面向21世纪课程教材
Textbook Series for 21st Century

全国高等学校法学专业必修课、选修课系列教材

法律英语教程

Legal English Textbook

（第二版）

齐 筠 主编

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Falu Yingyu Jiaocheng

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内容提要

本教程选材以美国法为主，包括美国法律制度、宪法、刑法、刑事诉讼法、民事诉讼法、侵权法、合同法、财产法、公司法、证据法、知识产权法、家庭法、反垄断法以及相关的经典案例等13个单元。每个单元自成体系，既包含系统的理论介绍，又包含美国法院的判决意见书。单元后还特别设计了听力部分、案例讨论和翻译练习。书后附录部分的内容也很丰富，包括听力部分的书面材料、部分合同样本和词汇表等。

本教程可供大学本科生、研究生、博士生使用，同时也可作为广大法律英语爱好者的学习用书。

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第二版修订说明

2007年，我在美国印第安纳大学布鲁明顿校区摩利尔法学院偶遇浙江大学法学院梁上上教授和正在印大攻读法学硕士学位的我国某法学院毕业生，互通姓名以后，他们立刻提到了《法律英语教程》这本教材，并对教材的知识性、系统性和实用性给予了充分的肯定，认为该教材在语言和知识方面为他们后来赴美学习美国法提供了非常大的帮助。作为主编，能得到读者的直接反馈和肯定，深感欣慰和鼓舞。《法律英语教程》自2005年出版以来，历经五个年头，一直是中国政法大学大学英语高级模块课程法律英语的主要教材之一，受到学生的广泛认同和欢迎。

作为编者和本书的使用者，我们认为该教材突出了知识性和系统性，很好地实践了以内容为依托的语言教学模式，避免专业英语教学“只见树木，不见森林”的弊端，针对法律语言的复杂特点，很好地帮助学生在真实语境下，领悟法律英语术语的含义，了解法律英语语言特点，获得语感。

近五年来，随着我国在经济、技术、文化、教育等方面的迅猛发展，学生的知识结构和层次也发生了很大变化，现代化通信手段在教育领域应用广泛，亟须对教材内容做适度的调整。在广泛征求师生意见的基础上，本书编者历经一年的时间，对本书进行了较大篇幅的修订，力求更加适应教学形势和满足师生需求。

第二版基本保持了第一版的编排体系，在内容方面作了如下修改：

第一，对内容进行了必要调整。秉承本书初版的编写原则，在强调语言技能训练的前提下，兼顾专业英语语言特点及学习者的特点和需要，力求课文内容更加丰富，更加突出知识性和系统性。同时考虑到语言教材的特点和课时限制，对初版中的一些课文进行了更换或删节，使主题更突出，内容更紧凑，结构更系统。

更换的内容有：第一单元：听力，课文A，课文C；第二单元：听力，课文A，案例；第三单元：案例；第四单元：听力，案例；第五单元：听力，课文B，案例；第十单元：案例；第十二单元（现第十三单元）：课文A，课文B，案例。此外，考虑到涉外婚姻家庭事务的增多，还增加了“家庭法”作为第十二单元，原十二单元改为第十三单元。并对以上各单元（除“家庭法”单元以外）的练习都进行了重新编写。

进行删节的内容有：第二单元：课文B；第三单元：课文A；第四单元：课文A；第六单元：课文A；第十单元：课文A；第十二单元：课文A，课文B。

并将第一版附件中的Case Brief提前到第一单元的案例部分，凸显briefing cases作为学习普通法的基本技能的重要性，也为学生学习以后单元中的案例提

供指导。

此外，第二版替换了一些案例，主要基于如下考虑：使案例与课文B所涉法律原则切合，以便学习者能更好地理解课文B中的法律原则及其适用；力求案例经典，或案例内容更富有趣味或有现实意义。建议学生仔细研读案例及课文B中的法律原则，学习掌握案例法的精髓。

初版问世五年以来，我国在信息化方面发生了根本性的变化，互联网的普及为人们查询资料提供了十分便利的条件，因此，第二版附录部分不再放入《美国宪法》，该部分内容将与其他法律文献或资料在本书配套的教学课件中以索引形式呈现给读者，以便学习者学习各部门法时查询法律依据。

第二，适当降低课文难度。根据师生的反馈，第二版对所有课文及案例中的单词和术语增加了注释及课后的注解，力求以有限的篇幅为学习者提供尽可能多的背景知识。

第三，编写人员也有较大变化。第二版对编写人员进行了调整。编者均多年从事语言教学，深谙语言教学规律，且全部有美国法学院系统学习法律的留学背景，主讲法律英语及美国法律制度等课程，英语法律语言及法律基础深厚，具有丰富的法律英语和双语课教学经验。具体编写分工如下：徐新燕编写第一单元和第二单元，胡晋华编写第三单元、第四单元和第十三单元，张清编写第五单元、第七单元、第八单元和第九单元，齐筠编写第六单元、第十单元、第十一单元、第十二单元。齐筠担任本书主编，负责全书的统稿工作。

本书对第一版中的打印和语言内容错误进行了认真仔细的修订，但由于水平有限，一定还存在很多的不足，恳切希望师生多提宝贵意见，并致以诚挚的谢意。

主编　齐筠

2011年春

前　言

随着我国与国际间交往的日益增多，以及我国涉外经济合作的飞速发展和涉外法律业务的急剧增多，社会迫切需要越来越多具有较强英语语言运用能力的法律从业人员，法律英语教学已凸显其在法律院校英语教学中的重要地位。本书旨在向法律专业学生和法律从业人员传授法律英语知识和系统的普通法知识，帮助学生扩大法律英语专业词汇，了解法律英语的语言特点，提高阅读能力和语言运用能力，为今后进一步学习专业法律英语和从事法律工作奠定基础。本教程以培养既懂法律又懂英语的复合型人才为目标，力求成为一本有效实用的教材。

本教程选材以美国法为主，强调知识性、系统性和实用性。在内容选排上克服了许多法律英语教材内容不够全面的缺点。每个单元自成体系，力求结构完整，内容全面系统，形式丰富多样。既包含系统的理论介绍，又包含美国法院的判决意见书，改变了现有专业英语教材多为“阅读—翻译”的单一模式。本书内容主要包括美国法律制度、宪法、刑法、刑事诉讼法、民事诉讼法、侵权法、合同法、财产法、公司法、证据法、知识产权法、家庭法、反垄断法以及相关的经典案例。

本教程包含十二个单元及附录部分，每个单元主要介绍一门法律，具体内容包含：

1. 听力部分，内容涉及案例事实、法庭辩论、法律知识介绍等。突出情景对话，让学生熟悉法律英语的常用表达方式并加以模拟，巩固法律英语词汇，培养语言运用能力。

2. 课文 A，概述一部门法的主要内容，旨在让学生系统了解有关部门法律制度、规则，掌握该部门法的主要词汇。

3. 课文 B，是对相关法中某个问题的重点论述，使学生在全面了解有关法的基础上，更深刻地理解某一具体原则或理论，同时也为第四部分的案例学习做准备。

4. 案例部分，选择相关部门法的经典案例，旨在增强实用性和趣味性，使学习者能够接触到原汁原味的美国联邦法院及州法院的判例。学生在学习课文 A 和课文 B 的基础上，可以对案件展开辩论，进行口语练习。

5. 练习部分，本教程每部分后面都设计了练习。练习强调专业词汇的学习，在课文 B 后面还特别设计了词汇扩展练习，其中一些词汇没有在课文中出

现，但属于相关法律的专业词汇，学生应予掌握。本教程练习的另一特点是突出学生的语言运用能力的训练，设计了听力部分、案例讨论和翻译练习。听力设计在单元的开始部分，教师可根据学生的学习情况，将该练习放在完成课文学习以后进行。

书后附录部分包括听力部分的书面材料、一些合同样本，如何写案情摘要、模拟法庭、《美国宪法》和词汇表。建议学习者提前阅读案情摘要(Case Brief)，以方便学习案例。

本书编写分工如下：高莲红：第一、五单元；陈延兵：第二、四单元；胡晋华：第三、十二单元；齐筠：第六、十、十一单元；张清：第七、八、九单元。齐筠负责全书的统稿工作。

限于时间和水平，书中可能存在一些失误和不妥之处，恳请广大读者批评、指正。

编者

2004 年冬于北京

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Unit One Legal Systems

Warm-up Exercises: Listening Practice

Words and expressions:

legal system	common law	precedent	civil law
code	Roman law	panel	Congressman
competition law	public and private	international law	comparative law
litigant	practitioner	system-builder	problem-solver

1. Spot dictation. Listen to the passage carefully and fill in the blanks with the words you hear.

In England, the legal system is based on _____. Over the centuries, English judges have unified and developed laws using a system of _____ and established practice. By contrast, in the rest of Europe, civil law forms the bases for most legal systems. Civil systems generally feature a _____ setting out basic rights and duties and in some cases, can be traced right back to _____. In 2004, the unreliable evidence set out to explore the differences between the two systems. Here's the presenter Clive Anderson, introducing his _____ of experts.

(Anderson) To discuss laws, common and uncommon, civil and uncivil, I'm joined by a Congressman Simon, one of the English judges in _____ _____. Hue Massa is a barrister specialized in EU _____, _____. He's appeared in cases involving European Commission. Prof. Bessel Maxis, who has joined in our program before, is a leading expert on _____. Prof. John Bell is another distinguished academic expert, currently professor of Lord Canterbury College of Cambridge. Welcome a distinguished penal. Prof. Maxis, an ordinary person, maybe an ordinary _____, to recognize the differences of the court on historical

bases of civil law or common law.

(Maxis) I would put it in this way. Our concept of the law, the people who tell us what the law is in the continental European systems are the academics of the universities and in the common law systems are the _____ and the judges. That's very important difference. Because academics go for system, logic, structure and theory and therefore tend to be system-builders while our lawyers are practitioners. They look for the problems and they try to find the right remedies. So they are problem-solvers.

(Anderson) What are the differences between the ways a town or city might develop England using old rules and gradually building up one supposed to be a new town which is laid up on a great pattern?

(Maxis) Yes, I think it is true to say that our system has developed without the kind of structure that the European systems have from the beginning largely for the reasons you said they inherit from Roman Law. But these differences are being a tenuated practice, and gradually, I think, will all move together. Let's give a take. We are adapting to their ideas and they are taking many of ours.

Ⅱ. Listen to the passage again and decide whether the following statements are True or False according to what you hear.

1. English legal system follows the common law tradition, which was based on case law.
2. The source of law in civil law system is the legislation, which is also part of the source in the common law system.
3. There is tendency that civil law system and common law system learn from each other and the feature of one legal family is accepted by the other.
4. Judges play an important role in interpreting the law in the common law system the same as what law scholars do in the civil law system.
5. In the civil law jurisdictions, judges may not make principles as their equivalents do in the common law systems.

Text A

Common Law v. Civil Law Systems

By Judge Peter J. Messitte

The two principal legal systems in the world today are those of civil law and common law. Continental Europe, Latin America, most of Africa and many Central European and Asian nations are part of the civil law system; the United States, along with England and other countries once part of the British Empire, belongs to the common law system.

The civil law system has its roots in ancient Roman law, updated in the 6th century A. D. by the Emperor Justinian and adapted in later times by French and German jurists.

The common law system began developing in England almost a millennium ago. By the time England's Parliament was established, its royal judges had already begun basing their decisions on law "common" to the realm. A body of decisions was accumulating. Able lawyers assisted the process. On the European continent, Justinian's resurrected law-books and the legal system of the Catholic Church played critical roles in harmonizing a thousand local laws. England, in the midst of constructing a flexible legal system of its own, was less influenced by these sources. It never embraced the sentiment of the French Revolution that the power of judges should be curbed, that they should be strictly limited to applying the law such as the legislature might declare.

After the American Revolution, English common law was enthusiastically embraced by the newly independent American states. In the more than 200 years since that time, the common law in America has seen many changes — economic, political and social — and has become a system distinctive both in its techniques and its style of adjudication.

- civil law system 民法法系
- common law system 普通法系
- British Empire (旧称)大英帝国
- Roman law 罗马法
- the Emperor Justinian 查士丁尼大帝
- jurist 法学家
- millennium 一千年
- accumulate 积累;积攒
- resurrect 恢复旧风俗、习惯等;复兴
- embrace 包含,收买,信奉
- curb 控制,约束,抑制
- legislature 立法机构
- adjudication (法院的)审判;裁定

· code
法典
· analogy
类比，类推，类似
· tort
侵权行为
· delict
不法行为
· inheritance
继承
· penal code
刑法典
· procedure
程序
· interpret
解释
· accessible
可得到的
· Magna Carta
英国大宪章
· legislation
立法
· enacted law
制定法
· constitution
宪法
· enactment
成文法
· internal revenue code
国内税收法
· uniform
统一的
· ratify
批准，认可
· statute
成文法
· sources of (the) law
法律渊源

"Judge-made" Law

It is often said that the common law system consists of unwritten "judge-made" law while the civil law system is composed of written codes. For the most part, law in the United States today is "made" by the legislative branch. To some extent, however, the judge-made law analogy is true.

Historically, much law in the American common law system has been created by judicial decisions, especially in such important areas as the law of property, contracts and torts — what in civil law countries would be known as "private delicts." Civil law countries, in contrast, have adopted comprehensive civil codes covering such topics as persons, things, obligations and inheritance, as well as penal codes, codes of procedure and codes covering such matters as commercial law.

But it would be incorrect to say that common law is unwritten law. The judicial decisions that have interpreted the law have, in fact, been written and have always been accessible. From the earliest times —Magna Carta is a good example — there has been "legislation," what in civil law systems would be called "enacted law." In the United States, this includes constitutions (both federal and state) as well as enactments by Congress and state legislatures.

In addition, at both the federal and state levels, much law has in fact been codified. At the federal level, for example, there is an internal revenue code. State legislatures have adopted uniform codes in such areas as penal and commercial law. There are also uniform rules of civil and criminal procedure which, although typically adopted by the highest courts of the federal and state systems, are ultimately ratified by the legislatures. Still, it must be noted that many statutes and rules simply codify the results reached by common or "case" law. Judicial decisions interpreting constitutions and legislative enactments also become sources of the law themselves, so in the end the basic perception that the American system is one of judge-made law remains valid.

At the same time, not all law in civil law countries is codified in the sense that it is organized into a comprehensive organic, whole

statement of the law on a given subject. Sometimes individual statutes are enacted to deal with specific issues without being codified. These simply exist alongside the more comprehensive civil or penal codes of the system. And while decisions of the higher courts in a civil law jurisdiction may not have the binding force of law in succeeding cases (as they do in a common law system), the fact is that in many civil law countries lower courts tend to follow the decisions of higher courts in the system because of their persuasive argumentation. Nevertheless, a judge in the civil law system is not legally bound by the previous decision of a higher court in an identical or similar case and is quite free to ignore the decision altogether.

The Concept of Precedent

In the United States, judicial decisions do have the force of law and must be respected by the public, by lawyers and of course, by the courts themselves. This is what is signified by the "concept of precedent", as expressed in the Latin phrase *stare decisis* —"let it [the decision] stand". The decisions of a higher court in the same jurisdiction as a lower court must be respected in the same or similar cases decided by the lower court.

This tradition, inherited by the United States from England, is based on several policy considerations. These include predictability of results, the desire to treat equally everyone who faces the same or similar legal problems, the advantages to be gained when an issue is decided that affects all subsequent cases and respect for the accumulated wisdom of lawyers and judges in the past. But it is also understood that primary responsibility for making law belongs to the legislative authority; judges are expected to interpret the law, at most filling in gaps when constitutions or statutes are ambiguous or silent.

Thus, there are important limiting features to the concept of precedent. First and foremost, a court decision will only bind a lower court if the court rendering the decision is higher in the same line of authority. For example, a decision of the U. S. Supreme Court on a matter of constitutional or ordinary federal law will bind all U. S. courts everywhere because all courts are lower and in the

- argumentation 论证
- identical 相同的
- precedent 先例
- *stare decisis* 遵循先例的原则
- predictability 可预见性
- ambiguous 含糊不清的，引起歧义的
- render 做出

- sit
  审案
- entertain
  受理(案件)
- litigant
  诉讼当事人
- pronouncement
  宣告
- distinguish
  区别于
- overrule
  推翻;宣布无效
- integration
  结合;一体化
- analogous
  相似的

same line of authority as the Supreme Court in such matters. But decisions of one of the several U. S. Courts of Appeals — the intermediate federal appeals courts — will only bind federal trial courts within their respective regions. Decisions of a state supreme court on the meaning of a state law where that court sits will be binding everywhere, so long as the state court's decisions do not conflict with constitutional or federal statutory law.

American judges tend to be very cautious in their decision-making. As a rule, they only entertain actual cases or controversies brought by litigants whose interests are in some way directly affected. In addition, judges usually decide cases on the narrowest possible grounds, avoiding, for example, constitutional issues when cases may be disposed of on non-constitutional grounds. Then, too, the "law" that judges state is only so much of their decision as is absolutely necessary to decide the case. Any other pronouncement on the law is unofficial.

Another important limiting feature of the concept of precedent is that the later case must be the same or closely related to the previous one. Unless the facts are identical or substantially similar, the later court will be able to distinguish the earlier case and not be hound by it.

The highest court of a jurisdiction, e. g. , the U. S. Supreme Court for the United States or a state supreme court within its own state, can overrule a precedent even where the facts of the later case are identical or substantially similar to the earlier case. In 1954, for example, in the famous school integration of *Brown v. Board of Education*, the U. S. Supreme Court overruled an analogous decision it had rendered in 1896.

But such direct over-ruling is not common. What is more likely is that the high court, by distinguishing later cases over time, will move away from an earlier precedent which has become undesirable. But for the most part, the long standing precedents of the high courts remain.

Common Law v. Civil Law

Apart from these features, there are a number of institutions

associated with the common law system not usually found in civil law systems. Principal among these is the jury which, at the option of the litigants, functions in both civil and criminal cases. The jury is a group of citizens, traditionally 12 in number, summoned at random to determine the facts in a lawsuit. When a trial by jury is held, the judge will instruct the jury on the law, but it remains for the jury to decide the facts. This means that ordinary citizens will decide which party will prevail in a civil case, and whether, in a criminal case, the accused is guilty or innocent of the charge against him or her.

The institution of the jury has had an important shaping effect on the common law. Because jurors are brought in on a temporary basis to resolve factual issues, common law trials are usually concentrated events, sometimes only a matter of days (although occasionally possibly weeks or months in duration). Emphasis is on the oral testimony of witnesses, although documents also are presented as evidence. Lawyers have responsibility for preparing the case; the trial judge performs no investigation of the case prior to trial. Lawyers, acting as adversaries, take the lead in questioning the witnesses at trial, while the judge acts essentially as a referee. Testimony is recorded verbatim by a court reporter or electronically.

All this stands in marked contrast to what is usually found in civil law systems, where jury trials are for the most part unknown. In a given case, instead of a single continuous trial, a series of court hearings may be held over an extended period. Documents play a more important role than witness testimony. The judge actively investigates the case and also conducts the questioning of the witnesses. Instead of a verbatim record of the proceedings, the judge's notes and findings of fact comprise the record. Appeals may be taken both on the facts and the law, and the appeals court can and, sometimes does open the record to receive new evidence.

Despite their differences, both the common and civil law systems have as their goal the just, speedy and inexpensive determination of disputes.

U. S. courts have become particularly sensitive in recent years

· jury
陪审团
· summon
召集
· prevail
占优势
· the accused
(刑事)被告
· juror
陪审团成员
· testimony
证言
· witness
证人
· adversary
对手
· verbatim
(完全)照字面的,逐字的
· court hearing
庭审

- reappraise 重新评估
- alternate dispute resolution mechanisms 诉讼外纠纷解决机制
- arbitration 仲裁
- mediation 调解
- default judgment 缺席判决
- summary judgment 简易判决

for the need to continuously reappraise their processes in order to improve the quality of justice. As a consequence of these efforts, there are many other aspects of court activity in the U. S. These range from alternate dispute resolution mechanisms (including arbitration and mediation) to such procedural devices as default and summary judgment, used by judges to decide cases at an early stage without having to proceed to a formal trial.

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Notes

1. Judge Peter J. Messitte: an Article III federal judge for the United States District Court for the District of Maryland. He joined the court in 1993 after being nominated by President Bill Clinton. He is serving on senior status.
2. Roman law: the legal system of ancient Rome, forming the basis for modern civil law. 罗马法。
3. the Emperor Justinian: a Christian emperor of the Roman Empire on the cusp between Antiquity and the Middle Ages. Emperor Justinian is known for his reorganization of the government of the Roman Empire and his codification of the laws, the Codex Justinianus, in A. D. 534. Corupus Jurus Civilis or the Justinian Code, was the result of Emperor Justinian's desire that existing Roman law be collected into a simple and clear system of laws, or "code," Justinian's own laws, as well as two additional books on areas of the law. In 534, the Justinian Code, made up of the Code, the Digest, and the Institutes, was completed. 查士丁尼大帝。
4. Magna Carta: widely viewed as one of the most important legal documents in the history of democracy. King John of England agreed, in 1215, to the demands of his barons and authorized that handwritten copies of Magna Carta be prepared on parchment, affixed with his seal, and publicly read throughout the realm. Thus he bound not only himself but his "heirs, for ever" to grant "to all freemen of our kingdom" the rights and liberties the great charter described. With Magna Carta, King John placed himself and England's future sovereigns and magistrates within

the rule of law. 英国大宪章。

5. alternate dispute resolution mechanisms: new methods of dispute resolution such as ADR which facilitate parties to deal with the underlying issues in dispute in a more cost-effective manner and with increased efficacy. The resolution of disputes takes place usually in private and is more viable, economic, and efficient. It has proven to be one the most efficacious mechanisms to resolve commercial disputes of an international nature. 诉讼外纠纷解决机制。

Exercises

Check Your Understanding

Answer the following questions according to the text.

1. What are the major legal families in the world?
2. What is the origin of the civil law system?
3. How does the common law come into being?
4. How were the judges treated in the French Revolution?
5. What were the grievances of the Americans against the British King that were listed in the American Declaration of Independence?
6. What is the main source of law in the common law system? What about that in the civil law system?
7. Do you agree with the author that "it would be incorrect to say that common law is unwritten law"?
8. What is a code? Are all laws codified in America? If no, what are other types of written laws?
9. What is a precedent? What are the bases for the principle of *stare decisis*?
10. Are all the decisions binding precedents for the subsequent cases? Are there any limitations on the precedential effect of a judicial decision?
11. What is the difference between distinguishing a case from a precedent and overruling a precedent?
12. What is the main function of treatises in the common law system and in the civil law system respectively? Why such difference?

Build Up Your Vocabulary

I. Match the items in the following two columns.

1. codification — a. a body of Roman ecclesiastical jurisprudence that

was compiled between the 12th and 14th centuries

2. civil law
3. canon law
4. statute
5. source of law
6. litigant
7. *stare decisis*
8. jury
9. arbitration
10. mediation
11. adjudication
12. predictability
13. jurist
14. judgment
15. common law

b. the process of compiling, arranging, and systematizing the laws of a given jurisdiction into an ordered code

c. the materials and processes out of which law is developed

d. one of the two prominent systems of jurisprudence in the Western World

e. a method of alternative dispute resolution in which a neutral third party helps resolve a dispute

f. the law passed by the legislative body

g. a party to a lawsuit

h. a method of dispute resolution involving one or more neutral third parties who are chosen by or agreed to by the disputing parties, and whose decision is binding

i. the process of judicially deciding a case

j. a group of people selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them

k. the doctrine of precedent, under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation

l. a court's final determination of the rights and obligations of the parties in a case

m. the body of law derived from judicial decisions and opinions, rather than from statutes or constitutions

n. (also called banality) the degree to which a correct prediction or forecast of a system's state can be made either qualitatively or quantitatively

o. one who has thorough knowledge of the law, esp. a judge or an eminent legal scholar

p. a law-making body

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

legislature	precedent	codify	ratify	customs
jurisdiction	judicial	enact	police	subject matter

1. A _____ is a branch of government under the separation of powers with the power to pass, amend, and repeal laws. The law that it creates is called legislation or statutory law. It is also known by many names, the most common being parliament and congress, although these terms also have more specific meanings.
2. Generally, decisions of higher courts (within a particular system of courts) are mandatory _____ on lower courts within that system—that is, the principle announced by a higher court must be followed in later cases. For example, the California Supreme Court decision that unmarried people who live together may enter into cohabitation agreements (*Marvin v. Marvin*), is binding on all appellate courts and trial courts in California (which are lower courts in relation to the California Supreme Court). Similarly, decisions of the U. S. Supreme Court (the highest court in the country) are generally binding on all other courts in the U. S..
3. _____ is the process of bringing together a legislative act and all its amendments in a single new act. The new act passes through the full legislative process and replaces the acts being codified.
4. Sen. Joe Lieberman said the administration [might] have problems getting the START treaty signed last week _____ in the Senate. Lieberman said he'd arrived at his belief on the vote tally falling short after conversations with colleagues over the congressional recess.
5. Cicero once said that "Justice has emanated from nature. Therefore, certain matters have passed into _____ by reason of their utility. Finally the fear of law, even religion, gives sanction to those rules which have both emanated from nature and have been approved by custom."
6. _____ (from the Latin *ius*, *iuris* meaning "law" and *dicere* meaning "to speak") is the practical authority granted to a formally constituted legal body or to a political leader to deal with and make pronouncements on legal matters and, by implication, to administer justice within a defined area of responsibility. The term is also used to denote the geographical area or subject-matter to which such authority applies.
7. The judiciary (also known as the _____ system or judicature) is the system of

courts which interprets and applies the law in the name of the sovereign or state. The judiciary also provides a mechanism for the resolution of disputes. Under the doctrine of the separation of powers, the judiciary generally does not make law (that is, in a plenary fashion, which is the responsibility of the legislature) or enforce law (which is the responsibility of the executive), but rather interprets law and applies it to the facts of each case.

8. Two dozen economists wrote to Sen. Reid: "We Urge _____" of Your Healthcare Reform Bill.
9. A _____ officer is a warranted employee of a police force. In the United States "officer" is the formal name of the lowest police rank; in many other countries "officer" is a generic term not specifying a particular rank, and the lowest rank is often "constable".
10. _____ jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter. For instance, bankruptcy court only has the authority to hear bankruptcy cases. It must be distinguished from personal jurisdiction, which is the power of a court to render a judgment against a particular defendant, and territorial jurisdiction, which is the power of the court to render a judgment concerning events that have occurred within a well-defined territory.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

action	authorized	code	constitution	customs
enacted	jurisdiction	legally	legislature	police

The legal system is legal regimen of a country consisting of a written or oral _____, primary legislation (statutes) _____ by the legislative body established by the constitution, subsidiary legislation (bylaws) made by person or bodies _____ by the primary legislation to do so, _____ applied by the courts on the basis of traditional practices, and principles or practices of civil, common, Roman, or other _____ of law. This aspect of the legal system is its substance.

The legal system also has structure. The structure of a legal system consists of elements of this kind: the number and size of courts; their _____ (that is, what kind of cases they hear, and how and why); and modes of appeal from one court to another. Structure also means how the _____ is organized, what a president can

_____ do or not do, what procedures the _____ department follows, and so on. Structure, in a way, is a kind of cross section of the legal system—a kind of still photograph, which freezes the _____.

Translation

Translate the following sentences into Chinese.

1. The common law system is that of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified written laws.
2. Civil law (or civilian law) is a legal system inspired by Roman law, the primary feature of which is that laws are written into a collection, codified, and not (as in common law) determined by judges. Conceptually, it is the group of legal ideas and systems ultimately derived from the Code of Justinian, but heavily overlaid by Germanic, ecclesiastical, feudal, and local practices, as well as doctrinal strains such as natural law, codification, and legislative positivism. Materially, civil law proceeds from abstractions, formulates general principles, and distinguishes substantive rules from procedural rules.

Comparative study

Fill in the form with comparison between common law and civil law.

	Common law	Civil law
Other names		Continental, Romano-Germanic
Source of law	Case law, legislation	
Lawyers		Judges dominate trials
Judges' qualifications		Career judges
Degree of judicial independence	High	High; separate from the executive and the legislative branches of government
Juries	Provided at trial level	
Policy-making role	Courts share in balancing power	Courts have equal but separate power
Examples	Australia, England, Hong Kong, Ireland, USA (except Louisiana), Canada (except Québec), Pakistan, India, Malaysia	

Text B

State and Federal Court Structure and Characteristics

- trial court 初审法院
- felony 重罪
- superior court 高级法院
- circuit court 巡回法庭
- district court 地区法院
- subdivision 分支
- preside 主管
- correspond 一致
- exercise 行使
- criminal prosecution 刑事控诉
- misdemeanor 轻罪
- handle 处理，审理
- regular 常规的
- appeals court 上诉法院
- appellate court 上诉法院
- specialized jurisdiction 专属管辖权
- probate or surrogate courts 遗嘱认证法院
- oversee 监督
- decedents' estates 死者房产、财产
- juvenile 青少年的

1. State Court Structure

Trial Courts of General Jurisdiction The basic component of the state court systems of all states is the trial court of general jurisdiction. This court has jurisdiction over major civil disputes and all serious criminal offenses, called "felonies". These courts are called by various names. The most common names for this court is "superior court" or "circuit courts", though in some areas they are called "district courts". In general the territorial subdivisions over which these courts preside correspond with the county lines of a state.

In most states, there is a layer of trial courts below the circuit or superior court level which exercise limited general jurisdiction. Typically they have jurisdiction over all types of civil cases up to a certain amount of money in controversy and over all criminal prosecutions of less serious criminal matters, called "misdemeanors". For example, in California the Superior Court handles all felonies and civil cases with over $25,000 in controversy, while the Municipal and Justice Courts handle criminal misdemeanors and civil disputes of less than $25,000. A similar division exists in Michigan between the higher level state circuit court and district court, except that the civil dividing line is $10,000. Appeals from judgments of these lower courts often go to the general jurisdiction trial court (circuit or superior court) rather than to the regular appeals court. In such cases, the circuit or superior court acts as a single-judge appellate court rather than a trial court.

Trial Courts with Specialized Jurisdiction States have other trial courts with specialized jurisdiction to decide only disputes of a particular type. Among them are probate or surrogate courts (for overseeing distribution of decedents' estates, for juvenile mat-

ters, or for mental commitments and guardianships over adults unable to handle their affairs), juvenile courts (if juvenile matters are not handled by the probate court), and courts of claims (to handle money claims against the state). In some states, some courts with specialized subject-matter jurisdiction are considered the equal of the superior or circuit courts of general jurisdiction. In other states, specialized courts are considered inferior to the circuit or superior court and the latter are sometimes assigned the task of deciding appeals from the former. This is another instance when a trial court exercises appellate court functions and when an appeal can be decided by a single judge.

Small Claims and other Informal Courts Most states have established small claims divisions either in the courts of general jurisdiction or in the courts just below them. Disputes are limited to those involving less than a specified amount in controversy, such as $300, $500 or $1,000. Sometimes these courts are called Justice of the Peace Courts, because that is the name of the official who presides over the proceedings. Sometimes these "justices" are not lawyers and have no particular legal training. Procedure in small claims courts is very informal and there is generally no appeal from a judgment. Sometimes lawyers are prohibited from representing parties in such courts. However, in most jurisdictions, if parties to cases in small claims court wish to utilize a lawyer or to avail themselves of the greater rights afforded by a regular court, they may do so by simply asking that the case be "removed" from small claims court, at which time it is placed on the docket of a regular trial court. In others, there is no right of removal, but the losing party has a right to a trial *de novo* in a higher court. A trial *de novo* is a completely new trial that ignores the earlier result in the small claims court.

Appellate Courts The structure of state appellate courts conforms generally to that described above in the general description of appellate courts. However, it bears repeating the state appellate court of last resort of a state is the final arbiter of the meaning and application of state law. While the United States Supreme Court has

- mental commitment 精神病人押交令
- guardianship 监护责任
- court of claims 求偿法院
- subject-matter jurisdiction 标的管辖权
- small claims 小额诉求
- Justice of the Peace 治安官
- proceeding 诉讼程序
- justices 法官
- utilize 聘用,雇用
- remove 移送
- docket 判决日程表
- losing party 败诉方
- a trial *de novo* 重新审理、再次审理
- bear 需要,要求
- appellate court of last resort 终审法院
- arbiter 仲裁者

· review
审查
· aggregate
总数
· hold court sessions
开庭
· prestige
权威，地位
· tariff
关税

power to review state court judgments, it may do so only on issues of federal law.

2. The Federal Court System

Federal courts have jurisdiction over federal law claims and state law claims that involve parties from different states. Such claims can arise anywhere, so the federal court system covers the entire country. However, the federal court system is much smaller than the aggregate of all the state systems.

District Courts The basic trial court in the federal system is the United States District Court, which is located in 91 districts throughout the states, the District of Columbia and Puerto Rico. These districts vary in size. In the more populous states, there will be three or even four districts. In the less populous states, the entire state is one district. New York has southern, northern, eastern and western districts, while the state of Montana is all one district and is simply called the District of Montana. All district courts have at least two judges and one (the southern district of New York) has as many as 28. Where necessary to provide better access for litigants and witnesses, judges of the district court "sit" (i.e. hold court sessions) in various places in the state.

Although federal law claims are not as numerous as state claims, when issues of federal law arise, they are often very important. Either the federal Constitution is involved or the case involves a problem that Congress thought it appropriate to exercise its legislative power. The importance of many of the cases that federal judges handle, plus the facts that there are relatively few federal judges and that they are appointed by the President for life, all combine to give federal district judges a certain prestige that does not attach to state trial judges.

Federal Courts with Specialized Jurisdiction There are several federal courts with specialized jurisdiction. They are the United States Claims Court, which handles exclusively claims against the federal government; the Tax Court, which handles suits involving federal taxes; the Court of International Trade, which handles civil matters related to tariff and trade agreements; and the system

of Bankruptcy Courts housed with the federal district courts. In addition, there are the District of Columbia Superior Court and the District of Columbia Court of Appeals, which act like "state" courts for Washington, D. C. where local law is federal law. There is also a Foreign Intelligence Surveillance Court, which determines applications by the Attorney General for permission to implement domestic wiretaps in the interest of national security and which uses judges from the regular federal courts. Two specialized courts deal with military and veterans matters: the Court of Military Appeals reviews court-martial convictions for military offenses and the Court of Veterans Appeals reviews decisions of the Veterans Administration on claims for veterans benefits.

The judges of all these specialized courts, except the Court of International Trade and Foreign Intelligence Surveillance Court, are what are called "Article I" judges and courts. Unlike "Article III" district judges, they are not appointed for life, but for specific terms.

The volume of cases these specialized courts handle is insignificant in comparison to district courts. Congress has generally resisted pressures to create more federal courts with specialized jurisdiction, preferring that most federal judicial business be handled by "generalist" Article III judges who handle all kinds of cases.

Circuit Courts of Appeals Above the federal district level are the 13 federal circuit courts of appeals. There is a right to appeal all final judgments of district courts to the circuit courts of appeals of the appropriate circuit. In addition, the circuit courts have jurisdiction to hear appeals from decisions of certain administrative agencies, such as the National Labor Relations Board and the Department of Health and Human Services.

Eleven of these 13 circuits cover several states. For example, the Sixth Circuit covers Ohio, Kentucky, Tennessee and Michigan. The Federal Circuit is not organized on a geographical basis at all. It has been assigned the task of handling appeals that involve patents and certain damages suits against the United State government from any of the 91 district courts, as well as appeals from the

- Bankruptcy Courts
（联邦）破产法院
- house with
包括在……内
- intelligence
间谍
- surveillance
侦查
- implement
安装
- wiretap
窃听设备
- veteran
老兵
- the Court of Military Appeals
军事上诉法院
- court-martial
军事法院
- conviction
定罪，判罪
- offense
犯罪，罪刑
- Article I Judges and courts
美国联邦宪法第一条规定的法官和法院
- Arricle III judges
美国联邦宪法第三条规定的法官
- suits
诉讼案件

· precedential
具有先例效力的,先例的
· split in the circuits
巡回法院意见相左
· dual
双重的
· hybrid
混合的
· *en banc*
全体庭审
· discretionary
自由决定的
· writ of certiorari
调卷令

Claims Court and the Court of International Trade. The smallest number of court of appeals judges is in the First Circuit, which has six, and the largest is in the Ninth Circuit, which has twenty-eight.

The federal circuit courts of appeal have the right to disagree with one another and decisions from one circuit only have persuasive precedential effect in another circuit. The result is that there can be and often is a different rule on a point of federal law in New York (a state in the Second Circuit) and in California (a state in the Ninth Circuit). Just such a "split in the circuits" forms one basis for the Supreme Court to exercise its power to review decisions of the circuit courts of appeals.

3. The United States Supreme Court

Nature and Dual Function The Supreme Court of the United States is part of the federal court system, but has a hybrid function. As one might expect, it exercises appellate jurisdiction over the United States Courts of Appeals, but it also exercises appellate jurisdiction over state courts as to federal issues. The Supreme Court is the only court that is specifically created by the Constitution. However, its composition and jurisdiction are determined by Congress. Currently and since 1868, the Court has consisted of a total of 9 judges: 8 associate justices and one Chief Justice of the United States. It has had as few as 5 and as many as 10 justices. The Court is located in Washington D. C. and hears every case *en banc*, meaning that all 9 justices sit together and make final decisions in all cases.

Certiorari and Appeals There are two ways to seek review by the U. S. Supreme Court: an appeal as a matter of right and the discretionary grant of a writ of certiorari. Very few cases fall into the category of appeals as of right, so as a practical matter certiorari is the only way to gain Supreme Court review. Certiorari means to "bring up the record," generally the first step in an appeal to any appellate court once jurisdiction is taken. By exercising its appellate certiorari jurisdiction over cases involving issues of federal law coming from the lower federal courts and the highest courts of the states, the Court maintains the supremacy and consistency of

federal law.

Certiorari Procedure On petition for writ of certiorari, the justices vote on whether to take a case in a private conference held each week. Certiorari grants are decided according to the "Rule of Four," meaning that it takes a vote of four Justices to grant certiorari. As is the case with the state supreme courts exercising discretionary jurisdiction, the Supreme Court does not view its role as one of correcting error, but as one of serving the broader interests of the law and the legal system. Thus, its rules provide that certiorari will be granted only when there is a conflict on an issue of federal law that exists among the federal courts of appeals or between one of them and a state supreme court, or when a state supreme court or the federal court of appeals has decided an important federal question in a manner contrary to decisions of the Supreme Court. Typically, the Supreme Court will receive about 6,000 petitions for certiorari and will grant review in only about 130 of them, or about 2%.

Original Jurisdiction The Supreme Court also has original jurisdiction in a narrow category of cases. These cases form a negligible part of its business, usually less than one-tenth of the number in which certiorari is granted. Virtually all the original jurisdiction cases handled by the Court involve disputes between states. Most such cases concern territorial disputes, usually arising as a result of a river changing its course. A notable non-territorial dispute that has arisen lately was the seemingly interminable litigation between Texas, California and Utah over who had the right to tax the estate of multi-billionaire Howard Hughes. As the court of first instance in these cases, the Supreme Court acts as a trial court. Since a trial before the Supreme Court would be unwieldy, the Court appoints a "special master," usually a retired federal judge, to hear proofs and make a recommended decision in such disputes.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

- petition
  申请
- Rule of Four
  四人规则
- negligible
  可忽视的
- interminable
  无休止的
- the court of first instance
  初审法院
- unwieldy
  难以操作的
- hear
  听审

Notes

1. superior court: In common law systems, it is a court of general competence which typically has unlimited jurisdiction with regard to civil and criminal legal cases. A superior court is "superior" relative to a court with limited jurisdiction, which is restricted to civil cases involving monetary amounts with a specific limit, or criminal cases involving offenses of a less serious nature. A superior court may hear appeals from lower courts. 具有广泛管辖权的初审法院。
2. probate or surrogate courts: specialized courts that deal with matters of probate and the administration of estates. Probate courts administer proper distribution of the assets of a decedent (one who has died), adjudicate the validity of wills, enforce the provisions of a valid will (by issuing the grant of probate), prevent malfeasance by executors and administrators of estates, and provide for the equitable distribution of the assets of persons who die intestate (without a valid will). 遗嘱认证法院。
3. mental commitment: Under extreme circumstances, one could be forced into mental health treatment but only with court approval. At the hearing, the court will decide whether he is a danger to himself, others, or "gravely disabled as a result of mental illness". 精神病人押交令。
4. Justice of the Peace (JP): a puisne judicial officer elected or appointed by means of a commission to keep the peace. Depending on the jurisdiction, they might dispense summary justice or merely deal with local administrative applications in common law jurisdictions. Justices of the Peace are appointed or elected from the citizens of the jurisdiction in which they serve, and are (or were) usually not required to have a formal legal education in order to qualify for the office. 治安官。
5. a trial *de novo*: a form of appeal in which the appeals court holds a trial as if no prior trial had been held. A trial *de novo* is common on appeals from small claims court judgments. The difference between an appeal and a trial de novo is that new evidence may not be presented in an appeal, although there are some cases when evidence just came to light after the trial and couldn't have been presented in the lower court. 重新审理、再次审理。
6. Bankruptcy Courts: legislative courts which were created under Article I of the Constitution. They function as units of the district courts and have subject-matter jurisdiction over bankruptcy cases. Because the federal district courts have original and exclusive jurisdiction over all cases arising under the bankruptcy code,

(see 28 U. S. C. § 1334(a)), bankruptcy cases cannot be filed in state court. Each of the 94 federal judicial districts handles bankruptcy matters. (联邦)破产法院。

7. Article I judges and courts: certain federal courts and other forms of adjudicative bodies. These tribunals, as created by Congress, are of various forms, and have differing levels of independence from the executive and legislative branches. They can be Article I Courts (also called legislative courts) set up by Congress to review agency decisions, ancillary courts with judges appointed by Article III appeals court judges, or administrative agencies. Article I judges are not subject to the Article III protections. 美国联邦宪法第一条规定的法官和法院。
8. Article III judges: judges of certain federal courts. These courts are the Supreme Court of the United States and the inferior courts established by the Congress, which currently are the 13 United States courts of appeals, the 94 United States district courts, and the U. S. Court of International Trade. They constitute the judicial branch of the government (which is defined by Article III of the Constitution). 美国联邦宪法第三条规定的法官。
9. split in the circuits: in the context of the United States Supreme Court, a split in the circuits exists when two or more circuits in the United States court of appeals system have opposite interpretations of federal law. The concept is sometimes key to the Supreme Court's decision to accept a case. A circuit split means that the federal case law in one area is different than that in another. In that instance, the Supreme Court may hear an appeal to clarify federal law. 巡回法院意见相左。
10. *en banc*: a French term, meaning "by the full court", "in the bench" or "full bench". When all the members of an appellate court hear an argument, they are sitting *en banc*. 全体庭审。
11. writ of certiorari: a writ, or order, sent from a higher court to a lower one which orders the lower court to turn over transcripts and documents related to a specific case for review. In general, a writ of certiorari is issued by the highest court in a nation after a request from a petitioner. The decision to grant such a writ is made at judicial discretion. 调卷令。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

1. The trial court of general jurisdiction has jurisdiction over all cases without any restriction in subject matter or amount of money.
2. Felony cases and misdemeanor cases are tried by different kinds of trial court although what is considered to be a felony in one state may be a misdemeanor in another state.
3. Trial courts can serve as appellate courts with a panel of 3 judges to review appeals from lower trial courts with limited general jurisdiction.
4. The small claims divisions usually entertain money claim actions against the State.
5. The jurisdiction of some courts is restricted to only one subject matter, such as courts of claims.
6. All the circuits are organized on a geographical basis, with one or more circuit courts to handle appeals from district courts.
7. Judges working in the federal courts with specialized jurisdiction are considered to be Article III judges who enjoy life tenure.
8. In the Supreme Court of the United States, when 4 justices agree, the majority opinion formed and the decision is final and binding upon the parties.
9. The Supreme Court of the United States is the final court for people to resort to no matter whether they appeal for every reason from the federal circuit courts or state supreme courts.
10. The Supreme Court of the United States doesn't serve as trial court at any time.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
cause of action	
	诉讼人
adjudicate	

(continued)

English	Chinese
	自然人
affirm	
	即决判决
petition	
	司法独立
"judge-made" law	
	案例法
writ of certiorari	
	第三方诉讼
the accused	

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

amicus curiae	common law
de novo	domicile
ex parte	finding
joint trial	full faith and credit
legal aid	*habeas corpus*
justice	Justice of the Peace
remove a case	court of first instance

felony, misdemeanor, and infraction

Translation

Translate the following sentences into English.

1. 中华人民共和国公民在法律面前一律平等。任何公民享有宪法和法律规定的权利,同时必须履行宪法和法律规定的义务。
2. 中华人民共和国公民对于任何国家机关和国家工作人员,有提出批评和建议的权利;对于任何国家机关和国家工作人员的违法失职行为,有向有关国家

机关提出申诉、控告或者检举的权利，但是不得捏造或者歪曲事实进行诬告陷害。

3. 中华人民共和国人民法院是国家的审判机关。人民法院依照法律规定独立行使审判权，不受行政机关、社会团体和个人的干涉。人民法院审理案件，除法律规定的特别情况外，一律公开进行。被告人有权获得辩护。
4. 最高人民法院是最高审判机关。最高人民法院监督地方各级人民法院和专门人民法院的审判工作，上级人民法院监督下级人民法院的审判工作。

Case Brief

Ⅰ. Introduction

In your first year of law school, you will be analyzing a case in two contexts. First, your professors may suggest that you "brief" each case assigned for class. This type of brief is a written synopsis of the important points of the case. For this purpose, you consider each case in isolation, just trying to understand that particular case. In the second context, however, your concern is the impact that a previous case may have as a precedent for your own problem case, often a hypothetical fact pattern. There, you analyze the relationship between cases. Your success in both of these contexts will depend to some extent on how carefully you identify the significant parts of a judicial decision.

Ⅱ. Briefing a case: Finding the parts of a Judicial Decision

You brief a case to help you understand its significance. There are different methods of briefing a case and the following format is meant to be only an example. Your professors may suggest a format to you, or you may devise your own system by identifying what helps you in your classes. Whatever method you use, read through the case once to get a general idea of what it is about before you start your brief.

The typical components of a case brief are explained below.

Facts

The fact section describes the events between the parties that led to the litigation and tells how the case came before the court that is now deciding it. Include those facts that are relevant to the issue the court must decide and to the reasons for its decision. You will not know which facts are relevant until you know what the issue or issues are. For example, if the issue is whether a minor falsely represented himself as an adult for the purpose of fraudulently inducing a car salesman to contract with him, relevant facts could include the minor's written and oral statements about his age, the

minor's height and weight, and his manner of dress. These facts are relevant because they can help prove how the minor represented his age. However, the minor's eye color, the weather on the day the contract was signed, and the payment schedule in the contract would not be relevant to the issue of false representation.

The fact section should also include the relevant background information for the case, for example, who the plaintiff and defendant are, the basis for the plaintiff's suit, and the relief the plaintiff is seeking. Also include the procedural history, although you may put the procedural facts under a separate heading. Procedural facts should include any dispositive motions, such as a motion to dismiss for failure to state a claim. If the case is an appeal, state the lower court's decision, the grounds for that decision, and the party who appealed. Often you will have to understand the procedural posture of a case in order to understand the court's decision. For example, if the appeal is from a successful motion to dismiss, then the appellate court will decide whether the plaintiff's pleadings stated a claim and whether the plaintiff should be permitted to continue the lawsuit. The appellate court will not decide who should win the lawsuit if it continues.

Issue(s)

The issue is the question that the court must decide to resolve the dispute between the parties in the case before it. To find the issue, you have to identify the rule of law that governs the dispute and ask how it should apply to those facts. You usually write the issue for your case brief as a question that combines the rule of law with the material facts of the case, that is, those facts that raise the dispute. Although we use the word "issue" in the singular, there can be and often is more than one issue in a case.

Holding(s)

The holding is the court's decision on the question that was actually before it. The court may make a number of legal statements, but if they do not relate to the question actually before it, they are dicta. The holding provides the answer to the question asked in the issue statement. If there is more than one issue, there may be more than one holding.

Reasoning

The court's reasoning explains and supports the court's decision. The court may explain why it applied the controlling rule as it did. Sometimes the issue in the case may involve the validity of the rule itself, and the court may have looked at two lines of authority and decided the case was more like one group of cases than another. Or

the court may have decided that the policy justifying a rule was no longer valid, or may have concluded that the facts of this particular case required an exception to the rule. In any event, it is important is isolate the court's reasoning from the facts and the holding of the case.

Policy

Underlying legal decisions are the social policies or goals that the decision-maker wishes to further. When a court explicitly refers to those policies in a case, include that information in your case brief, since it will probably help you understand the court's decision. If the court does not explain the policies on which it based its decision, then try to identify them for yourself.

Read the following case. It is followed by a sample brief.

Paugh v. City of Seattle

The plaintiff is the father of two boys who died at ages six and eight when they drowned in a pond on city-owned land. Mr. Paugh sued the city for the deaths of his sons. The city successfully moved for summary judgment and this appeal followed.

The pond is about 100 feet wide at its widest point. It is shallow at the edges, and slopes gently to six feet at its deepest point. Its bottom is muddy and the water is murky. It is located in unimproved bushy terrain about 300 yards form the housing development where the plaintiff lives, and is accessible by a dirt road. The sheriff described it as an ordinary pond, just like the many others in the area. The pond is popular with nearby residents for fishing and swimming and the plaintiff himself had taken his sons there four or five times to fish. He had told them to go only with him and to stay out of the water. There are no witnesses to the drownings.

The city had not taken any measures against trespassers. There are no warning signs around the pond, and the evidence is that a fence all around would be prohibitive in cost and probably not possible without leveling the trees and the uneven ground. The city is now contemplating draining the pond and estimates the cost at $25,000.

The general rule is that a landowner owes no duty to trespassers except to not willfully cause their injury. Mail v. Smith Lumber Co., 287 P. 2d 877 (Wash. 1955). There is an exception, however, for child trespassers, the attractive nuisance doctrine, which has been adopted in this state. Id. This doctrine reflects public con-

cern for the welfare and safety of children. The requirements for this doctrine to apply are

1. The condition must be dangerous in itself, that is, it must be likely to, or probably will, result in injury to those attracted by it;

2. The condition must be attractive and enticing to young children;

3. The children, because of their youth, must be incapable of understanding the danger involved;

4. The condition must have been left unguarded at a place where children go, or where they could reasonably be expected to go; and

5. It must have been reasonably feasible either to prevent access or to render the condition innocuous without destroying its utility.

Shock v. Ringling, 105 *P.2d* 838 (*Wash.* 1940).

In this case, we agree with the court below that the pond is not an attractive nuisance because it is not dangerous in itself. Thus summary judgment for the defendant is appropriate. Admittedly, ponds, like many bodies of water, are attractive to children, who love to fish and swim. Moreover, when ponds are located near people's homes, children could reasonably be expected to visit them. Nevertheless, although drowning is always a danger, it is a commonly known danger, and six- and eight-year olds are capable of understanding it. In addition, all the evidence is that the number of similar bodies of water. The evidence is that this sad event was the first drowning in this pond.

This state has miles of shoreline and numerous natural creeks, ponds, lakes, and rivers. These bodies of water, standing or flowing, are natural to all states and countries that are not deserts. Compared to the heavy use of these bodies of water, the number of drownings is so small that we must conclude that they are not dangerous. Moreover, it would be an undue burden to require owners to fence them or drain them in order to escape liability for the occasional drowning that occurs, and this duty would shift the responsibility of child care to the landowners from the parents. In addition, the environment, especially wildlife, would suffer and people would not be able to enjoy the recreational facilities. It is a policy of this state to encourage owners of recreational facilities. It is a policy of this state to encourage owners of recreational land to allow the public to use the land. Towards this end, the state's Recreational Land Act limits the land owner's liability to the public allowed to use the land for recreational purposes.

If, however, there were conditions that caused particular risk, like a concealed

danger, our decision might be different. The trial court here correctly decided that the pond is not an attractive nuisance. Affirmed.

Sample Brief of Paugh v. City of Seattle

A. Facts

The plaintiff sued the city for the deaths of his six- and eight-year-old sons, who drowned in a pond on city-owned land. The trial court granted summary judgment for the city and plaintiff appealed. The pond is described as ordinary, shallow at the edges, gently sloping, and murky. It is about 300 yards from a housing development. The pond is accessible by a dirt road and is used by the community for fishing and swimming. The plaintiff, who lives in the adjacent community, had taken his sons there to fish 4 or 5 times and warned them not to go alone. The plaintiff's sons were the first drownings in the pond.

The court affirmed the trial court summary judgment for the city.

B. Issue

Is an ordinary pond located near residential property an attractive nuisance so that the property owner is liable for the drowning deaths of trespassing children?

C. Holding

The pond is not an attractive nuisance because it is not dangerous in itself.

D. Reasoning

The general rule in Washington is that a landowner (the city) owes no duty to a trespasser except not to willfully cause injury. There is an exception in favor of child trespassers for injury from an "attractive nuisance". If the landowner maintains an attractive nuisance on its land, it is liable for injuries caused by that condition. The state imposes five requirements:

1. The condition must be dangerous in itself, that is, it must be likely to, or probably will, result in injury to those attracted by it;

2. The condition must be attractive and enticing to young children;

3. The children, because of their youth, must be incapable of understanding the danger involved;

4. The condition must have been left unguarded at a place where children go, or where they could reasonably be expected to go; and

5. It must have been reasonably feasible either to prevent access or to render the condition innocuous without destroying its utility.

