an opportunity to choose jurors who will be fair and unbiased. Their task is to listen to the evidence as it is presented at the trial. They judge the demeanor of the witnesses to determine their truthfulness. They then apply the principles of law, as explained to them by the court, and arrive at their verdict, based upon their determination of the facts.

A prospective juror who states that he cannot be impartial may be "challenged for cause" by either side and he will then be excused by the court.

Both sides are permitted a certain number of "peremptory challenges" which they may use at will without giving any reason. The peremptory challenge is a safeguard afforded each litigant to eliminate any prospective juror whose attitude indicates that he is incapable of being fair and unbiased.

When the requisite number of jurors acceptable to both sides, has been chosen, the jury is declared to be "satisfactory" and the trial will proceed.

In some of the local municipal courts there is provision for 6 instead of 12 jurors, although a party demanding a jury may request and pay the fee for 12, if he so desires.

THE TRIAL OF A CIVIL ACTION

In the trial of a civil case, the plaintiff has the burden of proving all of the necessary elements in his complaint by a "fair preponderance of the credible evidence." This is to be distinguished from a criminal case, in which the prosecution must prove its case against the defendant "beyond a reasonable doubt."

To give the plaintiff an advantage, he is given the right, in a jury case, to make his "opening statement" before the defendant. He has the first opportunity to present his side of the controversy and explain to the jury what he intends to prove.

When both sides have opened their cases to the jury, the plaintiff will begin to present his proof. This is accomplished by means of witnesses or documents. Documents which are admissible in evidence are marked as "exhibits" for either the plaintiff or the defendant. Those which are not admissible but are referred to during the trial are marked "for identification." The "exhibits in evidence" are part of the proof and are to be considered by the jury in their deliberations. "Exhibits for identification" are not evidence and may not be shown to the jury.

Witnesses are brought into court by the service upon them of a "subpoena." This is a direction from the court that they are to appear and

testify in a case. A *subpoena duces tecum,* meaning, literally, bring with you, is served on any witness who has books, papers or documents in his possession which are required for the trial.

The witnesses for the plaintiff are each in their turn sworn to tell the truth. A witness who has conscientious scruples against taking an oath may be permitted to "solemnly, sincerely and truly declare and affirm" that the testimony he will give in the case on trial shall be the truth. An "affirmation" is just as binding as an oath in the event of perjury.

The witness will first be examined by the plaintiff's attorney to elicit that information, which is necessary to establish his cause of action. When he has completed his questioning, the attorney for the defendant will cross-examine. He will, by means of his questions, test the witness as to his testimony and his credibility. If he is able to "impeach" his credibility, the testimony, of course loses its probative value before the jury.

After each of the plaintiff's witnesses is examined both on direct and cross-examination, the plaintiff will "rest." He has submitted all of his proof and feels that he has established all that proof necessary for him to present in order to win.

The defendant may then test this proof. He will make a "motion," an oral application to the court, to dismiss the complaint, on the ground that the plaintiff did not prove the elements necessary for his case.

The court will then decide if the proof is sufficient, as a matter of law. If the judge grants the motion of the defendant, then he will dismiss the complaint and the case is over. If he denies the motion the case will continue and the defendant will be required to answer the evidence of the plaintiff.

The defendant's witnesses are then sworn and examined, both directly by the defendant and on cross-examination by the plaintiff. When all of the available faces have been elicited by the defendant, he too will "rest."

If necessary, the plaintiff may be permitted to call "rebuttal" witnesses, to disprove some of the evidence presented by the defendant. Both sides will then "rest." All of the proof in the case is then completed.

The defendant will then make his closing statement or "summation" to the jury. The plaintiff, again getting the advantage, has the last word before the jury. Each side, in its turn will try to persuade the jury by facts, reason, logic and rhetoric that its client is entitled to their verdict.

The court then "charges" or instructs the jury as to the applicable principles of law in the case.

Illustration of a "charge":

> "The plaintiff brings this action to recover damages for injuries he alleges were sustained by him by reason of the negligence of the defendant. In order to recover a verdict, the plaintiff must prove that the negligence of the defendant was the proximate cause of the accident... Negligence in law may be defined as the failure or omission to perform some act or duty which one person owes to another. More simply defined, it is the absence of such care as a reasonable and prudent person would be expected to use, under similar circumstances....
>
> "You have heard the testimony. The law places upon you jurors the burden of deciding the issue of fact from your recollection of that testimony...

"Under the law, if the plaintiff is to recover he must not only show that the defendant was negligent, but that he himself was free from any fault which in any way contributed to the accident...

"The plaintiff can only recover if the evidence produced by him outweighs the evidence produced by the defendant. By that I do not mean the number of witnesses. It is the quality of the testimony and not the quantity that counts…

"If you find therefore that the plaintiff has sustained the burden of proof and that the defendant should be called upon to compensate the plaintiff for the damages he sustained, you will then determine how much in money you should award the plaintiff…

"If the evidence in your minds is so equally balanced that you cannot make up your minds, then your verdict must be for the defendant…

"That is what we call "preponderance of the evidence." So if the evidence of the plaintiff does not preponderate in his favor, he cannot recover....

"With minds free from bias, prejudice or sympathy, you must determine from the facts, considering them fairly and impartially, who is entitled to a verdict. You can bring in one of two verdicts. If you find that the plaintiff has not satisfied you by the rules I have laid down, you will find for the defendant. If you find that the plaintiff has satisfied you and you believe that the plaintiff's testimony outweighs the defendant's, in quality, then your verdict will be for the plaintiff."

After the charge, the court will ask for "exceptions."

Each side will state any objections it has to the court's charge. The court will rule as to each exception. He may amend the charge to include a correction or he may deny it.

The jury will then retire to deliberate on the facts of the case. Some jurisdictions require a unanimous verdict even in civil actions. Others have amended the law and only require five-sixths of the jurors to agree in order to constitute a legal verdict. If the required number cannot agree on a verdict, then the jury will be dismissed and the case tried all over again before another jury.

If the deliberations of the jury extend far into the night, the court may order a "second verdict." When the verdict is reached, it will be written down and signed by all of the members of the jury - those in favor and those against. The verdict will then be sealed and opened before the court and both litigants at its next session, usually the next morning.

The verdict of the jury will be either "for the defendant" or "for the plaintiff." If the case requires the jury to determine the amount of recovery for the plaintiff, the verdict may be "For the Plaintiff in the sum of $1,500."

In a non-jury case, the trial of a civil action proceeds in essentially the same manner except that there is no need for opening and closing statements. The determination of the court is called its "decision."

APPEAL PROCEDURE

If the losing party in a civil action, whether jury or non-jury, is convinced that some "error" of law was committed on the trial of the case, he may appeal to a higher court. He will serve the other side with a "notice of appeal." Within the required time, he will prepare and serve on his opponent the papers and documents necessary for such an appeal.

These include a "record on appeal" consisting of all the documents in the case such as the summons, complaint, answer and bill of particulars. It will

also include a complete transcript of all the testimony at the trial, and copies of the exhibits. The "appellant" will also be required to serve and file a "memorandum of law" to sustain his claim that an error was committed. The "respondent," also known as the "appellee," will also serve and file a memorandum of law to defeat the arguments of the appellant.

The appeal will be placed on a calendar in the appellate court. When it is reached in its turn it will be heard in argument. The appellate court may not feel that argument is required and may request both sides to "submit" their papers for its consideration and decision.

The appellate court will either affirm the decision of the lower court or reverse it and send the case back for a new trial.

ENFORCING THE JUDGMENT OF THE COURT

When the verdict of the jury or the decision of the court is for the plaintiff, he will enter judgment in the sum awarded to him, in the County Clerk's office, or such other place as judgments are recorded. If payment is not made within a reasonable time, he will then take those steps necessary to collect that judgment.

An appeal stays the enforcement of the judgment. If the judgment creditor is served with notice of appeal he is stayed from proceeding until the appeal is denied, dismissed or defeated.

If there is no appeal, the judgment creditor may be entitled to examine the judgment debtor under oath in "proceedings supplementary to judgment" to determine the extent of his assets. In his further attempts to collect on the judgment, he may have "execution" issued to an officer of the court, directing him to seize and hold the debtor's property until payment is made or it is sold.

When payment is made, the judgment debtor is entitled to have a "satisfaction" of judgment" docketed to show that the judgment was satisfied. In those cases where a lawsuit involves real estate, and a *lis pendens* was filed as notice to prospective purchasers that litigation was pending, this too should be canceled of record when payment is made.

ADMINISTRATIVE AGENCIES

Because of the increasing complexity of government, motor vehicle bureaus, tax assessors, liquor authorities and similar government agencies have been given power to administer activities affecting personal rights and business interests. In the event of an adverse decision, a court proceeding "in certiorari" may review that determination. If it is shown that the decision was unreasonable, arbitrary or capricious, the court will order a reconsideration or will reverse that decision.