The court does not provide a detailed application of these elements, but seems to decide mainly on the ground that the plaintiff could not prove that the pond was dangerous in itself, the first element.

The statistics (not supplied) are that in relation to the many bodies of water in the state, there are few drownings. That is, a pond is not dangerous because its use is not likely to result in injury. These were the first drownings in this pond.

The court also mentions that it was not feasible to prevent access by fencing off the pond because of the terrain. The city may drain it for $25,000, which will destroying its utility for recreation and for the environment.

Finally, the plaintiff had warned his children about the danger of drowning and, at six and eight years, they were old enough to understand that warning. Thus, although ponds are attractive to children (second element) and although this pond was unguarded (fourth element), three of the five elements were not proven.

E. Policy

The purpose of the attractive nuisance doctrine is to protect the welfare and safety of children, who are unprotected under the general rule governing a landowner's liability to trespassers. However, the condition on the landowner's premises must be a dangerous one, that is, likely to causes injury. Ponds and other bodies of water are so common and widely used without injury that they are not dangerous.

Other considerations here are first that ponds are environmentally important; if the water is drained or fenced off, the water is neither available to wildlife, nor available for recreation for others. Moreover, this duty would be unduly burdensome on landowners, and would shift responsibility to protect children to them from the children's parents. The court will do that only if the condition is dangerous. Finally, the state by statute encourages landowners to allow the public to use recreational lands, not to fence them off or make them unusable.

Unit Two Constitutional Law

Warm-up Exercises: Listening Practice

Words and expressions:

civil rights movement	arrest	minority rights	activist
unequal treatment	violate	boycott	racial separation
equality	Senator	freedom	

I. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

1. Rosa Parks is called mother of the American civil rights movement because she was the mother of Martin Luther King, Junior.
2. Rosa Parks's peaceful disobedience was the signal of protests in Montgomery that brought about legal changes in minority rights in the United States.
3. Rosa Parks and her husband worked for the NAACP, as civil rights activists.
4. In the past black people might sit anywhere on the bus so long as they were separated from the white.
5. Rosa Parks was the first person in the city to refuse to leave a seat to a white man.
6. Blacks boycotted the city buses until Rosa Parks was tried to be not guilty and released.
7. The Supreme Court of the United States finally ruled that racial separation is unconstitutional.
8. Rosa Parks's body lay in honor in the United States Capitol building in Washington, the first American woman to be so honored.

Ⅱ. Spot dictation. Listen to the passage again and fill in the blanks with the words you hear.

In her later years, Rosa Parks was often asked how much _____ between the races had improved since the _____ rights laws were passed in the 1960s. She thought there was still a long way to go. Yet she remained the face of the movement for racial _____ in the United States.

Rosa Parks died on October 24th, 2005. She was 92 years old. Her body lay in _____ in the United States Capitol building in Washington. She was the first American woman to be so honored. 30,000 people walked silently past her body to show their respect.

_____ Conyers spoke about what this woman of quiet strength meant to the nation. He said: "There are very few people who can say their actions and conduct changed the face of the _____. Rosa Parks is one of those individuals."

Rosa Parks meant a lot to many Americans. 4,000 people attended her funeral in Detroit, Michigan. Among them were former President Bill Clinton, his wife _____ Hillary Rodham Clinton, the Reverend Jesse Jackson, and Nation of Islam leader Louis Farrakhan.

President Clinton spoke about remembering the separation of the races on buses in the South when he was a boy. He said that Rosa Parks helped to set all Americans _____. He said the world knows of her because of a single act of bravery that struck a deadly blow to racial hatred.

Earlier, the religious official of the United States Senate spoke about her at a memorial service in Washington. He said Rosa Parks's bravery serves as an example of the power of small acts. And the Reverend Jesse Jackson commented in a _____ about what her small act of bravery meant for African-American people. He said that on that bus in 1955, "she sat down in order that we might stand up and she opened the doors on the long journey to _____."

Text A

The Constitutional Law

Constitutional law pervades virtually every area of law in the United States. The broad topic of constitutional law deals with the interpretation and implementation of the United States Constitution.

constitutional
宪法的

- pervade
  渗透
- House of Representatives
  众议院
- Senate
  参议院
- Congress
  国会
- the commerce clause
  贸易条款
- Amendment
  修正案
- income tax
  所得税
- apportion
  分配
- proportioned
  成比例的
- presidency
  总统职位
- pardon
  赦免
- impeachment
  弹劾
- treaty
  条约
- ambassador
  大使
- minister
  部长

As the Constitution is the foundation of the United States, constitutional law deals with some of the fundamental relationships within our society. This includes relationships among the states, the states and the federal government, the three branches (executive, legislative, judicial) of the federal government, and the rights of the individual in relation to both federal and state governments.

The Constitution establishes the three branches of the federal government and enumerates their powers. Article I establishes the House of Representatives and the Senate. Section 8 enumerates the powers of Congress. Congress has specifically used its power to regulate commerce (the commerce clause) with foreign nations and among the states to enact broad and powerful legislation throughout the nation. The Sixteenth Amendment gives Congress the power to collect a national income tax without apportioning it among the states. Section 9 of Article Ⅰ prohibits Congress from taking certain actions. For example, until the passage of the Sixteeth Amendment Congress could not directly tax the people of the United States unless it was proportioned to the population of each state. Section 10 of Article Ⅰ lists a number of specific actions that individual states may no longer take.

Article Ⅱ of the Constitution establishes the presidency and the executive branch of government. The powers of the President are not as clearly enumerated as those of the Congress. He is vested with the "executive" power by section 1. Section 2 establishes him as the "commander and chief" and grants him power to give pardons, except in cases of impeachment, for offenses against the United States. Section 3 provides the power to make treaties (with the advice and consent of two-thirds of the Senate) and the power to nominate ambassadors, ministers, Judges of the Supreme Court, and all other Officers of the United States.

The role of the Supreme Court and the rest of the judicial branch of the federal government is covered by Article Ⅲ.

Article Ⅴ of the Constitution provides the procedures to be followed to amend the Constitution. Currently, the Constitution has been amended twenty-seven times (including the Bill of Rights).

Article Ⅵ of the United States Constitution states that the "Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." Furthermore, all federal, state, and local officials must take an oath to support the Constitution. This means that state governments and officials cannot take actions or pass laws that interfere with the Constitution, laws passed by Congress, or treaties. The Constitution was interpreted, in 1819, as giving the Supreme Court the power to invalidate any state actions that interfere with the Constitution and the laws and treaties passed pursuant to it. That power is not itself explicitly set out in the Constitution but was declared to exist by the Supreme Court in the decision of *McCulloch v. Maryland.*

The first section of the fourth article of the Constitution contains the "full faith and credit clause". This clause provides that each state must recognize the public acts (laws), records, and judicial proceeding of the other states. The fourth article also guarantees that a citizen of a state be entitled to the "privileges and immunities" in every other state.

The power of the federal government is not absolute. The Tenth Amendment specifically states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The two characteristics of that structure that most directly affect the legal system are "federalism" and "separation of powers".

Federalism means that there are two levels of government in the country, federal and state. In the version of federalism found in the United States, the 50 states of the United Sates have a great deal of independence and power. Each of these governments has its own legal system.

Separation of powers principles assure that none of the 3 branches of federal government—legislative, executive or judicial—oversteps the bounds of its proper constitutional role and usurps power belonging to the others. The concept derives from the writings

- in pursuance of 按照
- oath 宣誓
- explicitly 明确地
- immunity 豁免
- federalism 联邦制
- separation of powers 三权分立
- usurp 滥用

- Baron de Montesqieu 孟德斯鸠
- John Locke 约翰·洛克
- delegate 代表
- partition 分配
- checks and balances 制衡原则
- judicial review 司法审查
- constitutionality 合宪法
- *Marbury v. Madison* 马伯里诉表迪逊案
- the supremacy clause 至上条款

of Baron de Montesqieu and John Locke, with whose works the delegates to the convention were familiar. However, the idea as understood in the United States is less one of strictly separating powers than it is of spreading power among the branches. As Madison observed, the "necessary partition of power among the several departments" in the Constitution will assure that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places". A contemporary commentator has described the Constitution as establishing "separate institutions sharing power". Consequently, it is more appropriate to understand the scheme of the Constitution as a balancing of powers—as it is referred to commonly, a system of "checks and balances".

Since 1789, governmental structure and relationships between components of government have evolved. Supreme Court decisions have caused some changes. Others have resulted from the natural growth of the size of the country and changes in technology and in the types of challenges facing government. One of the major developments affecting the balance and separation of powers is judicial review.

The Constitution's "checks and balances" provide means for the executive and legislative branches to check the power of the judicial branch, primarily through selection of judges and control of federal court jurisdiction. The constitutional text does not clearly set out what checks the judicial branch was to have on legislative and executive power. Today, we know it is the power of judicial review—the power of the Supreme Court to pass on the constitutionality of laws and actions of the other two branches. But such power is not explicitly set out in the Constitution. Instead, it was held to be implicit in the Constitution (and officially recognized) in the 1803 case of *Marbury v. Madison*.

The court in *Marbury*, speaking through Chief Justice John Marshall, found judicial review implicit in the nature of a written constitution, in the supremacy clause and in Article Ⅲ's grant of judicial power. He reasoned as follows. First, the Constitution is law and must be followed; indeed, the supremacy clause makes the

Constitution the supreme law of the land. Second, the judges of the judicial branch, being vested by Article Ⅲ with the "Judicial Power of the United States", have the power to say what the law is in cases that come before them. It follows then that judges, in deciding an issue to which both a statute and the Constitution apply, must follow the hierarchy of law set out in the supremacy clause: they must apply the constitutional provision and disregard the statute. Marbury involved a federal statute, but the reasoning of *Marbury* was applied to invalidate a state enactment in 1810 in *Fletcher v. Peck*.

- provision 法条、规定
- province 范围
- hierarchy 等级
- choice-of-law 法律选择
- constitutional tribunal 宪法法院
- case or controversy 案件或争议

The General Nature of Judicial Review

Constitutional Review as a By-Product of Private Litigation The basic idea behind Marbury is that constitutional judicial review of laws is nothing extraordinary. As the Court observed, the first "province and duty" of all courts is to determine "what the law is" in any case before them. "The law" includes the Constitution and, in particular, its supremacy clause setting the hierarchy of laws. Consequently, when a court discovers that a statute violates the Constitution, it simply engages in a "choice-of-law" determination, applying the Constitution and ignoring the statute.

This rationale for judicial review has three effects on how such review is carried out. First, unlike some countries, the United States has no special constitutional tribunal separate from the ordinary courts that effectuates judicial review. Any court at any level may and indeed every court at every level must engage in constitutional judicial review—from the lowest municipal court to the U. S. Supreme Court. Thus, judicial review in the United States is a decentralized rather than a centralized system of constitutional review.

Second, courts decide constitutional issues when they arise in ordinary lawsuits. Any person may challenge the constitutionality of any law or other governmental action that adversely affects that person. The right is not limited just to certain public officials or entities as it is in some countries. And at least the federal courts may decide constitutional issues only if they arise in an actual "case or controversy". Federal courts and the courts of most states may not

render advisory opinions.

Finally, judicial review is supposed to be judicial in the sense that a court deciding a constitutional question makes a legal rather than a political determination. And it does so by doing what courts normally do—by interpreting enacted laws. Indeed, the "political question" is designed to prevent courts from doing anything else.

Judicial Review as a Special Public and Political Process Despite the above, there is evidence to undercut each of the three points made above. While it is true that judicial review is decentralized and thus available in any court, and that the U. S. Supreme Court is simply another "ordinary" court, there is a reverence with which lawyers and lower court judges treat even *obiter dictum* in Supreme Court constitutional decisions that gives those decisions the aura of being, not just the "final word", but the "only word" on the meaning of the Constitution. The feeling is that an issue of constitutional law is not really settled until the Supreme Court resolves it and that the decisions of the lower federal and state courts (not to mention the opinions of legislators or executive officials) are somehow only "best guesses" about what the Constitution means.

The Supreme Court has not exactly discouraged this impression. For example, in the 1992 decision reaffirming its 1973 abortion decision, the Court spoke of the abortion case as involving "the sort of intensely divisive controversy" that "has a dimension that the resolution of the normal case does not carry". Such "rare precedential force" occurs when "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate normal preclusive and precedential effects a judicial decision would have in an ordinary non-constitutional case.

Second, any attempt to pass of judicial review as a by-product of ordinary litigation does not take into account "test case" litigation that is routinely brought today in the Supreme Court and the lower federal courts. Many suits are truly "public law litigation" that go beyond the private interest of any party. The focus instead is almost exclusively on the issues raised and their impact on the public at

- enact 制定(法律)
- reverence 尊敬,敬重
- *obiter dictum* 附带意见
- "test case" litigation "测试性的个案"诉讼

large. An example is the class action suit, in which the original plaintiff and his or her problem may be all but forgotten, but the lawsuit continues anyway on behalf of an undetermined class of persons similarly situated.

Finally, as will be discussed in the next section and demonstrated in the cases, interpretation of constitutional provisions is quite different from more "ordinary" interpretations of enacted law that courts engaged in. Indeed, some have suggested that constitutional review in the United States is not "judicial" at all—that it is more accurately described as a political function that has been "carefully disguised" behind the "fiction" of courts determining the law. We have already seen how "judicial philosophy" is perceived to play an important role in judicial decision-making. It is clear that many of the elements of "judicial philosophy" touch on basic political values. If evidence of this is needed, one need look no further than the judicial selection process, particularly at the Supreme Court level, which is as almost as politicized and rancorous as a partisan election campaign.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

Notes

1. Baron de Montesqieu: one of the great political philosophers of the Enlightenment. Insatiably curious and mordantly funny, he constructed a naturalistic account of the various forms of government, and of the causes that made them what they were and that advanced or constrained their development. He used this account to explain how governments might be preserved from corruption. He saw despotism, in particular, as a standing danger for any government not already despotic, and argued that it could best be prevented by a system in which different bodies exercised legislative, executive, and judicial power, and in which all those bodies were bound by the rule of law. This theory of the separation of powers had an enormous impact on liberal political theory, and on the framers of the Constitution of the United States of America. 孟德斯鸠。

2. John Locke: one of the most influential political philosophers of the modern period. In the Two Treatises of Government, he defended the claim that men are by nature free and equal against claims that God had made all people naturally subject to a monarch. He argued that people have rights, such as the right to life, liberty, and property, that have a foundation independent of the laws of any particular society. 约翰·洛克。
3. checks and balances: a part of the Constitution of the United States. It guarantees that no part of the government becomes too powerful. For example, the legislative branch is in charge of making laws. The executive branch can veto the law, thus making it harder for the legislative branch to pass the law. The judicial branch may also say that the law is unconstitutional and thus make sure it is not a law. The legislative branch can also remove a president or judge that is not doing his/her job properly. The executive branch appoints judges and the legislative branch approves the choice of the executive branch. Again, the branches check and balance each other so that no one branch has too much power. 制衡原则。
4. *Marbury v. Madison*: In November 1800, President John Adams, a Federalist, lost his bid for reelection to Thomas Jefferson, a Republican. The Federalists also lost control of Congress in the election. For the few months before the new President and Congress took office, however, Adams and his Federalist Party still had control. During these months, Adams persuaded Congress to pass a new law, the Judiciary Act of 1801. This act gave Adams the power to appoint several new federal judges. The Federalists hoped to fill the nations courts with people who would be opposed to the policies of the incoming Republican administration. Adams was generally successful in this effort, appointing some 39 new judges. Adams's Secretary of State was to deliver the commissions, or official documents authorizing the appointments. The Secretary of State, though, failed to deliver the commissions to three new justices of the peace before Adams's term of office ended. One of the commissions was to go to William Marbury. When Thomas Jefferson became President in March 1801, he learned of Adams's attempt to pack the court with Federalist judges. He also discovered the failure to deliver the remaining commissions. To prevent these Federalists from becoming justices of the peace, Jefferson instructed his Secretary of State, James Madison, to refuse the appointments. Marbury went to the Supreme Court in an attempt to gain his post. He wanted the Court to issue an order forcing Madison to give Marbury his commission. The Judiciary Act of 1789 had given the Supreme Court the power to issue such an order.

马伯里诉麦迪逊案。美国法院由此案件之后，具有宪法审查权，即司法审查。

5. the supremacy clause: "this Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." U. S. Const. art. Ⅵ, Paragraph 2. Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. It has long been established that "a state statute is void to the extent that it actually conflicts with a valid federal statute" and that a conflict will be found either where compliance with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 至上条款。美国联邦宪法规定此法是该国最高法律，不得与其相违背，否则违宪。
6. case or controversy: a term used in Article Ⅲ, Section 2, of the Constitution to describe the structure by which actual, conflicting claims of individuals must be brought before a federal court for resolution if the court is to exercise its jurisdiction to consider the questions and provide relief. 案件或争议。
7. *obiter dictum*: remark or observation made by a judge that, although included in the body of the court's opinion, does not form a necessary part of the court's decision. In a court opinion, obiter dicta include, but are not limited to, words "introduced by way of illustration, or analogy or argument." Unlike the *rationes decidendi*, *obiter dicta* are not the subject of the judicial decision, even if they happen to be correct statements of law. Under the doctrine of *stare decisis*, statements constituting *obiter dicta* are therefore not binding, although in some jurisdictions, such as England and Wales, they can be strongly persuasive. 附带意见。
8. "test case" litigation: A test case is one in which an individual or a group intentionally violates a law in order to bring a case to court. The purpose is to test the constitutionality of the law. For example, in 1989 Congress passed a law against flag burning. Soon afterward, protesters broke this law because they wanted to bring a test case to the courts. Thus, the case of *United States v. Eichman* (1990) was tried and eventually taken to the U. S. Supreme Court. The Court decided that the federal flag-burning law was unconstitutional and overturned it—exactly the outcome desired by those who initiated the test case. "测试性的个案"诉讼。指故意违反某个法律，目的是测试其合宪性。

Check Your Understanding

Answer the following questions according to the text.

1. What are the two characteristics of the governmental structure that influence American legal system?
2. How are the governmental powers divided? What is the major function of separation of powers?
3. Is the separation of powers adopted in the United States the same pattern designed by Baron de Montesqieu and John Locke? What is the difference?
4. Why does the author think it is more appropriate to say that the system of "separation of powers" a system of "checks and balances"?
5. What is the significance of the 1803 case of *Marbury v. Madison*?
6. What is the syllogism of Chief Justice John Marshall in *Marbury v. Madison*?
7. What are the rationales for the exercise of judicial review?
8. What are the two approaches the courts may employ in interpreting the constitution?

Build Up Your Vocabulary

I. Match the items in the following two columns.

1. religious freedom	a. the right to express one's thoughts and opinions without unreasonable governmental restriction, as guaranteed by the First Amendment
2. freedom of speech	b. an assembly or meeting of members belonging to an organization or having a common objective
3. discrimination	c. the right to believe in any form of religion, to practice or exercise one's religious belief, and to be free from unreasonable governmental interference in one's religion, as guaranteed by the First Amendment
4. due process	d. legal condition
5. convention	e. the relationship and distribution of power between the individual states and the national government

6. constitutional right	f. right which is guaranteed by a constitution
7. provision	g. different treatment, esp. a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored
8. separation of powers	h. division of governmental powers into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach.
9. tribunal	i. the conduct of legal proceedings according to the rules and principles established in the systems of jurisprudence for the protection and enforcement of private rights
10. checks and balances	j. a court's power to review the actions of other branches or levels of government, esp. the court's power to invalidate legislative and executive actions as being unconstitutional
11. federalism	k. (cap.) the legislative body of the federal government, created under U. S. Const. Art. Ⅰ, § 1 and consisting of the Senate and the House of Representatives
12. invalidate	l. a court or other adjudicatory body
13. judicial review	m. (cap.) the upper house of the U. S. Congress, composed of 100 members — two from each state—who are elected to six-year terms
14. Senate	n. to make something illegal
15. Congress	o. the theory of governmental power and functions whereby each branch of government has the ability to counter the actions of any other branch, so that no single branch can control the entire government
	p. protection against arrest or prosecution

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

federalism	separation of powers	framer	legislative
executive	choice-of-law	constitutional interpretation	
equal protection of law		checks and balances	
constitutionality			

1. The _____ devised by the framers of the Constitution was designed to do one primary thing: to prevent the majority from ruling with an iron fist. Based on their experience, the framers shied away from giving any branch of the new government too much power. The separation of powers provides a system of shared power known as Checks and Balances.
2. Established by Article Ⅰ of the Constitution, the _____ branch consists of the House of Representatives and the Senate, which together form the United States Congress. The Constitution grants Congress the sole authority to enact legislation and declare war, the right to confirm or reject many Presidential appointments, and substantial investigative powers.
3. Courts faced with a _____ issue generally have two choices: a court can apply the law of the forum (*lex fori*) — which is usually the result when the question of what law to apply is procedural, or the court can apply the law of the site of the transaction, or occurrence that gave rise to the litigation in the first place (*lex loci*) — this is usually the controlling law selected when the matter is substantive.
4. _____ in the first century of U. S. history is often described as dual, with clear distinctions between the spheres of activity of state and national government. Competition between the two levels was chiefly over economic development and regulation.
5. The power of the _____ branch is vested in the President of the United States, who also acts as head of state and Commander-in-Chief of the armed forces. The president is responsible for implementing and enforcing the laws written by Congress.
6. A federal judge on Thursday expressed skepticism about the _____ of a key part of Arizona's controversial immigration law, but did not say whether she would prevent the measure from taking effect next week.
7. The system of _____ is a part of our Constitution. It guarantees that no part of the government becomes too powerful. For example, the legislative branch is in

charge of making laws. The executive branch can veto the law, thus making it harder for the legislative branch to pass the law. The judicial branch may also say that the law is unconstitutional and thus make sure it is not a law.

8. The Founding Fathers of the United States, also known as _____, were the political leaders who signed the Declaration of Independence in 1776 or otherwise took part in the American Revolution in winning American independence from Great Britain, or who participated in framing and adopting the United States Constitution in 1787 – 1788, or in putting the new government under the Constitution into effect.
9. The _____ is a more explicit safeguard of prohibited unfairness than "due process of law", and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.
10. _____, or constitutional construction, the term more often used by the Founders, is the process by which meanings are assigned to words in a constitution, to enable legal decisions to be made that are justified by it.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

authority	branches	constitution	executive	federal
law	Judicial	judiciary	province	statutes

_____ review is a distinctive power associated with the Supreme Court that is nowhere specifically mentioned in the _____. Chief Justice John Marshall in *Marbury v. Madison* (1803) asserted the major principle on which it rests by observing: "it is emphatically the _____ and duty of the judicial department to say what the _____ is". Through judicial review the Court most dramatically asserts its _____ to determine what the Constitution means.

The power of the Court to review the law extends in two directions. The first involves decisions by other _____ of the federal government. These cases include actions taken by the _____ branch, like the decision by President Richard Nixon to withhold taped records of conversations in the White House, and _____ passed by Congress, such as the Missouri Compromise, which excluded slavery from northern portions of the Louisiana Purchase territory. Judicial review also expresses the authority of the _____ courts over state laws and judicial decisions that involve the

federal Constitution. Whether involving federal or state matters, the practice of judicial review has been marked by dynamic expansion and persistent controversy. Judicial power has been consolidated both in the superiority of the federal _____ over the states and of the Supreme Court over the other branches of the federal government.

Translation

Translate the following sentences into Chinese.

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years.
2. The executive power shall be vested in a President of the United States of America. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient.
3. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.
4. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Text B

Civil Rights and Civil Liberties

Ⅰ. Introduction

Civil Rights and Civil Liberties, political and social concepts referring to guarantees of freedom, justice, and equality that a state may make to its citizens. Although the terms have no precise meaning in law and are sometimes used interchangeably, distinctions may be made. Civil rights is used to imply that the state has a positive role in ensuring all citizens equal protection under law and equal opportunity to exercise the privileges of citizenship and otherwise to participate fully in national life, regardless of race, religion, sex, or other characteristics unrelated to the worth of the individual. Civil liberties is used to refer to guarantees of freedom of speech, press, or religion; to due process of law; and to other limitations on the power of the state to restrain or dictate the actions of individuals. The two concepts of equality and liberty are overlapping and interacting; equality implies the ordering of liberty within society so that the freedom of one person does not infringe on the rights of others, just as liberty implies the right to act in ways permitted to others.

Ⅱ. Civil Rights and Civil Liberties in the United States

The civil rights and liberties of U. S. citizens are largely embodied in the Bill of Rights (the first ten amendments to the Constitution) and in similar provisions in state constitutions. The First Amendment guarantees freedom of speech, press, assembly, and religious exercise as well as separation of church and state. The Fourth Amendment protects the privacy and security of the home and personal effects and prohibits unreasonable searches and seizures. The Fifth through Eighth amendments protect persons accused of crime; they guarantee, for example, the right to trial by jury, the right to confront hostile witnesses and to have legal counsel, and the privilege of not testifying against oneself. The Fifth Amendment also contains the general guarantee that no one shall be deprived of life, lib-

- civil rights 民事权利
- civil liberties 民事自由
- distinction 区别
- freedom of speech, press, or religion 言论自由，出版自由或宗教自由
- equality 平等
- infringe 侵犯
- assembly 集会
- privacy 隐私
- personal effects 个人财物
- unreasonable searches and seizures 不合理的搜查和扣押
- legal counsel 律师
- testify 作证
- deprive 剥夺

· the Oneida Community
奥奈达社区
· the Church of Jesus Christ of Latter-day Saints
耶稣基督后期圣徒教会
· persecute
迫害
· overt
公开的
· pacifist
反战主义者
· strip
剥离
· scandalous
极不公正的
· malicious
恶意的
· harassment
骚扰
· subversive
颠覆分子

erty, or property without due process of law. Originally these amendments were binding only on the federal government. However, decisions by the Supreme Court of the United States have established that the Due Process Clause of the 14th Amendment (ratified in 1868) applies many of the guarantees in the Bill of Rights to actions by state and local governments.

1. Religious Freedom

Although religious freedom has not generally been curtailed in the United States, Roman Catholics, Jews, and members of such unconventional Protestant groups as the Oneida Community and the Church of Jesus Christ of Latter-day Saints have historically been discriminated against and sometimes have even been persecuted, although today overt discrimination has almost vanished.

The federal Civil Rights Act of 1964, as well as many state and local laws, prohibits religious discrimination. The government recognizes the right of religious pacifists to refuse to bear arms, even in time of war. The Supreme Court has ruled that this right, known as conscientious objection, need not be based only on religious training or belief in a supreme being. The Court has also upheld the right of Jehovah's Witnesses to refuse to salute the flag because of religious objections.

2. Freedom of Speech, Press, and Assembly

Civil liberties have been most endangered during periods of national emergency. In 1798 hostility toward revolutionary France led Congress to enact the Alien and Sedition Acts, which stripped aliens of nearly all civil rights and threatened freedom of speech and the press by prohibiting "false, scandalous and malicious writing" against the government, Congress, or the President. The constitutionality of these acts was never tested, but they soon expired, were not reenacted, and are now generally agreed to have been unconstitutional.

During the American Civil War, President Abraham Lincoln gave his principal military officers wide and unreviewed authority to arrest civilians for disloyal speech or acts. After World War I, fear of the newly established Communist government in the Soviet Union led to the harassment of suspected subversives by the U. S. Depart-

ment of Justice.

New problems emerged during the 1960s and 1970s. Demonstrations by opponents of racial discrimination and the Vietnam War, and government attempts to restrict these demonstrations, led the Supreme Court to specify where, when, and how cities and states may limit the use of streets, parks, and other public places for purposes of protest. At the same time, certain symbolic forms of expression were employed by the protesters, leading to court rulings upholding criminal punishment for the burning of draft cards but reversing convictions for the mutilation of the American flag as a form of expression. The Court held in 1989 and 1990 that neither the federal government nor the states could single out the burning of the American flag for criminal penalties.

The attempted publication in 1971 by the *New York Times* and the *Washington Post* of the so-called Pentagon Papers led to a major Supreme Court decision that prior restraints on publication of national security material could not be enjoined unless such material "will surely result in direct, immediate and irreparable damage to our nation or its people."

In 1964 the Supreme Court ruled for the first time that, to give the press breathing room, even false statements about public officials are protected by the First Amendment unless uttered with "actual malice"; that is, with knowledge of their falsehood or with reckless disregard of the facts. Later cases refined this decision but left to the discretion of the states whether to allow defamation actions brought by persons who are neither public officials nor public figures.

The Court has broadened constitutional protection for many other forms of speech, including commercial speech. In the 1990s, it struck down several attempts to ban advertising, including liquor advertising, said to be harmful.

3. Criminal Trials and Due Process of Law

Thousands of Supreme Court rulings have been concerned with the rights of persons accused of crimes. Defendants in state as well as federal criminal cases are assured that they cannot be imprisoned for an offense unless represented by a lawyer, or counsel; if a de-

- draft card 征兵通知
- mutilation 切断
- Pentagon 五角大楼(美国国防部办公地)
- enjoin 禁止

· impoverish
使贫穷
· confession
自首，供认
· self-incrimination
自证其罪

fendant is impoverished, such counsel must be supplied by the government. Defendants must be warned that they may not be questioned until counsel is provided, and defendants may not be convicted on the basis of confessions obtained by coercion. The Court also ruled that prosecutors may not exclude people from juries on grounds of race or sex.

The Fifth Amendment privilege against self-incrimination was the most controversial constitutional protection during the 1950s and 1960s, when it was invoked by, among others, individuals accused of subversive activities and participation in organized crime. The Court's interpretation of the Fourth Amendment has also generated controversy; its provisions protecting the security of the person and of dwellings have been cited in disallowing convictions based on evidence obtained by the police illegally. The Court in the 1970s began to narrow its interpretation, a process that has continued into the 21st century as the public has come to favor crime-control measures over the rights of defendants. This climate of opinion has also led to more frequent use of capital punishment, although the Court has limited the crimes for which death may be the punishment. The Court has also prescribed procedures that must be followed before the death penalty may be given. At the same time, it has limited the right of prisoners to appeal their convictions on constitutional grounds.

Following the attacks on the World Trade Center and the Pentagon by international terrorists on September 11, 2001, Congress passed the USA Patriot Act of 2001. This law expanded the federal government's power to investigate and prosecute suspected terrorists. Among other provisions, the law allowed the government to detain noncitizens suspected of terrorism for months or longer without filing charges and to hold court hearings about them in secrecy. Also, the U. S. military detained as "enemy combatants" hundreds of foreign nationals who were captured during hostilities in Afghanistan and elsewhere. The government held them indefinitely at the U. S. naval base at Guantánamo Bay, Cuba, without bringing criminal charges or allowing them legal counsel. The military also detained

two American citizens as enemy combatants.

In 2004 the Supreme Court considered the constitutionality of indefinite detentions of enemy combatants. In the case *Hamdi v. Rumsfeld*, the Court upheld the authority of the president of the United States to classify U. S. citizens as enemy combatants and to detain them without charges. However, the Court ruled that such detainees are entitled to challenge the government's case against them before an impartial judge. In addition, detainees have the right to an attorney. In *Rasul v. Bush*, the Court ruled that foreign detainees held at Guantánamo Bay have the right to challenge their detention in U. S. courts.

- detention 羁押
- detain 拘留，扣留
- servitude 奴役状态
- abridge 限制

4. Minority Right

(1) Civil Rights for Blacks

The most critical civil rights issue in the United States has concerned the status of its black minority. After the Civil War the former slaves' status as free people entitled to the rights of citizenship was established by the 13th and 14th Amendments, ratified in 1865 and 1868, respectively. The 15th Amendment, ratified in 1870, prohibited race, color, or previous condition of servitude as grounds for denying or abridging the rights of citizens to vote. In addition to these constitutional provisions, Congress enacted several statutes defining civil rights more particularly. The Supreme Court, however, held several of these unconstitutional, including an 1875 act prohibiting racial discrimination by innkeepers, public transportation providers, and places of amusement.

During the period of Reconstruction the Republican-dominated federal government maintained troops in the southern states. Blacks voted and held political offices, including seats in Congress. Two blacks became senators, and 20 were elected to the House of Representatives during this era. The Reconstruction era aroused the bitter opposition of most southern whites. The period came to an end in 1877, when a political compromise between the Republican Party and southern leaders of the Democratic Party led to the withdrawal of federal troops from the South.

In the last two decades of the 19th century, blacks in the South

· disfranchise
剥夺选举权
· covert
不公开的，秘密的
· segregation
种族隔离
· integrate
融合
· dispatch
派遣

were disfranchised and stripped of other rights through discriminatory legislation and unlawful violence. Separate facilities for whites and blacks became a basic rule in southern society. In *Plessy v. Ferguson*, an 1896 case involving the segregation of railroad passengers, the Supreme Court held that "separate but equal" public facilities did not violate the Constitution and refused to acknowledge that the separate facilities in use were not in fact equal.

During the first half of the 20th century, racial exclusion, either overt or covert, was practiced in most areas of American life. During World War Ⅱ (1939—1945) black leaders such as A. Philip Randolph protested segregation in military service, and some reforms were introduced. In 1948 President Harry S. Truman signed an executive order integrating the armed forces. The 1954 Supreme Court decision in *Brown v. Board of Education* represented a turning point; reversing the 1896 "separate but equal" ruling, the Court held that compulsory segregation in public schools denied black children equal protection under the law. It later directed, ineffectually, that desegregated educational facilities be furnished "with all deliberate speed". Subsequent decisions outlawed racial exclusion or discrimination in all government facilities. The Court also upheld federal laws barring discrimination in interstate commerce, such as public transportation. A state law against racial intermarriage was also ruled invalid.

School desegregation was resisted in the South. Federal determination to enforce the court decision was demonstrated in Little Rock, Arkansas, in 1957, when President Dwight Eisenhower dispatched troops to secure admission of black students into a "white" high school. Nevertheless, in the Deep South progress toward integration was negligible in the years following the Supreme Court decision. In 1966, for example, the overwhelming majority of southern schools remained segregated. By 1974, however, some 44 percent of black students in the South attended integrated schools, and by the early 1980s the number was approximately 80 percent.

Civil rights for blacks became a major national political issue in the 1950s. The first federal civil rights law since the Reconstruc-

tion period was enacted in 1957. It called for the establishment of a U. S. Commission on Civil Rights and authorized the U. S. attorney general to enforce voting rights. In 1960 this legislation was strengthened, and in 1964 a more sweeping civil rights bill outlawed racial discrimination in public accommodations and by employers, unions, and voting registrars. Deciding that normal judicial procedures were too slow in assuring minority registration and voting, Congress passed a voting rights bill in 1965. The law suspended (and amendments later banned) use of literacy or other voter-qualification tests that had sometimes served to keep blacks off voting lists, authorized appointment of federal voting examiners in areas not meeting certain voter-participation requirements, and provided for federal court suits to bar discriminatory poll taxes, which were ended by a Supreme Court decision and the Twenty-Fourth Amendment (ratified in 1964). In the aftermath of the assassination of the civil rights leader Martin Luther King, Jr., Congress in 1968 prohibited racial discrimination in federally financed housing, but later efforts to strengthen the law failed.

(2) Affirmative Action

An important constitutional issue that has caused public controversy is whether, and to what degree, public and private institutions may use affirmative action to help members of minority groups obtain better employment or schooling. In the *Regents of the University of California v. Bakke* case in 1978, the Supreme Court held that it was unconstitutional for the University of California Medical School at Davis to set an absolute quota for the admission of minority candidates, but said that race can be taken into account for the setting of numerical goals that were not disguised quotas. The Court later ruled that racial preferences by a private corporation designed to remedy prior discrimination did not violate the Civil Rights Act.

A changing political climate in the 1980s and 1990s, however, led to the repeal of many affirmative action programs. In 1995 the Court said that all public affirmative action plans must be strictly scrutinized. The Court hinted strongly that only those plans designed to remedy past acts of discrimination would survive. Furthermore,

- attorney general 司法部长
- sweeping 广泛的
- registrar 注册员，登记官员
- affirmative action 扶持行动
- quota 配额
- scrutinize 细察

· hail
欢呼

many lower courts began to openly reject the finding in the *Bakke* case that colleges and universities were permitted to seek racial diversity among their student bodies by giving special consideration to minority applicants.

Nevertheless, in the first major decision on affirmative action since the *Bakke* case in 1978, the Supreme Court in 2003 reaffirmed racial diversity as a goal of college and university admissions programs. The case involved the University of Michigan Law School's admission program, which considered race, among other qualities, in evaluating each applicant. In a 5 to 4 decision the Supreme Court upheld the law school's affirmative action program, finding that there was a "compelling public interest" in achieving diversity as long as quotas were not used. The decision in *Grutter v. Bollinger* came despite briefs filed against affirmative action by the administration of President George W. Bush. The decision did not rescind state laws that forbid affirmative action programs, such as those passed by popular initiative in California and Washington. Civil rights organizations hailed the ruling as a historic victory. Opponents of the decision took note of the Court's opinion that affirmative action should only be necessary for another 25 years.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999.)

Notes

1. freedom of speech: liberty to speak and otherwise express oneself and one's opinions. Like freedom of the press, which pertains to the publication of speech, freedom of speech itself has been absolute in no time or place. The First Amendment to the U. S. Constitution bars the federal government from "abridging the freedom of speech"; since the 1920s the amendment's protections have been extended against state, as well as against federal, action. 言论自由。
2. unreasonable searches and seizures: The Fourth Amendment to the Constitution of the United States of America prohibits unreasonable searches and seizures by federal law enforcement agents. The Fourteenth Amendment to the Constitution of the United States of America imposes the Fourth Amendment upon the states and to

law enforcement agents within the states. The 14th Amendment rights to privacy do not extend into every aspect of a person's private affairs. 不合理的搜查和扣押。

3. the Oneida Community: the Nineteenth-Century Utopian Society of John Humphrey Noyes. To state it briefly, the old Oneida Community was a religious and social society founded in Oneida, New York, in 1848 by John Humphrey Noyes and his followers. In the beginning, most of them were Vermonters, almost all were New Englanders. The Community was founded on Noyes' theology of Perfectionism, a form of Christianity with two basic values: self-perfection and communalism. 奥奈达社区。
4. the Church of Jesus Christ of Latter-day Saints: the official name of the religion commonly called the Mormon Church. Mormons believe first and foremost that Jesus Christ is the Savior of the world and the Son of God. 耶稣基督后期圣徒教会。
5. pacifist: a person who sticks to a belief that violence, even in self-defence, is unjustifiable under any conditions and that negotiation is preferable to war as a means of solving disputes. 和平主义者,反战主义者。
6. affirmative action: positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded. When those steps involve preferential selection—selection on the basis of race, gender, or ethnicity, affirmative action generates intense controversy. 扶持行动,指美国政府推动的一系列面向包括妇女、黑人和其他少数民族在内的政策和措施。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

1. Though used interchangeably, civil liberties are different from civil rights.
2. Civil liberty is used to refer to positive actions by the government to protect or extend the rights of people—to provide for individuals or groups opportunities that were previously denied to them.
3. Ethnic groups of people do not always enjoy their full rights of citizenship under the U. S. Constitution till the civil rights movement.
4. The significance of the first Civil Rights Act over President Andrew Johnson's veto

is granting African Americans full citizenship.

5. Acts adopted in 1960s relating to the civil rights of the minority had a profound impact on American politics, especially in the South.
6. Civil rights concern basic rights and freedoms that are guaranteed—either explicitly identified in the Bill of Rights and the Constitution, or interpreted through the years by courts and lawmakers.
7. Affirmative action programs are in fact discriminate to the white when preferential treatment is provided to the minority.
8. The first ten Amendments to the Constitution are called the Bill of Rights, which prescribes rights of defendants in both civil and criminal proceedings.
9. In America, private property cannot be taken for any reason by the State.
10. The powers not specifically granted to the federal government by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states respectively, or to the people.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
constitutional amendment	
	违宪性
censorship	
	司法审查
right to a public trial	
	市民身份
administration	
	言论自由
equality	
	法律和秩序
freedom of assembly	
	宗教自由
personal effects	
	聘请律师的权利
unreasonable searches and seizures	

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

freedom of press	legislature
women's movement	ratification
right to/of privacy	rule of law
right to vote	term of office
enumerated powers	the right to trial by jury
the rights of citizenship	affirmative action
privilege against self-incriminating	police power
the right to confront hostile witnesses	

Translation

Translate the following sentences into English.

1. 本宪法以法律的形式确认了中国各族人民奋斗的成果，规定了国家的根本制度和根本任务，是国家的根本法，具有最高的法律效力。全国各族人民、一切国家机关和武装力量、各政党和各社会团体、各企业事业组织，都必须以宪法为根本的活动准则，并且负有维护宪法尊严、保证宪法实施的职责。
2. 中华人民共和国年满 18 周岁的公民，不分民族、种族、性别、职业、家庭出身、宗教信仰、教育程度、财产状况、居住期限，都有选举权和被选举权；但是依照法律被剥夺政治权利的人除外。
3. 中华人民共和国公民有言论、出版、集会、结社、游行、示威的自由，还有宗教信仰自由。
4. 宪法的修改，由全国人民代表大会常务委员会或者 1/5 以上的全国人民代表大会代表提议，并由全国人民代表大会以全体代表的 2/3 以上的多数通过。法律和其他议案由全国人民代表大会以全体代表的过半数通过。

Case Study

Brown et al. v. Board of Education of Topeka et al.

U. S. Supreme Court

347 U. S. 483

MR. Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a

common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal", and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States". Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation,

had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education*, 175 U. S. 528, and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. *Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white

schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, *supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of

this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system." Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question — the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

1. By declaring that the discriminatory nature of racial segregation . . . "violates the Fourteeth Amendment to the U. S. Constitution, which guarantees all citizens equal protection of the laws," *Brown v. Board of Education* laid the foundation for shaping future national and international policies regarding human rights.
2. *Brown v. Board of Education* was not the first challenge to school segregation. As early as 1849, African Americans filed suit against an educational system that mandated racial segregation, in the case of *Roberts v. City of Boston*.
3. The 1954 United States Supreme Court decision in *Oliver L. Brown et al. v. the Board of Education of Topeka (KS) et al.* is among the most significant judicial turning points in the development of our country. Originally led by Charles H. Houston, and later Thurgood Marshall and a formidable legal team, it dismantled the legal basis for racial segregation in schools and other public facilities.
4. The *Brown* decision initiated educational and social reform throughout the United States and was a catalyst in launching the modern Civil Rights Movement. Bringing about change in the years since the *Brown* case continues to be difficult. But the *Brown v. Board of Education* victory brought this country one step closer to living up to its democratic ideas.

Exercises

1. Does segregation always connote inferiority for one of the separated groups and superiority for the other? Or must one know the history of the two groups to know the answer to this question? (factors that may be mentioned: power one group once held over the other, current social differences between the two groups, the will one group imposed on the other.)
2. Please find the cases *Plessy v. Ferguson* and *Sweatt v. Painter*. Compare them with *Brown* case, and look for the reasoning of each court for separate-but-equal rule and the rule against it in the *Brown* case.
3. What is the principle of *stare decisis*? Is it common for the court to overrule a precedent? What is the common practice when the precedent is out of date?
4. Please write a casebrief of the *Brown* case.

Unit Three Criminal Law

Words and expressions:

categorize	misdemeanor	magistrate	summary proceeding jury
ordinance	felony	substantive	procedural

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

( ) 1. Crimes are categorized into classes that are defined by their severity.

( ) 2. The trial of a petty offense may be conducted in a summary proceeding.

( ) 3. There can be no jury trial if there is no violation of constitutional rights.

( ) 4. The typical punishment for violation of a petty offense is the imposition of short jail sentence.

( ) 5. A felony crime is subject to the punishment that is the most severe of those available to petty offenses and misdemeanors.

( ) 6. The class of a crime is important because the governing substantive law and procedural law are the same between the classes.

( ) 7. Petty offenses are provided more protections than felonies.

Ⅱ. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

Most legal systems distinguish criminal from civil wrongs: wrongs that ground a ____ prosecution, from those that ground a civil case for ____ by the injured party. We can clarify the concept of crime by focusing on this ____. The same conduct often constitutes both a criminal and a civil ____, as is shown most dramatically when, af-

ter a failed ____ or a decision not to prosecute, the ____ or her family bring a civil case for damages ____ the alleged wrongdoer; but we can still usefully ask what the ____ is between defining and treating conduct ____ a criminal wrong and defining and treating it as a ____ wrong.

Text A

Introduction to American Criminal Law

- substantive law 实体法
- criminal procedure 刑事诉讼程序
- statutory crimes 法定罪行
- *mala in se* crimes 自然犯
- *mala prohibita* offenses 法定罪行
- penitentiary 监狱，感化院
- coexist 共存
- constitute 构成

Criminal Law, branch of law that defines crimes, establishes punishments, and regulates the investigation and prosecution of people accused of committing crimes. Criminal law includes both substantive law, which is addressed in this article, and criminal procedure, which regulates the implementation and enforcement of substantive criminal law.

Crimes are classified in many different ways: common law crimes versus statutory crimes, and crimes that are *mala in se* (evil in themselves) versus those that are *mala prohibita* (criminal only because the law says so). An important classification is the division of crimes into felonies or misdemeanors. This distinction is based on the severity of the crime and is rooted in common law.

In many jurisdictions in the United States, felonies are crimes punishable by death or imprisonment in a state prison or penitentiary and misdemeanors are those punishable by fine or imprisonment in a local jail. In other jurisdictions, crimes punishable by imprisonment for one year or more are felonies, and those punishable by fine or imprisonment for less than one year are misdemeanors. Since each jurisdiction determines the penalties for offenses it defines, a misdemeanor in one jurisdiction may constitute a felony in another.

Elements of Crime

Certain elements, or factors, must coexist in order for behavior to constitute a crime. To be guilty of a crime, a person must commit an act. Criminal liability is not imposed for thoughts without ac-

tion. The person acting must be doing so intentionally—that is, his or her conduct must not be accidental or involuntary.

(1) The Wrongful Act

To be guilty of a crime, a person must either have performed a voluntary physical act or failed to act when he or she had a legal duty to do so. In other words, there is no criminal liability for bad thoughts alone. Thus, a child may earnestly wish a parent dead and may even think about killing the parent. But even if the parent should coincidentally die, the child is not a murderer, provided that he or she took no action to bring about the parent's death.

Most crimes are committed by a specific action—for example, the pulling of a trigger or the thrusting of a knife in murder, or the lighting of a fire in arson. Some crimes, however, are defined in terms of omission or failure to act. For example, it is a crime not to file an income tax return. A person who has a special relationship with another or has voluntarily assumed a duty to help another may be guilty of a crime if he or she fails to act. For example, a parent is obligated to rescue his or her child from danger and a lifeguard on duty must attempt to rescue a drowning swimmer if it is physically possible for the parent or lifeguard to do so. Although the duty to rescue a person who is in danger is limited, parents owe a duty to their young children and lifeguards to swimmers in their charge.

(2) Mental Fault

To be guilty of a crime, the person must also have had the intent to act in a harmful way. This element is sometimes called the requirement of mental fault or *mens rea*, a Latin term that means "guilty mind". Thus, many crimes are defined in terms of intentionally, knowingly, maliciously, willfully, recklessly, or negligently acting or bringing about a result, or of conducting oneself with intent to accomplish a specified consequence. The *mens rea* requirement distinguishes between inadvertent or accidental acts and acts for which a person is criminally liable.

Generally, a person must have intended the actual harm that in fact resulted—that is, there is no criminal liability unless the criminal act and the required intent concur. Thus it is not murder if

- accidental 偶然的
- thrust 用力推
- arson 纵火
- omission 不作为
- assume 承担
- rescue 解救
- mental fault 犯罪心理
- conducting oneself (行为)表现
- inadvertent 疏忽的
- concur 合意

· manslaughter
过失杀人
· assault
侵犯人身罪
· battery
殴打
· mayhem
暴力伤害罪
· loosely
不严格地
· inflict
使遭受
· aforethought
预谋
· aggravate
加重

a man desires to kill his brother and, while driving to the store to purchase a gun for this purpose, accidentally runs over and kills his brother who happens to be crossing the street. On the other hand, if one intends harm to a particular person or object and, in attempting to carry out that intent, causes a similar harm to another person or object, one's intent will be transferred from the target person or object to the person or object actually harmed. For example, if a woman shoots at a man with the intent to kill him but, due to poor aim, misses the man and hits and kills a child nearby, the shooter's intent to kill the man is transferred to the child and the woman is liable for the child's murder.

Criminal crimes

1. Crimes Against the Person

Crimes that physically or psychologically injure individuals are described as crimes against the person. These include murder, man-slaughter, assault, battery, mayhem rape, and kidnapping.

(1) Murder

The crime of murder is loosely defined as the unlawful killing of a human being by a person who had an intent to kill. It requires, first of all, that a living person be killed. Some jurisdictions still follow the common law rule that for a murder to exist, death must occur within a year and a day after the accused inflicted the fatal wound.

(2) Manslaughter

Manslaughter is sometimes loosely defined as the unlawful killing of another without malice aforethought. It is generally divided into two branches: voluntary manslaughter and involuntary manslaughter. In some jurisdictions, manslaughter, like murder, is divided into degrees so that what one state calls voluntary manslaughter another calls first-degree manslaughter.

(3) Assault and Battery

Assault and battery are actually two separate common law crimes, although the words are often used interchangeably and run together as a single expression. They differ from murder and manslaughter primarily in that the victim is not killed. Statutes common-

ly prescribe greater punishment for so-called aggravated assaults and batteries than for simple assaults and batteries. Thus, assault and battery with a deadly weapon or with intent to commit some other crime, such as rape, are commonly punishable as felonies, while simple assault and battery are considered misdemeanors.

(4) Robbery

Robbery is a form of aggravated larceny. It can be viewed as a combination of assault or battery, plus larceny. All the elements of larceny are required—the trespassing and taking and moving of money or property from another without consent and with the intent to permanently deprive that person of the money or property—plus two additional requirements. First, there must be violence or threat of immediate violence. Second, the taking must be from the victim or in the victim's presence.

(5) Rape

The common law felony of rape referred to forcible rape. It was defined as unlawful sexual intercourse with a woman by a man who was not her husband, without the woman's consent. Rape can occur when the woman's resistance is overcome either by force or by the threat of death or serious bodily harm. Sexual intercourse with a woman who is unconscious or so intoxicated, drugged, or mentally incompetent as to be incapable of granting effective consent may also constitute rape. Some modern statutes define rape to include forced sex by a husband with his wife.

(6) Kidnapping

A felony in all jurisdictions, kidnapping generally involves the seizure, confinement, and, perhaps, the carrying away of another by force (or threat of force) against his or her will. It does not apply to those acting under the authority of the law. An aggravated form of kidnapping occurs if the purpose of the act is to A. obtain ransom or reward; B. use the victim as a shield or hostage; C. facilitate the commission of another offense, such as robbery or rape; or D. terrorize or inflict bodily injury on the victim. In the United States, a federal statute known as the Lindbergh Act makes it a federal felony to transport a kidnapped person across a state line.

· larceny
盗窃
· mentally incompetent
心智不健全
· seizure
控制
· ransom
赎金
· shield
保护之人
· the Lindbergh Act
林白法案

· embezzlement
盗用
· false pretense
欺诈
· consolidate
合并
· intangible
无形的
· promissory note
本票

2. Crimes Against Property

Another major category of crimes concerns actions that affect another's property—either real or personal. Real property consists of land and structures attached to it, as well as the products of land before they are removed, such as growing crops, trees, and unmined minerals. Personal property refers to personal belongings such as money, jewelry, and clothing.

Most jurisdictions have adopted statutes that modify the common law definitions of certain property crimes. For example, in some states the common law crimes of larceny, embezzlement, and false pretenses have been consolidated into a single crime known as theft.

(1) Larceny

The common law definition of the crime of larceny includes the following elements: A. The thief must take possession of the property (that is, secure control over the property) from another. B. The thief must move or carry away the property, although a slight movement is enough, such as the removal of a wallet from another's pocket. C. There must be a trespass in the taking—that is, the thief must take possession of the property without consent from the rightful possessor. D. The property must be tangible personal property, such as money, jewelry, or clothing. Under common law larceny does not apply to real property or intangible personal property, such as checks, promissory notes, or other documents that are regarded as evidence of property rather than as property itself. E. The property must be taken from the possession of another who had a right of possession superior to any right of the accused. It is not necessary, however, that a person steal directly from the owner. F. There must be an intent to steal—more accurately expressed as an intent to permanently deprive the person from whom the property is taken of possession of or interest in the property. It is not larceny to take another person's property that one honestly believes one owns. It is not larceny to borrow property, intending to return it promptly. A notable exception is the temporary, unauthorized taking of a car, which commonly constitutes the crime of joyriding.

By statute, larceny is often divided into two degrees: grand lar-

ceny and petit larceny. The line between the two depends upon the value of the property stolen. Grand larceny is commonly a felony, while petit larceny is a misdemeanor.

(2) Embezzlement

In general, embezzlement occurs when a person who has lawful possession of another's money or property fraudulently converts that money or property. In other words, the wrongdoer, often an employee, trustee, fiduciary, or agent, acquires possession of the property lawfully and then converts the property to his or her own use.

For a conversion to constitute embezzlement, the wrongdoer must intend to defraud the rightful owner of the property. Innocent conversions do not qualify, as when a person honestly believes he or she has a right to convert another's property.

3. Crimes Against Government

A government has the authority to protect itself against injury and destruction and to protect its administrative functions from corruption. To promote these objectives, it may define certain activities, such as treason, perjury, and bribery, as criminal.