ARBITRATION

Although it is illegal to make any contract which will deprive anyone of the right to seek relief in the courts, contracts may provide for the settlement of disputes by arbitration. The contract will set forth the manner of choosing the impartial arbitrator or it may direct that the matter be submitted to the American Arbitration Association. An arbitration decision cannot be appealed or reversed in court unless it is shown that there was some impropriety in the proceeding or in the decision.

QUESTIONS AND TASKS

1. Describe the legal system of the United States.
2. Is the legal process in the United States different from the, legal process in Great Britain? Discuss all the similarities and differences that you know.
3. Speak on the role of the jury selection in a trial.

CRIMINAL LAW AND PROCEDURE

The criminal law is a portion of our laws, both administrative and substantive, which control the behavior of our citizens as members of the community.

Since the purpose of these laws is to protect the community from the wrongful and harmful acts of individuals, the basic principles are generally similar throughout the country, although the specific rules and their applications may vary among the states.

Criminal law is a very technical part of our law because it concerns the liberty of the individual. Because of our basic doctrine that a person is presumed innocent until he is proved guilty, every safeguard is made available to the person charged with any crime. This does not mean, however, that a person charged with a crime may safely sit back and feel secure in the thought that the law is on his side. It is up to him through proper legal counsel to make use of every defense that the law provides for him.

A crime may be defined as an act which is forbidden by law. If such an act is committed and the person responsible is caught, tried and convicted, then his punishment is determined by the law which he has violated.

Punishments as prescribed in the law are dependent upon the gravity of the crime. A capital offense is one which the state recognizes as punishable by the death sentence. In other crimes the punishment may be imprisonment in a state prison, in a county or a city jail.

The punishment may be a fine or imprisonment or both. The severity of punishment is also dependent upon the criminal record of the defendant.

Conviction of a crime may disqualify a person from holding public office and may cause him to be deprived of the right to practice his profession, particularly if that profession is based on trust and confidence.

The convicted person may receive such other penal discipline which the court considers adequate in that particular situation.

A "felony" is generally defined as a crime which is punishable by death or confinement in a state prison. The statute which establishes the crime and its punishment usually indicates whether it is a felony.

"Misdemeanors" are all other crimes not considered felonies. The punishment for misdemeanors is less severe since the crime itself is less serious in nature. The third category of criminal or antisocial behavior is called an "offense." It is not considered a crime, but is serious enough to warrant punishment according to the direction of the law which creates it. An offense is usually a violation of local laws or of rules of accepted public conduct and behavior.

Illustrations: An assault with a weapon would be considered a felony by the law which defines it and which prescribes the punishment on conviction.

A simple assault without any weapon would be considered a misdemeanor.

Disorderly conduct, vagrancy or public intoxication are considered offenses and as such would probably call for a short sentence in the county jail or the workhouse.

As we have mentioned, a crime is an offense against the state and the people of the state. The action against the offender is prosecuted by the district attorney or any public officer charged with such a duty. The criminal action is brought in a special criminal court or in a special division of criminal actions in a state court.

The title of the action would be "The State against John Jones" or "The People of the State of __ against John Jones." In some states it will be "The Commonwealth of __ against John Jones."

The individual who was injured as a result of the crime is not a party to the criminal action. However, he will be an important witness and is called the complainant or the complaining witness. When called, he must appear and testify at the trial relative to the crime. The purposes of the criminal proceeding are to punish the offender and to act as a deterrent to others who may contemplate such action in the future.

Each state is sovereign in its power to determine those acts which are defined as crimes and to prescribe adequate punishments. This power is, however, restricted since the states are prohibited from passing laws which are contrary to the Bill of Rights of the federal Constitution and to those limitations in their own constitutions which are intended to protect the liberty of its citizens.

"Bills of attainder" are prohibited. No state legislature may pass any law which, in effect, will cause a person convicted of a felony to forfeit his property.

A person finally sentenced to a term of life imprisonment, though deprived of all his civil rights and considered legally and civilly dead, has the right to own property, make a will and devise his property.

"Ex post facto" laws are prohibited. No state may pass a law which will, in effect, make an act, which was legal and permissible when committed, punishable as a crime. This includes those laws which increase the penalty of crimes committed prior to their enactment.

Illustrations: A law which prohibits the sale of liquor cannot affect those sales which were legal before the law was passed.

A law which increases the punishment of a crime from 5 years to 10 years in a state prison cannot affect a crime which was committed before the penalty was raised. The punishment for the crime previously committed must be 5 years.

No law shall be passed which violates the right of the people against unreasonable searches and seizures.

No person shall twice be put in jeopardy of his life for the same offense. This is commonly known as double jeopardy. In effect, it means that once a person has been tried for a crime and found not guilty, he cannot again be tried for the same crime.

No person shall be compelled to be a witness against himself in a criminal prosecution. This is the well-known Fifth Amendment. Actually, it is only one portion of the Fifth Amendment of the United States Constitution, a part of the Bill of Rights. It guarantees a person protection from testifying in any proceeding which may tend to expose him as guilty of a crime. This testimony may not be used against him. However, this claim of self incrimination may not protect a person from testifying if he has been given

immunity and a guaranty that he will not be prosecuted for any crime revealed by his testimony.

No person may be deprived of life, liberty or property without due process of law. This guarantees to all the right to a hearing, the right to submit a defense, the right to cross examine and to be confronted by all witnesses. No law shall be passed by any state which will abridge and violate these constitutional safeguards.

Crimes are either "*malum in se*," inherently vicious and harmful in nature, and so declared by law, or they are "*malum prohibitum*," created by law because they are contrary to the public welfare, safety, health or morals.

The vicious crime, malum in se, requires a criminal intent. This must be proved before a conviction can be had. No intent need be proved to convict for a crime which is malum prohibitum, since none is necessary. The only proof required here is that there is a law which prohibits such an act and that such an act was committed by the person who is charged with it.

A mistake of fact may excuse the commission of a vicious crime but will not excuse a crime created -and prohibited by statute.

Illustrations: Sitrux shot and killed a man he mistook to be a burglar. If proof of these facts is presented, he may be absolved of the crime.

Russell is charged with violating the law which prohibits the sale of liquor to a minor. The mistake of fact based on the minor's statement that he was over the required age is not sufficient to relieve him of his criminal act.

"Intent" in the commission of a crime is the state of mind of me individual which is consistent with criminality. The intent may be actual and specific to commit the crime.

Illustration: Jones set fire to a building owned by Sohmer to get even with him for a fancied insult.

This intent may be "constructive;" that is, implied by the law from the nature of his activities. A person who intends to commit one crime is responsible for any other crimes which result. The intent for the other crimes is constructive and presumed from his criminal intent and activity.

Illustration: Doe bought a gun to commit a "stick-up." In attempting it, he killed an innocent bystander. He is presumed to have intended to commit the murder; the intent here is constructive. This is an example of a felony murder. When a person commits a felony and a person is killed, he may be charged with murder.

Malice is an ill will or an evil disposition from which an unlawful act may result without any legal justification.

The term "malice aforethought," sometimes used in relation to murder, implies premeditation to indicate a cunning mind and evil deliberation.

"Motive" is the element which may induce and create the intent to commit a crime. Motive is not essential in proving a person guilty of a crime. However, intent is necessary. The presence of a motive will help to establish the intent.

Illustration: To convict Alfred of shooting Roberts, intent must be proved. If it is shown that Roberts had run away with Alfred's wife, the motive is present from which the intent may be inferred.

CAPACITY TO COMMIT A CRIME

All persons are held responsible for their acts. This is a presumption of law. Based on this presumption, the prosecution need only establish those

elements which prove that the defendant committed the crime. The defendant then has the opportunity to prove as his defense that when he committed the crime he was not legally responsible. The prosecution must then establish that the defendant was legally responsible.

The burden of proof in a criminal case is always on the prosecution. This is another of the safeguards based on the legal presumption of innocence. The matter of incompetency is a defense which the defendant must establish by legally sufficient evidence. Once he does, it then continues to be the burden of the prosecution to show that the defendant was legally competent to commit the crime with which he is charged.

Generally, infants below 7 years of age are conclusively presumed to be incapable of committing a crime. Usually, even proof that a crime was committed by a child under 7 is not sufficient to charge him with a crime. Such a child is by law not considered mentally capable of committing a crime.

A child between the age of 7 and 12 is still considered incapable of committing a crime. However, if it is proved that the child had the mental capacity to know the nature of the act he committed and to know that his act was wrong, then he may be held chargeable with the crime.

Under special laws relating to criminal activity of children under 16, an act which, if committed by an adult, would be a crime, can only be charged as "juvenile delinquency" if committed by a child under 16. However, if the act is such as to expose an adult who committed it with death, or life imprisonment, the child may also be charged with the same crime. Thus a juvenile may be charged with treason, kidnapping and murder.

Illustration: A boy of 15, arrested and charged with holding a man up with a gun to get some money, will only be charged with juvenile

delinquency. He may, however, be charged with murder if it is shown that he committed a deliberate and premeditated murder.

A person is not excused from punishment for the commission of a crime unless it is proved that at the time he committed the crime he did not know the nature and quality of the act and did not know that it was wrong. There is a new trend to accept medical evidence proving mental illness.

A person who is actually held insane when he commits a crime will not be held accountable for it and will probably be sent to a mental institution.

A person who is sane when he commits the act but becomes insane while awaiting trial, cannot be tried and must be kept in a mental institution until such times as he regains his sanity so that he can be tried. A person who is insane is not deemed capable of properly defending himself in a criminal prosecution.

A tendency or propensity to commit crime is not a defense as mental incompetency. It is the duty of every citizen to resist those temptations and to avoid criminal activity or to be punished for the crimes he commits.

Voluntary intoxication is never an excuse, sufficient to avoid punishment, for committing a crime. However, if the crime requires the necessary elements of intent and deliberation, and these cannot be shown because of the inebriated condition of the individual, the crime cannot be proved.

Persons whose will is imposed upon and who commit a crime while under the domination, duress or threat of another may be excused if such domination is proved.

CRIMES AGAINST THE PERSON

Homicide is the killing of one human being by the act of another human being.

There are certain homicides which are considered legal, others justifiable. An executioner carrying out the legal direction of a court commits a legal homicide. A police officer who kills a prisoner escaping from custody or a person suspected of committing a felony fleeing arrest may be excused for a justifiable homicide.

A person who killed in self defense to protect, his own life and safety may be excused if it is shown that he did all in his power to avoid killing but was compelled to do so in order to save his own life.

Accidental or excusable homicide occurs when it is the result of an unforeseen and unexpected accident. It must be the result of a lawful act done in a lawful manner with ordinary care and without criminal intent.

Illustration: Anthony, Jim and Clancy all stood by watching Joe chop wood. Suddenly, the axhead flew off and killed Jim. Joe had no warning that the axhead was loose. This is an accidental and excusable homicide.

Felonious homicide is the charge for intentionally causing the death of another.

Murder is the killing of a human being by a deliberate and premeditated design to effect his death. It is also the killing of a person by any act which is so imminently dangerous as to indicate a depraved disregard for the value of human life.

Illustrations: A person who deliberately causes a railroad or air-plane accident would be charged with murder if anyone is killed. The planting

of a bomb in a place of public gathering which causes death is chargeable as murder.

When death results from the commission of the crime of arson, the charge is murder.

When the killing is the result of deliberation and premeditation, it will be considered as murder in the first degree. This has also been classified as "murder with malice aforethought." Where there is no such premeditation, the charge will be murder in the second degree.

The charge of manslaughter is a lesser charge in a felonious homicide. The statute of each state will list the crimes which are chargeable as manslaughter. Here, a design to effect a person's death is not necessary. Manslaughter is usually the charge when a person is killed by another in the heat of anger and passion. If the death is accomplished with a dangerous weapon or by unusual means it may be manslaughter in the first degree, otherwise it may be in the second degree. The distinctions of degree are important because the punishments vary according to the gravity of the charge.

The term "corpus delicti" is often used in connection with homicide. The general impression, though in error, is that it means the "corpse" or body of the person murdered. Since the corpus delicti is necessary to prove a murder or manslaughter, the erroneous impression has been created that the body must be produced. That is not the meaning at all. This term actually means proof of the crime. In a homicide, there must be proof of the death of the person who is claimed to have been killed. This must be so direct and tangible that his absence can be explained by no other reason than by a violent death.

Illustration: In addition to other proof, the dentures of the deceased were found in a furnace. This was the corpus delicti, the proof that his death was due to violence.

Kidnapping is the crime of taking a person against his will, without authority and with a criminal intent for the purpose of collecting a ransom for his safe return. This has been established as a capital offense in most states. If the person is transported across state lines, it becomes a federal offense and the penalty is death.

A criminal assault or an assault and battery is an unjustified attack upon a person with or without a deadly weapon with an intent to injure or kill him.

Robbery is the forceful and unlawful taking of money or property from the person of another, by first putting him in fear of his life or his personal safety.

Extortion is the crime of taking or obtaining money or property induced by the wrongful use of force or fear.

Blackmail is the use of letters, containing threats and producing fear, to obtain money.

Conspiracy is the combination of two or more persons with intent to commit a crime.

Perjury is the making of a statement under oath which is false. It is usually made with a corrupt purpose and intent and is known to be false by the person making it.

Subornation of perjury is the crime of willfully inducing a person to commit perjury.

CRIMES AGAINST PROPERTY

Arson is the willful and malicious burning or setting fire to a dwelling, a building, a car or a vessel.

Larceny is the crime, of taking property from the possession of any person with intent to defraud and deprive him of it.

Burglary is the crime of breaking into and entering a building or other enclosure with intent to commit a crime.

Malicious mischief is intentional injury to the property of another.

Possession of burglar tools is usually a misdeneanor. However, if there has been a previous conviction of any crime then it may be charged as a felony.

Criminally receiving stolen goods, knowing them to be stolen, is a felony.

Forgery is the making or altering of a writing with intent to deceive or defraud. Uttering is the publication or the putting into circulation of a document with the knowledge that it is a forgery.

AN ATTEMPT TO COMMIT A CRIME

Some statutes stipulate that an attempt to commit a crime is a crime in itself. It is punishable according to the particular law which was violated. Legally, it is an act which is directly connected with an intent to commit a complete crime but fails to complete its commission. To prove an attempt to commit a crime, the prosecution must show that there was a criminal intent and a wrongful overt act.

CRIMINAL COURT PROCEDURE

Generally, persons charged with minor offenses are brought into court by means of a summons. The officer who sees the offense committed gives the offender a summons, which is a notice to appear in court at a designated date.

On the return day, the date set in the summons, the name of the person summoned, now known as a defendant, is called from a calendar or list of all similar cases. When his name is called the person may plead "guilty" or "not guilty," to the charge.

If the plea is guilty, he may ask the court for an opportunity to explain the commission of the offense merely in mitigation or reduction of punishment. The court may then pronounce sentence or may adjourn the case for sentence at a later date.

If the person objects to the charge and disputes his responsibility, he should plead "innocent" or "not guilty." This creates an issue for which a hearing or a trial is necessary. The officer may or may not be in court. Since proof must be presented to convince the judge beyond a reasonable doubt that the defendant is guilty, the matter may be adjourned or postponed to some later date. Witnesses may be necessary and the defendant may then want to get a lawyer to represent him.

On the adjourned date, the case is called again and, if both sides are ready, it will be set down for trial.

A trial is a hearing before a judge, magistrate or justice of the peace. Evidence concerning the charge is then presented by the prosecutor and contradictory evidence is presented by the defendant. The evidence consists of the testimony of witnesses and documents or other material submitted by each

side intended to convince the judge. The hearing may or may not be taken down by a reporter, or a person on the court staff to retain a permanent record of the proceedings.

Although in a hearing on a minor offense the proceedings are informal, the purpose is to prove the defendant guilty of the offense as charged beyond a reasonable doubt. If the judge is convinced that the defendant is guilty, he will render such a decision. The defendant will then be sentenced in accordance with the specific punishment set forth in the particular law under which he was charged. The punishment may be a fine, a jail sentence or both in certain instances.

If a person served with a summons fails to answer it on the return day, the court may order a warrant to be issued. A warrant is a written order of the court directing that a person named in it be apprehended and brought before the court.

A person apprehended and arrested under the authority of a warrant must be brought before the court as soon as possible. He is given an opportunity to plead to the original charge and to the charge of failing to answer the summons. A hearing may be held then and the matter may be disposed of immediately or it may be adjourned to a later date for trial.

If the case is adjourned to a later date, the defendant may be held in custody, released on his own recognizance or on the promise of his attorney that he will appear on the date of trial. If held in custody, he may make application to be released on bail.

"Bail" is the security that a defendant or a person charged with a crime must give to assure the court that he will not leave the jurisdiction of the court and will be available when necessary for the trial of the case or for sentence

after trial. In the event the amount of money required by the court as such bail is not available to the defendant, he may get someone to post bail for him. If he can't do that, then he may obtain a bond either from a private individual or a bonding company in the required amount. A bonding company charges a premium for such a bond and will usually not issue one unless the person obtaining it leaves some adequate assurance that there will be no default.