(1) Treason

The crime of treason consists of attempting by overt acts to overthrow or levy war against the government, to adhere (devote) oneself to the enemies of the government, or to give aid and comfort to the enemy. To be guilty of treason, the person must intend to betray the government to which he or she owes allegiance.

(2) Perjury

A common law misdemeanor, perjury is now generally classified as a statutory felony. Perjury is defined as willfully giving a false statement while under oath concerning a material matter in a judicial proceeding. A statement is material if it could have influenced the outcome of the proceeding in which it was given. For example, a witness to an automobile accident who lies under oath about her age is not guilty of perjury because the false statement does not concern a relevant issue. However, an alleged victim of statutory rape commits perjury if she falsely testifies that at the time of the intercourse she was over the statutory age of consent. The age of the victim is a core

· convert
非法占有
· defraud
骗取
· corruption
腐败
· treason
叛国
· bribery
贿赂
· levy
发动
· allegiance
忠诚

· falsehood
谎言
· congressional hearing
国会听证
· notary public
公证人
· subornation
使人作伪证

issue in a statutory rape prosecution.

People swear falsely when they tell what they know to be a falsehood or even what they believe to be a falsehood (even if it is in fact true). It is not swearing falsely, however, to tell what is in fact false when the witness honestly believes it to be true. Modern statutes have generally expanded perjury to include proceedings other than judicial proceedings, such as congressional hearings and proceedings before a notary public.

The crime of intentionally causing or encouraging another person to commit perjury is known as subornation of perjury. If the other person erroneously believes his or her testimony to be true and thus does not commit perjury, the person who encouraged the perjury is not guilty of subornation of perjury.

(3) Bribery

A common law misdemeanor, bribery is now generally classified as a statutory felony. Bribery is defined as giving or promising to give a public official something of value with a corrupt intent to influence the official in the discharge of his or her official duty. The public official who solicits or accepts anything of value or a promise of something valuable, accompanied by a corrupt intent to influence the performance of his or her public duty, also commits bribery.

(From Criminal Law Encarta @ online Encyclopedia 2005.)

Notes

1. *mala in se* crimes: crimes that are "inheritly evil". These crimes include murder, rape, robbery, burglary, larceny, and arson. 自然犯,自然罪行,本质不合法。
2. *mala prohibita* offenses: offenses that are not "inheritly evil", but that are prohibited by statue. These offenses include tax evasion, carrying a concealed weapon, leaving the scene of an accident, being drunk, and disorderly in public. 法定罪行,法律禁止的行为。
3. the Lindbergh Act: a federal law that makes it a crime to kidnap—for ransom, reward, or otherwise—and transport a victim from one state to another or to a foreign country, except in the case of a minor abducted by his or her parent. The Lindbergh law provides that if the victim is not released within twenty-four hours after being kidnapped, there is a rebuttable presumption that he or she has been trans-

ported in interstate or foreign commerce. The punishment for violation of the Lindbergh Act is imprisonment for a term of years or for life. 林白法案(又名:林德伯格法)。是处置州境以外拐骗罪犯的法律。1932 年 Charles A. Lindbergh 的儿子被拐骗杀害事件发生后制定此法。

Check Your Understanding

Answer the following questions according to the text.

1. What is criminal law?
2. What punishments are imposed on felonies and what punishments are imposed on misdemeanors?
3. What is the basis for making the distinction between felonies and misdemeanors?
4. What elements are essential for a behavior to constitute a crime?
5. How do you understand the wrongful act?
6. How important is *mens rea* requirement?
7. What elements are required for a behavior to constitute the crime of robbery?
8. How do arson and burglary differ from other crimes against property?
9. When does a statement constitute perjury?
10. What is the purpose of defining certain activities as crimes against government?

Build Up Your Vocabulary

Ⅰ. Match the items in the following two columns.

A	B
1. assault	a. entry into a building for the purposes of committing an offence
2. robbery	b. intention to commit some wrongful act
3. battery	c. unlawful killing of a human being without malice aforethought
4. trespass	d. taking or attempting to take something of value by force or threat of force
5. burglary	e. an intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact
6. malice	f. unlawful entry

7. involuntary manslaughter
8. guilty mind
9. fraud
10. confinement

g. the intent to harm
h. intentional deception made for personal gain or to damage another individual
i. criminal offense involving unlawful physical contact
j. legal proceedings against the wrongdoer
k. imprisonment

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

conversion	felony	offense	convict	*mens rea*
prosecution	omission	misdemeanor	theft	execution

1. Criminal law involves _____ by the government of a person for an act that has been classified as a crime.
2. A "crime" is any act or _____ of an act in violation of a public law forbidding or commanding it.
3. Crimes include both felonies (more serious offenses, like murder or rape) and _____ (less serious offenses, like petty theft or jaywalking).
4. Most crimes (with the exception of strict-liability crimes) consist of two elements: an act, or "*actus reus*," and a mental state, or "_____."
5. The most common _____ charge is Petty Theft and this can only be charged as a misdemeanor.
6. A theft of item(s) of a value in excess of $400 can be charged as a _____ and is known as Grand Theft.
7. Most of the time hit and run accidents are not considered serious _____; however, if there is considerable property or bodily damage they can be charged as felonies.
8. Criminal punishment, depending on the offense and jurisdiction, may include _____, loss of liberty, government supervision, or fines.
9. He was wrongfully _____ of first-degree murder—though not formally sentenced for the conviction.
10. Many criminal codes provide penalties for _____, embezzlement, theft, all of which involve deprivations of the value of the property.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

arrest	sentence	prosecute	felony	commission
convict	imprisonment	robbery	misdemeanor	criminal

The offense of misprision of _____ is a part of the common law of England and of this country as well. It is also recognized by statute in the federal law and in certain jurisdictions wherein it is punishable as a _____.

Isaac Carson was _____ for misprision of a felony in the aftermath of a murder and armed _____. The police alleged that Carson had not been truthful with them about whether he had witnessed the _____ of the two crimes. They further alleged that Carson had committed misprision by withholding information from the police concerning his knowledge about the commission of the crimes. Carson, subsequent to his _____, admitted that he had been present at the scene and provided information that exonerated him from any possible _____ liability as an aider and/or abettor of the perpetrators. Carson was tried and _____ of misprision and _____ to three years _____. Carson appealed to the South Carolina Supreme Court. On appeal, Carson claimed that the trial court should have granted his motion for a directed verdict of acquittal. Carson argued that misprision of felony prosecutions were prohibited by the federal and state constitutional protections against self-incrimination.

Translation

Translate the following sentences into Chinese.

1. Under Model Penal Code, intent has the meaning as follows: a person acts with intent with respect to a material element when (1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
2. A felony, in many common law legal systems, is the term for a "very serious" crime; misdemeanors are considered to be less serious. Crimes which are commonly considered to be felonies include: aggravated assault, arson, burglary, murder, and rape. Those who are convicted of a felony are known as felons. Originally, felonies were crimes for which the punishment was either death or forfeiture of property. Nowadays, felons can receive punishments which range in severity;

from probation, to imprisonment, to execution.

3. The same conduct often constitutes both a criminal and a civil wrong, as is shown most dramatically when, after a failed prosecution or a decision not to prosecute, the victim or her family bring a civil case for damages against the alleged wrongdoer: but we can still usefully ask what the difference is between defining and treating conduct as a criminal wrong and defining and treating it as a civil wrong.
4. The general purposes of the provisions governing the definitin of offenses are:
   (1) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
   (2) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
   (3) to safeguard conduct that is without fault from condemnation as criminal;
   (4) to give fair warning of the nature of the conduct declared to constitute an offense;
   (5) to differentiate on reasonable grounds between serious and minor offenses.

Text B

Mens Rea

- *mens rea* 犯罪意图
- guilty mind 犯罪心理
- blameworthy 应受指责的
- underlying 基础的

Effect of Mental State

What makes a crime a crime? In most cases, an act is a crime because the person committing it intended to do something that most people would consider wrong. This mental state is generally referred to as "*mens rea*," Latin for "guilty mind".

The "*mens rea*" concept expresses a belief that people should be punished (fined or imprisoned) only when they have acted in a way that makes them morally blameworthy. "*Mens rea*" is never identified as a distinct element of a crime. Instead, moral blame is almost always the underlying justification for the enactment of a criminal law. In the legal system's eyes, people who intentionally engage in the behavior prohibited by a law have "*mens rea*;" they are morally blameworthy. For example, a murder law may prohibit "the intentional and unlawful killing of one human being by another human being." Under this law, one who intentionally and unlawfully kills an-

other person has "*mens rea*".

Crimes that Don't Require "*Mens Rea*"

Laws that don't require "*mens rea*"—that is, laws that punish people who may be morally innocent—are called "strict liability laws". The usual justification for a strict liability law is that the social benefits of stringent enforcement outweigh the harm of punishing a person who may be morally blameless. Examples of strict liability laws include:

"Statutory rape" laws which in some states make it illegal to have sexual intercourse with a minor, even if the defendant honestly and reasonably believed that the sexual partner was old enough to consent legally to sexual intercourse.

"Sale of alcohol to minors" laws that in many states punish store clerks who sell alcohol to minors even if the clerks reasonably believe that the minors are old enough to buy liquor.

Strict liability laws like these punish defendants who make honest mistakes and therefore may be morally innocent. Because the legal consequences of innocent mistakes can be so great in certain circumstances, people who find themselves in situations governed by strict liability rules need to take special precautions before acting.

"Intentional" and "Unintentional"

People who unintentionally engage in illegal conduct may be morally innocent; this is known as making a "mistake of fact". Someone who breaks the law because he or she honestly misperceives reality lacks "*mens rea*" and should not be charged with or convicted of a crime. For example, if Paul Smith hits Jonas Sack because he reasonably but mistakenly thought Sack was about to hit him, Smith would have labored under a mistake of fact—and would not have *mens rea*. It is this same principle that underlies the traditional insanity defense—the defendant so misperceived reality that her actions were caused by a mental disease or defect rather than *mens rea*.

While a "mistake of fact" can negate *mens rea*, a "mistake of law" usually cannot. People who intentionally commit illegal acts are almost always guilty, even if they honestly don't realize that what

- stringent 严格的
- outweigh 比……更重要
- consent 同意
- mistake of fact 事实错误
- convict of 宣判有罪
- negate 否定，使无效
- mistake of law 法律错误

- civil damages 民事损害赔偿
- recklessness 疏忽
- criminal negligence 犯罪过失
- knowingly 故意地

they are doing is illegal. For example, if Jo sells cocaine in the honest but mistaken belief that it is sugar, Jo has made a mistake of fact and may lack *mens rea*. However, if Jo sells cocaine in the honest but mistaken belief that it is legal to do so, Jo is considered morally blameworthy. Perhaps the best explanation for the difference is that if a "mistake of law" allowed people to escape punishment, the legal system would be encouraging people to remain ignorant of legal rules.

"Carelessness"

"Ordinary" carelessness is not a crime. For example, negligent drivers are not usually criminally prosecuted, though they may have to pay civil damages to those harmed by their negligence. However, more-than-ordinary carelessness can demonstrate "*mens rea*". Common terms for morally blameworthy carelessness are "recklessness" and "criminal negligence". Unfortunately, no clear line separates non-criminal negligence from recklessness and criminal negligence. In general, carelessness can amount to a crime when a person "recklessly disregards a substantial and unjustifiable risk". Indefinite language like that cannot always rationally draw a line between ordinary and criminal carelessness. Police officers and prosecutors have to make the initial decisions about whether to charge a careless person with a crime. At that point, it's up to judges and juries to evaluate a person's conduct according to community standards and decide whether the carelessness is serious enough to demonstrate "*mens rea*".

"Knowing" or "Knowingly"

Many laws punish only violators who "knowingly" engage in illegal conduct. The "knowingly" requirement indicates that a crime involves "*mens rea*", and prevents people who make innocent mistakes from being convicted of crimes. Since most crimes require *mens rea* anyway, the word knowingly is often redundant. What a person has to "know" to be guilty of a crime depends on the behavior that a law makes illegal. For example:

A drug law makes it illegal for a person to "knowingly" import an illegal drug (often referred to as a "controlled substance") into

the United States. To convict a defendant of this crime, the prosecution would have to prove that a defendant knew that what he brought into the United States was an illegal drug.

Another drug law makes it illegal to furnish drug paraphernalia with "knowledge" that it will be used to cultivate or ingest an illegal drug. To convict a defendant of this crime, the prosecution would have to prove that a defendant who sold or supplied drug paraphernalia knew about the improper purposes to which the paraphernalia would be put.

A perjury law makes it illegal for a person to testify to any material matter which she or he "knows" to be false. To prove perjury, the prosecution would have to prove that the defendant knew at the time she testified that her testimony was false.

A school safety law makes it illegal for a person to "knowingly possess a firearm in a school zone". To prove a violation of this law, the prosecution would have to prove both that the defendant knew that he was carrying a gun and that he was in a school zone.

"Specific Intent" Crimes

"Specific intent" laws require the government to do more than show that a defendant acted "knowingly". Specific intent laws require the government to prove that a defendant had a particular purpose in mind when engaging in illegal conduct. Each specific intent law identifies the particular purpose that the government has to prove. For example, many theft laws require the government to prove that a defendant took property "with the intent to permanently deprive a person of the property". To convict a defendant of theft, the government has to prove that a thief 's plan was to forever part a victim from his or her property. For example, a culprit who drives off in another's car without permission and returns it a few hours later might be convicted only of "joyriding". However, the same culprit who drives off in another's car without permission and takes it across the country probably demonstrates a specific intent to permanently deprive the owner of the car and would be guilty of the more serious crime of car theft.

· specific intent
特定意图

"Malicious" Behavior

In everyday usage people often use the term "malicious" to mean "spiteful" or "wicked". In most criminal statutes, however, "maliciously" is simply synonymous with "intentionally" and "knowingly". As a result, the term "maliciously" usually adds nothing to the general "*mens rea*" requirement. As used in murder statutes, however, the term "malice" is often interpreted as meaning the defendant had a "man-endangering" state of mind when the act was committed, which is enough to justify at least a second degree murder charge.

"Willful" Behavior

As with "maliciously", the term "willfully" usually adds nothing to the general "*mens rea*" requirement. In most statutes, to commit an illegal act "willfully" is simply to commit it intentionally. For example, consider these statutes:

It is unlawful to willfully disturb another person by loud and "unreasonable noise".

Anyone who willfully encourages another to commit suicide is "guilty of a felony".

Each of these statutes merely requires the government to show that a person intentionally committed the act made illegal by the statute.

Less commonly, the term "willfully" in a statute has been interpreted to require the government to prove not only that a person acted intentionally, but also that the person intended to break the law. (This is an unusual instance in which "ignorance of the law" actually is an excuse!) For example, in one case a federal law made it illegal to willfully bring in to the country more than $10,000 in cash without declaring it to customs officials. The U. S. Supreme Court decided that to convict a person of violating this law, the government had to prove that the person knew the law's requirements. (*Ratzlaf* v. U. S., 510 U. S. 135 (1994).) This more exacting interpretation of "willfully" preserves the "*mens rea*" foundation of criminal law where, as in the "declaring cash" law, many people might be morally innocent yet break the law.

"Felonious" Behavior

The term "felonious" is sometimes included in a law when prohibited conduct can in some circumstances be interpreted as a misdemeanor or as a felony. For example, "felonious assault" in a statute would refer to those types of assault—such as "assault with a deadly weapon" or "assault with intent to commit great bodily injury"—that are typically treated as felonies.

The Role of "Motive" in Criminal Law

"Motive" generally refers to the reason behind an illegal act. For example, a person's need to raise money quickly to pay off a bookie may be the motive for a robbery; revenge for a personal affront may be the motive for a physical attack. Prosecutors often offer motive evidence as circumstantial evidence that a defendant acted intentionally or knowingly. The reason is that like most people, judges and jurors believe in "cause and effect". They are more likely to believe that a defendant had "*mens rea*" if they know that the defendant had a motive to commit an illegal act. While prosecutors frequently do offer "motive" evidence, they are not required to do so. By the same token, defendants may offer evidence showing that they had no motive to commit a crime, and then argue that the lack of a motive demonstrates reasonable doubt of guilt.

- felonious assault 严重伤害
- motive 动机
- by the same token 同样地

Notes

1. *mens rea*: In criminal law, the Latin term for "guilty mind", is usually one of the necessary elements of a crime under common law system. The standard common law test of criminal liability is usually expressed in the Latin phrase, *actus non facit reum nisi mens sit rea*, which means "the act does not make a person guilty unless the mind be also guilty". 犯罪意图,又称为犯罪心理,是英美法系犯罪构成的要件之一。"没有犯罪意图的行为,不能构成犯罪"是英美刑法的一条原则。
2. mistake of fact: Mistakes are categorized as a mistake of fact and mistake of law. A mistake of fact occurs when a person believes that a condition or event exists when it does not. A mistake of law is made by a person who has knowledge of the correct facts but is wrong about the legal consequences of an act or event. 事实错

误。错误可分为事实错误和法律错误两种。事实错误是指行为人的主观认识和客观事实不一致。所谓法律错误,一般指对事实有正确的认识,但对法律后果的认识有误。

3. criminal negligence: a mental state of disregarding known or obvious risks to human life and safety. 犯罪过失,是指行为人忽视自己的行为对人身安全造成的已知或明显的危害结果的一种心理态度。

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( ) 1. According to "*mens rea*" requirement, a person is punishable even if he does not have the intent to commit crime.

( ) 2. Strict liability laws are the laws under which a person who may be morally innocent shall be punished.

( ) 3. A person who has done something illegal may be identified to have made a mistake of fact if he honestly but mistakenly believed that it was legal to do so.

( ) 4. Whether a person is criminally liable is determined by whether the carelessness amounts to recklessness and demonstrates "*mens rea*".

( ) 5. If evidence shows that a person had a motive to commit an illegal act, he would be believed to have "*mens rea*".

( ) 6. "Strict liability law" applies when the harm of punishing a person who may be morally innocent outweigh the social benefit of stringent enforcement.

( ) 7. "*Mens rea*" is required in order for a person to be punished.

( ) 8. "Felonious" is used to determine whether a prohibited conduct constitutes a misdemeanor or a felony.

Build Up Your Vocabulary

1. Give the corresponding translation of each of the following terms.

English	Chinese
legal consequence	

(continued)

English	Chinese
	严格责任
mistake of fact	
	未成年人
	过失犯罪
civil damages	
	动机
material matter	
	犯意
specific intent	

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

grading systems	presumption of innocence
first degree murder	case at bar
retributive sentence	case of first impression
aggravated assault	verdict of acquittal
peremptory challenges	verdict of guilty

Translation

Translate the following sentences into English.

1. 根据《中华人民共和国刑法》第231条的规定，未经注册商标所有人许可，在同一种商品上使用与其注册商标相同的商标，情节严重的，处3年以下有期徒刑或者拘役，并处或者单处罚金；情节特别严重的，处3年以上7年以下有期徒刑，并处罚金。
2. 行为在客观上虽然造成了损害结果，但是不是出于故意或者过失，而是由于不能抗拒或者不能预见的原因所引起的，不是犯罪。
3. 以暴力、胁迫或者其他方法抢夺他人财物的，构成侵犯财产罪；以暴力、威胁方法阻碍国家工作人员依法执行职务的，构成扰乱公共秩序罪。
4. 承担民事赔偿责任的罪犯，同时被判处罚金，其财产不足以全部支付的，或者

被判处没收财产的，应当先承担对被害人的民事赔偿责任。

Case Study

Harold E. Staples, Ⅲ, Petitioner v. United States

Supreme Court of the United States

511 U. S. 600 (1994)

Justice Thomas delivered the opinion of the Court

The National Firearms Act (Act), 26 U. S. C. § § 5801 5872, imposes strict registration requirements on statutorily defined "firearms". The Act includes within the term "firearm" a machinegun, § 5845 (a) (6), and further defines a machinegun as "any weapon which shoots... or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." § 5845 (b). Thus, any fully automatic weapon is a "firearm" within the meaning of the Act. Under the Act, all firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. § 5841. Section 5861 (d) makes it a crime, punishable by up to 10 years in prison, see § 5871, for any person to possess a firearm that is not properly registered.

Upon executing a search warrant at petitioner's home, local police and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) recovered, among other things, an AR-15 assault rifle. The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. Many M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon. No doubt to inhibit such conversions, the AR-15 is manufactured with a metal stop on its receiver that will prevent an M-16 selector switch, if installed, from rotating to the fully automatic position. The metal stop on

petitioner's rifle, however, had been filed away, and the rifle had been assembled with an M-16 selector switch and several other M-16 internal parts, including a hammer, disconnector, and trigger. Suspecting that the AR-15 had been modified to be capable of fully automatic fire, BATF agents seized the weapon. Petitioner subsequently was indicted for unlawful possession of an unregistered machinegun in violation of § 5861(d).

· file away
锉平

At trial, BATF agents testified that when the AR-15 was tested, it fired more than one shot with a single pull of the trigger. It was undisputed that the weapon was not registered as required by § 5861(d). Petitioner testified that the rifle had never fired automatically when it was in his possession. He insisted that the AR-15 had operated only semiautomatically, and even then imperfectly, often requiring manual ejection of the spent casing and chambering of the next round. According to petitioner, his alleged ignorance of any automatic firing capability should have shielded him from criminal liability for his failure to register the weapon. He requested the District Court to instruct the jury that, to establish a violation of § 5861(d), the Government must prove beyond a reasonable doubt that the defendant "knew that the gun would fire fully automatically". 1 App. to Brief for Appellant in No. 91-5033(CA10), p. 42.

The District Court rejected petitioner's proposed instruction and instead charged the jury as follows:

"The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

Petitioner was convicted and sentenced to five years' probation and a $5,000 fine. The Court of Appeals affirmed. Relying on its decision in *United States* v. *Mittleider*, 835 F. 2d 769 (CA 10 1987), cert. denied, 485 U. S. 980 (1988), the court concluded that the Government need not prove a defendant's knowledge of a weapon's physical properties to obtain a conviction under § 5861(d). 971 F. 2d 608, 612-613 (CA10 1992). We granted certiora-

· provincial
褊狭的
· transient
短暂的

ri, 508 U. S. (1993), to resolve a conflict in the Courts of Appeals concerning the *mens rea* required under § 5861(d).

Whether or not § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the Act is a question of statutory construction. As we observed in *Liparota* v. *United States*, 471 U. S. 419 (1985), "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Id.*, at 424 (citing *United States* v. *Hudson*, 7 Cranch 32 (1812)). Thus, we have long recognized that determining the mental state required for commission of a federal crime requires "construction of the statute and... inference of the intent of Congress." *United States* v. *Balint*, 258 U. S. 250, 253 (1922). See also *Liparota*, *supra*, at 423.

The language of the statute, the starting place in our inquiry, provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. It states simply that "it shall be unlawful for any person... to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U. S. C. § 5861(d). Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. See *Balint*, *supra*, at 251 (stating that traditionally, "*scienter*" was a necessary element in every crime). See also n. 3, *infra*. On the contrary, we must construe the statute in light of the background rules of the common law. see *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436 – 437 (1978), in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo American criminal jurisprudence." *Id.*, at 436 (internal quotation marks omitted). See also *Morissette* v. *United States*, 342 U. S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as uni-

versal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common law rule requiring *mens rea* has been "followed in regard to statutory crimes even where the statutory definition did not in terms include it". *Balint*, *supra*, at 251 – 252. Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, *Liparota*, *supra*, at 426, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime. Cf. *United States Gypsum*, *supra*, at 438; *Morissette*, *supra*, at 263.

According to the Government, however, the nature and purpose of the National Firearms Act suggest that the presumption favoring *mens rea* does not apply to this case. The Government argues that Congress intended the Act to regulate and restrict the circulation of dangerous weapons. Consequently, in the Government's view, this case fits in a line of precedent concerning what we have termed "public welfare" or "regulatory" offenses, in which we have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.

For example, in *Balint*, *supra*, we concluded that the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics" within the ambit of the statute. See *Balint*, *supra*, at 254. Cf. *United States* v. *Dotterweich*, 320 U. S. 277, 281 (1943) (stating in dicta that a statute criminalizing the shipment of adulterated or misbranded drugs did not require knowledge that the items

· ambit
范围
· adulterated
掺入低级品的
· misbrand
贴假标签

· at one's peril
自负后果

were misbranded or adulterated). As we explained in *Dotterweich*, *Balint* dealt with "a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." *Id.*, at 280 – 281. See also *Morissette*, *supra*, at 252 – 256.

Such public welfare offenses have been created by Congress, and recognized by this Court. in "limited circumstances". *United States Gypsum*, 438 U. S., at 437. Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. Cf. *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 564 – 565 (1971) (characterizing *Balint* and similar cases as involving statutes regulating "dangerous or deleterious devices or products or obnoxious waste materials"). In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," *Dotterweich*, *supra*, at 281, he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Balint*, *supra*, at 254. Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements. See generally *Morissette*, *supra*, at 252 – 260.

The Government argues that § 5861 (d) defines precisely the sort of regulatory offense described in *Balint*. In this view, all guns, whether or not they are statutory "firearms" are dangerous devices that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of the Act. On this understanding, the District Court's instruction in this case was correct, because a conviction can rest simply on proof that a defendant knew he possessed a "firearm" in the ordinary sense of the term.

The Government seeks support for its position from our decision

in *United States* v. *Freed*, 401 U. S. 601 (1971), which involved a prosecution for possession of unregistered grenades under § 5861 (d). The defendant knew that the items in his possession were grenades, and we concluded that § 5861 (d) did not require the Government to prove the defendant also knew that the grenades were unregistered. *Id.*, at 609. To be sure, in deciding that *mens rea* was not required with respect to that element of the offense, we suggested that the Act "is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Ibid.* Grenades, we explained, "are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States* v. *Balint*." *Ibid*, But that reasoning provides little support for dispensing with *mens rea* in this case.

As the Government concedes, *Freed* did not address the issue presented here. In *Freed*, we decided only that § 5861 (d) does not require proof of knowledge that a firearm is *unregistered*. The question presented by a defendant who possesses a weapon that is a "firearm" for purposes of the Act, but who knows only that he has a "firearm" in the general sense of the term, was not raised or considered. And our determination that a defendant need not know that his weapon is unregistered suggests no conclusion concerning whether § 5861 (d) requires the defendant to know of the features that make his weapon a statutory "firearm"; different elements of the same offense can require different mental states. See *Liparota*, 471 U. S., at 423, n. 5; *United States* v. *Bailey*, 444 U. S. 394, 405 – 406 (1980). See also W. LaFave & A Scott, Handbook on Criminal Law 194 – 195 (1972). Moreover, our analysis in *Freed* likening the Act to the public welfare statute in *Balint* rested entirely on the assumption that the defendant *knew* that he was dealing with hand grenades—that is, that he knew he possessed a particularly dangerous type of weapon (one within the statutory definition of a "firearm"), possession of which was not entirely "innocent" in and of itself. 401 U. S., at 609. The predicate for that analysis is eliminated when, as in this case, the very question to be decided is *whether* the defendant

· grenade
手榴弹，枪榴弹

· gloss
解释
· food stamps
食品救济券
· stark
明显的

must know of the particular characteristics that make his weapon a statutory firearm.

Notwithstanding these distinctions, the Government urges that *Freed*'s logic applies because guns, no less than grenades, are highly dangerous devices that should alert their owners to the probability of regulation. But the gap between *Freed* and this case is too wide to bridge. In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct". *Liparota*, 471 U. S., at 426. In *Liparota*, we considered a statute that made unlawful the unauthorized acquisition or possession of food stamps. We determined that the statute required proof that the defendant knew his possession of food stamps was unauthorized, largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts. *Ibid*. Our conclusion that the statute should not be treated as defining a public welfare offense rested on the common sense distinction that a "food stamp can hardly be compared to a hand grenade" *Id*., at 433.

Neither, in our view, can all guns be compared to hand grenades. Although the contrast is certainly not as stark as that presented in *Liparota*, the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* or to the selling of dangerous drugs that we considered in *Balint*. See also *International Minerals*, 402 U. S., at 563 – 565; *Balint*, 258 U. S., at 254. In fact, in *Freed* we construed § 5861(d) under the assumption that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act". *Freed*, *supra*, at 609. Here, the Government essentially suggests that we should interpret the section under the altogether different assumption that "one would hardly be surprised to learn that owning a gun is not an innocent act". That proposition is simply not supported by common experience. Guns in general are not "deleterious devices or

products or obnoxious waste materials," *International Minerals*, *supra*, at 565, that put their owners on notice that they stand "in responsible relation to a public danger". *Dotterweich*, 320 U. S., at 281.

The Government protests that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices. Under this view, it seems that *Liparota*'s concern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous—that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*. But that an item is "dangerous", in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence. Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi suspect character we attributed to owning hand grenades in *Freed*. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon's characteristics.

On a slightly different tack, the Government suggests that guns are subject to an array of regulations at the federal, state, and local levels that put gun owners on notice that they must determine the characteristics of their weapons and comply with all legal requirements. But regulation in itself is not sufficient to place gun ownership in the category of the sale of narcotics in *Balint*. The food

· innocuous
无害的
· tack
方针
· array
系列

· impinge
冲击
· licit
合法的
· untoward
不恰当的
· unbeknownst
不知的

stamps at issue in *Liparota* were subject to comprehensive regulations, yet we did not understand the statute there to dispense with a *mens rea* requirement. Moreover, despite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.

If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Here. there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent. The Government does not dispute the contention that virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun within the meaning of the Act. Cf. *United States* v. *Anderson*, 885 F. 2d 1248, 1251, 1253—1254 (CA5 1989) (en banc). Such a gun may give no externally visible indication that it is fully automatic. See *United States v. Herbert*, 698 F. 2d 981, 986 (CA9), cert. denied, 464 U. S. 821 (1983). But in

the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.

We concur in the Fifth Circuit's conclusion on this point: "it is unthinkable to us that Congress intended to subject such law abiding, well intentioned citizens to a possible ten-year term of imprisonment if... what they genuinely and reasonably believed was a conventional semiautomatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." *Anderson*, *supra*, at 1254. As we noted in *Morissette*, the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." 342 U. S., at 263. We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as § 5861(d).

The potentially harsh penalty attached to violation of § 5861 (d)—up to 10 years' imprisonment—confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. See, *e. g.*, *Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine of up to $200 or six months in jail, or both); *Commonwealth* v. *Farren*, 91 Mass. 489 (1864) (fine); *People* v. *Snowberger*, 113 Mich. 86, 71 N. W. 497 (1897) (fine of up to $500 or incarceration in county jail).

As commentators have pointed out, the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: in a system that generally requires a "vicious will" to

- impute 归于
- harsh 严厉的
- incarceration 监禁

· incongruous
不一致的
· culpability
罪责

establish a crime, 4 W. Blackstone, Commentaries 21, imposing severe punishments for offenses that require no *mens rea* would seem incongruous. See Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933). Indeed, some courts justified the absence of *mens rea* in part on the basis that the offenses did not bear the same punishments as "infamous crimes". *Tenement House Dept.* v. *McDevitt*, 215 N. Y. 160, 168, 109 N. E. 88, 90 (1915) (Cardozo, J.), and questioned whether imprisonment was compatible with the reduced culpability required for such regulatory offenses. See, *e. g.*, *People ex rel. Price* v. *Sheffield Farms Slawson Decker Co.*, 225 N. Y. 25, 32 – 33, 121 N. E. 474, 477 (1918) (Cardozo, J.); *id.*, at 35, 121 N. E., at 478 (Crane, J., concurring) (arguing that imprisonment for a crime that requires no *mens rea* would stretch the law regarding acts *mala prohibita* beyond its limitations). Similarly, commentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*. See R. Perkins, Criminal Law 793 – 798 (2d ed. 1969) (suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare offense); Sayre, *supra*, at 72 ("Crimes punishable with prison sentences... ordinarily require proof of a guilty intent").

In rehearsing the characteristics of the public welfare offense, we, too, have included in our consideration the punishments imposed and have noted that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette*, 342 U. S., at 256. We have even recognized that it was "under such considerations" that courts have construed statutes to dispense with *mens rea*. *Ibid.*

Our characterization of the public welfare offense in *Morissette* hardly seems apt, however. for a crime that is a felony, as is violation of § 5861 (d). After all, "felony" is, as we noted in distinguishing certain common law crimes from public welfare offenses, "as bad a word as you can give to man or thing." *Morissette*, *supra*, at 260 (quoting 2 F. Pollock & F. Maitland, History of English Law 465 (2d ed. 1899)). Close adherence to the early cases described above

might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*. But see *Balint*, *supra* .

· delineate
描绘

We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

In short, we conclude that the background rule of the common law favoring *mens rea* should govern interpretation of § 5861 (d) in this case. Silence does not suggest that Congress dispensed with *mens rea* for the element of § 5861 (d) at issue here. Thus, to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR – 15 that brought it within the scope of the Act.

We emphasize that our holding is a narrow one. As in our prior cases, our reasoning depends upon a common sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items. In addition, we think that the penalty attached to § 5861 (d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section. As we noted in *Morissette*, "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." 342 U. S. , at 260. We attempt no definition here, either. We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the

offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect. Cf. *United States* v. *Harris*, 959 F. 2d 246, 261 (CADC).

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the case remanded for further proceedings consistent with this opinion.

So ordered.

Exercises

I. Brief the case and present the case brief to the class.

II. Suppose you were an attorney retained by the petitioner, develop an argument on the basis of the opinion.

Unit Four Criminal Procedure Law

Words and expressions:

prosecute	federal	commit	afford	amendment
enact	supplement	vary	judicial	proceedings
code	constitute	promulgate	witnesses	testify

Ⅰ. Listen to the passage and then answer the questions according to what you hear.

1. What does "criminal procedure" refer to?

_____

2. How many types of criminal procedure are there? What are they?

_____

3. What rights are afforded a defendant accused of federal crimes?

_____

4. How is state criminal procedure defined?

_____

5. When does a defendant begin to undergo criminal procedures?

_____

Ⅱ. Listen to the passage and complete the following statements.

1. Criminal law can be divided into three general groups.

First, _____.

Second, _____.

Finally, _____.

2. The penalties associated with committing a felony include _____.
3. Misdemeanor is a less serious crime but can still result in _____.

Text A

An Outline of the Criminal Justice Process

- adversarial 对抗式
- accusatorial 控告式
- impartial 公正的
- prosecutor 检察官,公诉人
- burden of proof 举证责任
- criminal codes 刑法典
- pre-trial procedure 审前程序

The system of criminal procedure in the United States is both adversarial and accusatorial. The adversarial aspects are as follows: the parties themselves develop and present the evidence before a passive and impartial decisionmaker, with the judge acting only as necessary to assure overall fairness of the contest between the sides. Accusatorial principles are not the same as adversarial principles, but they complement each other. Accusatorial principles require the "government in its contest with the individual to shoulder the entire load," while adversarial principles require that the prosecutor, as the government's representative, present the case against the defendant. Thus, the prosecutor must bear the entire burden of proving the defendant's guilt on every element of the crime without the compelled assistance of the accused. The U. S. system allows for exceptions to the accusatorial principle, just as it contemplates exceptions to the adversarial principle, but it remains primarily accusatorial and adversarial.

1. Arrest, Formal Charges, and the First Appearance

Crimes are divided into felonies and misdemeanors. The classification of each crime as a felony or a misdemeanor is determined by the sentencing portions of the criminal codes: felonies are usually crimes punishable by death or by imprisonment for more than one year, and misdemeanors are called "high misdemeanors," which are punishable by up to two years in jail. The distinction between felonies and misdemeanor has an impact upon the nature of pre-trial procedure, as noted below.

Police Investigation and Arrest In general, the police carry out investigations leading to arrests without any direct supervision by the prosecutor. The police eventually have to justify their arrests and criminal charges to the prosecutor before the latter will institute a criminal case in court, but the prosecutor does not normally get directly involved in the police investigation, except in very important cases. Judicial involvement is also episodic: if a search warrant or arrest warrant is needed, the police can apply to a judge for one, but neither a judge nor any other judicial officer has any further responsibility for overall supervision of the investigation.

The normal process is as follows. The police will get a report of crime. The report may be based upon a police officer's own observation, or upon information provided by the victim or another citizen. If the report is based upon police observation and the police believe that they have "probable cause" to believe the suspect committed a crime, the suspect is immediately arrested. If the report is based upon information provided by a victim, the police will conduct a pre-arrest investigation, sometimes in consultation with the prosecutor, to determine if there is sufficient evidence to support charges against a suspect. The police may also seek an arrest warrant from a judge if they can demonstrate by way of written affidavits (sworn statements under oath) that there is probable cause to believe the accused committed the crime. However, the vast majority of arrests are made based on probable cause, without a judicial warrant.

Once an arrest is made, a higher police official and then the prosecutor will informally review the sufficiency of the evidence to determine whether to formally charge the accused with the crime, but these reviews are not impartial or even quasi-judicial. The only information provided comes from the police working on the case, usually in the form of an arrest report and any additional evidence discovered. The arrestee does not appear. If there is not sufficient evidence to convict on the charges recommended, the arrestee may be released or may be charged with a lesser crime.

Formal Charges If formal charges are authorized by the prosecutor, a "complaint" is filed in court. This may take place

- institute
  提起(诉讼)
- search warrant
  搜查证
- arrest warrant
  逮捕证
- victim
  受害者
- probable cause
  合理根据
- affidavits
  书面证词
- sworn statements under oath
  宣誓陈述
- judicial warrant
  司法令状
- quasi-judicial
  准司法的

· *ex parte*
单方面的
· incriminating information
罪证
· charging instrument
指控文件
· indictment
起诉书
· information
控告书
· first appearance
首次出庭
· magistrate
地方法官,治安法官
· pending trial
候审期间
· bail
保释金
· hearings
开庭
· post bail
交付保释金

before or within 48 hours after the arrest. On receipt of the complaint, a judge conducts an *ex parte* review of it and supporting information to assure that there is sufficient incriminating information to establish probable cause. *Ex parte* in this context means that the prosecutor participates, but neither the defendant nor the defendant lawyer is present. The judge reviews the evidence from reports and information in the complaint or may require that the victim or arresting officer fill in details.

The complaint operates as the initial charging instrument. In the case of a misdemeanor, the complaint serves as the charging instrument throughout the proceedings. If the crime is a felony, the complaint is replaced by an indictment or information, as discussed below.

The First Appearance The next stage is the defendant's "first appearance" before a judge or magistrate. This first appearance has several purposes. One is to assure that the person arrested is actually the person named in the complaint. Another is to advise the defendant of the charge against him or her and to provide information about rights the accused will have in future proceedings. These include the right to a lawyer. For most defendants, this is the point at which a lawyer is appointed.

The judge also decides whether the defendant may be released pending trial. Pre-trial release has traditionally been referred to as "release on bail." To gain such release, defendants generally must pay a certain amount of money to the court and obligate themselves to pay an even larger amount if they do not appear at later hearings. Factors affecting the amount of bail include the nature and circumstances of the offense, the evidence against the accused, the character of the accused, and the ability of the accused to make bail. However, financial inability to post bail is not a reason for release without bail.

2. Preliminary Examinations, Indictments or Informations, and Pre-trial Motions

The task of the next step of the criminal process is to review the evidence supporting the charge against the defendant and to re-

place the complaint with a formal charging document if the charges are warranted. Screening the facts of the case is done in one of two different ways: by a judge at a preliminary hearing or by a grand jury in secret session. If the case survives scrutiny at the preliminary hearing, a "prosecutor's information" is filed. If the case passes muster with the grand jury, a "grand jury indictment" is filed. One-third of the states and the federal system require that the prosecutor present all felony cases to a grand jury and obtain a grand jury "indictment." The remainder of the states operate under some form of preliminary hearing system.

Preliminary Hearings and Prosecutor's Information The preliminary examination or hearing takes place before a judge or magistrate a few weeks after the first appearance. Both sides are present and represented by counsel. The issue at the preliminary hearing is whether there is enough evidence to "bind over" the defendant for trial. To do so, the court must find that (1) a crime has been committed and (2) there is "probable cause" to believe that the defendant committed it.

Charges are rarely dismissed as a result of the preliminary hearing. The defendant has the right to present evidence, but also has a constitutional right not to say anything or to produce any evidence, and will rarely do either at this stage. The prosecutor, however, is required to present enough of the government's case against the defendant to establish probable cause to believe that the defendant committed the offense charged. The defendant and his lawyer thus have the opportunity to listen to the evidence facing them and to cross-examine the prosecution's witnesses. This amounts to a form of "discovery" for the defense.

Grand Jury Indictments The grand jury is a group of 23 private citizens selected to review criminal case for a period of several months to one year. To return an indictment, the grand jury must determine, by a majority vote, that there is probable cause to believe that the defendant committed a crime. Thus, the grand jury has a function roughly equivalent to that of the judge at the preliminary hearing. However, the grand jury hears only the prosecution's

- prosecutor's information
  检察官起诉书
- pass
  符合要求
- grand jury indictment
  大陪审团起诉书
- counsel
  辩护律师
- bind over
  勒令
- cross-examine
  交叉质询

· arraign
提审
· plead guilty
表示认罪
· nature
本质
· exculpatory
开脱罪责的

evidence, and the defendant and defense counsel have no right to attend, to present evidence or to cross-examine the prosecution's witnesses. Although on rare occasions grand juries exercise independence and refuse to issue an indictment, they usually follow the wishes of the prosecutor. The number of refusals to indict is even lower than judge refusals to bind the defendant over following a preliminary hearing.

Arraignment on the Indictment or Information Within a short time after the indictment or information has been filed with the trial court, the defendant is "arraigned" before that court, meaning the defendant is brought before the court to be formally charged as specified in the indictment or information. At the arraignment, the defendant is informed of the charges and asked to plead guilty or not guilty. The vast majority of cases that reach this stage (70%-90%, depending on the jurisdiction) do not go to trial because the defendant at some point pleads guilty to these or lesser charges.

Pre-trial Motions Prior to the trial, a defendant has the right to raise several motions. A common motion is a motion for discovery of the prosecution's evidence. Prosecutors are not required to turn over their entire file to the defendant. And the extensive discovery devices available in civil cases are not applicable to a criminal case.

3. Trial

The differences in the nature of civil and criminal pre-trial have an impact on the trial. In particular, the extensive formal discovery procedures outlined for civil cases are inapplicable in criminal cases. Although, as just discussed, the defendant can obtain discovery of any exculpatory evidence, there is generally no right to discover the prosecution's evidence against the defendant. Because of the defendant's constitutional right against self-incrimination, the prosecutor has only limited rights of discovery from the defendant. Generally the only pre-incident prior statements of the defendant that may be used at trial are whatever statements she might have given voluntarily after appropriate warnings on her right to remain silent. The only evidence the defense will have other than that

which the prosecution is required to turn over, will be what the defense is able to find out through its own investigation. Since the lawyers will often know little of the details of the other side's case, the trial of a criminal case can hold several more surprises for the lawyers involved than the average civil case.

The prosecution at trial has the duty to prove each and every element of the offense against the defendant beyond a reasonable doubt and that burden may not be shifted to the defendant. As a result, another difference between civil and criminal trial is that it is less common in a criminal trial to have "stipulations," voluntary agreements between the parties, which obviate the need to present proof on some elements of the case or which concede the admissibility of evidence, particularly exhibits. Stipulations are routine in civil trials and are often entered into under pressure from the trial judge who does not want to waste time on unnecessary proofs. This is generally inappropriate in a criminal trial. The absence of stipulations will often mean that the lawyers in a criminal trial will have to spend more time laying the necessary foundation for admission of evidence.

- stipulation 约定
- obviate 排除
- concede 勉强承认
- admissibility 可接受性
- exhibits (所出示的)证据
- pre-sentencing report 判刑前报告
- probation 缓刑
- victim impact statement 受害人影响陈述

4. Sentencing Procedures in Criminal Cases

Sentencing Hearings Upon the defendant pleading guilty or being found guilty after a trial, the next step is to determine what punishment is appropriate —to impose a "sentence." The judge does not pronounce the sentence immediately after the trial is over as in some systems. Instead, the judge will set a separate date for sentencing and order the preparation of a "pre-sentencing report." This report is prepared by an agency attached to the court, generally the "probation department." The report addresses the defendant's background as it relates to factors relevant to sentencing. Some jurisdictions allow the jury to decide or recommend a sentence, but most leave sentencing determinations to the judge.

Victim Impact Statements Traditionally, the victim's role at the sentencing hearing has not been very important, since the focus is not what to do for the victim, but what to do with the defendant. But because of a move toward considerations of "victims' rights,"

· petition for certiorari
请求调审
· *habeas corpus*
人身保护令状
· lectern
面板倾斜的讲桌

recently enacted statutes may allow or require the use of "victim impact statements".

The Role of Jury in Death Penalty Cases The jury generally has no role in sentencing, so its work is completed when it determines that the defendant is guilty. However, it is common for the jury to participate in the decision whether the death penalty should be imposed. If the jury decides that the defendant is guilty, then the same jury is reconvened for a punishment stage of the trial. At this stage of the trial any additional evidence bearing on punishment may be brought in, including evidence related to the defendant's background, character and other crimes. The jury then takes into account all of the evidence presented in the case in deciding whether the death penalty should be imposed.

5. Appellate Review of Convictions

Defendants convicted in a state trial court generally have a statutory right to one appeal, usually to the intermediate appellate court of the state. If the state's intermediate appellate court affirms the conviction, they have the right to petition for leave (permission) to appeal to the state supreme court. Defendants may also file a petition for certiorari in the United States Supreme Court in an effort to appeal any federal issues raised. Defendants convicted in a federal district court have a statutory right to appeal to the United States Court of Appeals for the circuit in which they were convicted. If unsuccessful in the circuit court, they may petition for certiorari. Under certain circumstances, a prisoner may—after exhausting all direct appears—be able to gain additional review of federal constitutional issues by filing a *habeas corpus* case in the federal district court.

6. Resolving Criminal Cases Without Trial

One of the consequences of the fact that the adversary system is party-driven is that parties can choose to give up their rights. In a criminal case, defendants may choose to waive their right to a trial and plead guilty. Guilty pleas are a matter of necessity for the criminal justice system: if even a third of criminal defendants were actually to insist on having a trial, especially a trial by jury, the system would collapse.

Procedure for Guilty Pleas The process for accepting a guilty plea is summary. The defendant stands at the lectern with his lawyer and the judge questions the defendant personally about his plea. The judge's purpose in inquiring is twofold: to assure that the guilty plea is voluntary and to set out sufficient facts to show that the defendant is in fact guilty of the offense. Without establishing both these matters on the record, the plea cannot be accepted by the court and the case will be set for trial.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

Notes

1. burden of proof: the obligation of a party on one side of a dispute or issue to provide sufficient evidence in support of their position. 举证责任,是指在诉讼中应该由谁来担负提出证据,并用证据来证明事实的责任。
2. probable cause: in United States criminal law, probable cause is the standard by which a police officer has the authority to make an arrest, conduct a personal or property search, or to obtain a warrant for arrest. It is also used to refer to the standard to which a grand jury believes that a crime has been committed. 合理根据。美国的刑事程序法中,合理根据指的是警察有权逮捕、作出个人或财产的搜索,或是取得逮捕令状的标准。也经常指的是大陪审团相信被告有罪的一种标准。
3. sworn statements under oath. The person making the statement is swearing that its contents are truthful. It may be in an oral or a written form. This type of statement may be used in various kinds of legal proceedings. The persons making the statement understand that they are doing so under penalty of perjury. 宣誓陈述。指经宣誓所做的陈述,据此做陈述的人宣誓所陈述之内容为真实。宣誓陈述可以是口头形式或者是书面形式。这类陈述可以用于各类法律诉讼中。陈述人知道,如作伪证,将受到相应处罚。
4. pre-sentencing report: a summary of relevant information on the defendant's life prepared by the pre-sentencing probation officer and put together for the purpose of arriving at an appropriate sentencing recommendation. The defendant's criminal history, mitigating circumstances in the defendant's life, the effect of the crime on the victim, and other information are compiled by the probation officer. 判刑前报告,

由缓刑官在判刑前做出。其目的是汇总被告的有关情况以便提出适当的量刑建议。

5. victim impact statement: written or oral information about the impact of the crime on the victim and the victim's family. Victim impact statements are most commonly used at sentencing. Such statements provide a means for the court to take into consideration the impact of crime on victim in sentencing. 受害人影响陈述,是关于犯罪对被害人及其家庭所造成的后果的书面或口头意见和观点。
6. petition for *certiorari*: a document which a losing party files with the Supreme Court asking the Supreme Court to review the decision of a lower court. It includes a list of the parties, a statement of the facts of the case, the legal questions presented for review, and arguments as to why the Court should grant the writ. 请求调审,由败诉一方向最高法院提出,请求最高法院审核下级法院的裁决。
7. *habeas corpus*: a writ through which a person can seek relief from unlawful detention, or the relief of another person. The writ of *habeas corpus* protects persons from harming themselves, or from being harmed by the judicial system. 人身保护令状,是一种用于将某人带交法院的令状,常用于保证当事人不受非法拘禁或非法羁押。人身保护令状是以法律程序保障个人自由的重要手段。

Exercises

Check Your Understanding

Answer the following questions according to the text.

1. What is the difference between a felony and a misdemeanor?
2. When is a complaint filed?
3. What shall a defendant do in order to gain pre-trial release?
4. What are the purposes of "first appearance"?
5. When can the defendant be held for trial?
6. What is preliminary examination?
7. How does criminal trial differ from civil trial?
8. Is jury generally important in sentencing?
9. What rights does a defendant convicted in a state trial court generally have?
10. How is procedure for guilty pleas conducted?

Build Up Your Vocabulary

I. Match the items in the following two columns.

1. burden of proof	a. legal process for requesting a formal change to an official decision
2. arrest warrant	b. a type of writ seeking judicial review
3. prosecutor's information	c. the evidence favorable to the defendant in a criminal trial, which clears or tends to clear the defendant of guilt
4. justify	d. a formal sworn statement of fact, signed by the author
5. sworn statements	e. a formal, written charge issued by a grand jury in a criminal case
6. grand jury's indictment	f. a written statement given under oath
7. exculpatory evidence	g. to demonstrate or prove to be just, right, or valid
8. certiorari	h. written accusation by a district attorney charging one or more persons with the commission of one or more offenses
9. affidavit	i. issued by and on behalf of the state, which authorizes the arrest and detention of an individual
10. appeal	j. the obligation of a party on one side of a dispute or issue to provide sufficient evidence in support of their position
	k. initial document filed by the plaintiff

II. Fill in the blanks with the word or expressions given below, changing the form if necessary.

judicial	preliminary	probable	bail	trial
commit	charge	admissible	appeal	proceedings

1. Before a valid arrest warrant can issue, the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that _____ cause exists for the warrant.
2. If the affidavit of complaint establishes that there is probable cause to believe that an offense has been _____ and that the defendant has committed it, the magistrate or clerk shall issue an arrest warrant to an officer authorized by law to execute it.

3. The appropriate clerk or magistrate shall determine the amount of _____ and state it on the face of the warrant.
4. A criminal summons may be issued instead of an arrest warrant; when a clerk is performing this _____ function, the district attorney general is empowered to direct the clerk whether to issue a warrant or a criminal summons upon a finding of probable cause.
5. If the arresting officer does not have possession of the warrant at the time of the arrest, the officer shall inform the defendant of the offense _____ and that a warrant has been issued.
6. The magistrate shall advise the defendant of the right to a jury _____ and to be prosecuted only on an indictment or presentment.
7. The defendant may _____ a guilty judgment or the sentence imposed, or both, to the circuit or criminal court for a trial *de novo* as provided by law.
8. Any defendant arrested or served with a criminal summons prior to indictment for a misdemeanor or felony, except small offenses, is entitled to a _____ hearing.
9. The evidence of the witnesses does not have to be reduced to writing by the magistrate, or under the magistrate's direction, and signed by the respective witnesses; but the _____ shall be preserved by electronic recording or its equivalent.
10. The finding that an offense has been committed and that there is probable cause to believe that the defendant committed it shall be based on evidence which may be _____ hearsay except documentary proof of ownership and written reports of expert witnesses.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

plea	indictment	prosecutor	charge	grand jury
motion	arraignment	bail	pre-trial	preliminary hearing

Generally speaking, a person arrested for breaking a criminal law appears before a judge within twenty-four hours. The judge will inform the person of the _____ and _____ on conditions of release. For some minor offenses, the judge may allow the person to enter a _____ of guilty or not guilty at the initial appearance.

After the initial appearance, the defendant is entitled to a _____ to determine if there is sufficient evidence to continue the case. Generally, the defendant will waive that right, and the _____ will file a trial information, which is a formal statement of the charges. On occasion, the county attorney will call a _____, a panel of seven

citizens, to decide whether criminal charges should be brought, If five of the seven jurors determine there is enough evidence to support the charge, they will return an _____. An indictment and the trial information have the same effect of formally charging the defendant with a crime and beginning the criminal trial process.

Following the filing of a trial information or indictment, the defendant will appear for an _____. At the arraignment, the court may read the formal charges and the defendant must enter a plea, generally guilty or not guilty. If the defendant cannot afford to hire an attorney, the court will appoint an attorney to represent the defendant. If the defendant enters a not guilty plea, there must be a trial within ninety days from the date of the filing of the trial information or indictment. However, the defendant may waive this right. The defendant may also waive the right to a jury trial, and have the judge decide the case.

The defendant may engage in discovery, including requesting evidence from the state and taking depositions of witnesses. The defendant may also file various pre-trial _____, including motions to exclude evidence believed to be illegally obtained. The defendant and the state may engage in plea bargaining—discussions to resolve the charges short of a trial. If the defendant and the state do not reach an agreement, the court may schedule a _____ conference and thereafter a trial date.