In situations where bail is not set or is excessive, the defendant may institute a proceeding by means of a writ of habeas corpus to have the question determined in a superior or supreme court.

QUESTIONS AND TASKS

1. What is the difference between a felony, a misdemeanor and an offense?
2. What is the essence of the Fifth Amendment?
3. What is the difference between "intent", "malice" and motive"?
4. Whom does American law consider capable to commit a crime? 5. What crimes against the person do you know?
6. Enumerate and characterize crimes against property.
7. Give examples illustrating different types of crimes.

Analyse your examples revealing the motive, showing presence or absence of intent on the part of the wrong-doer. Consider different possibilities of interpreting the actions.

THE CONTRACT

WHY STUDY CONTRACTS?

In our daily associations and activities, we all make agreements; some are social in nature and others commit us financially.

Contracts are agreements which create legal obligations and are enforcible in a court of Law.

In civil law, the contract is the basic legal concept, the foundation of all legal relationships. Every one of our daily acts creates, in some way, a legal obligation.

When we arise in the early morning of a winter day, turn on the light or radio, we are a party to a contract with the electric company. It makes the electric current available to us and we pay for the amount that we use.

Those of us who are homeowners and don't have our own wells have a similar contract with the water company.

When our newspaper is delivered in the morning, we are purchasers under a contract, either express or implied, to pay for that paper when the newsboy comes around to collect.

We take a taxicab, get on a bus, go by subway; all of these acts are contractual relationships.

These are trivial, unimportant contracts and don't cost much. How about some of our more important transactions - buying a car, a washing machine, a house? Do we understand the principles which underlie our actions? Do we know the obligations we incur and the rights and privileges that we acquire?

More important, in making a contract, are we certain that it is as binding on the other side as it is on us?

In terms of law, a contract is a mutual obligation between two people with a mutual right by either to demand its performance. The breach of this right, the failure to perform that promise, creates in the other person the right to relief and redress in a court of law.

The Uniform Commercial Code was enacted to simplify the law governing commercial transactions and to continue the accepted commercial customs and practices. The basic concepts of contract law are thus not affected except that those contracts which are of a commercial nature are afforded the expanded benefits of commercial usage.

SOME TYPES OF CONTRACTS

A "unilateral" contract is a promise of commitment made by one party conditioned upon the performance of an act by the other. The contract does not become binding until the act is performed.

Illustration: "I promise to pay you a commission, if you will get me a buyer for my car." When the person to whom the promise is made brings a willing buyer for the car, he has earned his commission.

A "bilateral" contract is created when mutual promises are exchanged by both parties to the transaction. The failure by either party to perform his part of the contract in accordance with his promise may subject him a damages which result from the breach of contract.

Illustration: "I promise to pay you 15¢ a gallon for 300 gallons of # 2 grade fuel oil, if you will promise to deliver it tomorrow morning." "I'll deliver it."

An "executory" contract is one which is not fully performed. It has been partly performed but something still has to be done by either or both of the contracting parties.

An "executed" contract is one which has been fully performed by both sides. There is nothing further to be done. The transaction is complete.

Illustration: The 300 gallons are delivered in the morning as promised and the buyer pays in accordance with the agreement.

A "void" contract is one which is not legally enforcible and is not binding on either of the parties. The expression "null and void," so often used, is redundant. It actually means "non-existent and not enforcible."

Illustration: Contracts which are illegal in scope and in purpose are void and unenforcible.

A "voidable" contract is one which is valid, binding and enforcible. However, there is a right available to one or, in some instances, to both of the parties to avoid responsibility of performance. It may thus be enforcible against one of the parties but not against the other.

Illustration: A contract made with a "minor," also known as an "infant," a person legally under age, is enforcible by him against the other, the adult. Under certain circumstances, the minor may renege on his contract and demand the return of the money he paid. Of course, if he seeks to enforce the contract against the adult, he cannot then disaffirm.

An "express" contract is one in which all of the terms are agreed upon by the parties and are specifically set forth in detail, as in a writing.

Illustration: A lease or insurance policy is a good example of an express contract.

An "implied" contract is one which is created by law, imposed upon the parties because of their actions or their behavior, despite the fact that they had no actual or express agreement.

Illustration: Anna sued the estate of her deceased employer Gertrude. She claimed that she was hired by Gertrude, who was aged and infirm. She was told by Gertrude in the presence of other friends that she need not worry about getting paid, she would be well taken care of in the will. She worked as a companion for 11 years without pay, only for board and lodging. The will only provided for $ 100 to be paid to Anna. She claimed her rightful compensation. Despite the fact that there was no valid express contract between them, a contract was implied by law. Anna was awarded reasonable compensation for the services she rendered to Gertrude through the years.

A contract will be implied because of the particular relationship of the parties. A husband is obligated to support his wife, parents to support and care for their infant children.

A "quasi-contract," "as if there were a contract," will result and will be implied when one party in a transaction is in possession of money or property belonging to another. The law creates this implied contract to prevent that person from being "unjustly enriched."

Illustration: The previously described case of the unpaid companion, also applies here.

A person who pays money under a mistake of fact may be given the right to recover it under an implied or quasi-contract.

Illustration: Algernon, believing that he owned a certain parcel of real estate, paid taxes on it. When he found that he did not own it, he asked

that the money be refunded to him. The city refused and he sued. The court allowed him to recover on the theory of implied contract.

ELEMENTS NECESSARY FOR A VALID CONTRACT

In all express contracts, as distinguished from those, implied by law, the words and actions of the parties must reveal an intention to create a contract which the law will recognize. This intention can be determined from the provisions of the contract and the legal interpretation of those terms.

In addition to the terms of agreement, a contract, to be enforcible in a court of law, must have the following essential elements:

The contractual obligations must be voluntarily assumed. Therefore a contract must consist of an "offer" made by one party and an "acceptance" of that offer by the party to whom it was made. This is called consent, "mutual assent" or, popularly "a meeting of the minds."

Each party must have contributed some consideration toward the creation of the contract. There must be a quid pro quo, a something in exchange for something else to make the deal a binding one. A mere gratuitous promise, not made in reliance upon a reciprocal promise, is not binding and not enforcible.

Each of the participants to the transaction must have legal capacity to enter into the deal. They must have no legal disability which would prevent them from making a contract.

Illustration: A person who has been legally declared to be insane cannot enter into a legal contract. He has no capacity to contract.

Finally, the purpose and subject matter of the agreement must be legal and not in violation of any law or contrary to the public policy or morals of the place where the contract is made.

Illustration: An agreement to rent a house for the specific purpose of operating a house of prostitution, where such is unlawful, is void.

QUESTIONS AND TASKS

1. Is the definition of a contract given by American law different from that of British law?
2. What types of contracts do you know? Establish correspondencies between British and American terms.
3. Think of examples to illustrate each type of contracts. Analyse your examples.

REVISING THE MATERIAL

QUESTIONS AND TASKS

1. Use the Glossary to make lists of words pertaining to

a) civil law;

b) criminal law;

c) legal procedures;

d) contract law.

2. Compare the British and American legal systems according to their

a) basic principles;

b) structure.

3. Write an essay on the role of Law in modern society.

GLOSSARY

AN INITIO is a Latin term meaning "from the beginning."

ABANDONMENT is a ground for a legal separation when one spouse leaves the other without any intention to return.

ABATEMENT is the term used to indicate a suspension of a legal proceeding.

ANNUITY is the annual payment of money in accordance with an agreement between the donor and the recipient.

ANNULMENT is a declaration by a court that a marriage presumed to be binding is a nullity and ineffective.

ANSWER is the document which the defendant in a civil lawsuit serves on the plaintiff or his attorney in answer to the summons and complaint.

APPEAL is the proceeding by which a party to a lawsuit defeated in a lower court applies to a higher court to determine the correctness of that decision.

ARBITRATION is a proceeding established by previous agreement in which both sides to a controversy submit their dispute to persons designated or to be chosen.

ARRAIGNMENT is that part of a criminal case in which a person charged with a crime is brought before the court and advised of the charge against him.

ARREST is the legal apprehension and restraint of a person charged with a crime so that he may be brought to court to stand trial.

ASSIGNMENT is the transfer of a right or interest in property by one person to another.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS is the transfer by an insolvent debtor of all of his property to another for the purpose of arriving at an adjustment with his creditors.

ATACHMENT is the proceeding by which a person or his property are restrained in accordance with a direction of a civil court to secure payment of a judgment or the presence of the person when the case is being tried.

ATTESTATION CLAUSE is the formal legal language used at the end of a will, below the testator's signature, which declares that the requirements for the proper execution of the will have been complied with.

ATTORNEY IN FACT is a person who has been appointed by another to transact business for him and in his name. He does not have to be a lawyer.

AUCTION is a public sale of property to the highest bidder by a person called the AUCTIONEER, who must be licensed to carry on such a business.

AWARD is the determination of a judicial body which grants a sum of money to the winner.

BALL is security given to a court in exchange for the release of a person in custody to assure his presence in court later.

BAIL BOND is an undertaking by which someone obligates himself to pay the amount of the bail if the person out on bail fails to appear when required.

BAILMENT is the relationship created when the owner of property, the

BAILOR, delivers it to another, the BAILEE, for some specific purpose.

BANKRUPTCY is a proceeding under the federal laws, dealing with the property and debts of an insolvent debtor and his creditors.

BARRATRY is the act of encouraging lawsuits and inciting quarrels which ultimately end in litigation.

BASTARDY or FILIATION PROCEEDINGS are brought by the mother or a public welfare agency to establish the paternity of an illegitimate child.

BEARER PAPER is any negotiable instrument which can be negotiated by delivery and does not require indorsement.

BENCH WARRANT is a process issued by a court ordering the apprehension and arrest of a person guilty of contempt of court or indicted for a crime.

BEQUEST or LEGACY is a provision in a will giving property or money to a designated person.

BIGAMY is the crime committed when a person has two husbands or two wives living, without being divorced from one of them.

BILL OF ATTAINDER, forbidden by the Constitution, is any law which creates a forfeiture of a person's property.

BILL OF EXCHANGE or DRAFT is a negotiable instrument which requires the drawee to pay a designated sum of money to the payee or subsequent holder. BILL OF LADING is an agreement between a shipper of freight and a common carrier.

BILL OF PARTICULARS is a document in a lawsuit which amplifies the information set forth in the complaint.

BINDER, used in insurance and real estate, is a preliminary agreement.

BLANK INDORSEMENT results when an indorser of a negotiable instrument merely signs his name without specifying the person to whom he is negotiating it.

BLUE SKY LAWS are enacted by state legislatures to protect their citizens from investing in stock of spurious corporations.

BONA FIDE PURCHASER FOR VALUE, used in contracts and negotiable instruments, describes any person who acquires property or negotiable instruments in good faith and for a valuable consideration.

BOND is an undertaking, an obligation assumed by the person who executes it.

BREACH OF THE PEACE is any act committed by a person in a public place which disturbs the public peace and tranquility.

BULK SALE is the acquisition of all or a greater part of the stock and fixtures of a business in a manner other than in the ordinary course of its business.

BURDEN OF PROOF is the duty of a party in a lawsuit to present sufficient proof to sustain the charges that he made.

BURGLARY is the crime committed by a person who breaks into and enters the home of another without permission and with intent to commit a crime.

CALENDAR is the list of cases which is established in each court to determine their orderly disposition and trial.

CAPACITY is the ability under the law to take recognized legal action.

CAPITAL CRIME or OFFENSE is one which is punishable by death.

CAPTION is the title of a lawsuit as used to describe it, containing the names of the plaintiff and defendant and the court in which it is being tried.

CASH ON DELIVERY (C.O.D.) transactions require the buyer to pay for the merchandise is cash when it is delivered to him.

CAUSE OF ACTION is the legal basis on which the plaintiff relies for his recovery against the defendant.

CAVEAT EMPTOR means "Let the buyer beware."

CERTIFICATE OF DEPOSIT is a written receipt by a bank which indicates that there is a certain sum of money on deposit in the name of a designated person.

CERTIFICATE OF DOING BUSINESS is generally required when an individual or a partnership operates a business under an assumed or firm name.

CERTIFICATE OF INCORPORATION, also called a CHARTER, is the document which creates the corporation.

CESTUI QUE TRUST denotes the person who benefits from the trust.

CHALLENGE is the right of a party to a lawsuit to object to juror during the selection of the jury before the trial.

CHARGE in criminal law is the accusation made against a person that he committed a crime. In a civil action, it is instructions on the law which the court gives the jury at the end of the trial.

CHARTER is another name for the CERTIFICATE OF INCORPORATION.

CHATTEL is any item of personal property as distinguished from land, which is real property.

CHATTEL MORTGAGE is a document executed and delivered by the owner of personal property, transferring ownership to secure repayment of a loan.

CHECK is a negotiable instrument, a written order to a bank by its depositor requesting payment of a definite sum of money to the order of the named payee.

CITATION is a process of a probate or surrogate's court bringing the parties within its jurisdiction.

CLOSING OF TITLE in real property is the time when the buyer of a piece of real estate pays the money due under the contract in exchange for a deed to the property.

CODICIL is a document, executed with all the formality of a will, used to make minor changes in an existing will.

COHABITATION is the act of a man and woman living together as husband and wife, with all of its consequent rights and obligations.

COINSURANCE is a provision in fire insurance policies which requires the premises to be insured for an agreed proportion of their value.

COLLUSION is an agreement between two or more persons to proceed fraudulently to the detriment and prejudice of an innocent and ignorant third party.

COMITY AMONG NATIONS is the friendly relation existing between them so that the laws and institutions of each are recognized by the other.

COMMITMENT is the order of a court which directs a person to be kept in custody either in a penal or a mental institution.

COMMON CARRIER is any transportation facility which publicly undertakes to transport persons or property for a stated price and without restriction.

COMMON LAW is the body of law which was accumulated and collected from the decisions of the English courts and adopted as the basis of law in this country.

COMMON-LAW MARRIAGE is a relationship between a man and woman living together as husband and wife and recognized by law as a valid marriage.

COMMUTATION is a reduction of punishment or sentence after conviction for a crime.

COMPARATIVE NEGLIGENCE is a principle of law which takes into account the negligence of both sides in an accident.

COMPENSATORY DAMAGES is a sum of money awarded to a plaintiff by a court or a jury as a fair and just recompense for injury sustained to a person, property or reputation.

COMPLAINANT in a criminal action is the person who, as a victim of a crime, brings the facts to the attention of the police authorities.

COMPLAINT is the document prepared and submitted by the plaintiff in a lawsuit which sets forth his claims for recovery against the defendant. A complaint may contain several "causes of action."

COMPOSITION OF CREDITORS is an agreement by the creditors of a person who is financially insolvent to accept a sum less than the full amount of his indebtedness.

COMPREHENSIVE AUTOMOBILE INSURANCE COVERAGE is a policy of insurance which covers the owner of an automobile for damage to his car resulting from certain stated risks.

"CONDEMNATION is the legal machinery by which an author governmental agency takes private property for public use.

CONDITION is a provision in a contract which must be performed to make it effective.

CONDITIONAL SALE is an agreement which gives the buyer possession of personal property but not ownership until payment is made.

CONDITIONAL WILL is a will which disposes of a person's property only in the event of death under certain specified conditions.

CONDONATION by a husband or wife forgives an act of infidelity by the other.

CONFESSION of a debt by a debtor in a civil action under certain conditions gives the creditor the right to enter judgment for the debt. In a criminal action, it is the acknowledgment and admission of guilt to a crime with which a person is charged.

CONFINEMENT is restraint or restriction of a person's freedom of movement.

CONFISCATION is the act of taking private property as a penalty and a forfeit for public use.

CONFRONTATION is the right of a person to face the witnesses who charge him with a crime.

CONSANGUINITY is the relationship of persons by blood and "by descent from a common ancestor.

CONSENT is a voluntary accord between two people in their contractual relationship.

CONSIGNMENT is the delivery of merchandise by the owner to the CONSIGNEE to be sold and the proceeds, less commission, to be returned to the CONSIGNOR.

CONSOLIDATION is the combination of two or more corporations into one, or the combination of two or more lawsuits between the same parties to be tried together.

CONSORTIUM is the right which a person has to the affections, services and society of his spouse.

CONSPIRACY is an agreement between two or more people to commit an illegal act.

CONSTRUCTION of a contract or a will is the interpretation which the court gives to its terms to arrive at the intention.

CONTEMPT is the disobedience of the rules, orders and processes of the court or a legislative body.

CONTINUANCE is the adjournment or carry-over of a legal proceeding to another scheduled date.

CONTRABAND is any article which has been declared illegal for export or import.

CONTRACT is an agreement between two or more people enforcible in a court of law.

CONTRIBUTION is the right to enforce payment of a share in a common loss or obligation.

CONVEYANCE is a document by which ownership in real estate is transferred.

CORPORATION is a form of business organization created by state authority as a legal entity.

CORPUS DELICTI is the legal term for the actual tangible evidence to prove that the crime was committed.

COST INSURANCE AND FREIGHT (C.I.F.) are terms in a contract for the sale of merchandise which requires the seller to pay the insurance, cost and freight of the goods to the point of destination.

COUNTERCLAIM is the claim for relief made by the defendant in a lawsuit as part of his defense to the plaintiff's action.

COVENANT is a specific provision in a deed or lease relating to the use of the property.