Translation

Translate the following sentences into Chinese.

1. After the return of a guilty verdict, the jury's duty is complete. The jury is not involved in determining the defendant's punishment; sentencing is left solely to the judge. The court will schedule a sentencing hearing, and the parties will have the opportunity to make sentencing recommendations. Before any defendant is sentenced (except in traffic and less serious criminal matters) the judge is given a pre-sentence investigation report usually prepared by a probation officer. This report contains information about the defendant such as any criminal record, family and financial circumstances. harm to the victim. circumstances of the offense. and sentencing recommendations from the probation officer and others.
2. If the case proceeds to a jury trial, the parties will have the opportunity to question the prospective jurors. In a criminal case, the jury is comprised of twelve jurors and each party may exercise strikes, which means objecting to a certain person serving on the jury. The number of strikes is determined by the level of the offense charged, ranging from four to ten. Additionally, the court may determine that alternate jurors

are necessary.

3. Criminal cases involve charges filed by the government—typically the state—alleging that that a person, the defendant, has violated a criminal law or ordinance. Typically, a person convicted of committing a criminal offense is subject to certain penalties such as paying a fine and restitution, serving time in prison or jail, or community service. Criminal law is divided into two major classifications: misdemeanors and felonies. Misdemeanors are divided into three categories: simple, serious, and aggravated. Felonies are more serious crimes, and are classified from the most to the least serious as follows: class A, B, C, and D. For both misdemeanor and felony offenses, the penalty for conviction generally increases in severity with the level of offense.

Text B

Key Aspects of Modern Criminal Procedure: Defendants' Rights

- presumption 假定
- sit mute 拒不答辩
- confrontation clause 对质条款
- Sixth Amendment 美国宪法第六修正案

There are two fundamental aspects of the U. S. criminal justice system—the presumption that the defendant is innocent and the burden on the prosecution to prove guilt beyond a reasonable doubt. But criminal defendants have other rights too. Here we explore some of the other hallmarks of basic criminal procedure.

The Defendant's Right to Remain Silent

The Fifth Amendment to the U. S. Constitution provides that a defendant cannot "be compelled in any criminal case to be a witness against himself." In short, the defendant has the right to "sit mute." The prosecutor cannot call the defendant as a witness, nor can a judge or defense attorney force the defendant to testify if the defendant chooses to remain silent. By contrast, a defendant may be called as a witness in a civil case.

The Defendant's Right to Confront Witnesses

The "confrontation clause" of the Sixth Amendment gives defendants the right to "be confronted by the witnesses against" them. Implicit in this right is the right to cross-examine witnesses—that is, the right to require the witnesses to come to court, "look the defendant in the eye," and subject themselves to questioning by the

defense. The Sixth Amendment prevents secret trials, and except for limited exceptions, forbids prosecutors from proving a defendant's guilt with written statements from absent witnesses.

The Defendant's Right to a Public Trial

The Sixth Amendment guarantees public trials in criminal cases. This is an important right, because the presence in courtrooms of a defendant's family and friends, ordinary citizens and the press can help ensure that the government observes other important rights associated with trials.

In a few situations, normally involving children, the court will close the court to the public. For example, judges can bar the public from attending cases when defendants are charged with sexual assaults against children. Also, the judge may exclude witnesses from the courtroom when it appears that they will coach each other.

The Defendant's Right to a Jury Trial

The Sixth Amendment to the U. S. Constitution gives a person accused of a crime the right to be tried by a jury. This right has long been interpreted to mean a 12-person jury which must arrive at a unanimous decision to convict or acquit. (In most states, a lack of unanimity is called a "hung jury" and the defendant will go free unless the prosecutor decides to retry the case. In Oregon and Louisiana, however, juries may convict or acquit on a vote of ten to two.) The potential jurors must be selected randomly from the community, and the actual jury must be selected by a process that allows the judge and lawyers to screen out biased jurors. In addition, a lawyer may eliminate several potential jurors simply because he feels that these people would not be sympathetic to his side—but these decisions (called preremptory challenges) may not be based on the juror's personal characteristics such as race, sex, religion or national origin.

The Defendant's Right to be Represented by an Attorney

The Sixth Amendment to the U. S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." A judge must appoint an attorney for indigent defendants (defendants who cannot af-

- public trial 公开审理
- jury trial 陪审团审
- accused of 被指控犯有
- unanimous 一致同意的
- acquit 判定无罪
- hung jury 悬置陪审团
- preremptory challenges 不述理由而要求陪审员回避
- indigent 极端贫困的

· bail hearing
保释聆讯
· adequate representation
适当代理
· throw out
否决
· cocaine
可卡因
· incompetence
无行为能力,法律上无资格
· reversal
(对下级法院判决)撤销

ford to hire attorneys) at government expense only if at the conclusion of the case the defendants might be actually imprisoned for a period of more than six months. As a practical matter, judges routinely appoint attorneys for indigents in nearly all cases in which a jail sentence is a possibility. Otherwise, the judge would be locked into a nonjail sentence or a shorter sentence than he or she might think appropriate after hearing the evidence.

A judge normally appoints the attorney for an indigent defendant at the defendant's first court appearance. For most defendants, the first court appearance is either an arraignment or a bail hearing.

The Defendant's Right to Adequate Representation

The U. S. Supreme Court has ruled that both indigent defendants who are represented by appointed counsel and defendants who hire their own attorneys are entitled to adequate representation. However, adequate representation is by no means perfect representation. Here are examples of claims that defendants have made against their attorneys which appellate courts have ruled to not justify throwing out a guilty verdict:

failing to call favorable witnesses at trial

using cocaine during the time the representation took place

failing to object to a judge's mistaken instructions to jurors concerning the burden of proof

eliciting evidence very damaging to the defendant while cross-examining prosecution witnesses

repeatedly advising a defendant who claimed innocence to plead guilty

representing the defendant while being suspended from the practice of law for failure to pay state bar dues.

On the other hand, circumstances can be sufficiently shocking to justify throwing out a guilty verdict based on an attorney's incompetence. Judges have ruled that the following claims justify a reversal of a guilty verdict:

putting a law student intern in charge of the defense and leaving the courtroom while the case was going on

during closing arguments, acknowledging that the defendant

was guilty of a lesser crime without first securing the defendant's approval of this tactic

during *voir dire* (questioning of the jury), failing to challenge two potential jurors who said they would be bothered by the defendant's failure to testify.

Defendant's Right to a Speedy Trial

The Sixth Amendment gives defendants a right to a "speedy trial." However, it does not specify exact time limits. Thus, judges often have to decide on a case-by-case basis whether a defendant's trial has been so delayed that the case should be thrown out. In making this decision, judges look at the length of the delay, the reason for the delay, and whether the delay has prejudiced the defendant's position.

Every jurisdiction has enacted statutes that set time limits for moving cases from the filing of the initial charge to trial. While these statutes are very strict in their wording, most defendants cannot get their convictions reversed on the ground that these statutes were violated.

The Defendant's Right Not to Be Placed in Double Jeopardy

Among the several clauses of the Fifth Amendment to the U. S. Constitution is this well-known provision: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This provision, known as the double jeopardy clause, protects defendants from harassment by preventing them from being put on trial more than once for the same offense. Double jeopardy problems are unusual, because prosecutors usually want to wrap up all their charges in the same case. One important exception to the rule against double jeopardy is that defendants can properly be charged for the same conduct by different jurisdictions. For example, a defendant may face charges in both federal and state court for the same conduct if some aspects of that conduct violated federal laws while other elements ran afoul of the laws of the state.

Furthermore, the double jeopardy clause forbids only successive criminal prosecutions growing out of the same conduct. For instance, after O. J. Simpson was acquitted of murdering his ex-wife

- speedy trial
  速审
- double jeopardy
  双重危境
- wrap up
  完成
- afoul
  和……发生冲突；和……抵触

and her friend, their relatives filed a civil suit against him for actual and punitive damages caused by the killings. The civil suits raised no double jeopardy issues, even though punitive damages are a type of punishment, and Simpson was held civilly liable for the deaths.

From http://www.lawguide.com

Notes

1. confrontation clause: the provision in the Sixth Amendment to the United States Constitution guaranteeing a criminal defendant the right to hear and cross-examine at trial all the witnesses against him/her. 对质条款。指美国宪法第六修正案的规定,根据该规定,被告人享有在审判中与对他不利的证人对质的权利。
2. Sixth Amendment:美国宪法第六修正案。
3. hung jury: a jury which is unable to arrive at a required unanimous verdict. 悬置陪审团,指不能做出一致决断的陪审团。
4. peremptory challenge: usually a right in jury selection for each party to the case to reject a certain number of potential jurors who appear to have an unfavorable bias without having to give any reason. Other potential jurors may be challenged for cause, i. e. by giving a reason why they might be unable to reach a fair verdict. 不述理由而要求陪审员回避,又称绝对回避,是当事人可以不提出任何理由,要求一定人数的陪审员回避的一项程序权利。绝对回避向被告提供了一种审判公平的感觉,使其能够将个人感觉不佳的陪审员予以排除。另一要求陪审员回避的机制为有因回避,即以不能做到公正裁决为由要求陪审员回避。
5. bail hearing:保释聆讯。
6. double jeopardy: The constitutional prohibition against "double jeopardy" is designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for the same crime. 双重危境。宪法规定的禁止"双重危境"原则,是为了保护任何人不得因同一罪行而遭受一次以上审判或定罪的危险。

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

1. According to "confrontation clause", the defendant has the right to question the prosecutor.
2. Public trial in criminal cases is not absolute.
3. Jurors are selected randomly without any screening process.
4. The potential jurors who might be sympathetic to one side will be excluded from actual jurors.
5. A judge must appoint an attorney at government expenses to represent the defendants who cannot afford to hire attorneys in all criminal cases without exception.
6. Bail hearing is conducted at the defendant's first court appearance.
7. There is statutory time limit for a speedy trial.
8. By double jeopardy clause, defendants are protected from being put on trial more than twice for the same crime.
9. There is no specific time limit for moving cases from the filing of the initial charge to trial.
10. Double jeopardy clause is also applicable to civil cases.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of following terms.

English	Chinese
confrontation clause	
	公开审理
double jeopardy	
	交叉质询
speedy trial	
	有罪裁决

(continued)

English	Chinese
bail hearing	
	举证责任
right to remain silent	
	惩罚性赔偿
voir dire	

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

jury trial	guilty beyond a reasonable doubt
rebuttal evidence	presentation of all of the evidence
unanimous verdict	victim impact statement
preliminary hearing	guilty plea
issue a summons	commission of the offence
summary procedure	absence of evidence to the contrary

Translation

Translate the following sentences into English.

1. 情节显著轻微、危害不大，不认为是犯罪的，不追究刑事责任；已经追究的，应当撤销案件，或者不起诉，或者终止审理，或者宣告无罪。
2. 刑事案件由犯罪地的人民法院管辖。如果由被告人居住地的人民法院审判更为适宜的，可以由被告人居住地的人民法院管辖。
3. 辩护人的责任是根据事实和法律，提出证明犯罪嫌疑人、被告人无罪、罪轻或者减轻、免除其刑事责任的材料和意见，维护犯罪嫌疑人、被告人的合法权益。
4. 证人证言必须在法庭上经过公诉人、被害人和被告人、辩护人双方讯问、质证，听取各方证人的证言并且经过查实以后，才能作为定案的根据。
5. 原审人民法院对于发回重新审判的案件，应当另行组成合议庭，依照第一审程序进行审判。对于重新审判后的判决，依照《中华人民共和国刑事诉讼法》第 180 条、第 181 条、第 182 条的规定可以上诉、抗诉。

Case Study

Pointer v. Texas

U. S. Supreme Court

380 U. S. 400 (1965)

Mr. Justice Black delivered the opinion of the Court.

The Sixth Amendment provides in part that:

"In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defence."

Two years ago, in *Gideon v. Wainwright*, 372 U. S. 335, we held that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the States. The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right "to be confronted with the witnesses against him," which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment.

The petitioner Pointer and one Dillard were arrested in Texas and taken before a state judge for a preliminary hearing (in Texas, called the "examining trial") on a charge of having robbed Kenneth W. Phillips of $375 "by assault, or violence, or by putting in fear of life or bodily injury," in violation of Texas Penal Code Art. 1408. At this hearing, an Assistant District Attorney conducted the prosecution and examined witnesses, but neither of the defendants, both of whom were laymen, had a lawyer. Phillips, as chief witness for the State, gave his version of the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint. Apparently Dillard tried to cross-examine Phillips, but Pointer did not, although Pointer was said to have tried to cross-examine some other witnesses at the hearing. Petitioner was subsequently indicted on a charge of having committed the robbery. Some time before the trial

· layman
非专业人员

was held, Phillips moved to California. After putting in evidence to show that Phillips had moved and did not intend to return to Texas, the State at the trial offered the transcript of Phillips' testimony given at the preliminary hearing as evidence against petitioner. Petitioner's counsel immediately objected to introduction of the transcript, stating, "Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant." Similar objections were repeatedly made by petitioner's counsel, but were overruled by the trial judge, apparently in part because, as the judge viewed it, petitioner had been present at the preliminary hearing, and therefore had been "accorded the opportunity of cross-examining the witnesses there against him." The Texas Court of Criminal Appeals, the highest state court to which the case could be taken, affirmed petitioner's conviction, rejecting his contention that use of the transcript to convict him denied him rights guaranteed by the Sixth and Fourteenth Amendments. 375 S. W. 2d 293. We granted certiorari to consider the important constitutional question the case involves. 379 U. S. 815.

In this Court, we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon v. Wainwright*, *supra*. In making that argument, petitioner relies mainly on *White v. Maryland*, 373 U. S. 59, in which this Court reversed a conviction based in part upon evidence that the defendant had pleaded guilty to the crime at a preliminary hearing, where he was without counsel. Since the preliminary hearing there, as in *Hamilton v. Alabama*, 368 U. S. 52, was one in which pleas to the charge could be made, we held in *White*, as in *Hamilton*, that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that, at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted, and that the judge decides only whether the accused should be bound over to the grand jury, and, if so, whether he should be ad-

mitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve. In this case, the objections and arguments in the trial court, as well as the arguments in the Court of Criminal Appeals and before us, make it clear that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him. It is that latter question which we decide here.

I

The Sixth Amendment is a part of what is called our Bill of Rights. In *Gideon v. Wainwright*, *supra*, in which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." 372 U. S. at 372 U. S. 342. And last Term, in *Malloy v. Hogan*, 378 U. S. 1, in holding that the Fifth Amendment's guarantee against self-incrimination was made applicable to the States by the Fourteenth, we reiterated the holding of *Gideon* that the Sixth Amendment's right to counsel guarantee is "*a fundamental right, essential to a fair trial*," *and* "*thus was made obligatory on the States by the Fourteenth Amendment.*" 378 U. S. at 378 U. S. 6. *See also Murphy v. Waterfront Comm'n*, 378 U. S. 52. We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right, and is made obligatory on the States by the Fourteenth Amendment. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to con-

zealous
热衷的

front the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. *See*, *e. g.*, 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts 380 U. S. 55, 174 U. S. 56, referred to the right of confrontation as "one of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union."

Mr. Justice Stone, writing for the Court in *Alford v. United States*, 282 U. S. 687, 282 U. S. 692, declared that the right of cross-examination is "one of the safeguards essential to a fair trial." And, in speaking of confrontation and cross-examination, this Court said in *Greene v. McElroy*, 360 U. S. 474:

"They have ancient roots. They find expression in the Sixth Amendment which provides that, in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." 360 U. S. at 360 U. S. 496-497. There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 U. S. 257, this Court said:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in

court—are basic in our system of jurisprudence, and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S. at 333 U. S. 273. And earlier this Term, in *Turner v. Louisiana*, 379 U. S. 466, 379 U. S. 472-473, we held:

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

We are aware that some cases, particularly *West v. Louisiana*, 194 U. S. 258, 194 U. S. 264, have stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply. *See also Stein v. New York*, 346 U. S. 156, 346 U. S. 195-196. But, of course, since *Gideon v. Wainwright*, *supra*, it no longer can broadly be said that the Sixth Amendment does not apply to state courts. And, as this Court said in *Malloy v. Hogan*, *supra*,

"The Court has not hesitated to reexamine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." 378 U. S. at 378 U. S. 5. In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

II

Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. *See, e. g.*, *Dowdell v. United States*, 221 U. S. 325, 221 U. S. 330; *Motes v. United States*, 178 U. S. 458, 178 U. S. 474; *Kirby v. United States*, 174 U. S. 47, 174 U. S. 55-56; *Mattox v. United States*, 156 U. S. 237, 156 U. S. 242-243. *Cf. Hopt v. Utah*, 110 U. S. 574, 110 U. S. 581; 11 U. S. 295. This Court has recognized the admissibility against an accused of dying declarations, *Mattox v. United States*, 146 U. S. 140, 146 U. S. 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox v. United States*, 156 U. S. 237, 156 U. S. 240-244. See also *Dowdell v. United States*, *supra*, 221 U.S. at 221 U. S. 330; *Kirby v. United States*, supra, 174 U.S. at 174 U. S. 61. Nothing we hold here is to the contrary. The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. *Compare Motes v. United States*, *supra*, at 178 U. S. 474. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them. Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state pro-

ceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

Reversed and remanded.

Mr. Justice Harlan, concurring in the result.

I agree that, in the circumstances the admission of the statement in question deprived the petitioner of a right of "confrontation" assured by the Fourteenth Amendment. I cannot subscribe, however, to the constitutional reasoning of the Court.

The Court holds that the right of confrontation guaranteed by the Sixth Amendment in federal criminal trials is carried into state criminal cases by the Fourteenth Amendment. This is another step in the onward march of the long-since discredited "incorporation" doctrine (*see*, *e. g.*, Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965), which for some reason that I have not yet been able to fathom has come into the sunlight in recent years. *See*, *e. g.*, *Mapp v. Ohio*, 367 U. S. 643; *Ker v. California*, 374 U. S. 23; *Malloy v. Hogan*, 378 U. S. 1.

For me, this state judgment must be reversed because a right of confrontation is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 325, reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth.

While either of these constitutional approaches brings one to the same end result in this particular case, there is a basic difference between the two in the kind of future constitutional development they portend. The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of

· subscribe
同意
· fathom
彻底了解

· tour de force
精心杰作
· witness
目击证人

ordered liberty." The philosophy of "incorporation," on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights (*but see Ker v. California*, *supra*, at 374 U. S. 34) and increasingly subjects state legal processes to enveloping federal judicial authority. "Selective" incorporation or "absorption" amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be deemed "fundamental", it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental.

It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court. The "incorporation" doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.

Mr. Justice Stewart, concurring in the result.

I join in the judgment reversing this conviction, for the reason that the petitioner was denied the opportunity to cross-examine, through counsel, the chief witness for the prosecution. But I do not join in the Court's pronouncement which makes "the Sixth Amendment's right of an accused to confront the witnesses against him... obligatory on the States". That questionable *tour de force* seems to me entirely unnecessary to the decision of this case, which I think is directly controlled by the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property, without due process of law".

The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is "one of the fundamental guarantees of life and liberty", and "one of the safeguards essential to a fair trial". It is, I think, as indispensable an ingredient as the "right to be tried in a courtroom presided over by a judge". In-

deed, this Court has said so this very Term. *Turner v. Louisiana*, 379 U. S. 466, 379 U. S. 472 – 473.

Here, that right was completely denied. Therefore, as the Court correctly points out, we need not consider the case which could be presented if Phillips' statement had been taken at a hearing at which the petitioner's counsel was given a full opportunity to cross-examine. *See West v. Louisiana*, 194 U. S. 258.

Exercises

Ⅰ. Brief the case and present the case brief to the class.

Ⅱ. Mark the following statements with T for true or F for false according to what you have read from the case.

( )1. To deprive an accused of the right to cross-examine the witness against him is a denial of the Fourteenth Amendment's guarantee of right to the assistance of counsel.

( )2. A major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witness against him.

( )3. Before the Fourteenth Amendment, the right of confrontation applied only in federal criminal trials.

( )4. Right of confrontation is the fundamental guarantee of life and liberty while right of cross-examination is the safeguard essential to a fair trial.

( )5. The opportunity to be heard includes, among other things, the right to offer testimony and to be represented by counsel.

Unit Five Civil Procedure Law

Warm-up Exercises: Listening Practice

Words and expressions:

adjudicate	service of process	pleadings	motions
deposition	discovery	prosecution	claimant
damages	restitution	injunction	

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

( ) 1. Civil procedure law states the rules and standards for trying a civil case.

( ) 2. Criminal prosecutions are usually started by the state.

( ) 3. Civil actions can be initiated by both state and private individuals.

( ) 4. In criminal prosecution, the party starting the action is the plaintiff.

( ) 5. The standard of finding the defendant guilty is higher than the standard to prove defendant liable.

Ⅱ. Listen to the passage again, and complete the following chart according to what you hear.

Items	Criminal Procedure	Civil Procedure
The party starting the action is called		
The party responding the action is named		
If the defendant loses the case, then the defendant is found		

Text A

Introduction to American Civil Procedure

I. The Pleading Stage of the Case

1. The Complaint

A civil action is commenced by filing a complaint or petition. This initial pleading filed by the complaining party generally consists of factual allegations, a description of the legal claims based on those allegations, and a request for relief. A lawsuit may involve one defendant, multiple defendants, or even a class of defendants. Similarly, the lawsuit may involve multiple plaintiffs or a class of plaintiffs.

The relief most commonly sought is money damages. Compensatory damages are intended to compensate the injured party for its loss. Punitive or exemplary damages are awarded beyond the actual loss and are intended to punish the wrongdoer and to deter similar conduct by others. The availability of punitive damages is limited by statute.

A party also may seek injunctive relief, i. e., an order by the court directing a party to do some act (positive) or to refrain from doing some act (negative). Once such an order is entered by a court, noncompliance with that order may be punishable as contempt of court.

A party also may seek declaratory relief. The trial courts have jurisdiction to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. This may include the interpretation and declaration of rights under "a statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing." The declaration may be affirmative or negative and "has the force and effect of a final judgment." For example, declaratory judgment proceedings frequently are initiated by insurance companies seeking a determination of their obli-

- pleading 诉状,诉答
- complaint 起诉书
- action 诉讼
- allegation 指控
- defendant 被告
- plaintiff 原告
- damages 赔偿金
- compensatory damages 补偿性赔偿金
- punitive or exemplary damages 惩罚性赔偿金
- deter 阻止
- injunctive relief 禁制令救济
- contempt of court 藐视法庭(罪)
- declaratory relief 确认性救济
- equitable 衡平法的
- franchise 特许权
- instrument 文书
- declaratory judgment 确认判决,宣告或判决

- option
选择
- procedural defences
程序性答辩
- motion to dismiss
驳回(原告)起诉的申请
- merits
案件的实质
- answer
答辩
- service
送达
- counterclaim
反诉
- cross claim
交叉请求,交叉诉讼
- third-party complaint
对第三人的起诉
- leave of court
法庭的许可,经法庭许可
- deficiency
不足
- expedite
加速
- streamline
简化
- litigation
诉讼
- service of papers
传票送达

gation to defend against another action.

2. The Defendant's Response to the Complaint

The defendant responding to the complaint has two options. The first is to raise one or more of several procedural defences that are allowed to be raised by a "motion to dismiss." The second option is to contest the complaint on its merits by filing an "answer." Whichever of the two alternatives is chosen, the defendant's response must be filed with the court within 20 days after service of the complaint unless an extension of time is obtained from the plaintiff or the court.

In addition to its responsive pleading, a defendant may file a counterclaim, which operates like a complaint, except that the defendant is now the counterclaim plaintiff. Thus, a counterclaim sets out factual allegations, legal claims, and a request for relief, just like a complaint. A counterclaim requires a response by the "counterclaim defendant," who was the plaintiff in the initial complaint.

A defendant may file a cross claim against another defendant or may file a third-party complaint against a nonparty. Cross claims and third-party claims include factual allegations, legal claims, and requests for relief. They also require a response by the cross claim or third-party defendants.

3. Amendment

A party may amend the pleading once as a matter of right if there has been no responsive pleading. Otherwise, leave of court or written consent of the other side is required. Leave of court is "given freely when justice so requires". Frequently a party will amend the pleading to cure any deficiencies addressed by a motion to dismiss. Amendments may be allowed even after trial under certain circumstances.

Ⅱ. Pretrial Procedure

After responsive pleadings or motions are due, the court may schedule a case management conference to try to expedite and streamline litigation, for example, by scheduling service of papers, coordinating complex litigation, addressing discovery issues, pretri-

al motions and settlement issues, requiring the parties to file stipulations, etc.

Later, the court may schedule a pretrial conference to address simplification of issues, amendments, admissions by one party, experts, etc. The failure of a party or its attorney to cooperate in these conferences may result in sanctions.

1. Discovery

Generally, discovery is allowed of "any matter, not privileged, that is relevant to the subject matter of the pending action." In this context, "relevance" has a very broad meaning. Information is discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence".

2. Protective Orders

At any time, a party or nonparty from whom discovery is sought may ask the court to enter a protective order to protect that person from "annoyance, embarrassment, oppression, or undue burden or expense". Such a protective order may prohibit discovery, limit its scope, or effectuate other protective measures.

3. Sanctions

A party who is dissatisfied with the other side's cooperation in discovery may seek an order compelling discovery. If a motion to compel is granted, the opposing party shall pay the moving party's expenses incurred in obtaining the order, which may include attorney's fees, unless the opposition to the motion was justified or other circumstances make an award of expenses unjust. Similarly, if the motion is denied, the moving party shall pay the nonmoving party's expenses unless the motion was substantially justified or other circumstances make an award of expenses unjust.

Ⅲ. Dismissal

Frequently, civil actions are dismissed before a trial on the merits of the underlying claims. In addition to settlement, dismissal of a civil action may come about under a number of circumstances.

- stipulations
  （双方辩护律师对有关审理事项达成的书面）协议书
- pretrial conference
  审前会议
- sanction
  制裁
- discovery
  信息披露
- pending action
  待决诉讼
- oppression
  压迫、压制
- effectuate
  实现
- incur
  引起，造成

· summary judgment
简易判决
· comply with
遵守
· merit
值得
· subject to
取决于……，以……为条件
· genuine
真正的，真实的
· scrutinize
仔细检查
· deposition
书面证词
· interrogatory
书面质询
· credibility
可信性

1. Voluntary Dismissal

A party's ability to dismiss its own action is limited by the rules of civil procedure. A party may dismiss its lawsuit voluntarily without a court order prior to trial, as long as no motion for summary judgment has been heard or one has been denied and the case has not been submitted to the fact-finder. An action may be dismissed by stipulation of the parties. If the plaintiff previously has dismissed a similar case, this second dismissal will operate as an adjudication on the merits and the plaintiff will not be permitted to refile the action. Otherwise, the plaintiff may be able to refile the action. However, the plaintiff may be required to pay costs before bringing a similar action against the same party.

2. Involuntary Dismissal

The court may enter an order of dismissal as a sanction for failure to comply with court rules or orders. In evaluating whether the compliance merits this drastic sanction, the court considers the intent of the noncompliant party, the existence of previous sanctions, the involvement of the client, the degree of prejudice to the other side, and any justification for noncompliance.

3. Summary Judgment

After the lawsuit has been filed, either party may move for summary judgment, subject to certain time restrictions. Unlike a motion to dismiss, a motion for summary judgment does more than challenge the legal sufficiency of the complaint. In moving for a summary judgment, one argues that the opposing party cannot present evidence that would be sufficient to demonstrate a "genuine issue as to any material fact" and that the moving party is entitled to judgment as a matter of law. Orders granting summary judgment are scrutinized closely on appeal.

The motion for summary judgment may be supported or opposed by competent affidavits made on personal knowledge which set forth admissible facts. The parties also may rely upon depositions and answers to interrogatories. However, in evaluating a motion for summary judgment, a trial judge may not weigh evidence or assess credibility. If the material facts are in dispute,

summary judgment may not be entered and the litigation continues.

Ⅳ. Non-judicial Methods of Resolution.

There are several ways in which a case may be resolved by the parties before trial, with the assistance of "alternative dispute resolution" techniques.

1. Mediation

Mediation is "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement." The parties also may stipulate to mediation. Mediation does not suspend the discovery process.

2. Arbitration

There are generally two types of court-ordered arbitration: mandatory non-binding arbitration and voluntary binding arbitration.

(1) Mandatory (Non-binding) Arbitration

The court may direct the parties to participate in mandatory, non-binding arbitration. Unlike mediation, which is relatively informal, arbitration is similar to a mini-trial because arbitrators may administer oaths, take testimony, issue subpoenas and apply to the court for orders compelling attendance and production. The arbitrator (or arbitration panel) renders a written decision which will become final if the parties do not submit a timely request for a trial *de novo*. If a party requests a trial *de novo* and does not achieve a result which is more favorable than the arbitration award, that party may be assessed costs, including fees.

(2) Voluntary (Binding) Arbitration

The parties also may agree in writing to submit their action to binding arbitration, except when constitutional, issues are involved. The parties may agree on the selection of one or more arbitrators; otherwise, they will be appointed by the court. As

- alternative dispute resolution 替代纠纷解决程序
- mediation 调解
- whereby 因此
- facilitate 使便利，有助于
- stipulate 协商，协议
- administer 实施
- subpoena 传票
- trial *de novo* 重新审判
- arbitration award 仲裁裁决
- assess costs 分摊诉讼费

· custody
监护权
· visitation
探视权
· offer of judgment
判决提议
· liability
责任
· mechanism
机制
· at issue
待决中

in mandatory non-binding arbitration, the arbitrator has the power to administer oaths, issue subpoenas, etc. A majority of the arbitrators may render a decision. Appeals to the circuit court are limited to statutorily defined issues, such as failure of the arbitrators to comply with procedural or evidentiary rules, misconduct, etc. Disputes involving child custody, visitation, or child support, or the rights of a nonparty to the arbitration are non-arbitrable.

3. Offers of Judgment

Before trial, a party may submit a written "offer of judgment" which offers to settle a claim on specified terms, e. g. , for a specified amount, etc. The other side has thirty days to accept the offer in writing. If the plaintiff rejects an offer by a defendant under this section and ultimately obtains a judgment of no liability or at least twenty-five percent less than the offer, the plaintiff will be responsible for costs and fees from the date of the filing of the offer. Likewise, if the defendant rejects a demand for judgment by the plaintiff under this section, and the plaintiff subsequently obtains a judgment which is at least twenty-five percent greater than the offer, the defendant will be responsible for plaintiff's fees and costs incurred after the date of the filing of the demand. An offer or demand may be withdrawn in writing at any time prior to its acceptance. Given the availability of fees and costs under this section, it is a powerful mechanism for encouraging parties to consider settlement offers seriously.

V. Trial

Although the majority of civil cases are resolved without a trial, many still proceed to trial. Once all motions directed to the last "pleading" have been resolved or, if no such motions were served, within twenty days of the service of the last pleading, an action is "at issue", and a party may notify the court that it is ready to be set for trial. Typically, the court directs the parties to mediation if mediation already has not occurred. Otherwise, a trial date may be scheduled.

1. Demand for Jury

Typically, the demand for a jury trial is appended to the plaintiff's complaint. A plaintiff may choose, however, for strategic purposes or otherwise, not to assert its jury trial right. However, both parties enjoy the right to a jury trial and a defendant who desires a jury trial typically will demand one in its answer or other responsive pleading. If a jury trial is not demanded within the time limits imposed by the rules of civil procedure, it is deemed waived. If a jury trial is demanded, the demand thereafter may not be withdrawn without consent of the parties.

A matter may be tried completely or partially to a jury. However, parties are not entitled automatically to a jury trial in all cases because some matters, such as injunction proceedings, are not triable to a jury.

2. Jury Selection

Assuming that a jury trial has been demanded, the first step in the trial process is jury selection. Prospective jurors may be provided with a questionnaire to determine any legal disqualifications (e. g., felony conviction). Jurors also may be provided with questionnaires to assist in *voir dire*, or the oral examination of prospective jurors. The parties have the right to examine jurors orally on *voir dire*. The court also may question prospective jurors.

The parties may challenge any prospective juror "for cause", i. e., if the juror is biased, incompetent, or related to a party or attorney for a party or has some interest in the action. There is no limit to the number of "for cause" challenges which may be raised. On the other hand, a party generally is limited to three "peremptory" challenges, which do not require that the party establish cause, or any other reason for that matter.

3. Opening Statements

After a jury is selected, the parties present opening statements. Opening statements are not supposed to be arguments; rather, the parties should advise the jury of what the evidence will prove. After opening statements, the parties or the court may "invoke the rule",

- append to 附加于
- assert 主张
- impose 施加
- waive 放弃
- injunction 禁制令
- prospective juror 待送陪审员
- questionnaire 调查问卷
- disqualification 不适格
- *voir dire* 预先审查，对陪审员的资格审查
- challenge 申请……回避；质疑
- peremptory challenge 无因回避
- invoke 援引

- direct examination
  直接询问
- cross examination
  交叉询问
- the hearsay rule
  传闻证据规则
- leading question
  诱导性问题
- objection
  反对,异议
- ruling
  裁决
- sustain
  准许、同意
- valid
  有效的

which simply means that nonparty witnesses are excluded from the courtroom while others are testifying. In addition, the witnesses are directed not to discuss the case with anyone other than the attorneys.

4. Direct Examination and Cross Examination

The plaintiff's lawyer calls her or his witness and question the witness. This is known as direct examination. When the plaintiff's lawyer has finished, the defendant's lawyer may cross-examine the plaintiff's witness. On cross-examination, the defendant's lawyer is free either to limit his questions to topics raised by the plaintiff's lawyer or to open a new line of questioning. When the defendant's lawyer has finished, the plaintiff's lawyer may redirect, or ask additional questions of the same witness. On redirect examination, however, the plaintiff's lawyer may ask only questions raised by the defendant's lawyer on cross-examination; she or he may not open a new line of questioning. Upon completion of redirect, the defendant's lawyer may recross-examine but also is limited to questions raised on redirect. When both lawyers have asked all of their questions, the witness is excused.

Strict rules of procedure govern the questioning of witnesses and the admission of evidence. The hearsay rule, for example, forbids witnesses from testifying about facts of which they have no direct knowledge or information. Lawyers are forbidden to ask leading questions of their own witness. A question such as "Did you see the defendant strike the plaintiff on the evening of May 1?" would be improper. However, the question "What did you see on or about 6:00 P M. on the evening of May 1?" would be acceptable. During the questioning of a witness, a lawyer may note his objection to either the other lawyer's question or the witness's response. The judge must make a ruling to either sustain the objection as valid or overrule it as invalid. These objections, and the judge's subsequent rulings, may provide the losing party with the legal grounds on which to base a future appeal. Objections to a judge's ruling must be "timely"; after-the-fact objections when the trial is over usually do not provide grounds for an appeal.

5. Motion for Directed Verdict

After the plaintiff presents its case-in-chief, the defendant may move for a directed verdict on the grounds that the plaintiff has failed to present sufficient evidence to justify submission of the case to the jury. If the motion is denied or reserved, the case proceeds, subject to the defendant's ability to renew the motion at the close of the evidence.

After the plaintiff presents its case and any motions for directed verdict by either side are addressed, the defendant presents its case-in-chief. At the close of the defendant's case, either party may move for a directed verdict. The plaintiff may present rebuttal evidence.

6. Closing Argument

After the close of all the evidence, each side has an opportunity to present closing arguments. Because the plaintiff bears the burden of proof, the plaintiff is permitted to argue first and last (i. e., in rebuttal to defendant's argument). The attorneys are required to confine their closing arguments to the evidence presented, along with its reasonable inferences. Case law restricts the types of arguments which may be presented in closing argument. For example, an attorney may not express a personal belief in his client or his client's case. He may not request that the jury place itself in his client's shoes, i. e., the so-called "Golden Rule" argument.

7. Jury Instructions

If the judge does not direct a verdict following the parties' respective presentations, the case is submitted to a jury. The judge instructs the jurors on the manner in which they are expected to deliberate and the law that they must follow. Finally, the jurors retire to deliberate. Frequently, the jury has questions during the deliberation process. The parties and their attorneys are notified of such questions. There may be some discussion or debate on how such questions are to be answered and the attorneys may object on the record to the answers ultimately provided to the jury.

8. Verdict

Once the jury's deliberations are complete, the verdict is an-

- directed verdict 指示裁断
- present one's case-in-chief 举证
- rebuttal 辩驳,反驳
- bear the burden of proof 承担举证责任
- inference 推论,推断
- "Golden Rule" argument "黄金法则"("金科玉律")型辩论
- jury instruction (法官)对陪审团的指示
- deliberate 评议
- retire 退庭

· general verdict
总括裁断
· special verdict
特殊裁断
· count
诉讼请求
· foreperson
陪审团主席
· negligence
过失责任
· itemize
逐条记载
· compute
计算
· poll
投票
· discharge
准许离开
· appeal
上诉
· warrant
保证
· reversible error
可撤销判决的错误

nounced in open court. A verdict may be either a "general" verdict or a "special" verdict. A general verdict "finds for a party in general terms on all issues within the province of the jury to determine." On the other hand, the court might employ a "special verdict" which asks the jury to answer specific questions which determine the disputed facts. Regardless of the form of verdict that is used, a separate verdict on each count must be required if requested by either party. The verdict form is written and signed by the foreperson.

In negligence actions, the verdict is required to be itemized according to economic loss, noneconomic loss, and punitive damages (if awarded). In addition, damages must be itemized further into past and future damages. Economic damages are computed before and after reduction to present value, but no other damages are reduced to present value. After the verdict is read, either party may request that the individual jurors be polled. Each juror is asked then to confirm that the verdict read is his or her verdict. Once the requested polling is complete, the jury is discharged.

Ⅵ. Appeal

The person who loses the case at trial has the right to appeal the decision. The grounds for the appeal may vary but generally fall into two categories. The first alleges that the judge made an error or errors regarding questions of law. Recall our previous discussion of the need for attorney to make timely objections to the judge's rulings on points of law. When an attorney makes such an objection and the judge overrules it, there is a disagreement over a point of law. That disagreement provides the legal grounds upon which the appeal may be based. The appellate court must first decide whether the trial judge was correct in his ruling. If the trial judge is ruled to have been incorrect, the appellate court must next determine whether the error was serious enough to warrant a new trial. In the case of a reversible error, the appellate court concludes that the error was so serious that it might have adversely affected the outcome of the trial. In that instance, a new trial will be ordered. If the error is found to be a harmless error, however, the judgment of the trial

court will be affirmed. An appellate court will frequently refuse to overrule the trial judge if the alleged error falls into an area committed to the trial judge's discretion. In such an instance, the trial judge is presumed to be correct and the appellate court is precluded from overruling him.

The second category of appeals, known as remittitur, occurs in cases in which money damages have been awarded. Such appeals are often based on the grounds that the award was excessive. Juries find it difficult to determine the proper monetary damages to be awarded. In a libel suit, for example, how much is a person's reputation worth, and how can money compensate the victim for damage to his reputation? These are difficult questions to answer, and juries sometimes get carried away and award more in damages than is warranted. An appellate court may reduce the award if, in its judgment, the award was excessive.

As a general rule, litigants have the "right" to one appeal of a trial court decision. The right to an appeal must be based on a statute or it may be granted with the permission of the court. The person requesting the appeal is called the appellant and the person against whom an appeal is made is called the appellee.

- discretion 自由裁量权
- preclude 排除
- remittitur 减免赔偿额
- libel 诽谤
- appellant 上诉人
- appellee 被上诉人

Ⅶ. Conclusion

This article provides a general overview of the route of a civil lawsuit. Every lawsuit is different and the steps often vary dramatically.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

Notes

1. damages: money claimed by, or ordered to be paid to, a person as compensation for loss or injury. 损害赔偿金。指一方当事人的行为致另一方当事人的人身、财产或权益受损害,从而由前者向后者支付的用于赔偿或补偿的金钱。
2. compensatory damages: an amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses. 补偿性损害赔偿金。指用于补偿实际的和精神的损失、伤害的一切损害赔偿金。

3. punitive or exemplary damages: damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit. 惩罚性赔偿金。指当被告以恶意、故意、欺诈或放任之方式实施行为而致原告受损时，原告可以获得的除实际损害赔偿金外的损害赔偿金。
4. injunctive relief: i. e. injunction, a court order commanding or preventing an action. 禁制令救济。即禁制令，指法院签发的要求当事人做某事或某行为或禁止其做某事或某行为的命令。
5. declaratory relief: a court's decision that establishes the rights and other legal relations of the parties without providing for or ordering enforcement. 确认性救济；宣告式救济。指法院仅确认当事人之间的权利及其他法律关系而未规定可予强制执行的救济。
6. motion to dismiss: a request that the court dismiss the case because of settlement, voluntary withdrawal, or a procedural defect. 驳回（原告）起诉的申请。指被告以原告没有陈述一项法律可对之提供救济的请求，或该请求在其他方面存在法律上的欠缺为由，申请法院驳回原告的起诉。
7. merits: the elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case. 案件的实质。
8. cross claim: i. e. cross-claim, a claim asserted between codefendants or complaintiffs in a case and that relates to the subject of the original claim or counterclaim. 交叉请求；交叉诉讼。指诉讼中的共同当事人之一对其他共同当事人提出的请求，即共同被告相互之间或共同原告相互之间提出的请求。
9. third-party complaint: a complaint filed by the defendant against a third party, alleging that the third party may be liable for some or all of the damages that the plaintiff is trying to recover from the defendant. 对第三人的起诉。指被告对本案当事人以外的第三人的起诉，称本案原告向被告主张的损害赔偿将可能部分或全部由该第三人承担，因而起诉。
10. discovery: compulsory disclosure, at a party's request, of information that relates to the litigation. The primary discovery devices are depositions, interrogatories, requests for admissions, and requests for production. 信息披露。指民事诉讼中的一种审前程序，一方当事人可以通过该程序从对方当事人处获得与案件有关的事实与信息，以助于准备庭审。主要披露的方式包括：书面证词、书面质询、请求承认、请求出示文件等。
11. summary judgment: a judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. 简易判决。指当当事人对案件中的主要事实不存在真正的争

议或案件仅涉及法律问题时，法院不经开庭审理而及早解决案件的一种方式。

12. deposition: a witness's out-of-court testimony that is reduced to writing (usually by a court reporter) for later use in court or for discovery purpose. 书面证词。指证人在法庭外，依一般法律或法院诉讼规则规定，在宣誓后对口头询问问题做出回答，并做成笔录且经正式认证后形成的证词。
13. interrogatory: a written question (usually in a set of questions) submitted to an opposing party in a lawsuit as part of discovery. 书面质询。指诉讼一方当事人向他方当事人用书面提出的问题（通常是一系列问题）。
14. alternative dispute resolution: a procedure for settling a dispute by means other than litigation, such as arbitration, mediation, etc. 替代纠纷解决程序。指使用诉讼以外的方法来解决纠纷，如仲裁、调节等。
15. offer of judgment: a settlement offer by one party to allow a specified judgment to be taken against the party. 判决提议。指在民事诉讼中，在案件开庭审理前，反驳对方请求的一方当事人可向对方当事人送达其解决案件的提议，允许依照其提议中指定的金钱、财产或后果做出对其不利的判决。
16. *voir dire*: Latin French "to speak the truth", a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. 预先审查、对陪审员的资格审查。拉丁法语中意思是"讲真话"。指法官和当事人及律师对候选陪审团员通过询问来审查其是否具备作为陪审团员的资格及适当性的程序。
17. peremptory challenge: one of the party's limited number of challenges that need not be supported by any reason, although a party may not use such a challenge in a way that discriminates on the basis of race, ethnicity, or gender. 无因回避。指民事诉讼或刑事诉讼中的当事人可以不说明理由，拒绝或者阻止某人充任本案陪审员。
18. the hearsay rule: which refers to testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence; the evidence rule that no assertion offered as testimony can be received unless it is or has been open to test by cross-examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, by court rules, or by statute. 传闻证据规则。指证人不是以自己对某事实的亲身感知为基础，而是就自己从别人那里听说的事实所做的陈述。这种传闻证据不具有可采信

性，因为对这种证据不能通过在公开法庭上交叉询问的方式来验证其真实性，除非证据规则、法庭裁决或法律有例外规定。

19. directed verdict: a ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict. 指示裁断。指直接依案件承审法官的命令而对案件做出判决，因为案件的证据只能合理地得出唯一的结论。
20. "Golden Rule" argument: a jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff or crime victim. "黄金法则"("金科玉律")型辩论。指法庭辩论时律师要求陪审员将自己或家人或亲朋好友设想为案件的受害者，并由此做出裁断。
21. jury instruction: a direction or guideline that a judge gives a jury concerning the law of the case. (法官)对陪审团的指示。指法官就与案件有关的法律适用问题向陪审团所作的指示，对该指示陪审团应当接受和适用。

Exercises

Check Your Understanding

Answer the following questions according to the text.

1. What are the stages included in a civil case?
2. What is the pleading stage of a civil case?
3. How can a civil action be started?
4. What is the party initiating a civil action named?
5. What relieves can the plainstiff seek when he/she sues the defendant?
6. What is a declaratory relief?
7. How can the defendant respond to the plaintiff?
8. What proceedings are usually included in the pretrial procedure?
9. Under what circumstances may a civil case be dismissed?
10. What is a summary judgment?
11. In addition to filing a suit, are there any other methods of disput resolution? If yes, what are they?
12. How can a trial be conducted?
13. What are the grounds for an appeal?

Build Up Your Vocabulary

Ⅰ. Match the items in the following two columns.

A	B
1. plaintiff	a. the testimony of a witness reduced to writing in due form of law, taken by virtue of a commission or other authority of a competent tribunal
2. defendant	b. the formal decision issued by a jury on the issues of fact that were presented at trial
3. complaint	c. a judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law
4. verdict	d. the person who initiates a lawsuit
5. motion to dismiss	e. delivery of the statement of claim or other pleadings to those parties named in a court or other adversarial proceeding
6. counterclaim	f. in a civil action, the document that initiates a lawsuit
7. deposition	g. a person against whom an action or claim is brought in a court of law
8. subpoena	h. a request that a civil case be dropped without a judgment
9. service of process	i. a writ commanding a person designated in it to appear in court under a penalty for failure
10. summary judgment	j. a claim filed in opposition to another claim, especially in a legal action
	k. the evaluation of evidence in the making of a decision

Ⅱ. Fill in the blanks with the words or expressions given below, changing the forms if necessary.

arbitration	mediation	alternative dispute resolution
voir dire	peremptory challenge	cross-examination
leading question	directed verdict	jury selection appeal

1. Depending on the jurisdiction, attorneys may have an opportunity to mount a challenge for cause argument or use one of a limited number of _____.
2. Selected jurors are generally subjected to a system of examination whereby both the prosecution (or plaintiff, in a civil case) and defense can object to a juror. In common law countries, this is known as _____.

3. ____ refers to several methods used to choose the people who will serve on a trial jury.
4. Parties to a dispute may choose ____ as (often) a less expensive route to follow for dispute resolution.
5. ____ (also known as External Dispute Resolution in some countries, such as Australia) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation.
6. In ____, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution.
7. In law, a ____ is an order from the judge presiding over a jury trial that one side or the other wins.
8. Since a witness called by the opposing party is presumed to be hostile, cross-examination does permit ____.
9. The main purposes of ____ are to elicit favorable facts from the witness, or to impeach the credibility of the testifying witness to lessen the weight of unfavorable testimony.
10. In law, an ____ is a process for requesting a formal change to an official decision.

Cloze

Choose the proper word from the list below, and then fill in the blanks. Change the form if necessary.

adjudicate	appellate jurisdiction	discretionary jurisdiction	
federal jurisdiction	general jurisdiction	limited jurisdiction	litigant
original jurisdiction	personal jurisdiction	subject-matter jurisdiction	

The primary distinctions between areas of jurisdiction are codified at a national level. As a common law system, jurisdiction is conceptually divided between jurisdiction over the *subject matter* of a case and jurisdiction over the *person* of the ____. Sometimes a court may exercise jurisdiction over property located within the perimeter of its powers without regard to ____ over the litigants; this is called *jurisdiction in rem.*

A court whose ____ is limited to certain types of controversies (for example, suits in admiralty or suits where the monetary amount sought is less than a specified sum) is sometimes referred to as a *court of special jurisdiction* or *court of limited jurisdiction.*

A court whose subject-matter is not limited to certain types of controversy is referred to as a *court of general jurisdiction.* In the U. S. states, each state has courts of ____; most states also have some courts of limited jurisdiction. Federal courts (those operated by the federal government) are courts of ____. ____ is divided into federal question ju-

risdiction and diversity jurisdiction. The United States district courts may hear only cases arising under federal law and treaties, cases involving ambassadors, admiralty cases, controversies between states or between a state and citizens of another state, lawsuits involving citizens of different states, and against foreign states and citizens.

Certain courts, particularly the United States Supreme Court and most state supreme courts, have _____, meaning that they can choose which cases to hear from among all the cases presented on appeal. Such courts generally only choose to hear cases that would settle important and controversial points of law. Though these courts have discretion to deny cases they otherwise could _____, no court has the discretion to hear a case that falls outside of its subject-matter jurisdiction.

It is also necessary to distinguish between original jurisdiction and appellate jurisdiction. A court of _____ has the power to hear cases as they are first initiated by a plaintiff, while a court of _____ may only hear an action after the court of original jurisdiction (or a lower appellate court) has heard the matter. For example, in United States federal courts, the United States district courts have original jurisdiction over a number of different matters (as mentioned above), and the United States court of appeals have appellate jurisdiction over matters appealed from the district courts. The U. S. Supreme Court, in turn, has appellate jurisdiction (of a discretionary nature) over the Courts of Appeals, as well as the state supreme courts, by means of writ of certiorari.

Translation

Translate the following sentences into Chinese.

1. A civil action is commenced by filing a complaint with the court.
2. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff.
3. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.
4. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of person having knowledge of any discoverable matter.
5. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, or other rules adopted by the Supreme Court provides otherwise.

Text B

Long-arm Statute

- long-arm statute 长臂法
- *in personam* jurisdiction 对人管辖权
- service of process 诉状送达
- due process 正当程序
- minimum contacts 最低限度联系
- fair play and substantial justice 公平对待与实质公正
- avail oneself of 利用
- foresee 预见
- hale 迫使……去，强使

A state law that allows the state to exercise jurisdiction over an out-of-state defendant, provided that the prospective defendant has sufficient minimum contacts with the forum state.

Jurisdiction over an out-of-state defendant is referred to as extraterritorial *in personam* jurisdiction. In *personam* jurisdiction, also known as personal jurisdiction, allows a court to exercise jurisdiction over an individual, and is the fundamental requirement necessary for a court to hear the merits of a claim. Historically, a state could exercise jurisdiction only within its territorial boundaries; therefore, a nonresident defendant could be brought into court only when service of process was effected while that defendant was within the boundaries of the state. The U. S. Supreme Court upheld this principle, and raised it to a constitutional level, when it stated that judgments entered by a court without such jurisdiction were violations of the Due Process Clause of the U. S. Constitution (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 [1877]).

The requirement of physical presence within the state's boundaries was expanded in *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In *International Shoe*, the Supreme Court held that due process required that the defendant have "certain minimum contacts" with the forum in order for a state to assert jurisdiction, and that such jurisdiction may not offend "traditional notions of fair play and substantial justice".

Since *International Shoe*, the Supreme Court has set forth several criteria to be used in analyzing whether jurisdiction over a nonresident is proper. These criteria require (1) that the defendant has purposefully availed himself or herself of the benefits of the state so as to reasonably foresee being haled into court in that state; (2) that the forum state has sufficient interest in the dispute; and (3) that haling the defendant into court does not offend "notions of fair play and

substantial justice".

Following the Court's lead in *International Shoe*, individual states began enacting long-arm statutes setting forth their requirements for personal jurisdiction over nonresidents. Illinois was the first state to do so. Its statute (Ill. Rev. Stat. chap. 110, para. 17 [1955]) allowed service of process outside the state on nonresident individuals and corporations in actions arising out of (1) the transaction of any business in the state; (2) the commission of a tortious act within the state; (3) the ownership, use, or possession of real estate in the state; or (4) a contract to insure any person, property, or risk located in the state. The Illinois statute became a template for many state long-arm statutes.

In 1963, the Uniform Interstate and International Procedure Act was promulgated by the Commissions on Uniform Laws. The Uniform Act was similar to the Illinois statute, but also included a provision authorizing jurisdiction in the event that an act or omission outside the state caused injury in the state. This Uniform Act also became a model for other states in developing their long-arm statutes.

Since 1963, all states and the District of Columbia have enacted long-arm statutes. Long-arm statutes tend to fall into one of two categories. The first enumerates factual situations likely to satisfy the minimum-contacts test of *International Shoe*. The second type is much broader; it provides jurisdiction over an individual or corporation as long as that jurisdiction is not inconsistent with constitutional restrictions. If such a statute enumerates requirements for jurisdiction, the facts of the situation must fall within one of those requirements. The court must then determine whether the procedural due process requirements of both the state and federal constitutions have been met.