CREDIBILITY is the believability of a witness at a trial as to his testimony.

CRIMINAL CONVERSATION is illegal sexual intimacy between a man and a woman.

CROSS-EXAMINATION is the questioning by a party or his attorney to test the witnesses of his opponent.

CURTESY is the right given to a widower in the real estate of his deceased wife which she owned at her death.

CUSTODY is the legal right given to a parent or another person to live with, control, educate and guide children.

DAMAGES are the award of money assessed to compensate for financial loss to the injured party in a lawsuit. GENERAL or COMPENSATORY damages are awarded to pay in money for the pain, suffering and injury which was sustained. SPECIAL DAMAGES are awarded for any financial loss which flows directly from the other injury

sustained. This would include medical and hospital expenses and actual loss of earnings. PUNITIVE OR EXEMPLARY DAMAGES are awarded in a tort action where a willful or malicious act was involved. The purpose of such damages in addition to others imposed is to punish the responsible party. This may occur in defamation where the act was particularly vicious and malicious. NOMINAL DAMAGES are imposed when the injury is negligible yet the responsibility of the party at fault must be established.

DECEDENT in wills and estates is used to denote the deceased person whose estate is involved.

DECISION is the determination of the court which disposes of the case under consideration.

DECREE is a formal determination of a court, usually made in writing.

DEED is a document which transfers ownership to real estate.

DEFAMATION is a statement made orally or in writing which injures a person's reputation in the community.

DEFAULT is a legal term meaning the failure to appear and defend a lawsuit.

DEFENDANT is the person in a lawsuit who is charged with responsibility for creating a situation against which the plaintiff wants relief.

DEFENSE is the justification interposed by the defendant of a lawsuit which is intended to relieve him of blame and of financial obligation.

DELIBERATION is the consideration given by the jury to a case so that it may arrive at its verdict.

DEMURRER is the answer of a defendant to a charge made against him which denies legal responsibility though it may concede the plaintiff's contention.

DEPOSITION is a written statement made under oath. The person making it is called the DEPONENT.

DESTITUTE is the term applied to persons who do not have the necessaries of life and have no means of obtaining them.

DEVISE is a grant or transfer of real estate by will. The person getting such land is known as the DEVISEE.

DISABILITY is disqualification in law for lack of necessary legal requirements.

DISAFFIRM in law means to renege or to refuse to go through with an agreed transaction.

DISHONOR in law means a refusal to accept an obligation such as negotiable instruments when presented for acceptance or payment.

DISMISS is to throw a case out of court.

DISPOSSESS is the term used when a tenant of real estate is ousted from possession by an order of a court at the request of the landlord.

DISTRIBUTEE is a person who shares in the estate of anyone who died without leaving a will.

DIVORCE is a legal dissolution of a marriage, so that each partner is freed from the bonds of matrimony with the right to remarry.

DOMICILE is the place of permanent residence of an individual.

DOUBLE or FORMER JEOPARDY prevents a person from being tried twice for the same offense.

DOUBLE INDEMNITY is a separate agreement in an insurance policy which obligates the company to pay twice the face amount of the policy if the insured dies as a result of "violent and accidental means."

DOWER is the provision in the law which entitles a widow to a share of the real estate owned by her husband at his death.

DRAFT is a negotiable instrument, a written demand made by one person to another to pay a designated sum of money to a named third person known as the "payee."

DUE PROCESS guarantees that no person shall be deprived of his life, liberty or property without "due process of law."

DURESS is force, pressure or threats which induce a person to act in a manner contrary to his own wish.

EASEMENT is the right of a landowner to use the land of his neighbor.

EJECTMENT is the legal remedy available to the owner of real estate to remove persons in possession who have no right to be there.

EMINENT DOMAIN is the power of the government to acquire land or property of a private individual for a necessary public purpose.

ENDOWMENT in life insurance provides for the payment of the face amount of the policy if the insured survives the agreed term of the policy or dies while it is in effect.

ENOCH ARDEN is the name given to a proceeding which permits the dissolution of a marriage when one of the parties disappears and is absent for a designated period of time, creating the legal presumption that he is dead.

EQUITY grants relief to a party in cases when the mere payment of money is not adequate to help him.

ESCHEAT is the return of land and property to the state if there is no person legally entitled to inherit.

ESTATE consists of the property belonging to a recently deceased person which must be administered and distributed in accordance with a will or the laws of intestacy.

ESTOPPEL results when a person by his prior attitude caused someone to act in reliance upon it. A subsequent change of attitude will not be permitted or recognized by the court.

EVICTION is the act which deprives a person of the use and enjoyment of property.

EX PARTE indicates that an application has been made by one litigant without notice to the other.

EX POST FACTO LAW designates an act to be a crime although it was not a crime when it was committed.

EXAMINATION BEFORE TRIAL is a part of legal procedure which permits one litigant to make the other answer questions under oath before the actual trial of the case.

EXCEPTIONS are objections which a litigant may make to the court's ruling or its charge to the jury.

EXECUTED means that all of the terms of a contract have been fulfilled. An EXECUTORY contract still has some provisions to be complied with.

EXECUTOR (feminine: EXECUTRIX) is a person named in a will to take charge of the administration of the estate subject to the supervision of the court.

EXHIBITS are documents or other tangible evidence used at a trial to prove certain facts to the court and jury.

EXPRESS CONTRACT is one which has all of its provisions agreed upon by the parties. A contract is IMPLIED when it is created by the behavior of the parties.

EXTENDED COVERAGE is an agreement of insurance which covers damage resulting from windstorm, hail, riot, explosion and similar stated risks.

EXTORTION is the offense of taking money or property from a person by threat or duress or under pretense of authority.

EXTRADITION is the process by which fugitives from one state are returned by the authorities of another state in which they were apprehended.

FACTOR, also known as a commission merchant, is a person who takes property or merchandise of another to sell for him. It is also a person (or company) who takes over the accounts receivable of a business to collect the moneys due.

FAIR PREPONDERANCE OF THE CREDIBLE EVIDENCE is the measure of evidence required in a civil case for the plaintiff to prevail over the defendant. This is to be distinguished from the requirement in a criminal case that the defendant be found guilty BEYOND A REASONABLE DOUBT.

FALSE ARREST is the detention of a person by another who claims to have official authority which is in fact invalid.

FALSE IMPRISONMENT, also known as UNLAWFUL DETENTION, is the act of depriving a person of his liberty without any authority or justification.

FELONY is a crime which is punishable by a term in a state prison. Conviction of a felony deprives a person of his civil rights. A person convicted of such a crime is known as a FELON.

FIDUCIARY is a person who because of his position or relationship owes a duty of trust and confidence.

FIXTURES are items of personal property which may become a part of the real property when they are attached and cannot be removed.

FILIATION PROCEEDINGS, also known as BASTARDY PROCEEDINGS, are instituted to prove paternity of a child born out of wedlock.

FIT FOR HUMAN CONSUMPTION is a promise implied by the seller of food.

FORGERY is the act of making, counterfeiting or altering any writing with an intent to mislead and deceive.

FORECLOSURE is a proceeding in a court of law by which the right of a person against real or personal property is determined and enforced.

FRAUD is a false statement of a material fact made to induce someone to rely upon it to his financial loss.

FREE ALONGSIDE SHIP (F.A.S.) is a provision in a contract of sale which requires the seller to deliver the merchandise at a designated place for loading aboard ship.

FREE ON BOARD (F.O.B.) is a provision in a contract of sale which requires the seller to deliver the merchandise at a designated place, usually to a carrier.

GARNISHEE (GARNISHMENT) is a notice or proceeding which requires a person who owes money to judgment debtor to pay the judgment creditor instead.

HABEAS CORPUS, a legal proceeding instituted by a writ, requires the person upon whom it is served to prove that he has a legal right to the custody of the person in whose name the writ was brought.

HEARSAY EVIDENCE is evidence brought out by the testimony of a witness at a trial which is not based upon his personal knowledge but rather on information he obtained from someone else, someone not available for cross-examination. This evidence is generally not acceptable.

HOLDER IN DUE COURSE is a person who has obtained a negotiable instrument in a regular business transaction for a valuable consideration and without knowledge that it has any defects.

HOLDOVER TENANT is one who continues in possession of leased premiss after his lease has expired.

HOLOGRAPHIC WILL is one which is written in the handwriting of the maker or testator.

HOMICIDE is the killing of one human being by the act of another human being.

INCORPORATORS are persons who form a corporation and sign the certificate of incorporation.

INDEMNITY in insurance is the reimbursement for loss sustained.

INDICTMENT is a document prepared by the district attorney and approved by the grand jury which charges a person with the commission of a crime.

INDORSEMENT is the notation made on the back of a negotiable instrument by a person who owns it and is about to transfer it to someone else. The person making it is called an INDORSER.