The long-arm statute has seriously been challenged with the emergence of the Internet. Since the late 1990s, lawsuits that center on Internet commercial and defamation disputes have been commonplace. A key issue has been whether plaintiffs may sue and enforce judgment in their state of residence or whether they must file suit in the state where the defendant resides or has its place of business. In

- template
  样板,模板
- promulgate
  颁布
- Commissions on Uniform Laws
  统一法委员会
- enumerate
  列举,枚举
- emergence
  出现,兴起
- defamation
  污蔑,诽谤
- reside
  居住

· domain
域;范围,范畴

Zippo Manufacturing v. Zippo Dot Com, 952 F. Supp. 1119 (W. D. Pa. 1997), the court announced a standard that showed promise for analyzing this question.

Zippo Manufacturing, the maker of the well-known Zippo lighter, discovered that another company, Zippo Dot Com, had acquired the domain names "zippo. com", "zipponews. com", and "zippo. net". From these sites, Zippo Dot Com, based in California, ran a news distribution service with nearly 150,000 paying customers, including some 3,000 in Pennsylvania, Zippo Manufacturing's state of incorporation. Zippo Dot Com's contacts with Pennsylvania were almost entirely electronic, consisting of the contract filled out online by new customers and access agreements with seven Internet service providers in that state. Zippo Manufacturing sued Zippo Dot Com in the Western District of Pennsylvania for a variety of trademark offenses relating to the domain names owned by the latter. The news service filed a motion to dismiss for lack of personal jurisdiction.

The court denied Zippo Dot Com's motion and concluded that the news service does do business in Pennsylvania; therefore, jurisdiction was established. In its ruling, the court divided websites into three categories based on the presumption that the exercise of personal jurisdiction is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet". If a defendant enters into contracts that involve the "knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper". At the opposite end are situations where a defendant runs a "passive website" that merely contains posted information accessible to anyone. The third category involves interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the site.

Owing to the different types of long-arm statutes, as well as various court interpretations of these statutes, the relevant state laws must be examined when determining whether a prospective nonresi-

dent defendant falls under the jurisdiction of a state and may be brought into that state's court.

(http://law.jrank.org/pages/8361/Long-Arm-Statute.html)

Notes

1. long-arm statute: a statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect. 长臂法。指各州立法规定对非本州居民如果其与本州存在某种联系,则对之可行使对人管辖权。
2. *in personam* jurisdiction: a court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests. 对人管辖权。指法院具有约束当事人的权力;法院对被告人所具有的管辖权而不仅仅是对财产具有约束力。
3. due process: the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. 正当程序。
4. minimum contacts: a nonresident defendant's forum-state connections, such as business activity or actions foreseeably leading to business activity, that are substantial enough to bring the defendant within the forum-state court's personal jurisdiction without offending traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945). 最低限度联系。美国最高法院在"国际鞋业公司诉华盛顿州"一案中确立的关于对非本州民事被告行使对人管辖权的最低法律要求原则。依据该原则,如果被告与诉讼地州有足够的或实质性的联系,从而对该案的审理不违反传统的公平对待和实质公正的概念,则州法院对不在该州居住的民事被告有对人管辖权。
5. fair play and substantial justice: the fairness requirement that a court must meet in its assertion of personal jurisdiction over a nonresident defendant to comport with due process. 公平对待和实质公正。
6. Commissions on Uniform Laws: 统一法委员会。

Check Your Understanding

Mark the following statements with T for truth or F for false according to what you have read from Text B.

( )1. A state may exercise jurisdiction over an out-of-state defendant if the defendant has minimum contacts with the forum state.

( )2. Personal jurisdiction allows a court of a state to exercise jurisdiction over an individual's property.

( )3. If a court enters a judgment without personal jurisdiction over the defendant, the judgment is a violation of the U. S. Constitution.

( )4. Long-arm statutes allow a state to have jurisdiction over a defendant even if the defendant is not within the boundaries of the state.

( )5. A forum state could exercise personal jurisdiction over a nonresident defendant as long as the forum state is interested in the defendant.

( )6. Before the Uniform Interstate and International Procedure Act was issued by the Commissions on Uniform Laws in 1963, there was no state enacting any long-arm statute.

( )7. The Uniform Interstate and International Procedure Act was a uniformed long-arm statute across the USA.

( )8. According to the case *International Shoe*, a state can exercise jurisdiction over an out-of-state individual or corporation as long as that jurisdiction is not inconsistent with constitutional restrictions.

( )9. Under the internet situation, the exercise of personal jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the site.

( )10. Since the long-arm statutes are different from state to state, the relevant state laws must be examined when determining whether a nonresident defendant falls under the jurisdiction of a state and may be brought into that state's court.

Build Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
civil procedure	
	诉状,诉答
interrogatory	
	仲裁
voir dire	
	无因回避
leading questions	
	举证责任
adjudication	
	禁制令

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

in personam jurisdiction
in rem jurisdiction
subject matter jurisdiction
territorial jurisdiction
original jurisdiction
appellate jurisdiction
diversity jurisdiction
concurrent jurisdiction
due process
affidavit
forum
service of process
minimum contacts
class action
standards of proof
litigant

Translation

Translate the following sentences into English.

1. 民事诉讼当事人有平等的诉讼权利。人民法院审理民事案件,应当保障和便利当事人行使诉讼权利,对当事人在适用法律上一律平等。

2. 基层人民法院管辖第一审民事案件，但本法另有规定的除外。
3. 对公民提起的民事诉讼，由被告住所地人民法院管辖；被告住所地与经常居住地不一致的，由经常居住地人民法院管辖。
4. 人民法院有权向有关单位和个人调查取证，有关单位和个人不得拒绝。
5. 送达诉讼文书必须有送达回证，由受送达人在送达回证上记明收到日期，签名或者盖章。

Case Study

Gibbons v. Brown

Florida District Court of Appeals
716 So. 2d 868 (1998)

- quash
撤销
- prerequisite
前提，先决条件

PER CURIAM. This appeal arises from an appealable non-final order denying Martine Gibbons' motion to quash service of process and, alternatively, motion to dismiss Donna Brown's complaint. We have jurisdiction under Florida Rule of Appellate Procedure 9.130 (a)(3)(C)(i). The appellant contends that the lower tribunal erred in denying her motion, in that the appellee's complaint failed to set forth sufficient allegations of ultimate fact to establish the Florida court's proper exercise of long-arm jurisdiction over the appellant pursuant to section 48.193, Florida Statutes (1997). Concluding that the allegations satisfied neither the statutory prerequisites nor the constitutional requirements of due process, we reverse the order with directions that the cause be dismissed...

In her complaint in Duval County Circuit Court Case No. 97-5904, Mrs. Brown alleged 1) that she is a resident of Florida; 2) that Ms. Gibbons has subjected herself to the personal jurisdiction of the Florida court by bringing a prior lawsuit in Circuit Court Case No. 95-6244 against Clarence Brown (Mrs. Brown's husband) in Duval County "involving the same subject matter"; 3) that on August 24, 1994, Mrs. Brown and Ms. Gibbons were passengers in a motor vehicle driven by Mr. Brown near Montreal, Quebec, in Canada, when Ms. Gibbons negligently directed Mr. Brown to turn onto and proceed in the wrong direction on a one-way road; 4) that Ms. Gibbons

owed Mrs. Brown a duty to exercise reasonable care for her safety while giving traffic directions to the driver of the vehicle; 5) that as a direct and proximate result of Ms. Gibbons' negligence, Mr. Brown headed the wrong way on the road and crashed head-on into another vehicle on a hilly curve; and 6) that as a result of Ms. Gibbons' negligence, Mrs. Brown suffered injury. The plaintiff, Mrs. Brown, demanded judgment against Ms. Gibbons for damages, post-judgment interest and costs, and a jury trial.

In her motion to quash service of process and, alternatively, motion to dismiss, Ms. Gibbons stated that she is a resident of Texas. Noting that her 1995 civil action "arising out of the same subject matter" was brought against Mr. Brown, and not against Mrs. Brown, Ms. Gibbons challenged the allegations in the 1997 complaint as insufficient to establish proper service on her, and inadequate to satisfy the strict requirements of the Florida long-arm statute. *Citizens State Bank v. Winters Gov't Securities Corp.* ... (in light of strict construction to be accorded long-arm statutes, person seeking to invoke jurisdiction under such statute has burden of proving facts that clearly justify use of this method of service).

Obtaining in personam jurisdiction over a non-resident defendant requires a two-pronged showing. First, the plaintiff must allege sufficient jurisdictional facts to bring the defendant within the coverage of the long-arm statute, ... If that prong is satisfied, then the second inquiry is whether sufficient "minimum contacts" are shown to comply with the requirements of due process. *International Shoe Co. v. Washington.* ... Generally speaking, Florida's long-arm statutes are of a class that requires more activities or contacts to allow service of process than are currently required by the decisions of the United States Supreme Court.

As to the first part of the inquiry, Mrs. Brown contends that the allegations in her complaint satisfy section 48.193(2), Florida Statutes (1995), which states:

A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of

· proximate
最接近的，直接的
· two-pronged
两方面的
· intrastate
州内的

· partition
财产分割
· probate court
遗嘱检验法庭
· estop
禁止，阻止
· vehicular
车辆的

this state, whether or not the claim arises from that activity.

The parties agree that as a general rule in Florida, a plaintiff, by bringing an action, subjects herself to the jurisdiction of the court and to subsequent lawful orders entered regarding the same subject matter of that action. *Glass v. Layton.* ... (by instituting partition action, plaintiff subjected herself to jurisdiction of court, which had full power to adjudicate all rights of parties while parties and subject matter remained within court's jurisdiction); *Edwards v. Johnson.*...; *Burden v. Dickman.*... (probate court had personal jurisdiction over parents of minor who affirmatively sought court's jurisdiction to administer guardianship of minor's property; by petitioning probate court to be appointed joint guardians of property, parents submitted themselves to court's jurisdiction...; *Palm Beach Towers, Inc. v. Korn.*... ("It is the general law of this state that when a plaintiff institutes an action it subjects itself to the jurisdiction of the court and to such lawful orders which are thereafter entered with respect to the subject matter of the action.");*Shurden v. Thomas.*... (defendant who disputed trial court's jurisdiction over her person by moving to question purported service, but then on same day sued plaintiff in same court on same subject matter, waived service in first action and was estopped to question court's jurisdiction therein). Mrs. Brown broadly construes this general rule to mean that by initiating the 1995 action, Ms. Gibbons subjected herself to Florida jurisdiction with respect to any "lawful orders" that were entered subsequently regarding "the subject matter of the action". On the other hand, Ms. Gibbons notes that her prior suit was brought in 1995, whereas Mrs. Brown did not file her complaint until October 20, 1997. Although Ms. Gibbons acknowledges that her prior action arose from the same vehicular accident as Mrs. Brown's instant suit, Ms. Gibbons notes that Mrs. Brown was not a party in the earlier action. Furthermore, several years separate the filing of the two proceedings. For purposes of the resolution of the question on appeal, we assume that the 1995 proceedings were over by the time Mrs. Brown brought her 1997 suit.

In *Milberg Factors, Inc. v. Greenbaum*... the Florida-based

guarantor of debts owed by a New York textile manufacturer to Milberg Factors, Inc. (a Delaware factoring and commercial financing corporation with its principal place of business in New York) brought a declaratory judgment action in Florida seeking to determine the extent of the guarantor's liability. *Milberg Factors*... In support of jurisdiction in the Florida court, the plaintiff alleged that Milberg had entered into five factoring agreements over a ten-year period with Florida-based companies, had filed U. C. C. financing statements in Florida, and had filed lawsuits against account debtors in Florida. Noting that Milberg was a foreign corporation that did not solicit business or maintain an office, agent, employee, or telephone listing in Florida, the district court found that Milberg's contacts with Florida were "isolated." *Milberg Factors*... Observing that an entity cannot control where its account debtors choose to relocate, the court stated that "the filing of lawsuits unrelated to this action against account debtors in Florida does not subject Milberg to the jurisdiction of our courts".

Even if we assume (without deciding) that bringing an action in a Florida court can constitute a "substantial and not isolated activity" in some instances, we nevertheless note that Mrs. Brown has not shown that Ms. Gibbons "is engaged" in any activity in this state whatsoever other than defending the present suit. A current defendant's prior decision to bring a suit in Florida should not act indefinitely as a sword of Damocles hanging perilously over the head of that defendant if she later challenges jurisdiction in a separate suit (albeit a suit arising from the same subject matter). See *Frazier v. Frazier*... (former wife, who lived in Connecticut, did not subject herself to jurisdiction of Florida court for purpose of litigating issues of future alimony of child support raised by former husband's counterclaim when she filed suit in Florida against former husband to enforce money judgments obtained in Connecticut). Given the length of time between the two actions and the fact that the prior suit named as the defendant a non-party in the instant proceedings, we conclude that Mrs. Brown has not alleged a satisfactory ground for personal jurisdiction pursuant to statutory subsection (2). The appel-

- solicit 招揽(生意)
- perilously 非常危险地
- alimony 赡养费

· progeny
后代;后续
· requisite
需要的,必要的

lee does not suggest, nor do we find, that the appellant's filing the 1995 action in the Florida court would, by itself, satisfy any of the alternative grounds for jurisdiction set forth in section 48.193(1)(a)-(1)(h).

Even if we were to find that the allegations in Mrs. Brown's complaint demonstrate that Ms. Gibbons "is engaged in substantial activity", then we still would have to conclude that the acts alleged do not satisfy the constitutional "minimum contacts" test set forth in *International Shoe*, 326 U. S. at 310, and its progeny such as *Harlo Prods. Corp. v. Case Co.* ... (although non-resident may appear to fall within wording of long-arm statute, plaintiff may not constitutionally apply statute to obtain jurisdiction in absence of requisite minimum contacts with forum state). In *International Shoe*, the United States Supreme Court stated that to subject a defendant to personal jurisdiction when that person is not present within the territory of the forum, due process requires the defendant to have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *World-Wide Volkswagen Corp. v. Woodson*... The "minimum contacts" test "is not susceptible of mechanical application." *Kulko v. California Superior Court*... Rather, the facts of each case must be weighed to determine whether personal jurisdiction comports with "traditional notions"... The "constitutional touchstone" of this analysis is whether a defendant "purposely availed itself of the privilege of conducting activities" within the forum state, *Hanson v. Denckla*,... thereby invoking "the benefits and protections of the laws of that state". *International Shoe*...; *Burger King Corp. v. Rudzewicz*... When *in personam* jurisdiction is based on a single act, three criteria must be satisfied:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; second, the cause of action must derive from the defendant's activities there; third, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction

over the defendant reasonable.

Suffolk Federal Credit Union v. Continental Ins. Co.... (a single loan transaction in Florida did not authorize specific jurisdiction over New York credit union/lender, in suit brought against lender by insurer of boat purchased by Florida resident with loan provided by credit union); *McGee v. International Life Ins. Co.*... Florida courts have recognized that the "single most important factor to consider" in the analysis of due process under *International Shoe* is whether the defendant's conduct with respect to the forum state is such that the defendant "should reasonably anticipate being haled into court there." *Silver v. Levinson.*... This "reasonable anticipation" factor must be viewed from the perspective of the appellant, as defendant, and not that of the appellee... Given the allegations in the complaint, we are unable to conclude that Ms. Gibbons' 1995 negligence action against Mr. Brown in a Florida court was a sufficient contact to justify in personam jurisdiction over Ms. Gibbons in the same court in Mrs. Brown's 1997 lawsuit.

We certify the following matter as a question of great public importance pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(v):

DID THE NON-RESIDENT PASSENGER/DEFENDANT IN ANOTHER PASSENGER'S 1997 NEGLIGENCE ACTION ARISING FROM AN AUTOMOBILE ACCIDENT THAT OCCURRED IN A FOREIGN FORUM SUBJECT HERSELF TO PERSONAL JURISDICTION IN A FLORIDA COURT BY INITIATING A NOW-CONCLUDED 1995 SUIT IN THE SAME FLORIDA COURT ALLEGING THE NEGLIGENCE OF A DIFFERENT INDIVIDUAL (THE CURRENT PLAINTIFF'S HUSBAND, THE DRIVER) IN THE SAME AUTOMOBILE ACCIDENT?

Absent sufficient jurisdictional allegations to show that Ms. Gibbons' acts satisfy the prerequisites in the Florida long-arm statute and the constitutional due process requirements enunciated by the United States Supreme Court, the order is REVERSED and the trial court is directed to DISMISS Mrs. Brown's complaint.

Joanos and Lawrence, JJ., and Shivers, Douglass B., Senior

Judge, concur.

(http://www. audiocasefiles. com/acf_cases/8852-gibbons-v-brown)

Exercises

I. Answer the following questions after reading the case.

1. What are the facts of the case?
2. What is the legal issue of the case?
3. What is the rule of law or holding of this case?
4. What arguments did the plaintiff make? And what arguments did the defendant make?
5. What rules or principles have we learned from this case?

II. Brief the case and present the case brief to the class.

Unit Six Tort Law

Words and expressions:

torts	incur	tortious	recover	trespass
assault	battery	infliction	inaction	intentionally
accidental	defective	catastrophic	Stella Liebeck	misadventure
hospitalization	inflict	wrongfully		

I. Spot dictation. Fill in the blanks according to what you hear.

Torts are civil wrongs recognized by law as grounds for a lawsuit. These wrongs result in an _____ constituting the basis for a claim by the injured party. While some torts are also crimes _____ , the primary aim of tort law is to provide _____ incurred and deter others from committing the same harms. The injured person may _____ to prevent the continuation of _____ or _____. Among the types of damages the injured party may _____ are: loss of earnings capacity, pain and suffering, and reasonable medical expenses. They include both present and future expected losses.

There are numerous specific torts including ____, ____, ____, ____, ____, and intentional infliction of emotional distress. Torts fall into three general categories: _____ ; _____ ; and _____ . Intentional torts are those wrongs which _____ would occur through their actions or inactions. Negligent torts occur when the defendant's actions were _____ . Strict liability wrongs do not depend on _____ by the defendant, but are established when a particular action causes damage.

Ⅱ. Why do we need tort law?

1. Listen to the first part of the passage and complete the chart. In the chart below listed part of the examples given by the speaker in addressing the outcome if there were no legal system to deal with injuries. Fill in the chart according to what you hear.

Actors	Acts
Auto manufacturers	
	might be less careful
Property owners	
	would be penalized for their good behavior

2. Listen to the passage again, and complete the following sentences.

What if we had no legal system to deal with injuries like these?

(1) First, people would have _____ .

(2) Second, the victims of accidents would be left to their own resources to pay for _____ .

(3) Third, it just would not seem fair that _____ .

Text A

An Overview of Tort Law

- intentional tort 故意侵权(行为)
- reprehensible 应受指责的
- tortfeasor 侵权人
- causation 因果关系
- liberal 慷慨的
- the Restatement of Torts 《侵权法重述》

It is traditional to divide torts into three categories based on the degree of fault.

I. Intentional Torts

In general, intentional conduct is more morally reprehensible than negligent conduct, so the law tends to impose greater responsibility on intentional tortfeasors. Thus, the amount of compensation, degree of causation and the issue of who bears the burden of proof required will often be more liberal for the plaintiff in intentional tort cases than in negligence cases. The Restatement of Torts has attempted to formulate a general principle of intentional tort liability, but the overwhelming approach of courts is to consider intentional torts in their traditional common-law categories. Consequently, that is the way that the subject will be approached here.

Battery A battery is an intentional harmful or offensive contact the defendant makes with the plaintiff. It does not require that the defendant intended a particular injury, only that the person intended the contact. For example, assume a victim's leg is peculiarly susceptible to injury because of prior injury. Not knowing this, the defendant kicks the victim's leg in a way that would not seriously injury a healthy leg, but causes serious injury in this case. The defendant is liable even though he did not intend an injury that serious. The contact does not need to be violent. All that is required is harmful contact of something against the body of the plaintiff.

Assault Assault is closely related to battery but does not require contact. An assault occurs when the defendant intentionally acts in a way that is sufficient to cause reasonable apprehension of an immediate battery. The required apprehension of battery must be such that a normal person would feel threatened. This generally means that the defendant must have the apparent ability to carry out the threat. However, actual fear on the plaintiff's part is not required. Thus, a plaintiff who is too brave to be frightened can still recover if she perceives a threat. However, the plaintiff must be aware of the threatening act at the time. Generally, mere words alone, unaccompanied by physical act, will not be enough to establish reasonable apprehension. For the threatened contact to be immediate, there must be a manifestation of the threatened act. Thus, a threat to injure someone tomorrow is not immediate. Similarly, a threat to shoot someone, when it is clear that no gun is present, is not an "immediate" threat sufficient for an assault claim.

False Imprisonment False imprisonment is the unlawful confinement of a person against that person's will. The essence of the tort is the natural mental harm that results when one's freedom is restricted without justification. The defendant must intend to confine the person or there must be reasonable certainty that the person will be confined. The confinement may be a result of physical force or of a threat to person or property. Confinement may be the result of withholding or failing to provide a means of escape. The threat or physical barrier that restrains the plaintiff must be one that would

- apprehension 担心,忧虑
- recover 胜诉
- immediate 直接的,最近的
- false imprisonment 非法监禁

· shoplifting
入店行窃
· trespass
非法侵入
· quiet title
判决产权归属
· adverse possession
相反占有、时效占有
· an easement by prescription
习惯地役权
· conversion
非法挪用（占用）他人财产
· chattels
动产

restrain a reasonable person. For example, a false imprisonment would not occur if a person was told to stay in a room but there was not threat of harm or physical barrier to prevent her from leaving. A common use of false imprisonment is where merchants detain a person they suspect of shoplifting. In such cases, some states have passed statutes granting immunity to merchants in such circumstances if they have probable cause to detain and do so in a reasonable manner.

Trespass to Land Trespass to land involves entry onto the land of another. The intent requirement of trespass is only that a trespasser intended to enter the property. It is irrelevant whether she knew that the property belonged to the plaintiff, or even if she believed it was her own property. There is also no requirement of actual damages, Such damages are presumed. The strict rules of trespass reflect the high value placed on land ownership in feudal times. They also reflect that fact that at common law an action for trespass was the only way to determine title to land. Today that can be done by way of a suit to quiet title, though trespass actions are used even today to prevent a habitual trespasser from acquiring title through adverse possession or an easement by prescription—methods of gaining property rights through continued usage.

Conversion Conversion is one of the many common-law torts that relate to interferences with possessory interests in personal property, called "chattels." It is closely associated with a "trespass to chattels" and is a more serious version of it. Thus, trespass to chattels is available for any intentional interference with personal property of any substantial kind, while conversion is an interference so serious that the value of the personable property is essentially lost to the original owner. Whenever personal property is wrongfully taken or retained, the owner is entitled to appropriate damages. The measure of damage is determined by the length of time the defendant had control over the property, whether he acted in good faith, how much actual damage was done, and the amount of inconvenience inflicted upon the true owner.

Nuisance Nuisance is the use of the defendant's land in

such a way that it interferes with the plaintiff's use of his land. Factors to be considered in nuisance suits include the frequency of the intrusion, the value to society of the defendant's action, and the plaintiff 's knowledge, if any, of the nuisance when he bought the property. Even though nuisance is included here under intentional torts, the nuisance could be caused by the negligent or hazardous activities of the defendant, and therefore the plaintiff could proceed under the theories of negligence or strict liability. In addition to damages, the plaintiff in nuisance suit may also be awarded the equitable remedy of injunction.

Infliction of Mental Distress A person who willfully and intentionally causes serious mental distress to another can be held liable for his actions. This tort is limited to cases involving extreme misconduct—for example, telling a mother that her child had been killed when, in fact, the tortfeasor knows the child is fine. It involves more than hurt feelings, disappointment, or worry; there must be actual and severe mental anguish. Courts have traditionally required that mental distress be linked with some other tort and actual physical harm; however, the trend is away from both these requirements. Many jurisdictions now recognize the infliction of mental distress as a separate tort.

Invasion of Privacy The concept of privacy is zealously guarded in the United States; it is protected by the courts against invasion from either the government or the private sector. The first, invasion of privacy, covers three broad areas: (1) the intentional invasion of privacy by wiretapping a phone or shadowing a person, (2) the appropriation of a person's name or likeness without permission for a advertising purposes, and (3) the unwarranted publication of information about an individual's private matters.

The second action, defamation, also concerns the issue of one's reputation in the community. Defamation is the injury of personal reputation in the community by derogatory or defamatory comments. There are two distinct branches of defamation: slander, in which the comment is usually spoken; and libel, in which it is written or is in some permanent form. The underlying public policy is

- nuisance 滋扰
- infliction of mental distress 导致他人精神痛苦
- misconduct 违法行为
- anguish 剧痛
- zealously 积极地,狂热地
- wiretap 窃听
- shadow 跟踪
- derogatory 贬损的
- slander 造谣

- hefty
  相当多的
- standard of care
  谨慎责任的标准
- breach of a duty
  违反义务
- reasonable person standard
  理性人标准
- trait
  特征，显著特点

the strong emphasis on protecting people from malicious or untrue attacks on their good name in the community. Hefty damages are frequently awarded.

Ⅱ. Negligence

Negligent conduct is conduct that creates an unreasonable risk that the injury plaintiff suffered would result. Its elements are most easily understood if negligence is thought of as conduct breaches a standard of care deemed by the law as necessary to protect others from unreasonable risks of harm. Negligence, then, is generally expressed as a "breach of a duty."

There are three elements of a claim for negligence. The plaintiff must prove: (1) breach of a duty, (2) injury caused by that breach, and (3) damages. Below we will consider how negligence and causation are defined.

1. Breach of a Duty

Reasonable Person Standard All people in society owe a duty to refrain from conduct that creates unreasonable risk of harm. The standard of care to which people are expected to conform is described as the "reasonable person" standard.

This standard assumes that, if a reasonable person would have known the risks created by the activity, then the defendant did. Thus, it is a completely objective test under which subjective elements, such as the intelligence, or actual lack of knowledge, of an individual defendant are normally not taken into account unless the defendant is a minor. Subjective traits of the tortfeasor may be considered, but they are considered according to an objective standard. Thus, a defendant with a disability will not be held to the normal "reasonable person" standard, but to the standard of a reasonable person who has the defendant's disability.

Negligence of Professionals When negligence is applied to a professional, such as in a medical malpractice case, a "professional version" of the ordinary reasonable person standard is applied in general. The standard become that of a reasonable professional in that field possessing the training and skills of a member in good standing of that profession. Just as in a negligence case involving a

nonprofessional defendant, the standard of care in a medical malpractice case can be established by prior court decisions and any applicable regulatory rules. But if the doctor follows what was ordinary and customary in the profession, it is rare that a court will view that as negligent. The standard of care is further limited in some jurisdictions by requiring that the standard be that of reasonably qualified physicians in the locality where the defendant practices, though the trend is away from this limitation. The appropriate standard of care is most often determined with the assistance of expert witnesses, such as other doctors in the field who can give their opinion as to whether the care met appropriate standards.

· expert witness
专家证人
· cause-in-fact
事实上的原因
· proximate cause
近因
· legal cause
法律上的原因
· foreseeability
可预见性
· directness
直接性

2. Causation in Negligence Cases

To prove the element of causation the plaintiff must prove that the defendant's act, or breach of duty, was both the cause-in-fact and the proximate cause of his injuries.

Cause-in-Fact Cause-in-fact is usually determined by applying the "but for" test. Under this test, if the plaintiff would not have been injured "but for" the act of the defendant, the defendant's act is determined to be the actual cause of the injury. Another standard for determining actual cause is the "substantial factor" test, which attempts to determine if the defendant's action was a substantial factor in causing the plaintiffs injury.

Proximate Cause Despite the label "proximate," proximate cause has only slightly to do with proximity or nearness of the cause to the result. Rather it is better thought of as legal cause—the circumstances under which the law will recognize liability. As such, proximate cause may have less to do with "cause" than with the question of duty.

Courts in such situations consider the question to be one of the foreseeability of the injury and usually label it a problem of proximate cause. The question is not whether the defendant in fact foresaw the harmful results. It is sufficient if a reasonable person would have foreseen the harmful results. Another test that has been suggested is a test of the "directness". The question under this test the defendant's act is the proximate cause of the plaintiffs injury if there

· intervening cause 介入原因
· Act of God 自然灾害,不可抗力
· strict liability 严格责任
· mine shaft 井筒

is an unbroken sequence of events between the act and the harm. The directness test and the foreseeability test have been criticized as not being tests at all, but simply restatements of the scope of the defendant's duty.

Intervening Cause A complicating factor in causation is "intervening cause." An intervening cause is an event which occurs after the defendant's negligent act has occurred and which contributes to the injury. If the intervening cause was the proximate cause of the plaintiffs injury, the defendant's act will not be considered the proximate cause. But if the intervening cause was foreseeable, the defendant will often be held liable for this additional harm. For example, a person who allows gasoline to spill on the sidewalk may be liable for the resulting harm if a third person drops a lighted cigarette into the gas. This is because a reasonable person could foresee such a thing happening. A defendant may even be held liable for injury resulting from an Act of God as long as it is foreseeable.

Ⅲ. Strict Liability

Some torts impose liability for injury caused without regard to fault. In such instances, it is said that "strict liability" is imposed. Strict liability has traditionally been imposed on defendants engaged in especially dangerous activities that cause injury, but in recent years it has been imposed based on a social policy judgment that the risk of injury should be placed on a particular category of defendants, such as manufacturers of products.

1. Abnormally Dangerous Activities

Strict liability was first applied in cases involving owners of dangerous animals. The theory was later expanded to cover abnormally dangerous activities. The origin of the doctrine as applied to dangerous activities is the famous English case of the Rylands v. Fletcher, which imposed strict liability on the owner of a water reservoir that broke through a mine shaft and flooded adjacent land. In determining whether an activity is abnormally dangerous, courts have considered the degree of risk of some harm, the likelihood that the harm that results from it will be great, the inability to eliminate the risk by exercise of reasonable care, the extent to which the ac-

tivity is not a matter of common usage, the inappropriateness of the activity to the place where it is carried on, and the degree to which the dangerous nature of the activity outweighs any value of the activity to the community. To the extent that each of these factors is rated high, a given activity is more likely to be declared eligible for strict liability treatment.

2. Products Liability

Strict liability is applied commonly to dangerously defective or unsafe products. It was pioneered by California Supreme Court decision in 1963 and the Second Restatement of Torts §402A in 1964. Under this concept, the manufacturer and any seller of a product are strictly liable for any product they make or sell that is "in a defective condition unreasonable dangerous." Limitations on this sweeping liability are that (1) it applies only to merchant sellers, meaning sellers who regularly deal in the product, and (2) the product must not have been altered after it left the seller's control and must be used in a normal and proper manner. The manufacturer can be held liable even if it was not negligent in manufacturing the product and the retail seller can be held liable for what are manufacturing and design problems even though it was in no way involved in the manufacturing or design process.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

Notes

1. The Restatement of Torts: the products of the American Law Institute. The discourse is conducted principally through Member Consultative Groups, and focuses on tentative drafts produced by Reporters—who are distinguished scholars and teachers of the subject, and whose job is to study the cases and develop draft restatements of doctrine which can be said to represent the view of the majority of courts. This so-called "black letter" law is explained or qualified by "Comments" and "Caveats," and may directly or indirectly influence a court's statement of the rule of law in a case before the court. 《侵权法重述》,是由美国法律研究院整理、颁布的,对美国各部门法的权威表述和分析。

2. adverse possession: the acquisition of title to real property by continuous possession for the prescribed period of time. The underlying philosophy (for the doctrine of adverse possession) is basically that land use has historically been favored over disuse, and therefore he who uses land is preferred in the law to the one who does not, even though the latter is the rightful owner. 相反占有、时效占有。是取得不动产所有权的一种方式,指非法占用不动产一段时间后,取得此项不动产的所有权,目的是防止土地荒芜。
3. an easement by prescription: an easement created by the open, notorious, uninterrupted, hostile, and adverse use of another's land for 20 years or for a period set by statute called also prescriptive easement. 习惯地役权,指为自己土地的利益而使用他人土地的权利。
4. standard of care: the degree of care which a reasonable person would take to prevent an injury to another. 谨慎责任的标准。
5. Act of God: a severe event caused by forces of nature, without the possibility of prevention by humans—such as earthquake, tornado, hurricane, etc. 自然灾害,不可抗力。

Check Your Understanding

Answer the following questions according to the text.

1. What is battery? What is its basic requirement?
2. How does assault differ from battery?
3. What is false imprisonment? What is its essence?
4. What is trespass to land? Why do you think the restrict rule is applied to trespass to land?
5. What is nuisance? What factors should be considered in nuisance suits?
6. What areas does invasion of privacy cover?
7. What are the elements of a negligence claim?
8. Explain reasonable person standard.
9. What do courts consider when determining whether an activity is abnormally dangerous?
10. What are the limitations on products liability?

Build Up Your Vocabulary

Ⅰ. Match the items in the following two columns.

A	B
1. intent	a. close relationship of a plaintiff's injury to the defendant's action
2. negligence	b. unlawful confinement of a person against that person's will
3. proximate cause	c. the desire to cause a certain result or to an act with substantial knowledge that an injury will result
4. assault	d. civil responsibility as determined by judge or jury
5. false imprisonment	e. the act of entering another's land without permission
6. trespass	f. a civil wrong or private injury not based in contract law
7. nuisance	g. breach of a duty that proximately caused an injury
8. defamation	h. the act of putting a person in reasonable apprehension of imminent (immediate) bodily injury
9. liability	i. the unreasonable use of property so as to harm another
10. tort	j. holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

battery	breach one's duty	offensive	fault
strict liability	cause	intentional tort	trespass
misconduct	negligent		

1. While an intentional tort is a purposeful act meant to harm another, a _____ tort occurs when one simply fails to pay attention and therefore harms another person or thing.
2. As a trial lawyer, I take pride in my job. I consider it an honor to help people who are injured through no _____ of their own, get justice they deserve by holding wrongdoers accountable.
3. An _____ arises when a person intends to commit the wrongful act which results in injury.
4. A committee at the law school that produced such champions of the First Amendment as Justices Oliver Wendell Holmes, Jr., Louis D. Brandeis, and William J.

Brennan, Jr., announced plans Monday to draft a speech code that would ban _____ and harassing language and punish professors and students who violate the rules.

5. Self defense as to _____ can consist only of engaging in physical contact with another person in order to prevent the other person from themselves engaging in a physical attack.
6. It shall be unlawful, except as provided herein, for any person to _____ upon or attach a boat or other device to any privately owned dock erected along the shores of any public or private waters within this State.
7. A grieving husband who took on his wife's legal battle for compensation for alleged medical negligence after she died of breast cancer has won a High Court ruling that doctors _____ to her.
8. A male nurse who sexually harassed colleagues and mistreated patients is found guilty of _____ .
9. _____ mandates that responsibility for some accidents automatically rests with the defendant rather than the plaintiff.
10. Fire investigators will spend today sifting through the fire-damaged production studio owned by TV star Rove McManus in Melboume's inner east to determine the _____ of the blaze.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

foreseen	fault	conduct	burden
unreasonable	actor	risk of harm	risks
intentionally	motive	wrongful	harm

Fault is usually a necessary element of liability equation. It is not enough that one has caused _____ to another, ethically, we find it difficult to justify liability unless the actor's _____ was somehow culpable. One is not required —in most cases —to insure others against the _____ inherent in socially accepted conduct. But the requisite "fault" need not be narrowly defined, nor need the _____ be subjectively aware that his conduct carries an unacceptable _____. Clearly, if one _____ harms another, or knows (or is presumed to know) that his conduct creates a substantial certainty of harm, liability naturally follows. _____ (actual or inferred) can thus be an element of fault. However, "fault" also includes con-

duct where no harm was intended or even _____, where an ordinary person should have foreseen that such conduct created an _____ risk of harm to others. According to Learned Hand's classic formula, conduct is _____ if the burden of alternative conduct which would have prevented the harm is less than the foreseeable probability and gravity of the harm. In measuring this _____ we may consider the necessity and utility of the harm-producing conduct as compared to its alternatives. Thus, _____ may lie in merely creating an unnecessary or unreasonable risk, however unknowingly. In this sense, one can find a fault element even in some forms of so-called strict liability.

Translation

Translate the following sentences into Chinese.

1. General Principle
   (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
   (2) The right of privacy is invaded by:
      A. unreasonable intrusion upon the seclusion of another, as stated in 652B; or
      B. appropriation of the other's name or likeness, as stated in 652C; or
      C. unreasonable publicity given to the other's private life, as stated in 652D; or
      D. publicity that unreasonably places the other in a false light before the public, as stated in 652E.
2. One engaged in the business of selling or otherwise distributing food products who sells or distributes a defective food product under §2,3, or 4 is subject to liability for harm to persons or property caused by the defect. Under §2(a) a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.
3. The Restatement of Torts defines the common law cause of action for "trespass" as follows:
   One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
      A. enters land in the possession of the other, or causes a thing or a third person to do so, or
      B. remains on the land, or
      C. fails to remove from the land a thing which he is under a duty to remove.

4. The Restatement (Second) of Torts § 525 provides that:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

Text B

Nuisance Law

- amorphous 难归类的
- public nuisance 公共滋扰
- private nuisance 私人滋扰

"Nuisance" is one of those amorphous concepts in the law which cannot be concisely defined and is often misunderstood and misused. At one time or another, it has, as William Lloyd Prosser says, meant all things to all persons. The principal sources of confusion are (1) a tendency toward indiscriminate use of the term and (2) a failure to recognize and to focus upon the fact that it is in essence merely a form of action for particular kinds of harm with special rules as to when and how that harm may be redressed. It is the interest of plaintiff which has been invaded, and not the conduct of the defendant, which determines whether an action for nuisance will lie. Liability for interference with such a protected interest may be based upon defendant's intent to interfere, negligence, strict liability for abnormally dangerous activities, or occasionally upon violation of a statute. But the character of defendant's activity or conduct is irrelevant in distinguishing nuisance from other torts; it is the nature of the harm to plaintiff to which one must look. Indeed, strictly speaking, nuisance may not be a tort at all, but merely a category of certain types of harm. Unfortunately, there are a number of cases in which the term "nuisance" is used improperly and unnecessarily, as where plaintiff is actually being (or ought to be) permitted to recover under some other tort theory.

To understand nuisance at all, it is essential to bear in mind the distinction between public nuisance and private nuisance.

Private Nuisance Properly conceived, a private nuisance is a thing or activity which substantially and unreasonably

interferes with the possessor's use and enjoyment of his land or an interest therein.

This interference may occur in an infinite variety of ways. For example, there may be a physical effect upon the land itself, such as by vibration, objects hurled upon it, destruction of crops, flooding, or pollution of its water or soil. Or it may consist of a disturbance of the comfort, convenience or health of the occupant, as by foul odors, smoke, dust, insects, noxious gases, excessive noise, excessive light or high temperatures, and even repeated telephone calls. Under proper circumstances it may even extend to conditions on adjoining land which impair the plaintiff's mental tranquility by the fear or offensive nature of their mere presence, such as a house of ill repute, a contagious disease hospital, stored explosives, or a vicious animal.

The important thing to remember is that the interference must be with the use and enjoyment of plaintiff's interest in land. Similar interferences which affect plaintiff only personally, and do not affect his use and enjoyment of his land, may be some other tort but they are not a private nuisance.

It will be seen that there are situations in which nuisance will be a concurrent remedy with trespass to land, which, recall, protects one's right to exclusive possession against physical invasions. An interference with that right frequently will also be an interference with the use and enjoyment of the land. At one time, a trespass had to be direct; if defendant merely set forces in motion which eventually resulted in an invasion of the land, the remedy (if any) was in nuisance. And trespass could not be maintained for invasions of airborne gases and particles not visible to the naked eye. On the other hand, nuisance, a form of the action of case, required proof of fault and actual damages; trespass did not. In its modern form, trespass requires proof of fault, but may be direct or indirect, and it has been held that microscopic particles wafted on the breeze may constitute a trespass. Thus, trespass and nuisance are now more often concurrent remedies than in earlier times.

Public Nuisance A public nuisance is so different from a

- tranquility
  宁静
- a house of ill repute
  妓院
- vicious
  野蛮的
- microscopic
  非用显微镜不可见的
- waft
  水上漂浮着传或送

· omission
不作为
· hogpen
猪圈
· malarial
(有)瘴气的
· profanity
亵渎
· riparian owner
河岸所有人

private one that it is unfortunate that the term "nuisance" is applied to both. Public and private nuisances are separate and distinct wrongs which developed independently. The area of overlap between them is not very great, and is largely accidental.

A Public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all. It is fundamentally a catch-all collection of minor crimes, originally common law and now largely legislative in origin, to be redressed by criminal prosecution. "It includes interferences with the public health, as in the case of a hogpen, then keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold."

The interest or right which is interfered with must be one which is common to the public as a class, and not merely that of one person or even a group of citizens (except by statute in a few states where interference with the rights of a substantial number of persons is sufficient, even though no public right as such is involved). The pollution of a river is only a private nuisance insofar as it interferes with the rights of the riparian owners to make use of the water; but if it also kills the fish or impairs a public water supply it is to that extent a public nuisance.

In addition to broad, general criminal public nuisance statutes, all statutes have a number of specific provisions declaring

certain things (e.g. bawdy houses, certain plants, houses where narcotics are sold, mosquito breeding grounds) to be public nuisances.

A private citizen has no civil remedy for the harm he has sustained as a result of a public nuisance if that harm is of the same kind as that suffered by the general public, even though he may have been harmed to a greater degree than others. A criminal prosecution is the exclusive remedy. But an individual who has sustained damage particular to him, different in kind from that of the public, may maintain a tort action for his damages. Thus, where dynamiting has thrown a large boulder onto a public highway, members of the public who use the highway (even those who use it much more frequently than most) have no action for the inconvenience caused by the obstruction. But a motorist who collides with the boulder has sustained damage of a kind different from that of the general public, and so may sue for his personal injuries.

Where a public nuisance interferes with plaintiff's use and enjoyment of his land, it is a private nuisance as well. And since this injury is particular to his and different in kind from that suffered by the public, he may sue for his damages under either theory. Usually it is preferable to rely on the public nuisance theory, since in such cases certain defenses (prescriptive rights, laches, statute of limitations) are not available.

Basis of Liability: Fault. Notwithstanding some early cases to the contrary, nuisance liability is not absolute. Absent a statute, defendant's interference with plaintiff's protected interest must have been intentional, reckless, negligent, or the result of an abnormally dangerous activity such that principles of strict liability will apply. The requisite intent, if that is the theory of liability, is similar to that of other intentional torts, and it is sufficient if defendant created the condition or continued his conduct after he acquired knowledge of actual harm, or a substantial certainty of future harm, to plaintiff's interest.

Thus, attempts which some have undertaken to distinguish nuisance from, for example, negligence liability reflect a fundamental

- bawdy house 妓院
- narcotics 致幻毒品
- boulder 岩石块
- personal injury 人身伤害
- enjoyment of one's land 土地享用权
- prescriptive right 时效权
- laches 疏忽、怠慢
- statute of limitations 时效
- notwithstanding 尽管

· annoyance
被打扰的状态
· temperament
气质,性情
· *per se*
本身

misconception. Nuisance is a type of harm; negligence is one basis on which liability for that harm may be imposed.

In addition, nuisance liability may be based upon violation of a statute, and in such cases (within constitutional limits) there will be no need to find fault or some to her basis beyond the requirements of the statute to support nuisance liability.

Substantial Interference. Nuisance liability requires some substantial interference with the interest involved. Where the physical condition of property is affected, it is not too difficult to distinguish the substantial from the insubstantial. This is not always so, however, in cases of personal inconvenience, annoyance, or discomfort. Generally, the standard is that of the ordinary member of that community with normal sensitivity and temperament. Similarly, plaintiff cannot, by devoting his land to an unusually sensitive use, make a nuisance out of conduct on defendant's adjoining premises which would otherwise be relatively harmless. Beyond this, whether or not the harm is substantial is a question of fact.

Reasonableness of Defendant's Conduct. Not only must the interference with plaintiff's interest be substantial; it must also be unreasonable to bear it, or to bear it without compensation. This balancing process, weighing the respective interests of plaintiff and defendant, is of course required in any event where the basis of liability is negligence. A similar balancing process is used in determining whether an activity is "abnormally dangerous" such that strict liability is appropriate. But in the case of a nuisance, it is also a prerequisite to liability for harm which is intentionally inflicted. In effect, defendant has a privilege to cause substantial harm to an interest of the plaintiff which would otherwise be protected by the law of nuisance if, on balance, his conduct is reasonable under all the circumstances.

This reasonableness test may be applied to public nuisances, unless there is a statute which establishes the standard of conduct (i. e. makes something a nuisance *per se*) and therefore precludes further inquiry into the reasonableness of defendant's activity. But the primary application of the requirement is in cases of private nui-

sance.

The rationale behind the reasonableness requirement is that in a crowded society, some accommodation to the activities of others is necessary. Some activities are socially useful (particularly those relating to industry, commerce and trade), or at least do not deserve to be prohibited or unduly burdened, and therefore will be tolerated even though they impinge to some extent on others and on the tranquility, comfort, and quiet enjoyment of their land. At the same time, some activities may fairly be required to bear the cost of the harm they cause, where the cost is reasonable under all the circumstances.

The balancing process by which reasonableness is determined is not unlike that used to determine whether conduct is negligent. Essentially, the nature and gravity of the harm is balanced against the burden of preventing it and the utility of the conduct. More specifically, among the many factors which may be relevant are: (1) the extent and duration of the interference; (2) the character of the harm; (3) the social value of plaintiff's use of his land, or to her interest invaded; (4) the burden to plaintiff of preventing the harm; (5) the social value of defendant's conduct, both in general and to the particular community; (6) the motive of the defendant; (7) the burden and feasibility of defendant preventing or mitigating the harm; and (8) the nature of the locality and the suitability of the activities or uses of the land being made by defendant and plaintiff. With respect to the latter, the dominant character of a neighborhood or area may be an important factor in determining what activities are reasonable and what a nonconforming plaintiff must reasonably endure—a sort of judicial zoning.

Remedies. The usual private remedy for nuisance is an action for damages. In cases of permanent nuisance (that is, of a type which probably will continue indefinitely), all damages must be obtained in one action. If the nuisance can be abated, plaintiff generally recovers all damages incurred up to the time of the trial. If defendant then fails to abate it (a continuing nuisance), the further invasion of his interest constitutes a new nuisance for which another

· accommodation
调整
· impinge
侵害,侵入
· abate
减少,减轻

- contributory negligence 被害人本身的过失;共同过失
- assumption of risk 自冒风险原则
- the doctrine of avoidable consequences 可避免结果原则

action may be brought. In cases of continuing and threatened nuisances, if plaintiff has no adequate remedy at law (which frequently is the case where real property is involved) equitable relief may be sought. When an injunction is requested, the court will undertake a further balancing process, taking into account the relative economic hardships which will result to the parties form the granting or denial of the injunction, as well as the interest of the public in the continuation of the defendant's enterprise. Thus, the court may find defendant's conduct so unreasonable that he must pay damages but not so unreasonable as to justify an injunction, compliance with which might require an unreasonably high expenditure of funds to abate or the ceasing of the activity altogether.

In addition, there is a limited self-help privilege to enter upon defendant's land to abate a nuisance. Usually notice to defendant and his refusal to act is first required. Only reasonable force may be used, and plaintiff may be subject to criminal or civil liability for unreasonable or unnecessary damage, personal injuries, or a breach of the peace.

Defenses. Legislation authorizing a particular activity or use of land (e.g. zoning laws, licenses) may be used to establish that it is not a nuisance. Generally, however, the courts have tended to construe narrowly the authority given to include only reasonable conduct.

While it is no defense to an action for nuisance that others are also contributing to the harm, each defendant is ordinarily liable only for the damages which he has caused. However, it is consistently held that a defendant will be liable where his conduct along with the activities of several other persons combine to create a nuisance, even though neither defendant's activity nor that of any of the others, by itself, would have been sufficient.

Contributory negligence, assumption of risk, and the doctrine of avoidable consequences are defenses to the same extent as in other tort actions.

Defendants in nuisance cases have often alleged that plaintiff assumed the risk because he "came to the nuisance" by purchasing

and moving to land next to an existing and operating source of interference. The cases generally have not supported this defense, at least where plaintiff purchased the land in good faith and not for purposes of litigation. Absent a prescriptive right, which requires actual harm to the property for a certain period of time, defendant cannot require surrounding land to endure his nuisance—at least not without compensation. A purchaser is entitled to the reasonable use and enjoyment of his property the same as anyone else. Nevertheless, "coming to the nuisance" may be one factor to be considered in determining the reasonableness of defendant's conduct or activity, and also in determining whether plaintiff has suffered damage (since the purchase price of the land may reflect the existence of the nuisance.)

(Extracted and adapted from *West Nutshell Series: Torts, by Eduward J. Kionka, West Group*, 1992)

Notes

1. William Lloyd Prosser(1898—1972), Dean of the College of Law at UC Berkeley from 1948 to 1961. Prosser authored several editions of *Prosser on Torts*, universally recognized as the leading work on the subject of tort law for a generation and still widely used today(now in its 11th Edition). Furthermore, in the 1950s, Dean Prosser became Reporter for the *Second Restatement of Torts*.
2. prescriptive right: a right obtained by prescription, e. g. after a nuisance has been continuously in existence for 20 years, a prescriptive right to continue it is acquired as an easement appurtenant to the land or which it exists. 时效权。
3. contributory negligence: the act or omission amounting to want of ordinary care on part of complaining party, which, concurring with defendant's negligence, is proximate cause of injury. 被害人本身的过失;共同过失。
4. assumption of risk: the doctrine of assumption of risk means legally that a plaintiff may not recover for an injury to which he assents, i. e. that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger. 自冒风险原则。
5. the doctrine of avoidable consequences: a doctrine which imposes duty on person injured to minimize damages. 可避免结果原则。

Check Your Understanding

Mark the following statements with T for truth or F for false according to what you have read from text B.

( ) 1. An action for nuisance is based upon both the interest of plaintiff which has been invaded, and the conduct of the defendant.

( ) 2. A private nuisance is an interference with not only the plaintiff's personal right but also his use and enjoyment of his land.

( ) 3. In an nuisance action, fault and actual damages shall be proved.

( ) 4. A public nuisance has so much in common with a private nuisance that they both use the same term "nuisance".

( ) 5. A public nuisance is an interference with the interest or the right of the public at large.

( ) 6. An individual can not be granted any civil remedies for the damage caused to him by a public nuisance, no matter how great the damage is, unless the damage is different in kind from that of the public.

( ) 7. In a nuisance action, the plaintiff shall prove not only there is substantial interference with his interest or right, but also that it is unreasonable to bear it.

( ) 8. The balancing process determines the reasonableness of a particular activity by weighing the nature and gravity of the harm against the burden of preventing it and the utility of the conduct.

( ) 9. An action for damages is the only remedy for nuisance.

( ) 10. It is a defense that plaintiff purchases and moves to land next to an existing and operating source of interference.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
prescriptive right	
	干预他人的权益
redress	
	共同过失

(continued)

English	Chinese
sustain	
	独占权
a wrong	
	不作为
assumption of risk	
	人身伤害

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

public nuisance	private nuisance
basis of liability	consequential injury
a tort action	cause of action
cause in fact	proximate cause
remote cause	intervening cause
superseding cause	*per se*
reasonable care	feasibility
de facto tort	illegal ommission

Translation

Translate the following sentences into English.

1. 民事行为被确认为无效或者被撤销后，当事人因该行为取得的财产，应当返还给受损失的一方。有过错的一方应当赔偿对方因此所受的损失，双方都有过错的，应当各自承担相应的责任。
2. 因产品质量不合格造成他人财产、人身损害的，产品制造者、销售者应当依法承担民事责任。运输者、仓储者对此负有责任的，产品制造者、销售者有权要求赔偿损失。
3. 饲养的动物造成他人损害的，动物饲养人或者管理人应当承担民事责任；由于受害人的过错造成损害的，动物饲养人或者管理人不承担民事责任；由于第三人的过错造成损害的，第三人应当承担民事责任。
4. 我国《民法通则》既规定了过错责任，也规定了无过错责任。过错责任是依据行为人的过错而规定其应承担民事法律责任，基于过错责任原则所定的债权行为必须具备行为人的过错和其行为的违法性、损害事实、违法行为与损害事实的因果关系等四个构成要件。而无过错原则则根本不考虑行为人是否有过错，只要符合法律规定的特定行为，有损害事实，就应承担责任。

5. 因产品存在缺陷造成人身、他人财产损害的，受害人可以向产品的生产者要求赔偿，也可以向产品的销售者要求赔偿。属于产品的生产者的责任，产品的销售者赔偿的，产品的销售者有权向产品的生产者追偿。属于产品的销售者的责任，产品的生产者赔偿的，产品的生产者有权向产品的销售者追偿。

Case Study

Spur Industries, Inc. v. Del E. Webb Development Co.

Supreme Court of Arizona
494 P.2d 700(1972)

- feedlot 牲畜饲养地
- indemnify 赔偿
- predecessor in interest 先前所有人

CAMERON, Vice Chief Justice. From a judgment permanently enjoining the defendant, Spur Industries, Inc. from operating a cattle feedlot near the plaintiff Del E. Webb Development Company's Sun City, Spur appeals ... We feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot, is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?
2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix. In 1956, Spur's predecessor in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feedlots, about one-half mile south of Olive Avenue ... The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7-mile radius of the location developed by Spur's predecessors ...

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for $15,000,000 or $750 per acre. This price was considerably less than the price of land located near the urban area of Phoenix ...

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue, and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities ...

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January, 1960, and the first unit to be completed was south of Grand Avenue and approximately $2\frac{1}{2}$ miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur pens a problem, and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell ...

By December 1967, Del Webb's property had extended south to Olive Avenue, and Spur was within 500 feet of Olive Avenue to the north ... Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of

· manure
粪便,肥料

Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living that Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area.