INFANT, also known as a MINOR, is a person under legal age, generally 21.

INFORMATION is the written document which contains a charge that the person named in it committed a crime.

INJUNCTION is an order of a court which prohibits a named person from performing certain acts.

INSANE is the term applied to a person who is suffering from a mental desease which prevents him from knowing the consequence of his acts or that they are wrong.

INSOLVENT denotes the condition of a business when the liabilities are greater than the assets, so that the claims of the creditors cannot be paid.

INSURABLE INTEREST is the required ownership or interest a person must have to be able to take out insurance.

INTEREST is the charge made for the loan and use of money.

INTESTACY results when a person dies without leaving a valid will.

JOINT TENANTS are persons who each own an equal interest in the same property, either real or personal.

JOINT WILL is drawn and executed by more than one person with the intention that it be the will of each of them.

JUDGMENT is the formal entry of one court's decision between the plaintiff and the defendant. The winner to whom money is to be paid is the JUDGMENT CREDITOR. The one who owes the money is the JUDGMENT DEBTOR.

JURISDICTION is the legal authority which a court has to try a lawsuit.

JURY (sometimes called PETIT JURY) is a body of citizens of the county who are selected to hear and decide a case in a civil or criminal court.

LAST CLEAR CHANCE is a doctrine on which recovery for injury due to negligence is based. In those states where contributory negligence by the plaintiff defeats his right to recovery, this theory may be used as an exception if the defendant, the person causing the injury, had sufficient notice of the danger to which the plaintiff was exposed and had sufficient opportunity to avoid the accident but did not do so. If these facts can be proved, the plaintiff may still recover.

LAW MERCHANT is a collection of rules established by traders and men of commerce through the centuries, subsequently incorporated into the common law.

LEASE Is an agreement by which the owner of real estate rents and permits it to be used by a tenant or LESSEE on payment of a consideration called rent. The landlord is also called the LESSOR.

LEGACY is a provision in a will which leaves certain personal property to a named individual. It is also known as a BEQUEST.

LETTERS OF ADMINISTRATION are documents issued by a probate or surrogate's court which gives a person named as the ADMINISTRATOR, or ADMINISTRATRIX if it is a woman, the authority to administer the estate of a person who died without leaving a will.

LETTERS TESTAMENTARY are documents issued by a probate or surrogate's court giving a person named as EXECUTOR, or EXECUTRIX if it is a woman, in a will the authority to administer the estate of the testator.

LIBEL is any statement made in writing which is defamatory and injures the reputation of an individual in the community. If the statement is such as to hold him up to contempt or ridicule or to charge him with the commission of a crime, it is LIBEL PER SE.

LICENSEE is a person who has been given permission to enter upon the land of another for a specific purpose.

LIEN is a claim which a person has against the property of another which is in his possession.

LIMITED PARTNERSHIP is composed of general partners and limited partners. The latter are only responsible for the amount which they actually agreed to invest in the business.

LIS PENDENS is a notice filed in the office of the county which advises that a lawsuit is pending against the owner of the designated property and involves that property.

MAKER is the person who makes, signs and delivers a promissory note to a payee.

MERGER is the absorption of one corporation by another, including all of its assets. Its individual existence is subsequently discontinued.

MISDEMEANOR is a crime which is less grave than a felony, tried before a court of special sessions and punishable in accordance with the law.

MISTAKE prevents consent and a "meeting of the minds" in the formation of a contract.

MORTGAGE is a contract which places real property as security for the repayment of a loan.

MOTION is a formal application made to a court asking for incidental relief during the progress of a lawsuit.

MOTIVE influences and induces the commission of a crime.

MULTIPLE WILLS are copies of the same will, each executed as if it were an original.

MURDER is the killing of one human being by another with a deliberate and premeditated design to cause his death.

MUTUAL and RECIPROCAL WILLS are separate instruments executed by individual testators and containing reciprocal provisions for the disposition of their individual property in accordance with an agreement between them.

NECESSARIES are those essentials which every person needs to exist, such as food, shelter, clothing and education.

NECESSARY PARTIES to a litigation must be joined as parties plaintiff or defendant in order that all issues between them may be litigated without the need for subsequent lawsuits.

NEGLIGENCE is the failure of a person to use that degree of care in a certain situation which he is by law obligated to use in order to protect the rights and property of others.

NEGOTIABLE INSTRUMENT is a written document which, when property executed and delivered, can be used as a means of exchange and credit in place of money.

NEGOTIATION is the transfer of a document, particularly a negotiable instrument, from one owner to another by indorsement and delivery.

NON COMPOS MENTIS is a Latin phrase indicating that a person does not have the ability, due to his mental condition, to know the nature of his act.

NONJOINDER is the failure to make necessary persons parties to a lawsuit.

NON SUI JURIS means that a person, not of legal age, does not have legal capacity;

NONSUIT means that a lawsuit was dismissed because it was not properly proved.

NOTARY PUBLIC is a person authorized under state law to administer an oath. He also is authorized to present negotiable instruments for payment and to record a PROTEST in the event that they are not paid.

NOVATION results when a new contract, entered into by the same parties, supersedes a previous one made by the same parties concerning the same subject matter.

NUISANCE is the tort which results when a person uses his land in such a manner as to cause damage, danger and discomfort to his neighbors.

NUNCUPATIVE WILL is an oral will by which a person disposes of his property in the event of his death.

OBJECTION is the formal protest made by a litigant at a trial to record his disapproval of a question asked by his adversary.

OEFENSE is not a crime but a violation of some ordinance or some local municipal regulation.

OFFER is the initial step in the formation of a contract. It contains certain terms which, if accepted, may result in a contract.

OFFICE FOUND is a term often used to denote the adjudication of a person to be mentally incompetent.

OPEN TO THE JURY is a part of the procedure of a civil or criminal trial in which each side has an opportunity to present his position to the jury and outline what he intends to prove.

OPINION OF THE COURT is a statement by which the court sets forth the factual and legal reasons for its decision.

OPINION EVIDENCE is not based on provable fact but rather upon the opinion of the witness. Generally such evidence is not admissible at a trial.

OPTION is a collateral agreement in a transaction which gives one of the parties, or both, the right to choose, a course of action. Examples are: an option to renew a contract, or an option to keep an offer open for a specific period before the offer is terminated.

ORDER OF A COURT is a formal direction requiring that a certain act be performed or restrained.

ORDINANCE is a regulation established by a local government to enforce and control certain necessary activities of the members of the community.

PARDON, by the governor of a state, releases a person convicted of a crime from punishment imposed by the sentence of a court.

PAROL EVIDENCE is that oral evidence introduced at a civil trial with the intention of altering and changing the terms of a written contract.

PARTITION is the relief available to persons jointly owning property so that their individual rights in that property may be determined.

PAYEE is the person named in a negotiable instrument to whom the money is directed to be paid.

PENDENTE LITE is a Latin phrase which means "during the period while the action is pending."

PLEADING is the formal written document which states the position of a litigant in a lawsuit. It may be a complaint, an answer or, if there should be a counterclaim interposed by the defendant, a reply.

PLEDGE is the use of personal property as security for the payment of a loan.

POLLING THE JURY is a part of trial procedure which permits that each joror be asked if the nonunanimous verdict of the jury is his verdict.

POSTDATED CHECK is one which is complete in all respects but dated in the future. It is not payable until that later date is reached.

POWER OF ATTORNEY is a document executed by one person giving another the right and authority to act for him in certain specific situation.

PRETRIAL PROCEDURE has been established speed up the disposition of cases assisting settlements before trial.

PREMIUM is the consideration paid by the insured to the insurance company in return for which the company agrees to reimburse him for the loss agreed upon in the policy.

PRESCRIPTION is the technical term for the means by which a person may acquire a right to an easement.

PRIMA FACIE CASE is that amount of proof which the must show at the trial before the defendant required to prove his defense to the action.

PRIVILEGED COMMUNICATION is a statement made by litigant to a person of trust, such as a lawyer, a doctor or priest. This statement may

not be revealed at a trial by such confidant without the permission of the litigant.

PRIVITY OF CONTRACT is the relationship that is created between the parties to a contract to permit recovery for a breach of warranty of that contract.

PROBATE OF A WILL is the judicial procedure to determine that a certain document claimed to be a will of the decedent is valid and properly executed so that it can be enforced to dispose of the estate according to its provisions.

PROBATION is the sentence given to a defendant in a criminal prosecution when it is felt that he has a good chance for rehabilitation without being sent to prison.

PROBATIVE VALUE is the weight and belief which a judge or jury will give to evidence presented at a trial.

PROCESS is a course of proceedings in a lawsuit. It is also that legal document which brings the case or its participating parties into court.

PROMISSORY NOTE is a written document by which one person promises to pay money to the proper owner at a definite time.