Where the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction. Moreover, some courts have held, in the "balancing of conveniences" cases, that damages may be the sole remedy.

We have no difficulty, however, in agreeing with the conclusion of the trial court that Spur's operation was an enjoinable public nuisance as far as the people in the southern portion of Del Webb's Sun City were concerned.

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

In the so-called "coming to the nuisance" cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby. [In Dill v. Excel Packing Company, 183 Kan. 513 (1958), the Kansas Supreme Court said,] "People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation

rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be the case that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take disadvantages."

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city ...

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase houses in Sun City. It does not equitably or logically follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lower land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

· blameless
无可责备的

· detriment
损害，损失

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Notes

predecessor in interest: a person who previously held the rights or interests currently held by another. 先前所有人。

Exercises

Ⅰ. Answer the following questions.

1. What was the lower court's judgment?
2. What are the issues of this case?
3. Why does the appellate court affirm the trial court's decision to enjoin the nuisance?
4. Why does the appellate court order Webb to indemnify Spur?
5. Which part of the trial court's decision is reversed?
6. Explain the meaning of"..., it is ordered that each side will bear its own costs" (the last line of the second paragraph from the bottom of the opinion)?

Ⅱ. Brief the case and present the case brief to the class.

Unit Seven Contract Law

Words and expressions:

junk mail	solicitation	Visa card	fine-print	flip
burger	fleet	subject matter	General Motors	
the United Auto Workers		partnership law	tort law	trespasser
be liable for	interfere	negligently	pedestrian	

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

( ) 1. Contract law deals with all kinds of promises and agreements we make every day.

( ) 2. Contract law governs the employment contract, but not the agreement between a company and its union.

( ) 3. The agreement between the partners of a law firm is a contract, therefore is controlled by the general contract law.

( ) 4. Like property law and tort law, contract law is a private law.

( ) 5. The difference between contract law with the other two areas of private law is: contract law deals with the future, while property law handles the present, and tort law looks to the past.

Ⅱ. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

Contract law is initially concerned with determining what promises the law will enforce or recognize as creating legal rights. In the United States, a _____ is

enforceable if it is made as a bargained exchange for some legally sufficient _____. This requires agreement between the contracting parties, which may take the form of an _____ by one party and an _____ by the other. The agreement may be either _____ or oral and thus be an _____ contract. If a promise evolves not from _____ or written words but from the parties' _____ or a combination of words and conduct, it is characterized as an _____ contract. Promises resulting from either express or implied agreements can be _____.

Text A

The Common Law of Contracts

- Uniform Commercial Code(UCC) 《统一商法典》
- consumer protection law 消费者(权益)保护法
- transaction 交易
- mutual assent 合意
- offer 要约
- acceptance 承诺
- consideration 对价
- meeting of the minds 合意
- objective test 客观标准
- assign 指定

Contract law in America originated in the English common law courts and remains today largely governed by common law. However, state and federal statutes play an increasing role. For example, every state has adopted most or all of the Uniform Commercial Code (UCC) which sets out a standardized set of rules for many types of commercial agreements, such as the sale of goods. In addition, federal and state governments have created consumer protection laws which regulate many consumer transactions. The result is a mix of common law and federal and state statutes.

I. Formation of Contracts

A contract is a promise between two or more parties that the law recognizes as binding by providing a remedy in the event of breach. The common law states that for promises to be enforceable there must be "mutual assent" between the parties. Mutual assent exists if there was an offer and an acceptance of the offer, supported by mutual consideration. When focusing on offer and acceptance, it is common to refer to the parties as the "offeror" and the "offeree." Although mutual assent is frequently referred to as a "meeting of the minds" and courts speak freely of the "intent" of the parties, actual subjective intent is irrelevant. Instead, an objective test is used and the intent that a reasonable person would infer from a party's words and acts is assigned to the parties.

1. Offer and Acceptance

An offer is a manifestation of willingness to enter into a bargain so made as to justify another person in understanding his assent to that bargain is invited and will conclude it. An offer must be sufficiently definite such that, if accepted, there would be a sufficient basis for determining the existence of a breach and for giving an appropriate remedy. An offer must specify essential elements such as quantity and price. The offeror must manifest an intent to give the offeree the power to "close" the deal by accepting the offer. The offeree accepts the offer by agreeing to the proposed bargain. At common law the acceptance must be a "mirror image" of the offer; that is, the acceptance cannot add terms or change any terms of the offer. If it does, then it is not an acceptance at all, but a rejection of the original offer and a counteroffer.

The common law makes a distinction between "bilateral" contracts (where the offeror seeks acceptance through a promise of performance) and "unilateral" contracts (where the offeror seeks acceptance through actual performance). The offeror, as the master of the offer, may prescribe the method by which the offer will be accepted. If the offeror does not specify the mode of acceptance, the offeree can accept in any manner and by any medium reasonable in the circumstances. In a unilateral contract, where the offer specifically invites acceptance by performance, the offer can be accepted only by full performance. However, this rule may cause unfair results by allowing the offeror to receive partial performance and then revoke the offer before the acceptance is complete. Consequently it is generally held that once the offeree has started to perform, the offer becomes an "option contract" which cannot be revoked until the offeree has had a chance to perform.

The power to accept an offer does not belong to the offeree forever. The period of acceptance can be terminated by lapse, rejection, revocation, or the death of a party. Often the offer specifies the amount of time in which the offer may be accepted by the offeree. If the offeree does not accept within that time, the offer has lapsed, and the offeree can no longer exercise the power to accept

- manifestation of willingness 意愿表示
- bargain 交易
- appropriate 适当的
- specify 明确规定
- mirror image "镜像规则"
- rejection 拒绝接受要约
- counteroffer 反要约
- bilateral contract 双务合同
- unilateral contract 单务合同
- prescribe 规定
- mode of acceptance 承诺的方式
- medium 方法;手段
- option contract 选择权合同
- lapse 终止;失效
- revocation 撤销;取消

· mailbox rule
"邮箱规则"
· "illusory" promise
"虚幻"的允诺
· pre-existing duty
既有义务规则
· extorted
勒索的;敲诈的

and close the deal. If no period is specified in the offer, it lapses after a reasonable time or until the offeror revokes the offer. What is a reasonable time depends on the circumstances.

Before the offeree accepts or rejects the offer, the offeror can terminate the offeree's power of acceptance by revoking the offer. A revocation sent by the offeror is effective upon receipt by the offeree. Thus the issue of when the acceptance becomes effective may be an important question in determining if the offeror still has the power to revoke the offer or if it has already been accepted. The common law follows the "mailbox rule", whereby the acceptance becomes effective upon mailing the acceptance. Since the acceptance is effective when mailed, the contract is concluded at that time.

2. Consideration

Generally, no promise is enforceable unless it is supported by consideration. Consideration is a bargained-for exchange between the promisor and the promisee. "Promissee" refers to the person benefiting from a given promise, while the "promisor" is the person who made the promise and is being called on to carry it out. Generally, anything that is given in exchange for a promise will constitute consideration, as long as it was bargained for. Thus, a promise or performance given by the promisee to the promisor must be sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise. One situation affected by the consideration requirement is a promise to make a gift. Such a promise is usually unenforceable. This is because the whole nature of a gift is that the promisor wants nothing in return for the promise. Therefore, the mere fact that the promisee gave something to the promisor does not in itself satisfy the requirements of consideration.

A promise which appears to promise something, but in fact does not commit the promisor to anything at all, is known as an "illusory" promise and is insufficient consideration. Consideration may be absent when the promise is in exchange for performing a "pre-existing duty". A promise to do something that is already legally required is not valid consideration for a new promise. The pre-existing duty rule seeks to prevent extorted modifications of con-

tracts. Promissory estoppel provides that reliance on a promise can make the promise binding or enforceable to some extent, even without consideration, but only if it was foreseeable to the promisor that the promisee would rely on the promise.

- promissory estoppel 允诺性禁反言
- Statute of Frauds 防止欺诈法
- suretyship contract 保证合同;担保合同
- Parol Evidence Rule 口头证据规则
- extrinsic evidence 外部证据;旁证

3. Formal Requirements

Once there is mutual assent supported by consideration, an enforceable contract exists. There is no requirement for any formal ceremony to make the agreement "official," no requirement for a seal, and, in some cases, no requirement that the contract even be in writing. However, some types of contracts are required to be in writing under the "Statute of Frauds."

(1) The Statute of Frauds

All of the states (except Louisiana) have adopted a close form of the English Statute of Frauds (1677), which requires that certain types of contracts be in writing in order to be enforceable. The primary purpose of the Statute of Frauds is to ensure that certain contracts are not enforced unless there is sufficient proof that the contract exists. There are four types of contracts that typically fall within the Statute of Frauds and must therefore be in writing. These are A. a suretyship contract (a contract to answer for the debt or obligation of another), B. a contract to transfer or buy any interest in land, C. a contract that cannot be performed within one year of its making, and D. a contract for the sale of goods worth more than $500.

Under both the common law and the UCC, the Statute of Frauds requires that the writing must be "signed by the party against whom enforcement is sought." This generally means that the signature must be written on a paper copy of the contract.

(2) The Parol Evidence Rule

A frequent problem occurs when a contract has been reduced to writing, but one of the parties claims that their actual agreement included a term which is not in the writing. The "parol evidence rule" generally prohibits the introduction of extrinsic evidence that contradicts terms of a written contract. The purpose of the parol evidence rule is to promote certainty by preventing written agreements from being contradicted by less reliable accounts of the agreement and by en-

· contemporaneous
同时期的
· voidable
可撤销的
· void
无效的
· impossibility
不可能性
· frustration of purpose
目的落空
· literally
简直;确实
· impracticability
不可行性
· virtually
实际上;事实上

couraging parties to make their written agreements complete.

The parol evidence rule applies only to extrinsic agreements that were made prior to or contemporaneous with the written agreements. It does not bar evidence that the contract was orally modified after the writing. It also does not prevent the introduction of evidence that would show that no valid contract exists or that the contract is voidable, so parties may show evidence of fraud, duress, lack of consideration, or anything else that would make the contract void or voidable.

Ⅱ. Grounds for Nonperformance of Contracts

1. Mistake

The parties to a contract are excused when they entered into the contract due to a mutual mistake of fact as to a basic assumption on which the contract was made which has material effect on the performances due under the contract, so long as the party seeking relief from the contract did not assume the risk of the mistake when the contract was made. However, in cases of unilateral mistake, i. e., only one party has made a mistake, contract law does not generally provide the party with relief from the consequences of the unilateral mistake unless there was some sort of fraud or bad faith by the other party.

2. Changed Circumstances: Impossibility and Frustration of Purpose

A party might also be released from a contract where, through no fault of the parties, the performance has become impossible or the principal purpose of one of the parties in entering into the contract has become frustrated. In some cases, the performance has not become literally impossible, but unforeseeable circumstances have made performance extremely costly or burdensome. This is known as "impracticability", and the modern trend is to release a party from a contract if performance becomes extremely impracticable. But impracticability requires that the economic loss be both substantial and unforeseen at the time the contract was made. Likewise, frustration of purpose occurs when a change in circumstances makes one party's performance virtually worthless to the other.

3. Lack of Capacity: Minors and Mental Incapacity

Persons lacking legal capacity include those who are too young (below the age of majority) or mentally incompetent. A person who lacks the legal capacity to enter into an agreement can be released from the duty to perform.

A minor may enter into a contract, but may disaffirm the contract at any time during minority or within a reasonable time after majority, even if the other party has fully performed. To disaffirm a contract, the minor has only to indicate an intent not to be bound by the contract. Like a minor, a person who is mentally infirm lacks legal capacity. A person lacks capacity who, because of mental disease or defect, does not have the ability to understand the contract. A contract is voidable by a party who contracted while mentally infirm.

4. Duress and Undue Influence

A contract entered into under duress is voidable at the option of the victim of the duress. If the victim has already performed, damages or other suitable relief may be obtained in court. Duress is an action that compels another to do something that person would not otherwise do, so there can be no mutual assent when duress is present. Duress can be committed by violence, imprisonment, wrongful taking and keeping of a person's property, or the threat if any of those acts. Undue influence is like duress in that it involves pressure on a party. But it is generally invoked only when someone takes advantage of the party's particular vulnerability to pressure.

5. Misrepresentation

A party to a contract that was procured by misrepresentation or concealment may avoid the contract. Only misrepresentation of fact, not of opinion, qualify, and the victim of the misrepresentation must have justifiably relied on the misrepresentation. Generally the misrepresentation must have been intentional. But if it concerns a material fact, unintentional misrepresentation may be sufficient.

6. Unconscionability

A party may be excused from performance under a contract if the contract is found to be unconscionable. A contract may be unconscionable if there was an absence of meaningful choice on the

- majority
  成年
- disaffirm
  宣告无效
- minority
  未成年
- infirm
  虚弱的
- undue influence
  不正当影响
- vulnerability
  易受伤害性
- misrepresentation
  虚假陈述
- procure
  取得;获得
- concealment
  隐瞒
- material fact
  重要事实;实质性事实
- unconscionability
  显失公平性
- unconscionable
  显失公平的

· repudiation
拒绝履行合同
· due
到期
· repudiate
拒绝履行
· suspend
中止
· vague
不清楚的;模糊的
· forthcoming
即将发生的
· insecurity
不安全
· assurance
保证
· expectation damages
预期利益的损害赔偿
· aggrieved
受损害的
· mitigate
减轻

part of one of the parties together with contract terms which are unreasonably favorable to the other party. If a contract is found to be unconscionable, the court may refuse to enforce the unconscionable part or the whole contract, or may reform the contract so that it is no longer unconscionable.

7. Illegal Contracts and Contracts Against Public Policy

A contract that involves illegal subject matter or illegal means of performance is void for illegality. In addition, courts have found contracts void simply because they are against public policy of the state.

Ⅲ. Contract Breaches and Remedies

1. Breach and Repudiation

Traditionally a party who has not performed by the time that performance is due has breached. Today, the other party does not always have to wait until performance is due to see whether the first party will breach. When one party clearly communicates unwillingness or inability to perform the contract and the threatened breach is material, the other party may treat this potential breach as a "repudiation" of the contract. When one party repudiates, the other party may suspend performance and may sue for damages immediately as if a breach had already occurred. However, repudiation must be unequivocal, so there is no repudiation if one party merely states vague doubts about willingness or ability to perform or if circumstances make it appear that performance may not be forthcoming. Nevertheless, since such circumstances may give the other party reasonable ground for insecurity, the other party may demand an assurance of due performance.

2. Remedies for Breaches of Contracts

The most common kind of relief that is awarded in a suit for breach of contract are "expectation damages," so called because they seek to remedy the unfulfilled expectations of a party by awarding an amount of money that will put the aggrieved party in the same position that party would have been if the contract had been fully performed. But the award will not compensate for all losses that the aggrieved party may sustain from the breach. The injured party is under an obligation to take reasonable steps to mitigate or

minimize the damages. In addition, damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

Another possible remedy for a breach of contract is specific performance. Specific performance is an equitable remedy in which the court orders the breaching party to perform duties under the contract. This remedy is usually used only where remedies at law will not adequately compensate the innocent party for the breach of the contract. Usually, if the contracted-for item is unique and irreplaceable, the legal remedy is not adequate.

In some contract cases, "restitution" may be ordered as an equitable remedy. Restitution is based on the principle that one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss. The purpose is to place the parties back in the positions they were before the contract.

In cases where there is no contract, but the defendant has nonetheless been enriched by the plaintiff's action, the plaintiff may recover under "quasi-contract". Despite the terminology, quasi-contractual recovery has nothing to do with contracts. Such recovery comes from duties imposed by the law as a means of ensuring justice by preventing one party from being unjustly enriched at the expenses of another.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

- specific performance 实际履行
- irreplaceable 不可替代的
- restitution 返还;恢复原状
- accountable 应负责任的
- enrich 受益
- quasi-contract 准合同;准契约
- terminology 术语

Notes

1. Uniform Commercial Code (UCC): a uniform law that governs commercial transactions, including sales of goods, secured transactions, and negotiable instruments. This code has been adopted in some form by every state.《统一商法典》,涉及商业交易的各个方面,包括货物买卖、担保交易及商业票据等。美国各州均以某种形式采纳了该法。
2. consumer protection law: a state or federal statute designed to protect consumers against unfair trade and credit practices involving consumer goods, as well as to protect consumers against faulty and dangerous goods. 消费者(权益)保护法。旨

在保护消费者在购买和使用消费品中不受不公正交易、不公正信贷和不受假冒伪劣、有危险性商品等损害的法律。

3. mutual assent: agreement by both parties to a contract, usually in the form of offer and acceptance. 双方意思表示一致;合意。
4. meeting of the minds: actual assent by both parties to the formation of a contract. 合意,指合同当事人对合同内容和条款相互同意。
5. objective test: also objective theory of contract, the doctrine that a contract is not an agreement in the sense of a subjective meeting of the minds but is instead a series of external acts giving the objective semblance of agreement. 客观标准,也称契约之客观理论。并非允诺人心目中的契约含义,而是通情达理的受允诺人于其处境中所理解的含义。
6. mirror image : the common-law principle that for a contract to be formed, the terms of an acceptance must correspond exactly with those of the offer. "镜像规则"。指根据普通法,承诺的内容必须严格地与要约保持一致,否则不能成为有效的要约。
7. option contract: a contract made to keep an offer open for a specified period, so that the offeror cannot revoke the offer during that period. 选择权合同。指订立使某一要约在某一特定期间有效,且要约人不得撤销的合同。
8. mailbox rule: the principle that an acceptance becomes effective and binds the offeror once it has been properly mailed. "邮箱规则"。是关于承诺生效时间的规则,指一项承诺一经发出就产生效力。
9. pre-existing duty : the rule that if a party does or promises to do what the party is already legally obligated to do, or refrains or promises to refrain from doing what the party is already legally obligated to refrain from doing, the party has not incurred detriment. 既有义务规则。是合同法上的一项规则,指如果一方当事人履行或允诺履行其本应履行的义务,该当事人并未因此而遭受损害。其中本应履行的义务,既可以是作为的义务,也可以是不作为的义务。既有义务规则的运用,意味着履行既有义务的允诺并不构成合同的有效对价。
10. promissory estoppel: the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. 允诺的不容否定;不得自食其言;允诺性禁反言。指允诺人相信对方将由于信赖其允诺作出某项实质性的作为或不作为,所受允诺人确实因此作出某项作为或不作为,且作出的允诺不得否定或取消,以免给对方造成损害。
11. Statute of Frauds: the Statute (based on the English Statute of Frauds) designed

to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged. 《防止欺诈法》。指美国继受英国《防止欺诈法》而形成的法律。该法的目的在于通过规定某类合同必须采用书面形式且由当事人或其授权代理人的签字而防止欺诈或伪证行为。

12. Parol Evidence Rule: the principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to varies, or contradicts the writing. 口头证据规则。根据此项规则,当事人签订书面合同以之为最终正式协议时,合同条款不得因此前的书面或口头协议而变更或推翻,但不排除与书面合同并无抵触的口头证据。

13. extrinsic evidence: evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement. 外部证据;旁证。指并非包含于协议、契约等文件中的,而是从其他来源所得的证据,如当事人的陈述、订约时的情况等。

14. quasi-contract: an obligation imposed by law because of the conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched. 准合同;准契约。指为了防止发生不当得利而由法律设定的合同义务。

Check Your Understanding

Answer the following questions according to the text.

1. How is a contract defined in this article? Do you have other definitions?
2. What is "mirror image" in the American contract law?
3. What is the difference between a bilateral contract and a unilateral contract?
4. What is an option contract? What does it imply?
5. When does a revocation become effective, and when is the contract concluded?
6. What is consideration?
7. Why is the promise to make a gift unenforceable?
8. Does a contract have to be in writing to be enforceable? Why or why not?
9. What is the parol evidence rule?
10. When one party of a contract repudiates, what can another party do?
11. What remedies are available to the innocent party when there is a breach of contract?
12. Is quasi-contract a contract? Why is it termed this way?

Build Up Your Vocabulary

Ⅰ. Match the items in the following two columns.

A	B
1. acceptance	a. a person who makes an offer
2. breach of contract	b. a manifestation of assent by the offeree to be bound to the terms of the offeror
3. consideration	c. inducement to contract
4. duress	d. a doctrine in which a non-contractual promise may be made enforceable to avoid an injustice
5. incapacity	e. a contract in which one party promises to do or refrain from doing something in return for actual performance by the other party
6. offeror	f. a binding agreement in which the owner agrees to sell the property to a prospective purchaser, at a specified price, within a stated period of time
7. option contract	g. a defense to contract liability, such as being too young
8. promissory estoppel	h. a reference to the action of one person which compels another to do something that he or she would not otherwise do
9. unconscionability	i. lack of sophistication in commercial transactions
10. unilateral contract	j. the failure, without any legal excuse, to perform part or all of a contract
	k. doctrine that allows courts to protect the weaker party in a contract

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

counteroffer	expectation damages	impossibility	minor
misrepresentation	mutual assent	rejection	restitution
revocation	specific performance		

1. _____ are compensation awarded for the loss of what a person reasonably anticipated from a transaction that was not completed.
2. Only if the money damage remedies will not suffice to provide a sufficient remedy

for the victim of a contract breach can _____ be obtained.

3. The making of a _____ impliedly manifests a rejection of the offer and therefore terminates the offer.
4. If an offeree receives information from a reasonably reliable source which indicates that the offeror no longer intends to be bound by the terms of the offer, then this is effective as a _____ of the offer.
5. To establish a right to _____, a plaintiff must prove that the defendant was unjustly enriched and that this unjust enrichment was created at the plaintiff's expense or by violating the plaintiff's rights.
6. A _____ is an assertion which is not in accord with the facts.
7. _____ refers to agreement by both parties to a contract, usually in the form of offer and acceptance.
8. A refusal to accept a contractual offer is a _____.
9. Those below the "age of majority" are called _____ and allowed to disaffirm the contracts they make.
10. Increased or unexpected difficulty and expense do not usually qualify as an _____ and thus do not excuse performance.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

bilateral contract	consideration	counteroffers	meeting of the minds
offer	option	oral contracts	performance
promise	unilateral contract		

A contract is an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as _____. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The existence of a contract requires finding the following factual elements: a. an _____; b. an acceptance of that offer which results in a _____; c. a promise to perform; d. a valuable consideration (which can be a _____ or payment in some form); e. a time or event when performance must be made (meet commitments); f. terms and conditions for performance, including fulfilling promises; g. performance, if the contract is "unilateral". A _____ is one in which there is a promise to pay or give other consideration in return for actual _____. (I will pay you $500 to fix my car by Thursday;

the performance is fixing the car by that date.) A _____ is one in which a promise is exchanged for a promise. (I promise to fix your car by Thursday and you promise to pay $500 on Thursday.) Contracts can be either written or oral, but _____ are more difficult to prove and in most jurisdictions the time to sue on the contract is shorter (such as two years for oral compared to four years for written). In some cases a contract can consist of several documents, such as a series of letters, orders, offers and _____. There are a variety of types of contracts: "conditional" on an event occurring; "joint and several," in which several parties make a joint promise to perform, but each is responsible; "implied," in which the courts will determine there is a contract based on the circumstances. Parties can contract to supply all of another's requirements, buy all the products made, or enter into an _____ to renew a contract. The variations are almost limitless. Contracts for illegal purposes are not enforceable at law.

Translation

Translate the following sentences into Chinese.

1. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
2. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
3. Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.
4. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Text B

Consideration

· forbearance
不行使权利

The fact that a promise has been made does not mean the promise can or will be enforced. Under Roman law, a promise was not enforceable without some sort of cause—that is, a reason for making the promise that was also deemed to be a sufficient reason for enforcing it. Since the beginning of the common law tradition in England, good reasons for enforcing informal promises have been held to include something given as an agreed-on exchange, a benefit that the promisor received, and a detriment that the promisee incurred. Over time, these reasons came to be referred to legally as "consideration."

Thus, for centuries, it has been said that no informal promise is enforceable without consideration. Consideration is usually defined as the value (such as money) given in return for a promise (such as the promise to sell a stamp collection upon receipt of payment). Often, consideration is broken down into two parts: (1) something of legal value must be given in exchange for the promise, and (2) there must be a bargained-for exchange. The "something of legal value" may consist of a return promise that is bargained for. If it consists of performance, that performance may be (1) an act (other than a promise); (2) a forbearance (a refraining from action); or (3) the creation, modification, or destruction of a legal relation. For example, Ann says to her son, "When you finish painting the garage, I will pay you $100." Ann's son paints the garage. The act of painting the garage is the consideration that creates the contractual obligation of Ann to pay her son $100. Suppose, however, that Ann says to her son, "In consideration of the fact that you are not as wealthy as your brothers, I will pay you $500." This promise is not enforceable, because Ann's son has not given any consideration for the $500 promised. Ann has simply stated her motive for giving her son a

· sufficiency of consideration
对价的充分性
· synonymous
同义的
· adequacy of consideration
对价的适当性
· frivolous suit
没有法律依据的诉讼
· intoxicated
醉酒的

gift. The fact that the word consideration is used does not, alone, mean that consideration has been given.

Legal Sufficiency of Consideration

For a binding contract to be created, consideration must be legally sufficient. To be legally sufficient, consideration for a promise must be either legally detrimental to the promisee (the one receiving the promise) or legally beneficial to the promisor (the one making the promise). Note that legal detriment is not synonymous with actual (economic) detriment. A person can incur legal detriment in either of two ways: (1) by doing or promising to do something that he or she had no prior legal duty to do or (2) by refraining from or promising to refrain from doing something that he or she had no prior legal duty to refrain from doing (that is, by forbearance).

Suppose that Sally owns the right to use the name "The Stonehouse Restaurant." Kate offers Sally $5,000 to stop using the name for her restaurant, and Sally agrees. The consideration flowing from Sally to Kate is a promise to refrain from doing something that Sally is legally entitled to do—that is, use the name "The Stonehouse Restaurant" for her restaurant. The consideration flowing from Kate to Sally is the promise to pay a sum of money that need not otherwise be paid.

Adequacy of Consideration

Adequacy of consideration refers to the fairness of the bargain. In general, a court will not question the adequacy of consideration if the consideration is legally sufficient. Under the doctrine of freedom of contract, parties are normally free to bargain as they wish. If people could sue merely because they had entered into an unwise contract, the courts would be overloaded with frivolous suits. In extreme cases, a court of law may consider the adequacy of consideration in terms of its amount or worth because inadequate consideration may indicate fraud, duress, undue influence, or a lack of bargained-for exchange. It may also reflect a party's incompetence (for example, an individual might have been too intoxicated or simply too young to make a contract). Suppose David has a house worth $100,000 and he sells it for $50,000. A $50,000 sale could in-

dicate that the buyer unduly pressured David into selling or that David was defrauded into selling the house at far below market value. (It might also indicate that David was in a hurry to sell.)

In an equity suit, courts will more likely question the adequacy of consideration. (Actions at law allow for remedies that consist of some form of compensation. Actions in equity allow for such remedies as specific performance, injunction, and rescission.) In an equity suit, the defendant must show that the transaction was not unconscionable, that is, generally speaking, so one sided under the circumstances as to be unfair—and that consideration was exchanged. Adhesion contracts, for example, may be held unconscionable. These contracts are written for the benefit of one of the contracting parties only—the dominant party. The adhesion contract (ordinarily a form contract) is presented to the other party, who must either agree to the dominant party's terms or put aside the deal. The adhesion contract is characterized by little, if any, actual bargaining between the parties.

Settlement of Claims or Disputes

The compromise of a doubtful claim is supported by consideration so long as the claim is pressed in good faith and is the subject of a *bona fide* dispute. It is sufficient that the parties entering into the settlement or compromise thought at the time that there was a *bona fide* question between them, even if it later turns out otherwise. On the other hand, the release from the mere annoyance of unfounded litigation does not furnish valuable consideration.

Contracts That Lack Consideration

Sometimes, one of the parties (or both parties) to a contract may think that they have exchanged consideration when in fact they have not. Here we look at some situations in which the parties' promises or actions do not qualify as contractual consideration.

Pre-existing Duty

Under most circumstances, a promise to do what one already has a legal duty to do does not constitute legally sufficient consideration, because no legal detriment is incurred. The pre-existing legal duty may be imposed by law or may arise out of a previous contract.

- rescission
  解约,解除合同
- adhesion contract
  附意合同
- press
  提起,主张
- *bona fide*
  真实的,真诚的
- unfounded litigation
  毫无根据的诉讼

· sheriff
治安官
· extortion
敲诈
· holdup
拖延
· rescind
撤销;解除
· executory
待履行的

A sheriff, for example, cannot collect a reward for providing information leading to the capture of a criminal if the sheriff already has a legal duty to capture the criminal. Likewise, if a party is already bound by contract to perform a certain duty, that duty cannot serve as consideration for a second contract. For example, suppose that Bauman-Bache, Inc., begins construction on a seven-story office building and after three months demands an extra $75,000 on its contract. If the extra $75,000 is not paid, it will stop working. The owner of the land, having no one else to complete construction, agrees to pay the extra $75,000. The agreement is not enforceable, because it is not supported by legally sufficient consideration; Bauman-Bache was under a pre-existing contract to complete the building.

Unforeseen Difficulties

The rule regarding pre-existing duty is meant to prevent extortion and the so-called holdup game. What happens, though, when an honest contractor who has contracted with a landowner to construct a building runs into extraordinary difficulties that were totally unforeseen at the time the contract was formed? In the interests of fairness and equity, the courts sometimes allow exceptions to the pre-existing duty rule. In the example just mentioned, if the landowner agrees to pay extra compensation to the contractor for overcoming unforeseen difficulties, the court may refrain from applying the pre-existing duty rule and enforce the agreement. When the "unforeseen difficulties" that give rise to a contract modification involve the types of risks ordinarily assumed in business, however, the courts will usually assert the pre-existing duty rule.

Rescission and New Contract

The law recognizes that two parties can mutually agree to rescind their contract, at least to the extent that it is executory (still to be carried out). Rescission is defined as the unmaking of a contract so as to return the parties to the positions they occupied before the contract was made. When rescission and the making of a new contract take place at the same time, the courts frequently are given a choice of applying the pre-existing duty rule or allowing rescission

and letting the new contract stand.

Past Consideration

Promises made in return for actions or events that have already taken place are unenforceable. These promises lack consideration in that the element of bargained-for exchange is missing. In short, you can bargain for something to take place now or in the future but not for something that has already taken place. Therefore, past consideration is no consideration.

Suppose, for example, that Ellie, a real estate agent, does her friend Judy a favor by selling Judy's house and not charging any commission. Later, Judy says to Ellie, "In return for your generous act, I will pay you $3,000." This promise is made in return for past consideration and is thus unenforceable; in effect, Judy is stating her intention to give Ellie a gift.

However, the modern trend sometimes makes the past consideration enforceable. It states that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.

Detrimental Reliance as an Alternative to Consideration

Reasonably expected reliance may under some circumstances make binding a promise for which nothing has been given or promised in exchange. Where legal consideration is lacking courts sometimes enforce gratuitous promises under the theory of "Promissory Estoppel". Three elements must exist in order to invoke promissory estoppel:

(1) Was there a promise which the promisor reasonably expected to induce action or forbearance? (foreseeability)

(2) Did the promise actually induce such action or forbearance? (reliance)

(3) Can injustice be avoided only by enforcement of the promise? (injustice)

The Restatement (Second) Section 87 does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive so as to meet the requirements of an offer. Prom-

- past consideration
  过去的对价
- commission
  佣金
- detrimental reliance
  不利益的依赖，有害的依赖
- gratuitous
  自愿的，单方受益的
- induce
  促使；招致
- foreseeability
  可预见性
- restatement
  （法律）重述

· whim
冲动，心血来潮

issory estoppel can sustain a cause of action despite the absence of an intent to be bound. Promissory estoppel is more than an equivalent of or a substitute for consideration.

Illusory Promises

A promise which is conditioned upon the whim of the promisor is not consideration. Such a promise is called an illusory promise.

The trend of the courts is to avoid construing promises as illusory by, whenever possible, implying conditions of good faith and best efforts in the absence of express language in the contract. An example of this would be found in the case of *Wood v. Lucy, Lady Duff-Gordon*. In that case, Lady Duff Gordon, argued that she was free to break a contract because the other party's promise to perform was illusory resulting in a lack of mutual obligation. The Court of Appeals of New York implied a condition of good faith and an obligation to use best efforts and held the contract to be binding.

Contract Modification

A modification of a contract is a change in an obligation by a modifying agreement. With the exception of contracts for the sale of goods, to be effective the modifying agreement must be supported by additional consideration.

(From www. yourlawprof. com/22w/law1/chp14text. htm
www. west. net/ ~ smith/consider. htm)

Notes

1. sufficiency of consideration (sufficient consideration): enough consideration, as a matter of law, to support a contract. 对价的充分性(充分的对价)。
2. adequacy of consideration (adequate consideration): consideration that is fair and reasonable under the circumstances of the agreement. 对价的适当性(适当的对价)。指公平合理的对价。
3. adhesion contract: a standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms. 附意合同;附合合同。一种标准化、格式化的合同,由缔约双方中强势方单独拟定合同条款,弱势方对合同条款并无谈判或选择的余地。
4. past consideration: an act done or a promise given by a promisee before making a promise sought to be enforced. Past consideration is not consideration for the new

promise because it has not been given in exchange for this promise. 过去的对价。合同订立前已完成的行为，一般不能作为允诺的对价，因为这不是对新允诺的交换。

5. detrimental reliance: reliance by one party on the acts or representations of another, causing a worsening of the first party's position. Detrimental reliance may serve as a substitute for consideration and thus make a promise enforceable as a contract. 不利益的信赖；有害的依赖。由于一方当事人对他人的行为或陈述产生信赖，从而导致自己处于不利地位的，则该种信赖即属于不利益的信赖。不利益的信赖可以代替合同的对价，使某一单方的允诺成为可强制执行的合同。
6. restatement: one of several influential treatises, published by the American Law Institute, describing the law in a given area and guiding its development. （法律）重述。美国法律研究院发表的描述某一领域的法律规则及其发展，对司法判决没有法定的约束力，但具有很强的权威性和说服力。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( )1. Consideration refers to something given as an agreed-on exchange.

( )2. Consideration can be defined as something of legal value, which only consists of a return promise.

( )3. Sufficiency of consideration means that consideration must be equal.

( )4. Adequacy of consideration is as important as sufficiency of consideration.

( )5. When the transaction was so one sided, the court may tends to question the adequacy of consideration.

( )6. Settlement of claims or disputes are enforceable if they are entered into in good faith and the dispute was bona fide.

( )7. When the "unforeseen difficulties" that give rise to a contract modification do not involve the types of risks ordinarily assumed in business, the courts may refrain from applying the pre-existing duty rule and enforce the modification.

( )8. Past consideration is no consideration because the consideration is not sufficient.

( )9. Promissory estopple makes some promises that nothing has been given or promised in exchange binding.

( )10. Illusory promises are promises that are not true.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
adhesion contract	
	对价的充分性
adequacy of consideration	
	不正当影响
illusory promises	
	过去的对价
detrimental reliance	
	允诺人
unconscionable	
	解除;撤销
injunction	

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

express contract
implied contract
executory contract
executed contract
void contract
voidable contract
unenforceable contract
anticipatory repudiation
liquidated damages
unjust enrichment
reliance damages
quantum meruit
substantial performance
material breach
nominal consideration
constructive condition

Translation

Translate the following sentences into English.

1. 承诺的内容应当与要约的内容一致。受要约人对要约的内容作出实质性变更的，为新要约。有关合同标的、数量、质量、价款或者报酬、履行期限、履行地点和方式、违约责任和解决争议方法等的变更，是对要约内容的实质性变更。
2. 当事人对合同的效力可以约定附条件。附生效条件的合同，自条件成就时生效。附解除条件的合同，自条件成就时失效。当事人为自己的利益不正当地阻止条件成就的，视为条件已成就；不正当地促成条件成就的，视为条件不成就。
3. 当事人应当按照约定全面履行自己的义务。当事人应当遵循诚实信用原则，根据合同的性质、目的和交易习惯履行通知、协助、保密等义务。
4. 当事人一方违约后，对方应当采取适当措施防止损失的扩大；没有采取适当措施致使损失扩大的，不得就扩大的损失要求赔偿。当事人因防止损失扩大而支出的合理费用，由违约方承担。

Case Study

Hamer v. Sidway

Court of Appeals of New York

124 N. Y. 538 (1891)

[At a family celebration and in the presence of family and invited guests, William E. Story, Sr., the uncle of William E. Story, 2d, promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he was 21 years old, the uncle would pay him $5,000. The nephew agreed and abided by the terms of his uncle's promise. When the nephew asked for his money, the uncle replied that he fully intended to hand over the $5,000, but that he felt that he should keep the money until the nephew got his feet on the ground. The nephew never received the money; eventually he transferred his right to receive the $5,000 plus interest to another person named

· billiards
弹子戏

· excerpt
节选,摘录
· executor
遗嘱执行人
· ult.
上月的
· shove
推
· jackplane
大刨
· butcher
屠宰
· perseverance
坚持不懈
· cholera
霍乱

Hamer. Presumably Hamer was willing to give him immediate cash, say, $4,000. Before Hamer could collect the $5,000 plus interest from the uncle, the uncle died. So, in the opinion excerpted below, Hamer is suing Sidway, who is the executor of the uncle's estate, to recover $5,000 plus interest.

On his 21st birthday the nephew William E. Story, 2d, wrote to his uncle, William E. Story, Sr., to tell him that he had performed his part of the promise and thought he was entitled to the $5,000. The uncle shortly thereafter wrote the following letter to his nephew:

"*Buffalo, Feb. 6, 1875, W. E. Story, Jr.* —

Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you will have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty one years old that I intend for you, and you have the money certain. Now Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jackplane many a day, butchered three or four years, then came to this city, and after three months' perseverance I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season '49 and '52 and the deaths averaged 80 to 125 daily and plenty of smallpox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me if I left then, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how much I got it. It did not come to me in any mysterious way, and the reason I

speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This money you have earned much easier than I did, besides, acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop...

Truly yours

W. E. Story

P. S. *You can consider this money on interest."*

The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest. Sometime after February, 1875, the nephew had transferred his entitlement to Hamer, who has presented the claim for the money to Sidway, the executor of the uncle's estate.]

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff 's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousands dollars. The trial court found as a fact that "on the 20th day of March, 1869, ... William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the prom-

- provoke 导致;激起
- testator 留有遗嘱的人
- the said 上述的

· contention
论点
· controversy
论战
· Exchequer Chamber
财政署内室法庭

isee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.) "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol. 2,465, 12th ed.)

Pollock, in his work on contract, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the

strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense...

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

· speculate
思考,推测
· stimulant
兴奋剂
· Special Term
特别开庭期

Notes

1. Exchequer Chamber: the name of a former English court of appeal, intermediate between the superior courts of common law and the house of lords. 财政署内室法庭。指先前英国的一个上诉法院,介于普通法最高法院与上议院之间。
2. Special Term: a term of court scheduled outside the general term, usually for conducting extraordinary business. 特别开庭期。指法院在特别时期由负责官员指定的处理某些特别事务的期间,区别于法院常规的开庭期或休庭期。

Exercises

Ⅰ. Questions to discuss:

1. Do you think the nephew had a contract with his uncle? Why or why not?
2. Under what circumstances may one's words be counted as a promise for a contract?
3. Can you think of some similar situations in China?

Ⅱ. Brief the case and present the case brief to the class.

Unit Eight Property Law

Words and expressions:

tangible	subject matter	intangible	stocks	bonds
mutual fund shares		financial instruments		prevalent
a bundle of	prevail	liberty	exclude	immunity
privilege	trespass	garbage	lawn	tunnel
diagonally	extract	erode	orbit	invasion
infringement	nuisance	ordinance	allocation	inevitably

I. Listen to the passage, and then answer the following questions according to what you hear.

1. What can be the subject matter of property?

2. What are the typical forms of intangible property?

3. What is property about?

4. What does property law involve?

5. What can property law be described as?

6. What are the most important interests in property a property owner might have?

7. Among all the important interests in property, Which one is the most important?

Ⅱ. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

Traditionally, a landowner was thought to own not only the surface of the land but also all property extending down the _____ of the earth and up "to the heavens". The former is still true; your neighbor cannot dig a tunnel under your land, or dig diagonally to extract minerals under your land. The latter concept has been eroded; however, it is not a _____ for an airplane to fly over your house at 30,000 feet, or for a satellite to orbit the Earth above your _____.

A property owner not only has the right to exclude a physical _____ of the property, but also can _____ some other type of entry, like noise, smells, smoke, or vibrations, if the infringement on your enjoyment of your property is deemed to be _____. The invasions of your property are called _____. They may also violate local ordinances or state law specifically directed at these kinds of problems.

So property law is not about _____, or even in a simple sense about the ownership of things. Instead, property law is about the _____ of value in society. It is inevitably tied to questions about economics, politics, and our vision of the good society. We need to explore what _____ as property, what it means to say something is property, and how the answers to those questions tie in to social relations, power, and justice.

Text A

An Overview of Property Law

- aggregate 总计,合计
- alienate 转让,让渡
- convey 转让

Most people think of property as an object, such as a car, or a piece of land. More precisely, property law concerns the rights and obligations of people with respect to such objects. The aggregate of such rights and obligations is sometimes analogized to bundle of sticks. Each "stick" can been seen as a specific right: (1) the right to possess, (2) the right to use, (3) the right to exclude others and (4) the right to alienate(sell). The right of possession allows a person to possess property, but does not give that person the right to sell it. A fundamental principle of property conveyance is that an owner generally may not convey a greater interest than that

· real property
不动产
· personal property
动产
· realty
不动产
· personalty
动产
· fee simple absolute
绝对非限嗣继承地产(权)
· fee simple
非限嗣继承地产(权)
· transferable
可转让的
· inheritance
继承
· deed 契据
· will 遗嘱
· lessor 出租人
· lessee 承租人
· leasehold
租赁保有
· lease 租约
· extinguish
灭失
· sublease 转租
· sublet 分租
· assignment
转让
· transferee
受让人
· subleasee
转租人

owner has.

The U. S. legal system distinguishes between "real property" and "personal property". Real property, also called "realty", is land and structures built upon it. All other property is personal property or "personalty". These correspond roughly to the civil law notions of immovable and movable property.

Ⅰ. Real Property

A person who owns or possesses a piece of real property is said to have an "estate" or an "interest" in the property. Property interests can be defined in terms of (1) the degree of control the owner of that interest has, (2) the duration of the interest (time), (3) physical space allocated to the owner, and (4) the way the ownership interest is held (single or shared title).

1. Property Interests Defined by Degree of Ownership or Control

The greatest interest in terms of degree of control over the property is called "fee simple absolute" or "fee simple" ownership. The owner of the fee simple estate holds all the possible rights and interests associated with property in a single bundle. The fee simple estate is freely transferable during the life of the owner/holder and can be passed from generation to generation by inheritance. A fee simple estate may thus be transferred by a "deed" or a "will".

The owner of a property can convey to another person the right to possess the property for a limited period of time. The owner of the property is called the "lessor" or "landlord". The person using the property is called the "lessee" or "tenant". The interest of the tenant is called the "leasehold" and it is generally created by way of a document called a "lease". At the end of the lease term, the right to possess the property returns to the landlord and the tenant's rights are extinguished. During the term of the lease the tenant can transfer or assign the tenant's possessory interests to another or may sublease or sublet the premises. In an assignment, the transferee tenant takes the place of the original tenant. In a sublease situation, the lessee conveys the right of possession to subleasee, but remains liable to the landlord under the lease. Because of this, the original

lessee retains the right to intervene. Leases between landlords and tenants often restrict the tenant's ability to transfer all or part of the tenant's interest.

2. Property Interests Defined by Physical Limits

The most common way that interests in real property are defined is by the physical boundaries of the land owned. Thus, interests in land are confined to the physical boundaries of the property in question. Historically, the owner of land was said to possess the space below the surface of the land "to the center of the earth" and the space above the land as well "up to the heavens." However, the invention of the airplane has made ownership of air space infeasible.

Physical structures located on land, such as buildings, are part of the real property. Included as well are items of personal property that have been affixed to those structures, called "fixtures". Despite the fact that such items of property might otherwise be considered personal property before they became affixed, they become part of the realty when they become fixtures.

3. Property Interests Defined by Time

A life estate is a possessory property interest that terminates on the death of the estate holder. Upon such death the interest returns to the grantor or goes to another person in accord with the wishes of the grantor as expressed in the instrument that created life estate. Life estates are usually freely transferable. But the basic principle of property transfer—that a transferor can transfer no greater estate than that possessed—means that the life estate will terminate upon the death of the person who transferred the interest. Thus, life estates have little commercial value.

A future interest is an interest in property that comes into being sometime in the future. The holder of a future interest does not presently possess the property, but only has the right to possess it sometime in the future. Future interests are true property rights in that they are inheritable and generally freely transferable.

4. Property Interests Defined by the Way the Interest Is Held

A property interest may be held by one person or entity. Included are natural persons, partnership, corporations or trusts. Fee

- infeasible 不实际的
- affix 固定于
- fixture 附着物
- life estate 终身地产权
- future interest 未来权益
- inheritable 可继承的
- entity 实体
- trust 受托团体

- joint tenancy 共同财产权
- concurrent estate 共同财产
- right of survivorship 生存者取得权
- descend 继承,遗传
- heir 继承人
- proportion 份额
- tenancy by the entirety 夫妻共同保有
- tenancy in common 普通共有
- grantor 让与人,转让人
- right of "quiet enjoyment" 安静享用权

simple single ownership gives the person or entity full rights to the entire property for an indefinite period. As such, it is the highest form of property ownership.

In a joint tenancy, owners ("joint tenants") own an undivided, equal portion of the property. A joint tenancy creates "concurrent estates" in more than one person. This means that all the owners have the right to possess and enjoy the entire piece of property. Joint tenants also enjoy the "right of survivorship". In other words, if a joint tenant dies, that tenant's interest in the property does not descend to the tenant's heirs, but is extinguished. As a result, the interests of the surviving joint tenants expand in equal proportions.

Tenancy by the entirety refers to the method by which a husband and wife may jointly own property. It is similar to a joint tenancy because when one spouse dies the surviving spouse takes the entire estate in fee simple. However, unlike a joint tenancy, there is no unilateral right to division of the property. Divisions can be made only in a divorce action or by mutual agreement. A major advantage of tenancy by the entirety is that the creditors of an individual spouse cannot reach the entireties of property.

A tenancy in common establishes a concurrent estate in land and is similar to a joint tenancy, but tenants in common do not enjoy the right of survivorship. Thus, if a tenant in common dies, that tenant's interest descends to his or her heirs and the tenancy in common continues. When the ownership interest is ambiguous, the law prefers a tenancy in common over a joint tenancy. In general, absent the expressed intent of a grantor to create a joint tenancy, a court will presume that the grantor intended to create a tenancy in common.

5. Rights and Obligations of Owners of Real Property

(1) Rights Included in Ownership of Real Property

An owner has the right to possession and control of the property. This right is called a right of "quiet enjoyment" of the premises. This includes the right to exclude trespassers (anyone who comes on land without permission). Multiple owners of real property, such as joint tenants, tenants in common and tenants by the entireties, are

entitled to equal and undivided possession of the property.

Feel simple ownership of a property includes the ownership of resources both below and above the surface of the land. Not only can the resources themselves be conveyed by the owner, but the right to enter the land and remove these resources may be conveyed separately by the owner. Likewise, landowners have the right to use the water that is located on their property. The terms "riparian rights" (rivers) and "littoral rights" (seas, oceans and lakes) refer to the rights of a landowner with respect to bodies of water bordering on the landowner's property.

Landowners also have a right to the support afforded their land through adjacent or subterranean land. If a person removes either the lateral or subjacent support from another person's property, either through excavation or mining, that person is liable for any damage should the property slide or fall.

(2) Consensual Limitations on Ownership

An easement is the right to use the land owned by another for a specific purpose without actually owning it. An easement can be perpetual or for a limited period of time. If it is perpetual, the right to use it remains with the easement holder even if the property is sold. However, for this to occur the easement must be recorded. An easement may be terminated by a written agreement between property owner and the easement holder.

A license is the permission of a landowner to use his or her property in some specific way. A license can be distinguished from an easement in that it is generally revocable by the grantor at any time. An easement cannot be revoked by the grantor without the agreement of the grantee. Licenses and easements both differ from leases in that they only grant the right to engage in some sort of activity in the land, not the right to possession.

"Covenants" and "equitable servitudes" are promises made by landowners with respect to use of their land. These promises usually appear in deeds to the property or in subdivision plans. Covenants may be classified as either affirmative or negative. An affirmative covenant is a promise made by the landowner to do an affirmative

- riparian rights 河岸权
- littoral rights 海滨权
- subterranean 地下的,地面的
- lateral support 侧面支撑权
- subjacent support 垂直支撑权
- covenant 协议
- equitable servitude 衡平法上的地役

- run with the land 随土地转移
- toxic 有毒的
- categorize 分类
- invitee 受邀者
- licensee 被许可人
- repel 驱逐
- adverse possession 逆占有;时效占有
- notorious 公开占有财产的

act. Negative covenants, also known as "equitable servitudes", are promises not to use a piece of property in a certain way. A covenant generally "runs with the land". This means that a covenant binds all subsequent landowners.

(3) Duties of Owners of Real Property

Every landowner has a duty to refrain from creating or allowing a "nuisance" to exist on property that the owner controls. A nuisance is any activity that adversely affects adjacent owners or the general public, such as a factory that releases toxic fumes into the atmosphere.

An owner also has duties with regard to persons who enter his or her property and may be injured. Traditionally, what duties are owed has been categorized based on the relationship between the person who enters the property and the owner of it. "Invitees" are persons whom the owner has explicitly or implicitly invited to come onto the premises to make purchases or to work there, such as the customers or employees of a business. Since invitees are there for the benefit and profit of the owner, the owner owes the highest duty to them—a duty to protect them from all unreasonable risks. "Licensees" are people who enter the property with the owner's permission, but are not there for the profit of the owner, such as party guests. The owner's duty to them is not to protect them from all unreasonable risks of harm, but only to warn them of any risks of injury that the property presents. "Trespassers" generally have not the right to be on the owner's property, but even as to them the owner must keep the property free from unreasonable dangers that the trespasser might not expect. However, the owner has no duty to warn of any hidden dangers. And in any event, the owner of land may not set a trap employing deadly force to repel a trespasser.

6. Adverse Possession—A Method of Acquiring Real Property

Adverse possession is a means of gaining ownership of real property without the consent of the owner. The elements of an adverse possession claim are that the possession must be actual, hostile to the owner's interests, open and notorious, exclusive and continuous for the statutory period, typically 15 or 20 years. The theory

of adverse possession is that it is essentially a time limitation (statute of limitations) on the owner's right to sue for trespass. Once the land has been possessed for the required period of time and all the elements of adverse possession have been fulfilled, the adverse possessor can bring an action to "quiet title". If the action succeeds, the adverse possessor will be awarded title to the property. The policy behind adverse possession is to prevent land from remaining unused and to assure that owners are vigilant in protecting their rights.

- statute of limitations
  诉讼时效法
- an action to "quiet title"
  确权诉讼
- vigilant
  警觉的
- utensil
  器具
- intrinsic
  内在的,固有的
- donative intent
  赠与意图
- inaccessibility
  不可触及性

Ⅱ. Personal Property

1. Types of Personal Property

Personal property is all property that is not real property or "fixtures". Examples of personal property are books, utensils, cars, furniture, stocks, bonds, patents and copyrights. Personal property may be either "tangible" or "intangible". "Tangible" personal property consists of material objects that have intrinsic value—objects that are valuable in and of themselves, such as jewelry.

2. Acquiring and Transferring Interests in Personal Property

A gift is the transfer of title to property without an exchange of consideration for the property. For a gift to be valid, it must be made with the "donative intent" on the part of the grantor, the intention to make a gift. The grantor must also intend present transfer of the item. Additionally, for a gift to be valid, there must be delivery and acceptance of the item. The general rule on delivery is, if the item is capable of being manually delivered, it must be so delivered. However, some goods, because of inaccessibility or large size, cannot feasibly be delivered. If so, symbolic delivery of something that represents the item is sufficient, such as handing over the key to a car.

Ownership interests in personal property may also be acquired by finding an item. The ownership interest that the finder receives depends on how the true owner became separated from his or her property. Once lost property is found, the finder receives an ownership interest in the property which is inferior only to the interest of the original owner. If the personal property has been abandoned,

· inadvertently
无意地
· bailment
寄托
· bailee
受托人

the finder gets title superior to that of all others, including the original owner. If the personal property has been mislaid (the property has been put in a specific location purposefully and inadvertently left there), the owner of the real property on which it is found generally has the right to the item, not the finder.

Adverse possession of personal property, like adverse possession of real property, can be a means of acquiring ownership, and the same requirements apply, i. e. the possession must be actual, hostile to the owner's interests, open and notorious, exclusive and continuous for a statutory period, typically 15 or 20 years.