PROMOTERS are those persons interested in selling the stock of a newly formed corporation.

PROOF is that evidence presented at a trial which is believed by the judge or jury.

PROTEST is the formality of recording that a negotiable instrument was presented for payment and that such payment was refused.

PROXY is the authority given by a stockholder of a corporation to another to vote at the annual meeting of the corporation.

PUTATIVE FATHER is the father of an illegitimate child.

QUALIFIED INDORSEMENT on a negotiable instrument is an indication that it is made without incurring liability on the instrument.

QUANTUM MERUIT or "amount deserved" is the relief in money which is awarded to a plaintiff in an action based on a contract implied by law.

QUASH is to annul or to set aside for insufficiency. An indictment is quashed if there is insufficient evidence to hold a suspect for trial.

QUASI-CONTRACT is a relationship created by law with the obligations of a contract.

QUORUM is the number of people which must be present at a meeting of any organization before the business of the meeting can be properly transacted.

RATIFICATION is approval or confirmation.

REAL ESTATE, REAL PROPERTY or REALTY is land, an interest in land or any article which is so attached to land as to become a part of it.

REBUTTAL is that proof presented at a trial by the plaintiff intended to overcome the evidence introduced by the defendant.

RECEIVER is a person appointed by the court to gather and hold property to be disposed of by order of the court.

RECIDIVIST is a person who reverts to criminal activity.

REFEREE is a person appointed by the court to take testimony and hear evidence presented by both sides.

REMAND is to recommit, as when a prisoner's habeas corpus application is dismissed and he is remanded to prison.

REPLEVIN is the process by which personal property is recovered when it is unlawfully detained.

REPLY is the document submitted by the plaintiff to a lawsuit in answering the counterclaims of the defendant.

REPRIEVE is the temporary suspension of death sentence.

RES IPSA LOQUITUR is a theory of recovery for personal injury which presumes that under certain conditions the injury would not have occurred if the defendant had been careful.

RES JUDICATA is the legal defense that the issue presented has previously been adjudicated between the same parties.

RESPONDEAT SUPERIOR Is the principle in law which transfers liability to a principal for the negligent acts of his agent.

REST is the term used in a trial when each side has completed its submission of the evidence.

RESTRICTIVE INDORSEMENT is used in negotiating a negotiable instrument to a person for a specific task such as "for collection."

REVOCATION OF A WILL is an act by the person who has drawn a will that indicates his intention and desire that the will shall no longer be effective.

RISK in insurance is the specific event covered by the policy which may cause loss or damage to the property insured.

SALE BY DESCRIPTION refers to a transaction in which the merchandise is described in. detail and the bulk must conform to that description.

SALE BY SAMPLE occurs when the buyer is shown a sample of the merchandise he is buying. When the merchandise is delivered, the bulk must conform in quality to the sample.

SALE OR RETURN is an agreement that goods are delivered with an option to purchase or return the merchandise.

SATISFACTION OF JUDGMENT is a document which states that a recorded judgment has been paid and satisfied.

SATISFACTION PIECE is the document which states that a recorded mortgage has been satisfied.

SEAL is the stamp, mark or other formal indication used on a contract to create a presumption of consideration. By legislation, the presence of a seal on a contract now has no additional legal effect.

SEIZIN is the ownership of land.

SEPARATION or DIVORCE FROM BED AND BOARD is a determination by a court authorizing a husband and wife to live apart although most of their marital obligations continue.

SEQUESTRATION is the proceeding by which property belonging to a judgment debtor, or to a husband ordered to pay alimony, is taken and sold to satisfy his obligation.

SERVICE OF PROCESS is the term used for properly delivering a summons, subpoena or citation upon a person in a legal proceeding.

SLANDER is a defamation of a person's reputation made orally. If the statement accuses him of a crime or holds him up to ridicule and it is not true, it is called "slander per se."

SPECIAL INDORSEMENT is an indorsement of a negotiable instrument which transfers it to a named person.

SPECIFIC PERFORMANCE is a remedy in equity available to a person who has no adequate remedy at law.

SQUATTER is a person who takes possession of land without any claim or color of title.

STATUTE is any law passed by a legislative body.

STATUTE OF FRAUDS is a series of legal provisions which require a contract to be in writing.

STATUTE OF LIMITATIONS is a series of legal provisions which limit the time when a plaintiff may bring a lawsuit.

STAY OF EXECUTION is a temporary period during which the execution of the judgment of the court is delayed.

STAY OF PROCEEDINGS is a temporary delay in the proceedings of an action, usually ordered by the court to compel one of the parties to comply with its requirements.

STIPULATION is an agreement between the parties or their attorneys.

SUBPOENA is a process issued out of a court requiring a witness to attend. If he has any books or records in his possession, he will be served with a *subpoena duces tecum* ordering him to bring them with him.

SUBROGATION is the substitution of the person who pays the injured party so that he may proceed to recover against the person who was responsible for the damage.

SUMMARY PROCEEDING is usually used in dispossessing a tenant to give the landlord back his property without undue delay.

SUMMATION is the closing statement to the jury made by each side in a lawsuit.

SUMMONS is the process by which a case is brought before the court by advising the defendant that there is a claim against him.

SURETY is the person who promises to make good the obligation of another.

SURROGATE is a judge who presides in the court where estates of deceased persons are administered.

TENANT is a person who rents or leases land or real estate from the landlord.

TENANTS BY ENTIRETY are a husband and wife who have an equal interest and ownership in property.

TENANTS IN COMMON are persons who share ownership in the same property.

TENDER OF PERFORMANCE in a contract is the offer by one of the parties to perform his obligations under it.

TESTAMENTATION is the privilege given to a person to devise and dispose of his property by will, to become effective upon his death.

TESTATOR (feminine: TESTATRIX) is a disposes of his property by will.

TESTIMONY is the presentation of evidence by a witness under oath.

TITLE is ownership in property.

TORT is a civil wrong committed when a person's private right is interfered with.

TRADE ACCEPTANCE is a negotiable instrument, a draft used in connection with the sale of merchandise.

TRESPASS is the act of coming upon the land of another without permission.

TRUE BILL is the indictment after it has been "found," or indorsed, by the foreman of a grand jury.

ULTRA VIRES is any act committed by a corporation through its agent which is not empowered or authorized by its charter.

UNDERTAKING is a bond or an assumption of an obligation.

UNDUE INFLUENCE is any threat or persuasion which overcomes or destroys a person's consent or will to act for himself.

USURY is that rate of interest charged for the loan of money which is in excess of the rate authorized within the state.

VENDEE is a buyer or purchaser.

VENDOR is the seller.

VENUE is the court which has jurisdiction to try a case.

VERDICT is the determination of a jury.

VERIFICATION is a statement made under oath which confirms the contents of an accompanying document.

VOID means "without any legal or effectual force to bind."

VOIDABLE refers to an agreement that is valid and binding but in which one of the parties has the right to avoid his responsibility.

VOIR DIRE is a preliminary examination, as of a juror before he is chosen to act as such.

WAREHOUSE RECEIPT is a statement which sets forth that certain described merchandise is being stored in the warehouse.

WAIVER is the act of relinquishing a right which a person has.

WARRANT is a process of a criminal court which authorizes search or seizure of persons or property.

WARRANTY is a collateral promise related to a contract.

WASTE is damage or injury done to real property.

WITNESS is any person who testifies in a judicial proceeding.

WRIT is a process of a court ordering a public officer or a private person to do a certain act.

КОНТРОЛЬНЫЕ РАБОТЫ

ДЛЯ СТУДЕНТОВ ЗАОЧНОГО ОТДЕЛЕНИЯ

No. 1

1. Read the text "What is Law?"
2. Make a list of legal terms used in the text. Define the terms.
3. Being guided by "Questions and tasks" write a paper on the law and its functions in society.
4. Read the text "The Judicial System of Great Britain".
5. Write a paper describing the system of British courts. Characterize each type of courts from the point of view of its functions and jurisdiction.

No. 2

1. Read the text "The Personnel of the Law".
2. Answer the questions after the text" (in writing).
3. Read the text "Bringing a case in the Civil Courts".
4. Do points 1 and 2 of "Questions and tasks" in writing.

No. 3

1. Read the text "Legal Aid and Assistance".
2. Answer the questions (in writing).
3. Read the text "Freedom under the Law".
4. Answer the questions (in writing).
5. Write an essay on the rights, freedoms and liberties of people in democratic societies.

No. 4

1. Use the Glossary to make lists of words pertaining to
a) civil law;
b) criminal law;
c) contract law.
2. Write a paper comparing British and American legal systems according to their a) basic principles;
b)structure.

Учебно-методические материалы по теме "Юриспруденция"
для студентов V курса (переводческого факультета)

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