A bailment exists when one person leaves property in the possession of another for safekeeping or some other temporary purpose. Problems with bailments arise when the "bailee", the person keeping the property, loses it, conveys it, or damages it. There are different standards of care that apply depending on the nature of the bailment. For bailments that are for the benefit of the bailee, as where the bailee charges for the service, the bailee is held to a higher standard of care than where the bailment is gratuitous (where no fee is charged), or where the bailment is for the benefit of the property owner.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

Notes

1. fee simple absolute: an estate of indefinite or potentially infinite duration. 绝对非限嗣继承地产(权);绝对自由继承地。这种地产的继承不限于特定人,凡合法继承人均有权继承。一旦拥有这种地产,本人享有终身的权利,并可传给其后的继承人,与 fee simple 实质上一样。
2. fee simple: an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp. a fee simple absolute. 无条件继承的不动产(权);非限嗣继承地产(权)。它是法律认可的最广的土地权益。这种地产可无条件保有直至现在持有人无继承人为止。
3. life estate: an estate held only for the duration of a specified person's life, usu. the possessor's. 终身地产权。指在持有者或相关他人生存期间存在的地产

权，不具有继承性。

4. future interest: a property interest in which the privilege of possession or of other enjoyment is future and not present. 未来权益。在将来占有或享有不动产等的权益。
5. joint tenancy: a tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession. 共同占有；共同财产权。两人以上共同占有的财产具有不可分割性，如一个共同占有人死了，则其份额直接归属于生存者占有。
6. concurrent estates: ownership or possession of property by two or more persons at the same time. 共同财产；共同占有的财产。指财产为两人或多人同时占有或所有。
7. right of survivorship: a joint tenant's right to succeed to the whole estate upon the death of the other joint tenant. 生存者取得权；生存者财产权。指共有财产中生存者对死者财产享有的权利。
8. tenancy by the entirety: a joint tenancy that is created between a husband and wife and by which together they hold title to the whole with right of survivorship. 夫妻共同保有；夫妻共同保有财产。由夫妻双方共同保有某一财产，彼此享有生存者取得权。
9. tenancy in common: a tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship. 普通共有；共同占有；混合共有。指共同占有某一财产但却对该财产享有不同和独立的权益，每一成员对该财产均有占有权，但彼此不享有生存者取得权。
10. right of "quiet enjoyment": the right of tenant or grantee enjoying the possession of the premises in peace and without disturbance. 安静享用权。指承租人或地产受让人不受他人干扰，安定享有权益的权利。
11. riparian rights: the rights of a landowner whose property borders on a body of water or watercourse. 河岸权。指水流沿岸土地所有权人享有的权利。
12. littoral rights: rights concerning properties abutting an ocean, sea or lake rather than a river or stream. 沿岸权；海滨权。指有关洋、海、湖的财产权。
13. lateral support: the right of a landowner to the natural support of his land by adjoining land. 侧面支撑权。指某一土地受到与之相邻土地支撑，从而使之保持自然状态的权利。
14. subjacent support: the right of land to be supported by the land which lies under it. 地役支撑权；垂直支撑权。指土地受其下面的土地支撑的权利。

15. equitable servitude: a restriction on the use of land enforceable in court of equity. It is broader than a covenant running with the land because it is an interest in land. 衡平法上的地役。指衡平法上可实施的、对供役地建造房屋和使用土地的限制。
16. run with the land: passing with transfer of the land. A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of that land. 随土地转移。土地转移时,如果盖印合同的履约责任或权益也被转移给土地受让人,则称此盖印合同为"随土地转移"。
17. statute of limitations: a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). 诉讼时效法。它以诉因形成(例如损害的发生或被发现)的日期为起点,确定当事人可以提起民事诉讼的时间期限。
18. an action to "quiet title": a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and compelling him either to establish his claim or be forever after estopped from asserting it. 确权诉讼。一种确认不动产产权的诉讼。原告要求对其产权持有异议的人或者向法院提出权利请求,或者今后不得再持异议。
19. donative intent: a conscious desire to make a gift, that is, the donator desires to cause an immediate transfer of title of some property to another person. 赠与意图。指赠与人对赠与物的所有权所作的不可撤销和即时转让的意图。

Check Your Understanding

Answer the following questions according to the text.

1. What is property? How does the U. S. legal system distinguish it?
2. What is fee simple absolute?
3. What kind of interests is a lease?
4. Traditionally, what were the physical boundaries of a land owner?
5. What are fixtures?
6. What is a life estate, and what is future interest?
7. What are the ways that ownership interest may be held?
8. What is the legal effect of "the right of survivorship"?
9. What is the difference between joint tenancy, tenancy by the entirety and tenancy

in common?

10. What are the rights and obligations of real property owners?
11. What are the landowners' water rights?
12. What is adverse possession?
13. How to make a gift valid?
14. What is the rule related with finding?
15. With respect to bailments, what standard of care may be applied?

Build Up Your Vocabulary

I. Match the items in the following two columns.

A	B
1. adverse possession	a. land, and generally whatever is erected or growing upon or affixed to land
2. bailment	b. one who has permission to enter or use another's premises, but only for one's own purposes and not for the occupier's benefit
3. deed	c. an article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the land
4. estate	d. a conveyance of realty
5. easement	e. a delivery of personal property by one person to another who holds the property for a certain purpose under an express or implied-in-fact contract
6. fixture	f. a method of acquisition of title to real property by possession for a statutory period under certain conditions
7. lease	g. the degree, quantity, nature, and extent of interest which a person has in real and personal property
8. licensee	h. a right of use over the property of another
9. nuisance	i. any agreement which gives rise to relationship of landlord and tenant or lessor and lessee
10. will	j. a condition or situation that interferes with the use or enjoyment of property
	k. a document by which a person directs his or her estate to be distributed upon death

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

real property	personal property	lateral support	subjacent support
fee simple	life estate	right of survivorship	joint tenancy
tenancy by the entirety		tenancy in common	

1. _____ estate is the maximum estate; it potentially may last through infinity because one is permitted to pass it to one's heirs.
2. _____, or realty, is legally interpreted as the land itself and the appurtenances thereto, such as structures constructed on the tract or timber growing on it.
3. The _____ is of limited duration, during the life of the holder or some other person.
4. _____ is unique in that it is only available to married couples, so there can be only be two co-owners of the property.
5. In a _____, two or more people own a single, unified interest in real or personal property.
6. In a joint tenancy, each joint tenant has a _____. That is, if there are two joint tenants, and one dies, the other becomes sole owner of the interest that the two of them had previously held jointly.
7. The most important difference between the _____ and the joint tenancy is that there is no right of survivorship between tenants in common.
8. _____, or personalty, is everything other than realty and includes those items of real property that can be severed without injury to the realty, such as minerals.
9. The right to _____ is absolute. That is, once support has been withdrawn and injury occurs, the responsible person is liable even if he used utmost care in his operation.
10. The right to _____ arises only where sub-surface rights (i.e. mineral rights) are severed from the surface rights.

Cloze

Choose the proper words from the list below, and then fill in the blanks.

air rights	condominium	easements	future interest
joint ownership	life estate	land use	nuisance
run with the land	servitudes	zoning	

Property law covers a rich and varied group of subject. There are issues about

deeds, joint ownership, and land records and registration; and problems of land finance, including rules about mortgages and foreclosures. There is the law of _____, which restricts one from using one's land in such a way as to hurt one's neighbors, pouring smoke or sending bad smells onto his land, for example. There are the law of _____ and the exotic law covenant (especially those that _____); these deal with rights a person might have in his neighbor's land—rights to drive a car up his driveway, or to walk across his lawn. These are not rights of ownership; rather they are _____—restrictions or exceptions to the owner's rights, in favor of those of another.

The common law was ingenious in carving up rights to land into various complex segments called estates. These could be either time segments or space segments. A _____ is a time segment; so is a three-year lease of a farm or apartment house. Space segments include _____ (the right to build on top of certain property) and mineral rights (the right to dig underneath it). Nowadays, the _____ is also popular; one can own a slice of some building thirty stories above the ground. The common law was also quite ingenious in devising forms of common or _____, with subtle technical differences between them.

There are also all sorts of future interests known to the common law. Suppose one leaves one's house to one's sister for life, and then to any of her children who might be alive when she dies. The children have a _____; that is, the time they will get the house is postponed to some far-off date. But the future event is certain to happen, and thus the future interest can have value and reality now.

Another important branch of property law is the law of _____ controls. It deals with the limit imposed on what people can do with their property. This was an issue in the law of nuisance, but modern controls go far beyond this. _____ is a familiar type of land use restriction. Zoning ordinances divide towns into zones designated for different uses.

Translation

Translate the following sentences into Chinese.

1. A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title

as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

2. It shall be unlawful to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
3. Partition of Joint and Common Estates. Courts having jurisdiction of actions for equitable relief may, upon the complaint of any person interested, order partition of any real estate held in joint tenancy, tenancy in common or copartnery, and may appoint a committee for that purpose, and may in like manner make partittion of any real estate held by tenants in tail; and decrees aparing entailed estates shall bind the parties and all persons who thereafter claim title to such estates as heirs of their bodies.
4. An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause thereof accrued, but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of minority, of unsound mind, or imprisoned, such person, after the expiration of twenty-one years from the time the cause of action accrues, may bring such action within ten years after such disability is removed.

Text B

Adverse Possession

· lien
留置权

Possession in essence means holding an immovable property in possession with or without title of ownership. It is a continuous act of claiming exclusive use of the property as if the holder owns the property to which he may or may not be having right to ownership.

Possessions are of various types. Adverse possession, symbolic possession, possession under an irrevocable power of attorney, possession under lien and possession under part performance of a contract are a few important ones.

A person in actual possession of an immovable property has certain right and interest in the property he is holding. The possessor has such a strong control over the immovable property that he can keep out others from occupying it. Unless otherwise proved possession may be taken for granted as title of ownership.

Mere possession of an immovable property does not mean that the person is the real owner of the property.

Holding a property after a decree is passed for vacating it, even though enough time is given for vacating the premises, is wrongful and cannot be termed as permissive possession.

Possession, occupation and ownership are not one and the same. Possession means not only physical possession (or constructive possession) of a property but also full control over it. Occupation means the right to hold and occupy a property. Ownership means lawful possession of a property, which may not come with actual physical possession.

A landlord gives his agricultural land to a tenant for cultivation. Though the property is the same, the rights enforced are different. The landlord possesses the land without occupation and the tenant cultivates the land without possession. The mere right to cultivate does not confer the right of possession on the tenant.

Similarly, in a mortgage, the tenant as the mortgagee is in actual physical possession of an immovable property and the landlord as the mortgagor is the true owner of the property. Here the mortgagee possesses the property without ownership and the mortgagor owns the property without occupation.

Possession is temporary. Ownership is permanent.

Adverse Possession

Adverse possession means a person possessing an immovable property, which is unfavorable, unhelpful or harmful to the interest of the rightful owner. Adverse possession is possession of a property by a person on his behalf or on behalf of some other person on which the true owner has a right to immediate possession.

If, however, the true owner does not enforce his right within the time limit stipulated in the Law of Limitation, the possession of

- vacate
  搬出
- constructive possession
  推定占有
- confer
  授予
- mortgage
  抵押
- mortgagee
  抵押权人
- mortgagor
  抵押人
- Law of Limitation
  诉讼时效法

the property becomes adverse to the true owner. The result is that the true owner not only loses his right, title and interest in the property but also cannot maintain a suit in a court of law.

Possession must be hostile in total denial of the title of the true owner. The possessor must be in actual possession of the property under a claim of right. The property must be in his continuous possession and the people in the neighborhood must know that he has been staying on the premises peacefully and continuously for a long period of time and paying taxes in his name so as to show that the title of property is adverse to the true owner. It must be open and hostile enough for the interested parties to come to know of it.

A person, who exclusively holds an immovable property physically, openly, peacefully and without interruption by the true owner for a period of 15 years or more, is considered to have acquired the ownership and title of the immovable property by adverse possession.

The expression of adverse possession indicates a hostile or unfriendly possession, which is either expressed or implied in open denial of the title to the true owner.

Adverse possession is a one-sided act. Therefore, it cannot be documented. A person holding a property for a long time does not mean that title of the property is denied to the true owner.

The possession turns adverse only when the rights of the possessor and true owner do not match. The person holding the possession of the land should hold the same on his own behalf or on behalf of some person other than the true owner, while the true owner all along has a right to immediate possession of the property.

Further the possession to constitute adverse possession should be exclusive and actual physical possession. It is not at all necessary that the true owner should have actual knowledge of the adverse possession so long as it is open and the interested parties have knowledge of it. Also, it is not necessary that the person claiming the title of adverse possession should know who the real owner is.

The mere possession of a property by a trespasser does not constitute adverse possession unless the same is accompanied by open

assertion of hostile title.

Mr. A, who claimed to be a 'tenant' since 1966, was renting out the property to tenants. However, he had all along been claiming to be the constituted attorney of Mr. B. It was only since 1975 that Mr. A started depositing rent in his own name. Mr. A filed a suit in 1985 for permanent injunction seeking to restrain the owner from taking over the property from him. The court heard Mr. A's case and held that Mr. A had been a trespasser on the property since 1970, but started asserting his rights only from 1975 and not earlier. The court held that the suit filed in 1985 was pre-mature, as by the time the suit was filed, Mr. A. had not been in adverse possession of the property for 15 years.

In Hindu Joint Family, a member holding the family property cannot be adverse or unfavorable to other members of the family. All the family members treat the possession of the property by one member as possession by all family members. In the same manner the elder brother of the family collecting rent and revenue is not considered a hostile act against the other family members.

When a party accepts that possession of a property has been given on the basis of lease, mortgage, agreement to sell, the possession can never be adverse.

A property does not become adverse if it is given under part performance of a contract.

Possession of the property with the permission of the owner does not become adverse by a mere change in the mental attitude of the person in possession. Permissive possession never becomes hostile, till there is assertion of a hostile possession to the knowledge of the owner.

A person claiming right and title by adverse possession has to give concrete evidence to the fact that he had exclusive, peaceful and continuous possession of the property for a period of 15 complete years as prescribed in the Limitation Act. Title to the property by adverse possession must always be proved with bare facts.

Symbolic Possession

Symbolic possession of a property is given to the purchaser

- permanent injunction 长期禁制令
- Hindu Joint Family 印度共有家庭
- concrete 明确的，确定的
- Limitation Act 诉讼时效法

· auction
拍卖
· power of attorney
授权书,委托书
· clear
清偿
· guarantee
担保

when an immovable property is sold in auction. In that event the third party in actual physical possession of the property must be kept informed.

Possession Under an Irrevocable Power of Attorney

Under an irrevocable power of attorney, the attorney possesses the property and transacts it on behalf of the executor. The attorney signs and executes all documents and completes the transaction as if the executor himself personally did all the transactions.

Sometimes, a creditor holds an immovable property against certain debts. This is known as possession under lien. The right to possession comes to an end when the owner of the property clears the debt. Generally, banks have a right to retain a property till the charges are cleared.

Possession as Part Performance of a Contract

Possession of an immovable property is also given as guarantee for part performance of a contract. A possessor of this kind of property will not have right or title in the property, but he will have the right to resist any attempt by the transferor to take over the property from his possession. In this case the right of the true owner of the property is also affected, since he cannot enforce his right after possession has been given to the transferee.

(http:// www. realestatereporter. net)

Notes

1. constructive possession: control or dominion over a property without actual possession or custody of it. 推定占有。指某人虽未实际占有而有权并有意图地对某物的控制。
2. Law of Limitation: also Limitation Act. 诉讼时效法。指提起诉讼或指控的有效期,在期限届满后,诉讼或指控不得提起。
3. permanent injunction: an injunction granted after a final hearing on the merits. Despite its name, a permanent injunction does not necessarily last forever. 长期禁制令;永久禁制令。指法院对案件经过最终的实体审理之后发布的没有期限限制的禁制令。此种禁制令虽名为永久性的,但事实上不一定会永远存在下去。
4. Hindu Joint Family: 印度共有家庭。

5. power of attorney: an instrument granting someone authority to act as agent or attorney-in-fact for the grantor. 授权书;委托书。一种书面文件,本人以此指定他人为代理人,授权其为本人利益从事某类行为或某一特定行为。

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( )1. All the possessions are the same.

( )2. Mere possession does not mean the title of ownership.

( )3. Possession, occupation and ownership are the same.

( )4. The difference between possession and ownership is that possession is temporary while ownership is permanent.

( )5. Adverse possession is not a legal way to acquire property.

( )6. The only element required for adverse possession is the continuous possession for a statutory period.

( )7. The mere possession of a property by a trespasser is not adverse possession.

( )8. A party can become an adverse possessor based on lease, mortgage, and etc.

( )9. Permissive possession cannot become adverse possession.

( )10. Possession under lien means that a creditor holds an immoveable property against certain debts.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
adverse possession	
	长期禁制令
premises	
	抵押权人
constructive possession	
	诉讼时效法
power of attorney	

(continued)

English	Chinese
	承租人
lien	
	受让人

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

freehold estate	partition
eminent domain	condemnation
zoning	takings
marketable title	warranty of habitability
accessions	improvements
reversion	alienability
contingent remainders	vested remainders
dower	curtesy

Translation

Translate the following sentences into English.

1. 公民的个人财产，包括公民的合法收入、房屋、储蓄、生活用品、文物、图书资料、林木、牲畜和法律允许公民所有的生产资料以及其他合法财产。公民的合法财产受法律保护，禁止任何组织或者个人侵占、哄抢、破坏或者非法查封、扣押、冻结、没收。
2. 财产可以由两个以上的公民、法人共有。共有分为按份共有和共同共有。按份共有人按照各自的份额，对共有财产分享权利，分担义务。共同共有人对共有财产享有权利，承担义务。按份共有财产的每个共有人有权要求将自己的份额分出或者转让。但在出售时，其他共有人在同等条件下，有优先购买的权利。
3. 所有人不明的埋藏物、隐藏物，归国家所有。接收单位应当对上缴的单位或者个人，给予表扬或者物质奖励。拾得遗失物、漂流物或者失散的饲养动物，应当归还失主，因此而支出的费用由失主偿还。
4. 不动产的相邻各方，应当按照有利生产、方便生活、团结互助、公平合理的精神，正确处理截水、排水、通行、通风、采光等方面的相邻关系。给相邻方造成妨碍或者损失的，应当停止侵害，排除妨碍，赔偿损失。

Case Study

Gilinsky v. Sether

66 P.3d 584 (2003)

EDMONDS, P. J. Plaintiff appeals the trial court's judgment that adjudicated defendants to be the owners of certain property through adverse possession. He argues, in part, that the evidence presented by defendants at trial was insufficient to prove 10 continuous years of open, notorious, and hostile possession of the disputed strips of land before 1990 by clear and convincing evidence. We affirm.

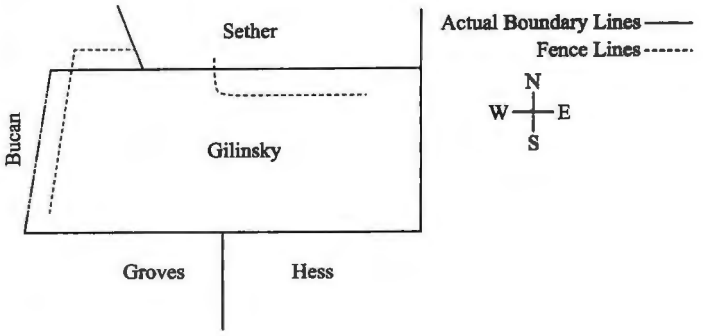
We find the following facts on *de novo* review. ORS 19.415 (3); *Brunswick v. Rundell*, 126 Or App 582, 585, 869 P2d 886 (1994). All the property at issue is located in a forested rural residential area of Jackson County. The property is not used for agricultural purposes. Like the land in the surrounding area, the subject parcels each consists of several acres and is used as a single family residence.

Plaintiff purchased his undeveloped parcel of land in 1998. The land is forested with dense underbrush. At the time he purchased it, the land had never been developed and showed no signs of human inhabitancy. Plaintiff had a survey done soon after he acquired the land. That survey revealed that the existing fence lines of adjoining properties encroached on his property. The encroachments, evidenced by fence lines, involve four parcels of property, each owned by different defendants: Martin Sether, Robert Bucan, Donald Hess, and Samuel and Bobbe Groves. The fence lines encroach on plaintiff's property as indicated in the following diagram.

(1) The Sether Property

Sether acquired his property in 1995. At that time, the fence appeared to be very old. The disputed area is in a meadow that functions as the backyard for the Sether residence. Sether mows the disputed area and attempts to keep weeds off of it. There is a line of

- P. J.: presiding judge 法院院长；首席法官；审判长
- adjudicate 裁定
- clear and convincing evidence 清楚且令人确信的证据
- underbrush 灌木丛
- inhabitancy 居住
- adjoining 毗连的；邻近的
- encroach 侵占
- mow 割(草)



young fir trees in the area that appears to have been intentionally planted and that was on the property when Sether acquired it. There is a visible difference between the use of the disputed property and the use of the Gilinsky property on the other side of the fence, which is densely forested.

James Hendricks, who owned the Sether property from 1972 until 1976, testified at trial... Both Sether and Hendricks testified that, when they purchased the Sether property, they were told that the fence line was the boundary line of the property and that they always believed that they owned the property up to the fence.

(2) The Bucan Property

Bucan acquired his property in early 1980. He always believed that he owned the property up to the fence line... According to his testimony, there is a visible difference between his use of the disputed property and the use of the property on the Gilinsky side of the fence, which is overgrown, brushy, and forested...

(3) The Hess Property

Hess acquired his property in 1989 from William Dolmage. Dolmage acquired the Hess property in 1970 from Myron Sukow. Both individuals understood their property to extend to the fence line...

(4) The Groves Property

Sukow, Bobbe Groves father, acquired the Groves property in 1948, and Bobbe Groves began living on it at that time... The Groveses acquired the property from Sukow in 1985... They testified that the fence lines have been on the property as long as they

can remember and have remained in the same location... They believed that the fence line was the property line.

After the survey of his land revealed the encroachments, plaintiff sued defendants for trespass and ejectment. Defendants filed counterclaims asserting ownership to the disputed areas by adverse possession, and they sought a judgment quieting title to the disputed areas. Each defendant claimed ownership of the disputed area adjoining his own property.

After trial, the trial court held that Sether, Bucan, and Groves had each obtained title by adverse possession of the strips of disputed property adjoining their respective properties. As to Hess, the trial court held that he acquired title by adverse possession to the portion of the disputed property west of the cross fence but did not have title to the area east of the cross fence. The court explained:

"The fences all are old on all perimeters and were intended clearly as boundary fences. They haven't been moved. It was clear to plaintiff, as it was clear on viewing the properties, that these owners intended these fences to define their areas of use. The enclosed areas were all used appropriately for land of its type. This all goes to the issue of hostility which is satisfied by the quite clear demarcation of the boundaries and by the use of the properties enclosed. Notice was given to prospective successors in interest by these boundaries."

However,

"the exception is the easterly portion of the disputed strip lying between the Hess property and plaintiff. This rear strip was different from the other disputed strips.... The only use of this strip apparently has been occasional cattle grazing. But the small gate between Hess's home and this easterly property was clearly not a cattle type gate. A potential buyer of the plaintiff's property would not see the same diversity of use between the two sides of this fence that was apparent throughout the other fence lines."

Plaintiff appeals, making several arguments. First, he argues that the evidence presented by defendants was not sufficient to establish 10 years of open and notorious possession. Second, he ar-

· ejectment
驱逐之诉
· perimeter
界限
· demarcation
界线

· predecessor
先辈
· alteration
变更
· corroborate
证实

gues that the evidence presented by defendants did not establish the hostile intent required to obtain property by adverse possession. Next, he argues that Bucan and Groves did not prove by clear and convincing evidence that their predecessors intended to convey more property than the property described in their deed. Finally, plaintiff argues that the trial court erred in failing to enter judgment in his favor on his claims for trespass and ejectment.

To establish title to the disputed property by adverse possession, defendants must show, by clear and convincing evidence, actual, open, notorious, exclusive, continuous, and hostile possession of the property for a 10-year period. *Hoffman v. Freeman Land and Timber, LLC*, 329 Or 554, 559, 994 P2d 106 (1999). A party who claims title to land by adverse possession must "use or occupy the land as an average owner of the same type of land would use it." *Nooteboom v. Bulson*, 153 Or App 361, 364, 956 P2d 1042, *rev den*, 327 Or 431 (1998). An adverse possessor's use of property is open and notorious if it "is 'of such a character as to afford the owner the means of knowing it, and of the claim.'" *Hoffman*, 329 Or at 560 (quoting *Hicklin v. McClear*, 18 Or 126, 138, 22 P1057 (1889)) (alteration in *Hoffman*). Limited use can satisfy the requirement of open and notorious use if its nature would put the actual owner "on notice that his or her title is being challenged." *Id.* at 560; *Reeves v. Porta*, 173 Or 147, 153, 144 P2d 493 (1944).

All the land at issue in this case was "actually" used as part of "backyard" areas for defendants' respective residences. Moreover, in our view, the mowing and maintenance of the strips, as well as their use for gardening, storage, parking, and recreation are all sufficient to show open and notorious use. Further, the placement of the fences, when taken with the testimony of all the witnesses in this case, establishes defendants and their predecessors in interest believed the fences to be boundary fences, not merely fences of convenience. The contrast between the disputed property on defendants' side of the fence and the densely wooded property on plaintiff's side of the fence corroborates our conclusions; they clearly gave any observer notice of defendants' use of and claim to the

disputed strips of property. Consequently, we have no difficulty in finding under the above circumstances that defendants' use was open and notorious.

· subordination
从属

To succeed in their claims of adverse possession, defendants also must show that their open and notorious use of the land continued for at least 10 years before 1990. The direct and circumstantial evidence presented by defendant Sether establishes that the open and notorious use of the property he claims began by 1972, when Hendricks acquired the property, and that it continued until the time of trial, or well beyond the required 10-year period. Similarly, the testimony of defendant Bucan as to his use of the property since 1980, along with the testimony of Bobbe and Sam Groves regarding the use of the property beginning in 1948, clearly establishes the 10-year continuous use element of the test. Bobbe and Sam Groves also testified about the use of the Groves property since 1948 and 1960. That use of that property has remained the same over the 50 years preceding trial...

To establish the element of hostility, a claimant must show that he or she "possessed the property intending to be its owner and not in subordination to the true owner." *Faulconer v. Williams*, 327 Or 381, 389, 964 P2d 246 (1998). Alternatively, "possession of property under a purely mistaken belief of ownership" satisfies the hostility requirement. *Mid-Valley Resources, Inc. v. Engelson*, 170 Or App 255, 260, 13 P3d 118 (2000), *rev den*, 332 Or 137 (2001). A pure mistake exists where a claimant takes property under a deed and "occupies other property that he mistakenly believes is covered by the deed." *Faulconer*, 327 Or at 390.

As stated above, the fences in this case were thought to be boundary fences by defendants and their predecessors in interest. The fences, in most areas, run parallel to the actual property lines. The extension of the fence in 1970, which was accomplished through the cooperative efforts of Dolmage and Kaelin, plaintiffs' predecessor in interest, also indicates that over the years, they had been considered the boundaries for the properties. Groves testified that, since 1948, her father used the disputed area of the property

· vested
确定的

as his own. Further, Sukow made improvements to the property within the disputed area, and he gave an easement to Dolmage to use the lane. Bobbe also testified that Jake Owens, Bucan's predecessor in interest, used the disputed portion of the Bucan property as his own. In sum, all the facts and circumstances in this case clearly establish the element of hostility due to pure mistake with regard to the disputed areas.

Plaintiff next argues that defendants Groves and Bucan did not receive from their predecessors in interest any property interest in the disputed areas that had vested by adverse possession. An owner who acquires title to property by adverse possession may transfer that title to third parties:

"Where there is evidence of intent between grantor and grantee to transfer the grantor's interest in property, the grantee may acquire the grantor's interest, vested and complete, in those situations in which the grantor has adversely possessed for the statutory period."

Evans v. Hogue, 296 Or 745, 756, 681 P2d 1133 (1984). We find that the requisite intent to transfer the disputed property is clearly proved by the circumstantial evidence in the record. As discussed above, the fence lines on both the Bucan and Groves properties were thought to be boundary fence lines. It is clear from the evidence that the owners of the properties believed, albeit mistakenly, that their deeds conveyed land up to the fence line. Their predecessors in interest had always used the land up to the fence line, acting as the owners of the disputed portions of the property. The use of the respective properties has remained the same, some for as long as 50 years. Also, both Bucan and the Groves testified that they believed that the property up to the fence line had been conveyed to them by their predecessors in interest. Under the circumstances, the transfers of the properties by deed was sufficient to indicate an intent to transfer the disputed portions of the property.

...

The portion of the disputed property that was not adversely possessed by Hess has not been developed. In fact, the trial court reasoned that the land had not been adversely possessed because

"The only use of the strip apparently has been some occasional cattle grazing... A potential buyer of the Gilinsky property would not see the same diversity of use between the two sides of this fence that was apparent throughout the other fence lines."

Because we find no evidence of damages in the record, and plaintiff fails to point to any such evidence, we hold that trial court did not err in failing to award damages to plaintiff regarding the portion of the Hess property found not to be adversely possessed.

Affirmed.

Notes

1. P. J.: an abbreviation for presiding judge, a judge in charge of a particular court or judicial district, esp., the senior active judge on a three-member panel that hears and decides cases. 法院院长;审判长;首席法官。指主管某一法院或某一司法区的法官,尤指在由三名法官组成的审理案件的合议庭中资深的、起主要作用的法官。
2. clear and convincing evidence: evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials. 清楚且令人确信的证据。能够证明确定争议的基本事实具有合理的真实性的一种证明标准。它高于证据优势的证明程度(多用于民事案件的审理),但低于排除合理怀疑的证明程度(用于刑事案件的审理)。

Exercises

Ⅰ. Read the case, and then answer the following questions.

1. Was the adverse possession in this case upheld?
2. According to the Oregon law, what elements must be proved for adverse possession?
3. Can you think of any other arguments for the plaintiff?

Ⅱ. Brief the case and present the case brief to the class.

Unit Nine The Law of Corporations

Words and expressions:

enterprise	charitable	statutory	provision
exchange	Uniform Business Corporation Act		charter
subscribe	capitalization	authorized capital	preferred shares
common stock	competence	incur	intervene
intervention	fiduciary duty	derivative suit	

I. Listen to the passage, and then answer the questions according to what you hear.

1. Under the American law, are there any differences between different forms of corporations? Is it the same with civil law system?

2. What is the difference between commercial corporations and noncommercial ones under the American law?

3. What is a public corporation? And what is a close corporation?

4. In terms of legal organizations, how many forms of corporations are there?

5. What determines the amount of a corporation's authorized capital?

Ⅱ. Spot dictation. Listen to the passage and then fill in the blanks with the words you hear.

A corporation is managed by a board of directors headed by a chairman. The _____ employs the management, for instance, the corporation's _____ and other leading managers. The number of directors is usually specified by statute; however, the _____ may specify a lesser number, for instance, for the case of a one-man company.

The board of directors is elected by the _____. It derives its competence from corporate charter and State _____ and therefore is not directly responsible to the shareholders. The latter only have the right of election as well as the right to seek _____ in tort for damages incurred by them individually. However, they do not have the right to intervene, for instance by suit, in the _____ of the corporation itself. Such an intervention by shareholders is made possible in a different manner. The directors have the obligation to manage the company with the greatest possible _____, that is, they are subject to a fiduciary duty. This _____ can be enforced against them by the shareholders in the name of the company (but not their own). This concept is closely related to _____ law (the enforcement of a fiduciary duty); since this suit of intervention is in the name of the company, it is therefore designated as a shareholder's "derivative suit".

Text A

Corporations

Corporations are recognized as legal entities distinct from their owners — "shareholders", so called because they "hold" a "share" of the overall ownership of the corporation. Corporations can sue and be sued, enter into contractual relations, and own property. One of the principal values of the corporate form of doing business is its limited liability. Absent exceptional circumstances, the shareholders in the corporation cannot be held personally liable for debts incurred or liability imposed on the corporation.

· fiduciary
委托的

Corporations law is principally state law. It is largely statutory, but the common law is often relied upon, especially when defining the fiduciary duties of management. Federal law governs trading in

· Model Business Corporation Act (MBCA)
《示范公司法》
· Revised Model Business Corporation Act (RMBCA)
《示范公司法(修订)》
· American Bar Association
美国律师协会
· New York Stock Exchange
纽约证券交易所
· "over-the-counter" market
场外交易市场
· dispersed
分散的
· block
大量
· inception
开始

publicly-offered corporate securities and federal income taxation law derives some corporate decision-making. There is a Model Business Corporation Act (MBCA) and Revised Model Business Corporation Act (RMBCA) promulgated by a committee of the American Bar Association.

1. Types of Corporations

There are all sizes of corporations, but it is generally distinguished between two types: publicly held corporations and closely-held corporations. Both are created by statute and are subject to the same basic rules. Both can conduct the same types of business. But they inhabit different worlds in terms of ownership and operation. Among the differences is the fact that publicly held corporations are subject to federal regulation to a much greater extent.

Publicly held corporations are those whose shares are traded by the general public in organized markets, such as the New York Stock Exchange, other national exchanges or in the "over-the-counter" markets. These are the largest corporations, and their stockholders are numerous, widely dispersed and constantly changing. Most shareholders purchase shares as an investment and have no desire to become involved in management decisions or even to attend stockholders' meetings or vote. However, some holders of major blocks of stock serve as directors or managers, are active at shareholder meetings or otherwise seek to affect management decisions.

Closely-held corporations are corporations that have relatively few shareholders. Often shareholders will be close business associations or family members. Most often, the shareholders have managed the business from its inception and do not want outside investors involved in the business. There is no market for shares of a close corporation. Moreover, shareholders often agree to restrict transfer of their stock to any outside investors to ensure that the corporation continues to run as the original shareholders want.

The shareholders in close corporations are usually directly involved in the management and daily operations of the business and generally serve as directors and officers. Most close corporations are

small businesses, but there are some large ones that rival the size of some of the publicly traded corporations. However, whatever their size, close corporations must still comply with the same state statutory requirements as publicly held corporations.

· articles of incorporation
公司章程
· certificate of incorporation
公司注册证书
· bylaw
内部章程
· equity securities
股票;股份
· debt securities
债券;债务证券

2. Formation of the Corporation

Despite variations in law from state to state, the basic rules for formation are substantially the same everywhere. The first step is to file "articles of incorporation" with the appropriate state official and to pay a fee. Exactly what these papers must contain varies among the states, but at a minimum they must include the name of the corporation, the number of shares the corporation is authorized to issue, the address of the corporation's registered office in the state, and the incorporators' names and signatures. When these papers are in the proper form, a state official will issue a certificate of incorporation, and the corporation comes into legal existence.

After obtaining a certificate of incorporation, the incorporators must adopt the corporation's bylaws. The bylaws are a set of rules that govern the internal affairs of the corporations. However, rules contained in the articles of incorporation control over contrary bylaws. The articles of incorporation are a matter of public record, whereas the bylaws are not accessible to the general public for inspection.

3. Corporate Finance and Ownership

Corporations raise capital primarily by issuing "securities". Securities are evidence of the obligation to pay money or of the right to participate in earnings. Most corporations issue two types of securities to investors: (1) equity securities or shares of stock (already encountered) and (2) debt securities or bonds.

Shares of stock represent ownership interests in the corporation. In public corporations, shares are generally freely transferable, meaning that shares can be bought and sold by investors without the consent of the corporation and without affecting corporate operations. Similarly, the death of a shareholder matters little to the corporation, as the shareholders' heirs become the corporation. All of the business' assets are owned by the corporation itself. Instead,

· common stock
普通股
· preferred stock
优先股
· dissolution
解散
· dividends
股息
· receipt
收到
· liquidation
清算

shareholders are granted certain rights, depending upon the type of stock owned.

Corporate shares are usually divided into two categories, "common stock" and "preferred stock." Common stock is the most basic type of stock and must be issued by every corporation. It confers upon its holders two fundamental rights: (1) the right to vote for the directors of the corporation and on other matters requiring stockholder approval, and (2) the right to the net assets of the corporation upon dissolution of the corporation. Dividends are discretionary payments made by the corporation to the stockholders out of the earnings of the business. Dividends are declared by the board of directors and are usually paid on a quarterly basis. The receipt of dividends is one way for stockholders to earn a profit on their investment in the corporation. However, the board of directors is not required to declare a dividend, and shareholders have no inherent right to the payment of dividends.

Shares of preferred stock also represent an ownership interest in the corporation. However, the owners of preferred stock are entitled to certain rights and privileges that are superior to those of common stock owners. The most common feature of the preferred shares is a dividend preference over common stock. This preference does not guarantee the payment of a dividend, but it does guarantee that any dividends declared by the board will be paid first to the preferred stock owners. Preferred stock holders also are given priority over common stockholders in the event of a liquidation of the corporation, though neither class of shareholders can be paid before the corporation's creditors, including bondholders.

In addition to equity securities, most corporations also issue debt securities, or bonds, which represent the borrowing of money. In other words, instead of purchasing an ownership interest in the corporation, the bondholder is making a loan to the corporation. The bond represents an unconditional guarantee by the corporation to pay the bondholder a specific amount on a certain date. In addition, the bondholder is generally entitled to periodic interest payments.

4. Organizational Structure and Powers

Ownership and management of a corporation consists of three tiers: (1) shareholders, (2) directors, and (3) officers. Directors and officers, and occasionally controlling shareholders, comprise the management. Each group has defined powers within enterprise.

Shareholders' rights are established in the articles, bylaws and the state's general incorporation law. Shareholders have either the absolute or qualified right to inspect the corporate books and records for proper purposes, such as to become informed of corporate affairs. Shareholders do not actually run the business, nor do they have the power to act individually on behalf of the corporation. Instead, their powers must be exercised collectively along with the other shareholders by way of voting, usually at the stockholders' meeting. Most states require a yearly stockholders' meeting with advance written notice.

Each shareholder is entitled to one vote per share of common stock owned. Shareholders do not have to be present at the stockholders' meeting to vote. Through the use of a document called a "proxy," shareholders can appoint someone else to cast their vote on a specific subject. Because of the large number of shareholders in most publicly held corporations and the impracticability of attending shareholders' meetings, voting by proxy is common.

Through their voting powers, shareholders have control over the corporation in three primary ways: A. they can elect or remove the directors; B. they can amend the articles of incorporation or bylaws; and C. they have the right to approve or disapprove extraordinary changes to the corporation, such as a merger with another corporation.

The obligations of shareholders are few. Because of the principle of limited liability, shareholders are not responsible for any of the corporation's debts or other actions, with the extraordinary exception of "piercing the corporate veil". If the corporation fails, its shareholders lose only their investments.

Directors are responsible for the management of the corporation

- tier
  层次
- comprise
  组成;构成
- incorporation
  公司;法人
- proxy
  投票授权书
- merger
  合并
- "piercing the corporate veil"
  "揭穿公司面纱"

- initial
最初的
- successor
继任者
- fiduciary
受托人
- entail
牵涉到
- prudent
审慎的
- confidential
保密的;机密的
- insider trading
内部交易;内幕交易
- discretion
决定
- "derivative" shareholder suit
股东代位诉讼,派生股东诉讼

and for creating corporate policy. The initial directors are usually named in the articles of incorporation or elected by the incorporators, and serve until the first annual shareholder meeting or until their successors are elected and qualified. Thereafter, directors are elected by majority vote of the shareholders and usually serve a term of one year. The number of directors of a corporation varies; some states require at least three, while others require only one.

Among other things, directors, as persons in control of the property of others, are "fiduciaries" who have duties to both shareholders and the corporation. The directors' fiduciary duties include the duty of care and the duty of loyalty. The duty of care entails being honest and using prudent business judgment when conducting corporate affairs. Directors must exercise the degree of care that a reasonably prudent person would use when conducting personal business affairs, including the duty to become informed about corporate affairs. The duty of loyalty prevents directors from, among other things, using corporate funds or confidential corporate information for their personal advantage, competing with the corporation, usurping a corporate opportunity, engaging in insider trading, or selling control over the corporation.

The corporate officers are responsible for the day-to-day operation of the corporation. They are most often selected and removed by the board of directors. Traditional titles include "chief executive officer", "president", "vice president", "treasurer", and "secretary". The officers carry out the board's decisions and conduct the day-to-day operations of the business. The tenure of the officers is generally pursuant to a contract, though it may also be at the board's discretion. Officers are viewed as having the same fiduciary duty of care and loyalty to the corporation and its shareholders as directors do when conducting business affairs, as well as the same obligations concerning corporate opportunities and conflicts of interest.

Many of the above duties of the management of the corporation can form the basis for a shareholder suit for breach of duty. Shareholders may file either a "direct" or a "derivative" shareholder suit. A common example of a direct shareholder suit is a suit to

compel the management to declare and pay a dividend. It is "direct" because it enforces a duty owed directly to shareholders.

A shareholder "derivative" suit is one to enforce a duty owed to the corporation. Shareholders in such a suit are suing on behalf of the injured corporation. In cases where the wrongdoing of officers or directors has injured the corporation itself, the corporation has a right to sue its own officers or directors. However, since those very officers or directors control the corporation, they will probably decide that it is "not in the best interests of the corporation" for it to sue them. A derivative shareholder's suit remedies this problem by allowing the shareholders to "step into the shoes" of the corporation and sue on its behalf. When the derivative suit is successful and benefits the corporation, the plaintiff-shareholder is entitled to be reimbursed by the corporation for reasonable expenses, including attorney fees.

If shareholders sue the directors or officers of a corporation, those directors and officers are entitled to the benefit of the "business judgment rule". The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." (Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)) This rule allows for honest mistakes and reasonably poor business decisions. However, if the directors permit the corporation to violate the law, the business judgment rule does not apply. On the other hand, directors in a large corporation who are effectively relegated to making broad policy decisions are not required to monitor employees closely to discover illegality absent some cause for suspicion.

(Extracted and adapted from *Introduction to the Law and Legal System of the United States* by William Burnham, 2nd edition, West Group, 1999)

· reimburse
补偿
· business judgment rule
商业判断原则
· relegate
被授予

Notes

1. Model Business Corporation Act (MBCA):《示范公司法》。
2. Revised Model Business Corporation Act (RMBCA):《示范公司法(修订)》。

3. American Bar Association: a voluntary national organization of lawyers in America. 美国律师协会。是全美律师的一个自愿社团组织。
4. New York Stock Exchange: an unincorporated association of member firms that handle the purchase and sale of securities both for themselves and for customers. 纽约证券交易所。是一个非法人的协会,由从事代为客户买卖证券和自营证券买卖的会员公司组成。
5. "over-the-counter" market: the market where purchases and sales of securities are done by brokers for themselves, between themselves, and for their customers rather than on an exchange. 场外交易市场。指不在有组织的交易所买卖的证券市场,通常由买方和卖方直接通过电话或电脑撮合交易。
6. articles of incorporation: a document that sets forth the basic terms of a corporation's existence, including the name of the corporation, the number and classes of shares and the purposes and duration of the corporation. 公司章程。指规定有关公司成立的基本内容的一种文件,包括公司的名称、公司股份的数量与种类、公司的目的及公司的存续期限等。
7. certificate of incorporation: a document issued by a state authority (usu. the secretary of state) granting a corporation its legal existence and the right to function as a corporation. 公司注册证书。指由政府机构签发的、用以证明公司章程已被认可、公司已告成立的文件。在有些州指公司章程。
8. bylaw: a rule or administrative provision adapted by an association or corporation for its internal governance. 内部章程。指社团或公司等为内部管理而制定的规章或制度。
9. equity securities: shares in a corporation. 股票;股份。指代表公司型企业所有人(股东)对于企业之所有者权益的证券。
10. debt securities: any form of corporate security reflected as debt on the books of the corporation in contrast to equity securities such as stock. 债券;债务证券。作为公司进行负债融资工具而在公司账务上反映为债务的任何形式的公司证券,如债券、票据等。通常认为,债务证券包括除产权证券和股票之外的任何证券。
11. "piercing the corporate veil": the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts. "揭穿公司面纱"。一项司法原则,即对公司的不法行为,法院可以不考虑通常的免除公司管理人员、董事、股东的有限责任,而责令其承担个人责任。(详见本单元课文 B)
12. insider trading: buying and selling of corporate shares by officers, directors and

stockholders who won more than 10% of the stock of a corporation listed on a national exchange. Such transactions must be reported monthly to Securities and Exchange Commission. 内部交易;内幕交易。指基于内部信息或预先获取的信息而进行的公共持股公司的股票交易。交易人通常为公司内部人员。该种交易需报告给证券交易委员会。

13. business-judgement rule: the presumption that in making business decision not involving direct self-interest or self-dealing, corporate directors act on an informal basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. 商业判断原则。指假设公司董事在行使决策之职时,在知悉的基础上,本着善意,为公司的最佳利益行事,则可豁免公司业务方面的责任。

Check Your Understanding

Answer the following questions according to the text.

1. What is the most important value of doing business as a corporation?
2. What does it mean by saying "limited liability"?
3. What laws govern corporation issues?
4. How are corporations classified? Why are they termed this way?
5. What are the steps for forming a corporation?
6. How does a corporation raise its capital?
7. Explain stocks and bonds respectively.
8. What is the basic organizational structure of a corporation?
9. What are the rights and duties of shareholders? And the rights and duties of directors and officers?
10. How can shareholders control the corporation?
11. What is a derivative suit?
12. What is the business judgment rule?

Build Up Your Vocabulary

Ⅰ. Match the items in the following two columns.

A	B
1. board of directors	a. a corporation whose shares are traded to and a-

	mong the general public
2. common stock	b. a corporation whose stock is not freely traded and is held by only a few shareholders (often within the same family)
3. closely-held corporation	c. the liability of a company's owners for nothing more than the capital they have invested in the business
4. publicly held corporation	d. a suit by a shareholder to enforce a corporate cause of action
5. incorporator	e. a class of stock entitled to priority over the other stocks
6. officer	f. a rule or administrative provision adopted by an association or corporation for its internal governance
7. proxy	g. a person who takes part in the formation of a corporation
8. bylaw	h. the document granting the authority to a person to vote another's stock shares
9. derivative suit	i. a person elected or appointed by the board of directors to manage the daily operations of a corporation
10. limited liability	j. securities that represent an ownership interest in a corporation
	k. a governing body of a corporation, elected by the shareholders to establish corporate policy, appoint executive officers, and make business decisions, etc.

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

bond	security	shareholder
dividend		legal entity
fiduciary duty		business judgment rule
preferred stock		articles of incorporation
certificate of incorporation		

1. Conceptually, when documents are filed with the secretary of state, that officer's

issuance of a charter or _____ can be viewed as a grant by the state of a franchise to conduct business in corporate form.

2. A _____, debenture or note is simply a promise by the borrower to pay a specified amount on a specified date, together with interest at specified times, on the terms and subject to the conditions spelled out in a governing indenture or note agreement.
3. _____ is a kind of documents filed with the secretary of state, which must contain certain mandatory information, such as the name of the corporation, the period of duration, the purposes of the corporation, the number of shares, etc.
4. Articles of incorporation must include information about the types or kinds of _____ the corporation is authorized to issue.
5. _____ is a separate portion or class of the stock of a corporation, which is accorded, by the charter or bylaws, a preference or priority in respect to dividends, over the remainder of the stock of the corporation.
6. The payment designated by the board of directors of a corporation to be distributed *pro rata* among the shares outstanding is called _____.
7. The duties of directors may be divided into two broad categories: a duty of care and a duty of loyalty or, sometimes phrased, a duty of "fair dealing", which the latter is often referred to as a _____.
8. Every state statute contains more or less routine provisions about meetings of _____.
9. The _____ is a principle applicable to business decisions by boards of directors: that decisions made by the board of directors upon reasonable information and with some rationality do not give rise to directoral liability.
10. Most provisions of modern corporation statutes are consistent with the theory that a corporation is a separate _____.

Cloze

Choose the proper word from the list below, and then fill in the blanks, changing the form if necessary.

corporation	directors	dissolution	shareholders
transfer of shares	legal entity	incorporated	secretary of state
publicly held corporations		closely held corporations	

In contrast to a partnership, a corporation is an incorporated association. Once

the corporation is formally incorporated, it becomes a separate _____ that has existence apart from the persons who form it. A _____ may own property in its own name and sue and be sued under its own name.

Corporations come in all shapes and sizes. Some corporations have millions of _____ and some have only one. In general, however, corporations are divided into two categories: _____ and close corporations.

Publicly held corporations are ones whose shares are publicly traded on organized markets. _____ are corporations that restrict the number of shareholders to thirty-five or less and that forbid _____ without the consent of other shareholders.

In the U. S., there is no federal corporate legislation. States create the legal framework to govern corporations that are _____ in its state. Each individual state has a _____ office whose corporate division usually handles the administrative matters for corporations, such as: incorporation, business registration and _____. The ownership of a corporation resides in its stockholders who normally have the right to appoint the _____ of the corporation.

Translation

Translate the following sentences into Chinese.

1. Any person, partnership, association or corporation, singly or jointly with others, and without regard to his or their residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter by filing with the Secretary of State a certificate of incorporation which shall be executed, acknowledged, filed and recorded in accordance with Section 103 of this title.
2. If the persons who are to serve as directors until the first annual meeting of stockholders have not been named in the certificate of incorporation, the incorporator or incorporators, until the directors are elected, shall manage the affairs of the corporation and may do whatever is necessary and proper to perfect the organization of the corporation, including the adoption of the original by-laws of the corporation and the election of directors.
3. In addition to the powers enumerated in Section 122 of this title, every corporation, its officers, directors, and stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental *thereto*, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purchases set forth in its certificate of incorporation.

4. Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for him by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period.
5. When the officers, directors or stockholders of any corporation shall be liable by the provisions of this chapter to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action, at law or in equity, against any one or more of them, and the complaint shall state the claim against the corporation, and the ground on which the plaintiff expects to charge the defendants personally.

Text B

Piercing the Corporate Veil: Does Incorporation Provide Shareholder Protection from Corporate Liability?

As most owners of corporations are aware, the rights and liabilities of a corporation are separate and distinct from those of its shareholders. The corporation is said to be like a veil that shields its shareholders from corporate debts and other similar obligations.

For instance, if a judgment is entered against a corporation, its shareholders will be liable for the judgment only to the extent of their investment in the corporation (the corporate assets); the shareholders' personal assets will not be subject to liability. The general rule is that the corporate entity protects the shareholders from liability beyond their investments.

The situation changes, however, when the shareholders are using the corporation to defraud creditors or achieve injustice. In those cases, Texas courts have "pierced," or set aside, the corporate veil and held the shareholders personally liable for corporate debts and other obligations.

The fact that a corporation has only a few shareholders or even just one shareholder does not necessarily mean the courts will disre-

· corporate veil
公司面纱
· *alter ego*
第二个我
· sham
虚假
· corporate records
公司档案
· co-mingle
混合在一起
· Texas Supreme Court
德克萨斯州最高法院
· formality
手续

gard its entity status and pierce its corporate veil. As long as the corporation is adequately financed originally, complies with all formation and record keeping requirements, and has a legal purpose and objective, its shareholders will enjoy the protection of limited liability.

The vast majority of cases in which the courts have pierced the corporate veil have been brought under two theories: (1) *alter ego* and (2) sham to perpetuate a fraud.

Alter Ego

When a corporation is not operating as a true legal entity and is being used by its shareholders as a "shell" to control private interests, assets or debts, the corporation is said to be the "*alter ego*" of its shareholders. A corporation may appear to be the *alter ego* of its shareholders when:

no corporate stock is issued following formation of the corporation;

no directors are elected;

no corporate records are kept;

personal funds or assets of shareholders are co-mingled with those of the corporation (e. g. no separate bank accounts), and the shareholders maintain the records.

The Texas Supreme Court has held that *alter ego* is shown from the total dealings of the corporation and the individual, including:

the degree to which corporate formalities have been followed and corporate and individual property have been kept separate;

the amount of financial interest, ownership and control the individual maintains over the corporation;

whether the corporation has been used for personal purposes.

If the shareholders themselves disregard the corporate form, the law will also disregard it and not offer the shareholders the protection the corporate structure gives its owners.

Sham to Perpetuate a Fraud

Texas courts have also pierced the corporate veil where a failure to do so would result in fraud or other injustice. For example, suppose a corporation is being used to defraud creditors: the share-

holders invest little money in the corporation and the corporation incurs debts far in excess of the investments, with little hope of being able to pay them. In that case, a failure to pierce the corporate veil and hold the shareholders personally liable would be an injustice to the creditors.

A sham to perpetuate a fraud exists where a shareholder has used, abused or manipulated the corporate form of the corporation to the detriment of a third party. This typically occurs when the shareholder or an affiliated corporation drains funds from the corporation, which results in the corporation being unable to pay its creditors.

Here's an example of a sham to perpetuate a fraud: A corporation owes obligations it does not want to pay. The shareholders drain off corporate revenues and sell most of the corporate assets. A new business then starts up that is essentially a continuation of the old business with many of the same shareholders, officers and directors. The old corporation's creditors are left "holding the bag", and the new corporation is free of debt.

To avoid liability, a shareholder who is involved in the business operations of the corporation should:

stay aware of the financial condition of the corporation and the corporation's formation and record keeping requirements;

ensure that business is conducted on a corporate and not a personal basis;

ensure that the corporation has and continues to have a legal purpose and objective.

The lawsuit protection features of a corporation will be available only if the integrity of the corporation as a separate and distinct entity, apart from the individual, is respected by a court and by the Internal Revenue Service. In matters involving a lawsuit by an injured party, especially if a corporation has no significant assets, the plaintiff will attempt to convince the court that the corporate entity should not be respected and that the principals of the company should be personally liable.

There are many reported cases on this topic, and the outcome

- abuse
  滥用
- manipulate
  操纵
- integrity
  完整性
- Internal Revenue Service
  国内税务署

· corporate minute book
公司股东大会或董事会会议记录
· stock ledger book
股票分类账簿
· letterhead
信笺抬头
· signatory
签约人

is usually determined by whether the corporation carries out its business and looks and acts the way a corporation should. If the principals treat the corporation and hold out the corporation to third parties as a separate and distinct entity, the court will usually uphold the status of the corporation and will not find personal liability. However, if various corporate formalities are not consistently observed, the corporation will be disregarded and the individuals may be held personally liable.

The following formalities which courts have determined to be of particular significance must be paid attention to:

Corporate Bylaws The corporation must adopt a set of bylaws, which provide a written statement of how the internal affairs of the corporation will be handled. The bylaws set the time and place of regular shareholder meetings and meetings of the board of directors.

Corporate Minute Book The corporate minute book contains a written record of actions by the shareholders and directors of the corporation. At a minimum, there must be annual minutes reflecting the election of directors by the shareholders. Any significant corporate activities, including corporate borrowings, purchases, and the payment of compensation to officers, should be properly reflected in the minutes of the meetings of the directors and shareholders.

Stock Ledger Book The corporation must maintain an accurate stock ledger book. This book shows who has been issued stock certificates and the amounts received by the corporation for the issuance of its stock. The stock ledger book contains an up-to-date record of the names and number of shares owned by each shareholder.

Conduct Business in the Corporate Name When doing business with third parties, the officers and directors must make it clear that they are acting on behalf of the corporation and not in their individual capacity. Correspondence should be sent out under the proper corporate letterhead, and contracts should be entered into only with the corporation as a signatory. Unless the documents clearly reflect that a transaction is entered into on behalf of the cor-

poration and all necessary agreements are entered into under the corporation's name, the corporate entity will not survive a challenge in a lawsuit.

Bank Accounts Corporate bank accounts and accounting records must be separate and distinct from the individual. A corporate bank account cannot be treated as if it were the account of an individual officer or director. Corporate income and assets must be separately accounted for on the books of the corporation. One of the biggest mistakes made by shareholders is that they feel free to move money and property back and forth between themselves and their corporation without properly accounting for such movement in the records of the corporation. This is a fatal mistake, and under these circumstances, the corporate entity will be disregarded by the court.

(by Brenda H. Collier, http://www.collier/aw.com)

Notes

1. corporate veil: the legal assumption that the acts of a corporation are not the actions of its shareholders, so that the shareholders are exempt from liability for the corporation's actions. 公司面纱;法人借口;法人托辞。指一种法律上的假设,公司的行为并不是股东的行为,因而针对公司的诉讼股东免于责任。
2. *alter ego*: a corporation used by an individual in conducting personal business, the result being that a court may impose liability on the individual by piercing the corporate veil when fraud has been perpetuated on someone dealing with the corporation. 第二个我。当公司被个人用以实施该人的个人商业行为时,如果对与该公司进行交易的相对人实施欺诈,则法院将揭去公司的面纱,而将法律责任直接归于该个人。
3. Internal Revenue Service: the branch of the U.S. Treasury Department responsible for administering the Internal Revenue Code and providing taxpayer education. 国内税务署。是美国财政部的一个机构,负责管理和实施《国内税收法》,并提供纳税人教育。
4. corporate minute book: a record of the subjects discussed and actions taken at a corporate directors' or shareholders' meeting. 公司股东大会或董事会会议记录。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( )1. The rights and obligations of a corporation are the same with those of its shareholders.

( )2. Normally the shareholders' liability will be limited to their investments.

( )3. When a corporation has only a few shareholders or just one shareholder, the rights and liabilities of the corporation and its shareholder(s) are not separate and distinct.

( )4. When a corporation is used by an individual in conducting personal business, the court may impose liability on the individual by piercing the corporate veil when fraud has been perpetrated on someone dealing with the corporation.

( )5. To avoid the corporate veil being pierced, shareholders should conduct business on a corporate and not a personal basis.

( )6. Whether to pierce the corporate veil is determined by the plaintiff.

( )7. Whether to pierce the corporate veil depends on whether the corporation carries out its business and acts the way a corporation should.

( )8. It does not matter whether the officers and directors make it clear that they are acting on behalf of the corporation and not in their individual capacity when doing business with third parties.

( )9. A corporate bank account may be treated as the account of an individual officer or director for the sake of convenience of doing business.

( )10. Corporate minute books are one of important documents for courts to determine whether the corporation's entity status should be upheld.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
alter ego	
	法律实体

(continued)

English	Chinese
affiliated corporation	
	公司面纱
stock ledger book	
	公司股东大会议事记录
corporate records	
	公司内部章程
stock certificate	
	银行往来账户

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

partnership	limited liability company
agency	principal
promoter	subscription
indenture	par value
preemptive right	subsidiary corporation
individual proprietorship	assets and liabilities
ultra vires	issuance of shares
merger	public offering

Translation

Translate the following sentences into English.

1. 有限责任公司和股份有限公司是企业法人。有限责任公司,股东以其出资额为限对公司承担责任,公司以其全部资产对公司的债务承担责任。股份有限公司,其全部资本分为等额股份,股东以其所持股份为限对公司承担责任,公司以其全部资产对公司的债务承担责任。
2. 设立公司必须依照本法制定公司章程。公司章程对公司、股东、董事、监事、经理具有约束力。公司的经营范围由公司章程规定,并依法登记。公司的经营范围中属于法律、行政法规限制的项目,应当依法经过批准。公司应当在登记的经营范围内从事经营活动。公司依照法定程序修改公司章程并经公司登记机关变更登记,可以变更其经营范围。

3. 股东可以委托代理人出席股东大会，代理人应当向公司提交股东授权委托书，并在授权范围内行使表决权。
4. 股东大会、董事会的决议违反法律、行政法规，侵犯股东合法权益的，股东有权向人民法院提起要求停止该违法行为和侵害行为的诉讼。
5. 董事、经理违反本法规定自营或者为他人经营与其所任职公司同类的营业的，除将其所得收入归公司所有外，并可由公司给予处分。

Case Study

Minton v. Cavaney

Supreme Court of California

364 P. 2d 473 (1961)

- Seminole Hot Springs Corporation
  西米诺尔温泉公司
- hereinafter
  以下，此后
- executrix
  女遗嘱执行人
- commissioner
  行政负责人

TRAYNOR, Justice. The Seminole Hot Springs Corporation, hereinafter referred to as Seminole, was duly incorporated in California on March 8, 1954. It conducted a public swimming pool that it leased from its owner. On June 24, 1954 plaintiffs' daughter drowned in the pool, and plaintiffs recovered a judgment for $10, 000 against Seminole for her wrongful death. The judgment remains unsatisfied.

On January 30, 1957, plaintiffs brought the present action to hold defendant Cavaney personally liable for the judgment against Seminole. Cavaney died on May 28, 1958 and his widow, the executrix of his estate, was substituted as defendant. The trial court entered judgment for plaintiffs for $10, 000. Defendant appeals.

Plaintiffs introduced evidence that Cavaney was a director and secretary and treasurer of Seminole and that on November 15, 1954, about five months after the drowning, Cavaney as secretary of Seminole and Edwin A. Kraft as president of Seminole applied for permission to issue three shares of Seminole stock, one share to be issued to Kraft, another to F. J. Wettrick and the third to Cavaney. The commissioner of corporations refused permission to issue these shares unless additional information was furnished. The application was then abandoned and no shares were ever issued. There was also evidence that for a time Seminole used Cavaney's of-

fice to keep records and to receive mail. Before his death Cavaney answered certain interrogatories. He was asked if Seminole "ever had any assets?" He stated that "insofar as my own personal knowledge and belief is concerned said corporation did not have any assets." Cavaney also stated in the return to an attempted execution that "Insofar as I know, this corporation had no assets of any kind or character. The corporation was duly organized but never functioned as a corporation."

Defendant introduced evidence that Cavaney was an attorney at law, that he was approached by Kraft and Wettrick to form Seminole, and that he was the attorney for Seminole. Plaintiffs introduced Cavaney's answer to several interrogatories that he held the post of secretary and treasurer and director in a temporary capacity and as an accommodation to his client.

Defendant contends that the evidence does not support the court's determination that Cavaney is personally liable for Seminole's debts and that the "*alter ego*" doctrine is inapplicable because plaintiffs failed to show that there was "'(1)... such unity of interest and ownership that the separate personalities of the corporation and the individual on longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.'"

Riddle v. Leuschner, *51 Cal. 2d 574*, *580*, *335 P. 2d 107*, *110*; *Automotriz Del Golfo De California S. A. De C. V. v. Resnick*, *47 Cal. 2d 792*, *796*, *306 P. 2d 1*, *63 A. L. R. 2d 1042*; *Minifie v. Rowley*, *187 Cal. 481*, *487*, *202 P. 673*.

The figurative terminology "*alter ego*" and "disregard of the corporate entity" is generally used to refer to the various situations that are an abuse of the corporate privilege... The equitable owners of a corporation, for example, are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will...; when they hold themselves out as being personally liable for the debts of the corporation ...; or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs...

- approach 接触,交涉
- personality 特性
- figurative 比喻性的
- disregard of the corporate entity 不考虑法人实体;对法人人格的否认
- equitable owner 衡平法上的所有人

· forfeit
剥夺
· trifling
不重要的
· Corporations Code
公司法典
· immaterial
不重要的
· merit
价值

In the instant case the evidence is undisputed that there was no attempt to provide adequate capitalization. Seminole never had any substantial assets. It leased the pool that it operated, and the lease was forfeited for failure to pay the rent. Its capital was "'trifling compared with the business to be done and the risks of loss . . .'" *Automotriz Del Golfo De California S. A. De C. V. v. Resnick*, *supra*, 47 Cal. 2d 782, 797, 306 P. 2d 1, 4. The evidence is also undisputed that Cavaney was not only the secretary and treasurer of the corporation but also was a director. The evidence that Cavaney was to receive one-third of the shares to be issued supports an inference that he was an equitable owner (*see Riddle v. Leuschner*, *supra*, 51 Cal. 2d 574, 580, 335 P. 2d 107), and the evidence that for a time the records of the corporation were kept in Cavaney's office supports an inference that he actively participated in the conduct of the business. The trial court was not required to believe his statement that he was only a "temporary" director and officer "for accommodation." In any event it merely raised a conflict in the evidence that was resolved adversely to defendant. Moreover, section 800 of the Corporations Code provides that " . . . the business and affairs of every corporation shall be controlled by a board of not less than three directors." Defendant does not claim that Cavaney was a director with specialized duties. It is immaterial whether or not he accepted the office of director as an "accommodation" with the understanding that he would not exercise any of the duties of a director. A person may not in this manner divorce the responsibilities of a director from the statutory duties and powers of that office.

There is no merit in defendant's contentions that the "*alter ego*" doctrine applies only to contractual debts and not to tort claims . . . ; that plaintiffs' cause of action abated when Cavaney died . . . or that the judgment in the action against the corporation bars plaintiffs from bringing the present action. . .

In this action to hold defendant personally liable upon the judgment against Seminole plaintiffs did not allege or present any evidence on the issue of Seminole's negligence or on the amount of damages sustained by plaintiffs. They relied solely on the judgment

against Seminole. Defendant correctly contends that Cavaney or his estate cannot be held liable for the debts of Seminole without an opportunity to relitigate these issues... Cavaney was not a party to the action against the corporation, and the judgment in that action is therefore not binding upon him unless he controlled the litigation leading to the judgment...

The judgment is reversed.

Gibson, C. J., and Peters, White and Dooling, JJ., concur.

Schauer, Justice (concurring and dissenting).

I concur in the judgment of reversal on the ground ... stated in the last paragraph of the majority opinion...

I dissent from any implication that mere professional activity by an attorney at law, as such, in the organization of a corporation, can constitute any basis for a finding that the corporation is the attorney's *alter ego* or that he is otherwise personally liable for its debts, whether based on contract or tort...

In the process of developing an idea of a person or persons into an embryonic corporation and finally to full legal entity status with a permit issued, directors and officers elected, and assets in hand ready to begin business, there may often be delays. In such event a qualifying share of stock may stand in the name of the organizing attorney for substantial periods of time. In none of the activities indicated is the corporation actually engaging in business. And the lawyer who handles the task of determining and directing and participating in the steps appropriate to transforming the idea into a competent legal entity ready to engage in business is not an *alter ego* of the corporation. By his professional acts he has not been engaging in business in the name of the corporation; he has been merely practicing law.

McComb, J., concurs.

(by Brenda H · Collier, http://www.collierlaw.com)

· relitigate
再诉
· embryonic
初期的

Notes

1. disregard of the corporate entity: 不予考虑法人实体;对法人人格的否认。
2. equitable owner: 衡平法上的所有人。指因实际使用财产而在衡平法上被视

为财产所有者的人，虽然该项财产法律上名义的所有权属于他人。

Exercises

Ⅰ. Read the case, and then answer the following questions.

1. Is the "corporate veil" pierced here in this case? Why or why not?
2. Is the doctrine of "*alter ego*" and "disregard of the corporate entity" applicable to this case?
3. Do you think plaintiffs will win the case if they relitigate?

Ⅱ. Brief the case and present the case brief to the class.

Unit Ten Evidence Law

Warm-up Exercises: Listening Practice

Words and expressions:

cross-examiner	Ford	intersection	witness	oath
Chevrolet	move	strike	your honor	juror
redirect	examination	proponent	opponent	
sustain	counsel	refresh	recollection	
bench	testimony	admissible		

Listen to the dialogues and fill in the blanks according to what you hear.

Dialogue One

Cross-examiner: During your _____ you said that the Ford _____ when it entered the intersection, didn't you?

Witness: Yes.

Cross-examiner: Two days after the accident _____ that the Chevrolet had the green light, didn't you?

Witness: _____.

Cross-examiner: Move to strike, _____, as non-responsive, and _____ to answer the questions that are asked?

Judge: The response is stricken; _____, _____ _____; and, witness, you _____. If there are explanations required, you may be asked about them _____.

Dialogue Two

Proponent: Dr. Green, when did you first see the patient?

Opponent: _____.

Judge: _____.

Proponent: Your honor, may I request that _____ _____, so that I can ask the question in a proper form?

Judge: What is the _____ for the objection?

Opponent: No foundation.

Proponent: Your honor, that is still a general objection. Counsel should specify _____.

Opponent: No foundation has been laid for the witness's use of the notes to refresh memory or as past recollection recorded.

Proponent: Mr. Green, would you indicate on the diagram _____ _____?

Opponent: Objection, no foundation.

Judge: _____.

Proponent: Your Honor, may I _____?

Judge: Yes.

Proponent: Your Honor, I am having problems here. I think that _____ _____ if I could put the questions in the proper form. Could you give me some guidance about how to proceed?

Text A

Rules of Evidence

- trier of fact 事实认定者
- score runs 跑垒得分

Trials are perhaps the ultimate contests in our competitive society. Even the names of cases, such as *Smith v. Jones*, reflect the adversarial nature of our judicial system. Each party bears the responsibility of persuading the trier of fact, whether judge or jury, to accept its version of the case, in much the same manner that it is the responsibility of a baseball team to move the batters around the bases in order to score runs and win. Each party is charged with structuring the facts it presents to persuade the fact-finder, although

certain "rules of the game" govern the introduction of evidence in legal proceedings.

Direct and circumstantial evidence Evidence may be classified as either direct or circumstantial, depending on the nature of the facts. Direct evidence is derived from one's five senses—taste, touch, smell, sight, and hearing. The following statements are examples of direct evidence: "I smelled alcohol on her breath", or "I saw the accident". Direct evidence proves the facts without the introduction of additional testimony. Although direct evidence may stand alone as proof, the fact-finder may decide to give little weight to it for a variety of reasons, such as the unreliability of the witness or contradictory testimony from another witness.

In contrast, circumstantial evidence requires the fact-finder to fit pieces of evidence together to complete the picture, just as one might fit a jigsaw puzzle together. The lawyer carefully provides the necessary pieces of evidence to construct a credible and viable case. To illustrate, suppose the State presents a series of witnesses who testify to the following: (1) Sebastian and Osborn had a disagreement at a party (2) the two of them went alone into a windowless room with only one exit and locked the door behind them; (3) eavesdroppers loitering outside the room heard a loud bang and decided to investigate; and (4) upon breaking down the door, they found Sebastian holding a revolver and Osborn stretched out on the floor with a neat, circular wound in his arm. Although none of the witnesses actually saw Sebastian shoot Osborn, the fact-finder at Sebastian's trial can easily use the building blocks of testimony provided by the State to infer Sebastian's guilt and convict him.

Forms of evidence Evidence may be presented in the form of tangible evidence (physical exhibits such as weapons or charts), evidence that comes under judicial notice (facts that are commonly known or are verifiable by referring to some widely accepted reference book), or oral testimony. First, tangible evidence is evidence that the fact-finder can touch or observe in the courtroom. This category is subdivided into two groups: real evidence and demonstrative evidence. Real evidence is a physical object that

- introduction of evidence 提交证据
- circumstantial evidence 间接证据
- direct evidence 直接证据
- fact-finder 事实认定者
- jigsaw 拼图玩具
- eavesdropper 偷听者
- loiter 闲逛
- tangible evidence 有形证据
- judicial notice 司法认知(规则)
- oral testimony 证人证言
- real evidence 实物证据
- demonstrative evidence 示意证据

· undercover
做秘密工作的
· sobriety test
清醒检测
· admission
准许进入;接受
· exhibit
(在法庭提交的)证据或文件
· legal residency
住所

is involved in the case, such as a murder weapon or the cocaine allegedly sold by the defendant to an undercover police officer. Demonstrative evidence is a visual or audiovisual aid, such as a chart of the intersection where an automobile accident occurred, a skeleton in a personal injury case, or a videotape of the incident. Lawyers are becoming increasingly creative in the use of these visual aids. For example, a fairly common practice is to present a videotape of an average day in the life of a person who is paralyzed because of a defendant's negligence; this strategy is designed to raise the jury's sympathy and thus the amount of damages awarded. Prosecutors and the police have also adopted video technology. Police routinely videotape allegedly intoxicated drivers taking sobriety tests of various kinds, and then those tapes are introduced at trial. In *Pennsylvania v. Muniz*, the Supreme Court ratified the admission of such tapes taken before the Miranda warnings were given to the accused, although they held that the warnings should be given before asking questions which go beyond routine booking queries.

A second form of evidence is judicial notice, which allows the judge to recognize that certain facts are commonly known within the community (e.g. it is very cold in the Arctic) or can be ascertained by reference to a highly reliable source such as a calendar (December 25th, 1983 was a Sunday). The parties are then relieved of the obligation to provide formal proof through witnesses or exhibits. Judicial notice is particularly useful when the case involves the law of several jurisdictions. For example, several states may claim an extremely wealthy person as a resident of their states upon her death in order to enrich their state treasuries through the inheritance tax. The crux of the case is the interpretation of the laws of the various states regarding the definition of legal residency. In such a case, the court could accept the statutes into evidence by judicial notice without calling the state official who is charged with publishing the official version of the laws to testify.

The third and most common form of evidence is oral testimony, which is given by a witness on the stand in open court or in a deposition under oath. Each party has the opportunity to question the

witness and to test his veracity, either on direct examination or on cross-examination. This right to observe the witnesses and their demeanor is guaranteed in criminal trials by the Sixth Amendment to the U. S. Constitution, which states that "the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor". The opportunity to cross-examine opposing witnesses and to present one's own witnesses is entrenched as firmly in the civil law as in the criminal law, but face-to-face confrontation of the witnesses is not an absolute rule. For example, the Supreme Court has permitted the use of one-way closed-circuit television in child abuse cases in which the victim and the defendant were in separate rooms but the child was subject to cross-examination. A subpoena, a written order from the court, may be served on a prospective witness demanding that he or she either appear in court to testify or be subject to a penalty, often contempt of court. As previously noted, a *sub-poena duces tecum* requires the witness to bring to court any records in his or her possession related to the case. These legal tools are available in civil and criminal cases to both parties in order to enable them to command the presence of witnesses. A party may not compel an out-of-state witness to appear in the absence of a statute, but states have acted to create procedures to allow service of subpoenas on out-of-state residents.

- veracity 真实性;精确
- demeanor 举止,行为人行动的方式
- entrench 确立
- *subpoena duces tecum* 令携带证据到庭的传票
- presentation of evidence 证据出示(程序)
- sequester 隔离

Presentation of evidence Evidence is presented to the fact-finder through the testimony of witnesses. Generally, one of the first orders of business in a trial is to segregate the witnesses from the courtroom proceedings in order to prevent them from tailoring their testimony to fit the evidence that has already been presented. Obviously, this procedure is not followed for witnesses who are also parties to the lawsuit. since they have a right to be present throughout the proceedings. Witnesses may also be sequestered for the duration of the trial, although this is rather rare. During the trial, the attorney identifies the person to be called to testify and the oath is administered.

Information is elicited from the witness through a series of

· the Federal Rules of Evidence 《联邦证据规则》
· custodian 监护人

questions and answers. The lawyer calling the witness first questions the person in direct examination, and then the opposing lawyer cross-examines the same witness. The process continues until one or the other counsel informs the judge that there are no more questions for this witness. The successive questions are limited to topics in the previous statements and thus are narrowed on each round of questioning.

As previously noted, an attorney generally may not lead her own witness. However, the Federal Rules of Evidence have altered the traditional rule to allow leading questions on direct examination as "necessary to develop the witness's testimony" while continuing to accept their use for adverse witnesses or parties. To impeach a witness is to put his credibility at issue in the minds of the triers of fact. Many methods are used to implant doubts about the witness's testimony. One is to show that the witness is biased or has a monetary interest in the case. Another method is to show that the person has a poor reputation for truth and veracity in the community. A third way is to present conflicting testimony from other witnesses.

Even tangible evidence is introduced into the trial through oral testimony. In other words, a witness on the stand must identify the tangible evidence and explain its significance to the case. However, the parties may agree on certain evidence by stipulation beforehand, and it is then presented to the fact-finder by the attorneys. To present tangible evidence of all types requires that foundation, or basic information, be provided about the item before the court will adapt it into evidence, this is called laying a predicate. " Assume, for example, that a contract case involves the records of the XYZ Corporation and that these records are essential to the plaintiff's case. The custodian of the corporation's records is called to the stand and is required to testify to the following before the records are admissible: (1) that the record was made during the regular course of business; (2) that the record was made at or near the time of the event in question; and (3) that the record was made by an employee with personal knowledge or as a regular part of business activities based on information from someone who did have personal knowl-

edge." Different requirements are set forth for items such as photographs, weapons, and other pieces of tangible evidence.

The judge is the umpire who decides on the admissibility of evidence. The opposing party has the opportunity to object to the testimony or tangible evidence as it is introduced, and the party who introduced the evidence then has to explain why the evidence should be admitted. Failure to enter a timely objection often constitutes a waiver of the objection for purposes of appeal. Evidence that might be inflammatory, such as gory pictures of a murder victim, or otherwise prejudicial might be the subject of a motion in limine. Such a motion is filed and considered before trial or outside the presence of the jury. The judge may forbid the introduction of such evidence and even prevent the attorneys from referring to such evidence. Many jurisdictions allow the parties to exclude evidence that the defendant's insurance company will actually pay the damages if the defendant is found to be at fault. The obvious intent is to prevent juries from assessing heavier or lighter damages because of the ultimate source of funds.

Rule against hearsay When a witness is testifying about information based on his own sensory perceptions, the jury and the parties to the lawsuit have the opportunity to observe the witness's demeanor. This is not the case when the witness quotes someone else, however for example, statements like "I know he forged the check because he told me he did," or "Black said that the defendant admitted it was all his fault" are deemed hearsay because the person who initially made the statement is not in the courtroom and cannot be cross-examined. Courts have, therefore, developed the rule against hearsay, which prevents such statements from being admitted as evidence.

There are three primary reasons for the exclusion of hearsay evidence. First, it is very possible that the statement has not been repeated accurately. A popular party game called "Gossip" illustrates this possibility. The first person whispers a comment to the next person and so on until everyone in the group has heard the statement. The final statement often does not even resemble the be-

· umpire
仲裁人,裁判员
· inflammatory
有煽动性的
· gory
血腥的
· motion in limine
保护性申请
· hearsay
传闻证据

ginning comment. The same may be true for a statement that is being offered as evidence. Second, the person who has made the statement is not in court and therefore is not subject to cross-examination. As we have already discussed, the right to confront witnesses is one of the mainstays of our legal tradition. In addition, the trier of fact, whether judge or jury, is not given the opportunity to observe the declarant and his demeanor in order to determine his veracity. Nor can the fact-finder determine the basis of the declarant's information, whether personal observation or casual rumor. The award reason for excluding hearsay, and perhaps the most obvious, is that the declarant was not under oath when he or she made the original statement and was therefore not compelled to tell the truth.

Over the years the courts have backed away from the absolute stand that hearsay is never admissible, and certain exceptions have developed. An example is the exception that permits dying declarations to be admitted as evidence on the questionable theory that people who are dying will be truthful because they will soon be facing their Maker. Three basic requirements must be met before such a statement will be admitted: (1) the declarant was aware of his pending death; (2) the declarant had direct and accurate knowledge; and (3) the statement contains facts, not opinions or guesses, about the cause or circumstances of the death. Traditionally, there has also been a requirement that the person must actually be deceased at the time of trial; however, that has been abandoned by some jurisdictions including the federal courts.

The Federal Rules of Evidence approach the problem of hearsay and the various exceptions by creating three categories of such statements. First, the rules declare that prior statements by the witness which were given under oath and were subject to cross-examination are not hearsay and neither are admissions by the party opponent. If the statements are not hearsay, then obviously the rule against hearsay does not apply. Second, the rules list a set of circumstances when hearsay can be admitted even when the declarant is available and could be called to testify himself or herself. The twenty-three or so exceptions include the following: (1) contempo-

raneous statements made while under the stress of a startling event or of one's impressions about the event; (2) statements made about the then existing mental, emotional, or physical conditions of declarant or for purposes of medical diagnosis; (3) records of regularly conducted activities or the absence of such entries; (4) various public records; (5) widely published and accepted market reports and learned treatises; (6) statement of personal or family history; and (7) reputation as to character or judgment of previous conviction (there are additional rules limiting the admissibility of both). Third, the rules provide for admission of hearsay for former testimony, for statements under belief of appending death, for statements concerning one's own personal or family history, for statements offered against a party who wrongfully contributed to the unavailability of the witness and for statements against one's pecuniary or proprietary interest or which would subject one to civil and/or criminal liability when the declarant is unavailable. The unavailability of the declarant may stem from death, from a refusal to testify despite a court order to do so, from the witness's testimony as to lack of memory of events, from mental or physical illness, or from absence from the proceeding after a showing by the party that he tried to locate the declarant and could not.

(Extracted and adapted from *American Law and Legal Systems* by James V. Calvi, 4th edition, Susan Coleman, Prentice-Hall Inc., 2000)

· treatise
学术专著,专题论文

Notes

1. trier of fact : term includes (1) the jury and (2) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence. 事实认定者。指陪审团,若无陪审团则指审理事实的法官。
2. *subpoena duces tecum*: a process by which the court, at the instances of a party, commands a witness who has in his possession or control some document or paper that is pertinent to the issue of a pending controversy, to produce it at the trial. 令携带证据到庭的传票。
3. the Federal Rules of Evidence: rules which govern the admissibility of evidence at trials in the Federal Courts and before U. S. Magistrates. Several states have

adopted Evidence Rules patterned on these federal rules.《联邦证据规则》。

4. motion in limine: A motion in limine is a motion filed by a party to a lawsuit which asks the court for an order or ruling limiting or preventing certain evidence from being presented by the other side at the trial of the case. 保护性申请。指由一方诉讼当事人提出的请求法院裁定限制或禁止对方当事人出示特定证据的申请。

Check Your Understanding

Answer the following questions according to the text.

1. What is direct evidence? What is circumstantial evidence? Give examples to each of them.
2. What are the forms of evidence? Define each of them.
3. What can tangible evidence be subdivided into? Define and provide an example to each of them.
4. When is judicial notice particularly useful? And why?
5. Where is oral testimony given? Why is face-to-face confrontation of the witnesses not an absolute rule?
6. Why should the witnesses be segregated from the courtroom proceedings?
7. Present some methods used to implant doubts about the witness's testimony.
8. What is the consequence if the opposing party fails to enter a timely objection?
9. Why sometimes may the judge forbid the introduction of inflammatory evidence?
10. How is hearsay defined? What does hearsay include?
11. Why is hearsay not admitted as evidence?
12. What are the basic requirements for dying declarations to be admitted?
13. How are hearsays categorized under the Federal Rules of Evidence?

Build Up Your Vocabulary

I. Match the items in the following two columns.

A	B
1. fact-finder	a. pertinent and proper to be considered in reaching a decision
2. oath	b. trier of fact

3. hearsay	c. something, such as a document, formally introduced as evidence in court
4. credibility	d. physical evidence (such as a knife wound) that itself plays a direct part in the incident in question
5. admissible	e. evidence that a competent witness under oath or affirmation gives at trial or in an affidarit or deposition
6. contempt of court	f. evidence based on the reports of others rather than the personal knowledge of a witness and therefore generally not admissible as testimony
7. real evidence	g. a solemn, formal declaration or promise to fulfill a pledge, often calling on God or a sacred object as witness
8. record	h. all the documents and evidence plus transcripts of oral proceedings in a case
9. demeanor	i. the way in which a person behaves
10. declarant	j. the quality, capability, or power to elicit belief
11. exhibit	k. a person who makes a statement or declaration
12. testimony	l. any act which is calculated to embarrass, hinder, or obstruct court in administration of justice

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

testify	establish	physical exhibits	cross-examine	subpoena
adverse party	credibility	veracity	identify	demeanor

1. The _____ of any witness may be attacked by any party, including the party calling the witness.
2. Circumstancial evidence is used in civil courts to _____ or refute liability.
3. The U. S. Department of Justice wants him to _____ against Jim Bell, in a criminal trial beginning the week of April 2 in Tacoma, Wash.
4. When a writing or recorded statement or part thereof is introduced by a party, an _____ may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
5. Oil-field services giant Baker Hughes said he received a _____ from a New

York grand jury looking into possible abuses by companies doing business in Iraq.

6. The jury would have the opportunity to closely watch and examine the _____ of the witness as he is testifying to determine whether he is telling the truth and how much weight to give his testimony.
7. If _____ other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument.
8. The growing significance of DNA evidence requires that victim service providers be trained to _____ DNA evidence and to counsel victims about its importance in apprehending and convicting offenders and to support victims in cases where an offender's conviction is overturned due to DNA testing.
9. Experts are often called into a court of law to confirm or deny the _____ of evidence.
10. Defendant in criminal trial cannot _____ witness about being on juvenile probation without proof that he is on probation.

Cloze

Choose the proper word from the listed below, and then fill in the blanks.

substantive	prescribed	fact-finder	trial judge
submitted	establish	producing	party
sufficient	grant	determination	

The term "burden of proof" is an umbrella term that's used to refer to both the burden of persuasion and the burden of production. The burden of persuasion is a function of _____ law. It concerns the ultimate function of the _____, and involves two distinct things: the _____ of the quantum of evidence (or standard of proof) required to _____ an ultimate question of fact, and the allocation of the risk that the factfinder will not be persuaded to that _____ degree of certainty.

The burden of production does not deal with proof in the sense of ultimate persuasion. It is of concern only to the _____, and its effect is expended before the case is _____ to the jury. This subcategory of "burden of proof" comes into play when one _____ submitted that the other party has not offered _____ evidence even to merit continuing with the case as to that issue or claim, and that the judge must _____ a preemptive motion at that point. This concept is sometimes referred

to as the burden of _____ evidence, or the burden of "going forward", though the term burden of production will generally be used here.

Translation

Translate the following sentences into Chinese.

1. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
2. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.
3. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either
   (1) while testifying, or
   (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

   an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.
4. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
5. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Text B

General Concepts of Relevancy

The Minimal Relevancy Requirement of Rule 401

- relevancy 相关性
- character evidence 品格证据
- probative value 证据力
- minimal 小的
- materiality 重要性,实质性
- proponent 提出证据者

Federal Rules of Evidence 401 and 403 establish general principles of relevancy and general limits on the admission of relevant evidence. They are supplemented in many situations by more specific rules, such as those governing character evidence.

Rule 401 provides that an item of evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". Rule 402 sets forth the general rule of admissibility of relevant evidence. However, Rule 403 provides that even if relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of unfair prejudice, waste of time, or confusion of issues.

Rule 402 adopts a very broad conception of relevancy. Almost anything that a rational lawyer would attempt to offer into evidence would be "relevant" within the meaning of Rule 402. Because it would have some minimal effect on the probability that a particular proposition of consequence to the case is true or false. In a personal injury case, the fact that the defendant had a fight with his wife on the morning of the accident that is the subject of the suit might be minimally probative of a fact at issue (perhaps he was not paying attention to his driving because he was thinking about domestic problems). Yet though "relevant" within the meaning of Rule 401, the court would almost certainly exclude the evidence as a waste of time (and possibly for reasons of unfair prejudice) under Rule 403.

Relevancy and Materiality

Relevancy is sometimes contrasted with materiality. While those two terms probably have as many meanings as they do users. The following distinction is as common as any. Evidence is irrelevant if it has no tendency in logic to establish the fact that the pro-

ponent asserts the evidence will help prove. Evidence is immaterial when, although it has a tendency in logic to establish the fact that it is offered to prove, that fact is not in issue. For example, the fact might have been removed as an issue because of an admission in the pleadings.

To apply this terminology, imagine a slander case in which plaintiff alleges that defendant falsely called plaintiff a thief. If defendant offers evidence that plaintiff was seen on the street corner selling new gold watches for five dollars a piece, that evidence is relevant to show that the slanderous statement was true. However, if the defense of truth had been eliminated from the case because defendant admitted in the pleadings that the statement was false, then the evidence, though relevant, would be "immaterial" because it would have no bearing on any issue to be tried.

The federal rules do not use the term "immaterial". Evidence that would previously have been described as "immaterial" is now "irrelevant" within the meaning of Federal Rule of Evidence 401 if, in the language of the Rule, it is not "of consequence" to the determination of the action. Suppose, for example, that in a prosecution for forgery of a check, defendant admits signing another person's name to the check, but wishes to offer evidence that a week later, she "covered" the check with her own money. This evidence would be irrelevant—not "of consequence"—because it would not affect her guilt of the crime; evidence of later remorse has no bearing on defendant's state of mind at the time she forged the check.

Where evidence is offered on an issue of consequence to the case, but which has been conceded, the Federal Rules take a somewhat different position. For example, suppose that in a personal injury case, plaintiff alleges that defendant's negligent driving caused permanent disability. Plaintiff makes no claim for punitive damages. Defendant, knowing that the evidence of negligence is overwhelming, and wishing to avoid having the jury hear damaging details of her conduct, admits negligence but disputes the amount of damages. At trial, plaintiff offers evidence that the defendant was intoxicated at the time of the accident. Assuming that the evidence

· bearing
关系
· forgery
伪造
· remorse
悔恨

· intoxication
醉酒状态
· ambit
范围
· underpinning
支撑，基础

of intoxication has no bearing on any issue other than that of liability, which has been conceded, some jurists using pre-Federal Rules terminology would have excluded the evidence as irrelevant, and a number of states would do the same today under their own codes. The federal rules, however, would treat such evidence as relevant but exclude it as a waste of time or prejudicial under Rule 403.

The importance of the Federal Rules' broad concept of relevance in relation to issues conceded by one party was made clear by the Supreme Court in *Old Chief v. Untied States*. In *Old Chief*, defendant was charged with being a felon in possession of a firearm, assault with a deadly weapon, and using a firearm in connection with a crime. He had previously been convicted of assault causing serious bodily injury, a felony that put him within the ambit of a federal statute prohibiting certain felons from possessing firearms. Prior to trial, defendant moved to prevent the government from mentioning any details of the prior conviction, except to state that he had been convicted of a crime punishable by imprisonment in excess of a year. In return, defendant offered to stipulate to the offense. The prosecutor refused the stipulation, arguing that he had a right to prove the essential facts of the case in his own way, despite defendant's offer to stipulate to one of the elements of the offense. The court denied defendant's motion, and at trial, the prosecutor introduced the record of conviction, which revealed defendant's prior conviction, including the nature of the crime and the sentence he received. Defendant was convicted, and the Ninth Circuit affirmed. In a 5–4 decision, the Supreme Court reversed. Though the Court rejected defendant's argument that the name of the prior offense was irrelevant, it held that the trial court was obligated to grant defendant's motion pursuant to Rule 403.

Several aspects of the Court's discussion of Rules 402 and 403 have broad application. In its discussion of relevance principles, the Court spoke broadly, emphasizing that "beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors'expectations about what prop-

er proof should be". As the Court explained:

Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; ... Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.

This reasoning, in part, is what gives rise to the adage that the prosecution is entitled to prove its case by evidence of its own choice—that defendant has no right to "stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it". Aphorizing that "a syllogism is not a story", the Court wrote that the prosecution is entitled to the benefit of a colorful story with descriptive richness. This led the Court to state a principle that, if carried to its logical extreme, would revolutionize the law of relevancy: in ruling on the admissibility of evidence, the court should take into account the prosecution's need to establish the "human significance" of a crime and to awaken a juror's "obligation to sit in judgment". This suggests that the prosecution is entitled to offer evidence to show more than what is strictly necessary for logical inference when the extra evidence is needed to insure that the jury does not nullify substantive law and does not require greater certainty than proof beyond a reasonable doubt. The Court also noted, less adventurously, that in some cases the absence of proof can cause the jury to draw unfair inferences unfavorable to the prosecution.

Nevertheless, the Court held that these principles had virtually no application in the case at bar, where the fact to be proved was the defendant's legal status, a decision to be rendered apart from the concrete facts of the present case but merely on the basis of some prior adjudicated events. As the Court stated, "proving status without telling exactly why that status was imposed leaves no gap in

- adage 格言,古语
- aphorize 精炼地陈述
- syllogism 三段论
- proof beyond a reasonable doubt 排除合理怀疑之证据,可靠证据

· officious
不正式的，非官方的
· reproach
丢脸；羞耻
· conclusive evidence
确凿证据，结论性证据

the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach". Here, then, the evidence the prosecution wished to offer carries the unfairly prejudicial risk that the jury will convict defendant because of his apparently bad character or simply to prevent him from committing future crimes regardless of his guilt in the present case. At the same time, the evidence has no greater probative value than the defendant's offered stipulation, which would have been "seemingly conclusive evidence" of an essential element of the crime. Thus, in this situation, "the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available".

The Universal Fall-back Objection

Evidence that is otherwise admissible under the rules is still subject to the Federal Rule of Evidence 403 balancing test and can still be excluded if its reception would be too unfairly prejudicial, too misleading, or waste too much time. Rule 403 thus provides an almost universal "fall-back" argument for the attorney seeking the exclusion of evidence. The rule applies equally to all parties in both civil and criminal cases. Rule 403 also provides a basis for arguing, when evidence is admissible for one purpose but inadmissible for another, that the evidence should be excluded in its entirety because of the danger that the jury will not follow a limiting instruction.

The task of balancing probative value against the enumerated dangers in Rule 403 is hardly a precise one. Neither the rule itself nor its accompanying commentary offers specific guidelines for the judge. The court must consider the dangers not in the abstract, but in the precise context of the case at hand.

In the *Old Chief* case, the Supreme Court attempted to clarify the trial court's task in applying Rule 403. The Court held that on objection, the trial judge should decide whether the questioned evi-

dence raises a danger of unfair prejudice. If such a danger exists, the judge must "take account of the full evidentiary context of the case as the court understands it when the ruling must be made". In particular, the judge should consider not just the evidence itself, but also the probative value and risk of prejudice of any available substitutes for that evidence.

While Rule 403 gives the trial judge the discretion to exclude evidence on grounds that it will prejudice, confuse, or mislead the jury, one limitation should be noted. The trial judge must still respect the jury's role in assessing the credibility of witnesses and cannot exclude evidence on grounds that the testifying witness is unreliable. Weighing probative value against unfair prejudice under Rule 403 means accepting the accuracy of the witness's testimony and then assessing the probative value of the inferences to be drawn from it; the judge is not supposed to decide whether or not the witness is believable. Finally, it is not enough for the court to find that one of the enumerated dangers simply outweighs the probative value of the evidence; the danger must substantially outweigh the probative value. Thus, the greater the probative value of the evidence, the more difficult it will be to exclude it under this rule. And the converse is also true. If the probative value of the evidence is slight, the degree of danger necessary to satisfy the rule's standard need not be particularly great.

(Extracted and adapted from *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* by Roger C. Park, David P. Leonard, Steven H. Goldberg, West Group, 1998)

Notes

1. character evidence: evidence of person's moral standing in community based on reputation. 品德证据。
2. proof beyond a reasonable doubt: such proof as precludes every reasonable hypothesis except that which is tends to support and which is wholly consistent with defendant's guilt and inconsistent with any other rational conclusion. 排除合理怀疑之证据,可靠证据。

3. conclusive evidence: the evidence which is incontrovertible, either because the law does not permit it to be contradicted, or because it is so strong and convincing as to overbear all proof to the contrary and establish the proposition in question beyond any reasonable doubt. 确凿证据,结论性证据。

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( ) 1. According to Rule 402, anything produced before the court by a rational lawyer as an evidence would be "relevant".

( ) 2. Evidence is irrelevant if the fact for which the evidence intend to establish has been removed as an issue.

( ) 3. In The Federal Rules of Evidence 401, "irrelevant" is substituted for "immaterial" if the evidence is not important in the determination of the action.

( ) 4. Where evidence is offered on an issue of consequence to the case, but which has been conceded, the federal rules would admit such evidence, whereas some jurists and many states would have excluded the evidence as irrelevant.

( ) 5. In *Old Chief v. Untied States*, the defendant's motion to prevent the prosecutor from disclosing any details of his prior conviction was granted at last.

( ) 6. In *Old Chief*, the prosecution insisted that he have a right to produce evidence and establish the facts of the case in his own way.

( ) 7. The principle regarding the prosecution's right to offer more evidences than necessary under certain circumstances is not applicable in *Old Chief*.

( ) 8. Under Rule 403, evidence which is admissible for one purpose but not for another should be admitted because the jurors have a limiting instruction to guide them.

( ) 9. To rule on objection, the trial judge should decide whether the challenged evidence is likely to cause unfair prejudice.

( ) 10. Under Rule 403, the trial judge has the absolute discretion to exclude evidence on grounds that it will prejudice, confuse, or mislead, the jury.

( ) 11. Under Rule 403, evidence will be excluded as long as it is found to raise one of the enumerated dangers, no matter how great the probative value of

the evidence is.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
conclusive evidence	
	相关性
probative value	
	传闻证据
admissibility of evidence	
	过失证据
immaterial evidence	
	证言
the absence of proof	
	可靠证据
exclusion of evidence	
	使无效

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

the opposing lawyer
direct-examination
cross-examination
the fact-finder
presentation of evidence
circumstantial evidence
tangible evidence
demonstrative evidence
preponderance of the evidence
presumptive evidence
leading questions
judicial notice
identification
character evidence
authentication
direct evidence
real evidence
exculpatory evidence
proffered evidence
prima facie evidence

Translation

Translate the following sentences into English.

1. 依照《中华人民共和国民事诉讼法》第 64 条第 2 款规定，由人民法院负责调

查收集的证据包括：

(1)当事人及其诉讼代理人因客观原因不能自行收集的；

(2)人民法院认为需要鉴定、勘验的；

(3)当事人提供的证据互相有矛盾、无法认定的；

(4)人民法院认为应当由自己收集的其他证据。

2. 证据有下列几种：书证；物证；视听资料；证人证言；当事人的陈述；鉴定结论；勘验笔录。

3. 当事人对自己提出的主张，有责任提供证据。当事人及其诉讼代理人因客观原因不能自行收集的证据，或者人民法院认为审理案件需要的证据，人民法院应当调查收集。人民法院应当按照法定程序，全面地、客观地审查核实证据。

4. 证据必须经过当庭出示、辨认、质证等法庭调查程序查证属实，否则不能作为定案的根据。对于出庭作证的证人，必须在法庭上经过公诉人、被害人和被告人、辩护人等双方询问、质证，其证言经过审查确实的，才能作为定案的根据；未出庭证人的证言宣读后经当庭查证属实的，可以作为定案的根据。法庭查明证人有意作伪证或者隐匿罪证时，应当依法处理。

Case Study

State v. Cowan

MO Court of Appeals

N. C. App. (2008)

Stroud, Judge.

Defendant was convicted by a jury of eight different offenses related to controlled substances and firearm possession. Defendant appeals arguing the trial court erred in (1) allowing "irrelevant and highly prejudicial" testimony, (2) failing to dismiss six of the charges as the State did not prove the element of "possession", and (3) failing to dismiss the charge of maintaining a dwelling for keeping or selling controlled substances when the State did not prove defendant "kept or maintained" the property and how he was "using" the property.

Ⅰ. Background

On 27 September 2006, members of the Rowan County Sheriffs

Department executed a search warrant at 1763 – B Flat Rock Road. Defendant was the subject of the search warrant. In the residence, the police found marijuana, cocaine, methamphetamine, firearms, thousands of dollars, and drug paraphernalia including razor blades and digital scales.

On or about 4 December 2006, defendant was indicted for (1) trafficking in cocaine, (2) possession of cocaine with intent to sell, (3) possession of marijuana with intent to sell, (4) possession of methamphetamine with intent to sell and deliver, (5 – 7) three counts of possession of a firearm by a felon, and (8) maintaining a dwelling used for keeping or selling controlled substances. Defendant was found guilty of all eight offenses. Defendant appesals arguing the trial court erred in (1) allowing "irrelevant and highly prejudicial" tesimony, (2) failing to dismiss six of the charges as the State did not prove the element of "possession", and (3) failing to dismiss the charge of maintaining a dwelling for keeping or selling controlled substances when the State did not prove defendant "kept or maintained" the property and how he was "using" the property.

Ⅱ. Testimony Regarding Marlene Chambers

Defendant's first two arguments contend that the trial court erred by allowing testimony, over defendant's objections, from Rahesia Chambers and defendant regarding the drug trafficking trial and conviction of defendant's aunt, Marlene Chambers. Defendant argues that this evidence was "irrelevant and highly prejudicail". We agree that the evidence was irrelevant, but do not conclude that it prejudiced defendant's case.

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial cour's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.

· Rule 403 (of Federal Rules of Evidence) 《美国联邦证据规则》第403条

Dunn v. Custer. 162 N. C. App. 259, 266, 591 S. E. 2d 11, 17 (2004) (citations and quotation marks omitted).

"'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N. C. Gen. Stat. § 8C - 1, Rule 401. "Evidence which is not relevant is not admissible," N. C. Gen. Stat. § 8C - 1, Rule 402. We conclude that evidence about defendant's aunt's prior trial and conviction is irrelevant as it does not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". *See* N. C. Gen. Stat. § 8C - 1, Rule 401. There was no evidence that Marlene Chambers'criminal activities had any relation whatsoever to the crimes for which defendant was charged. As we deem the testimony regarding Marlene Chambers drug trial and conviction irrelevant, the testimony was inadmissible. *See* N. C. Gen. Stat. § 8C - 1, Rule 402.

However, a defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N. C. Gen. Stat. § 15A - 1443(a) (2005). "If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred". *State v. Bodden*, 190 N. C. App. 505, —, 661 S. E. 2d 23, 26 (2008). We first note that the evidence contested by defendant regarding Marlene Chambers was very minimal: (1) The State asked Ms. Rahesia Chambers about her mother, Marlene Chambers: "The same mom that I just prosecuted about three months ago for drug trafficking.... That's your relative, isn't it?" to which Rahesia stated, "That's my mom". (2) The State asked defendant "Did you give Marlene Chamber's name [to Officer Bebber as your nearest relative] because she's involved in the drug business with you?" Defendant answered, "No, I didn't". The State then asked, "You know she was convicted of trafficking, don't

you?... And that's why you gave the name, didn't you? She was going to help you out, wasn't she, if you helped her out," to which defendant responded, "No, I wasn't and, no, I didn't." In the course of an eight day trial, these are the only instances of evidence regarding Marlene Chambers or her convictions which defendant has brought to our attention. The irrelevant evidence defendant contested was minimal, and there was sufficient evidence to convict defendant based upon the controlled substances and firearms found in the residence. We therefore do not find that there was a reasonable possibility that the jury would have reached a different result in the absence of this evidence; so efendant was not prejudiced by the irrelevant testimonv. *See* N. C. Gen. Stat. § 15A – 1443(a); *Bodden* at—, 661 S. E. 2d at 26.

· intendment
真正含义

Ⅲ. Motions to Dismiss

Defendant contends the trial court erred by failing to grant his motion to dismiss as to six of the charges.

A. Standard of Review

Our standard of review for the denial of a defendan's motion to dismiss is whether there is substantial evidence(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendan's being the perpetrator of such offense. If so, the motion is properly denied. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Estes, 186 N. C. App. 364, 369, 651 S. E. 2d 598. 601 – 02 (2007) (citation and ellipses omitted), *appeal dismissed and disc. review denied*, 362 N. C. 365, 661 S. E. 2d 883 (2008).

B. Possession

Defendant's next three arguments contend that the trial court erred in failing to grant defendant's motion to dismiss the charges of

· surveillance
监视
· informant
报告者
· toiletry
化妆品
· contraband
走私货
· dominion
支配权
· incriminating
显示有罪的

trafficking in cocaine, possession of marijuana with intent to sell or deliver, and the three charges of possession of a firearm bv a felon, because the State failed to prove the element of "possession" as to all of these charges. Defendant contends that the State presented a very weak case of constructive possession. There was no surveillance of this apartment, no eyewitnesses, and no confidential informants. Although there were two envelopes addressed to... defendant at that address and days later the police said he gave that address when he was arrested, there was nothing to tie him to drugs and guns and the occupancy of Ms. Bennett's apartment the day of the raid.

None of... defendant's clothes were in that apartment but there was testimony that the clothing of other men were sic in that closet. There was no evidence that... defendant had been in that apartment around the time of the raid but there was testimony that at least four other people were in that anartment around this time and had access to that closet. No toiletries belonging to... defendant were found in that apartment... [Defendant] had no key. The lease was not in his name as were none of the utilities. Even in the light most favorable to the State, the State failed to prove the element of possession for these ofrenses.

However, if the defendant is not in actual possession of contraband when it is discovered, the State may survive a motion to dismiss by presenting substantial evidence of constructive possession. Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the drugs.

State v. Miller. 191 N. C. App. 124, 661 S. E. 2d 770, 772 – 73 (2008) "When the substance is found on premises under the exclusive control of the defendant, this fact alone may support an inference of constructive possession. If the defendant's possession over the premises is nonexclusive, constructive possession may not be inferred without, other incriminating circumstances". *State v. Autry*, 101 N. C. App. 245, 252, 399 S. E. 2d 357, 362 (1991).

Constructive possession depends on the totality of circum-

stances in each case: . . . A showing by the State of other incriminating circumstances permits an inference of constructive possession. Incriminating circumstances which have been identified by this Court and the North Carolina Supreme Court as relevant to constructive possession include evidence that defendant: (1) owned other items found in proximity to the contraband, (2) was the only person who could have placed the contraband in the position where it was found, (3) acted nervously in the presence of law enforcement, (4) resided in, had some control of, or regularly visited the premises where the contraband was found, (5) was near contraband in plain view, or (6) possessed a large amount of cash. . . .

See Miller at —, 661 S. E. 2d at 773.

Here, the evidence supported at least two of the "incriminating circumstances" which allow an inference of constructive possession. *See id.* First, the State presented evidence that at 1763-B Flat Rock Road the police found, *inter alia*, defendant's birth certificate and a bill with defendant's name on it and noting his address as 1763-B Flat Rock Road in the same closet where the controlled substances were found. The police also found a show cause order directed to defendant and an insurance policy in defendant's name issued only days prior to the search which showed 1763-B Flat Rock Road as his home address. Second, defendant was also arrested at 1763-B Flat Rock Road and was seen coming out of the bedroom where the controlled substances and firearms were found. Defendant also told the police, that he resided at 1763-B Flat Rock Road. Viewing the evidence "in the light most favorable to the State," *Estes* at 369. 651 S. E. 2d at 602, we conclude the State presented sufficient evidence of constructive possession through incriminating circumstances, including that defendant "owned other items found in proximity to the contraband", and "resided in, had some control of, or regularly visited the premises where the contraband was found. . . ." *See Miller* at 661 S. E. 2d at 773. Therefore, the trial court did not err in denying defendant's motion to dismiss. These arguments are overruled.

· a show cause order
陈述理由令

C. Maintaining a Dwelling

Lastly, defendant argues the trial court erred in failing to dismiss the charge of maintaining a dwelling for keeping or selling controlled substances because there was absolutely no evidence that... defendant contributed in any way to the maintenance of Ms. Bennett's apartment. None of the factors under *Bowens*, *supra*, are present: no ownership of the property; no occupancy of the property; no repairs to the property; no payment of taxes; no payment of utility expenses; no payment of repair expenses; and no payment of rent There was no testimony that any of... defendant's clothing or personal effects were present but there was testimony of other men's clothing. The State failed to prove that... defendant used Ms. Bennett's apartment in any unlawful way.

Thus, defendant argues the State failed to prove that he "kept or maintained" the property and how he was using the property.

N. C. Gen. Stat. § 90 – 108(a)(7) reads,

It shall be unlawful for any person:

To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for tbe keeping or selling of the same in violation of this Article.

N. C. Gen. Stat. § 90 – 108(a)(7)(2005). *Stale v. Bowens*, lays out several factors which indicate that an individual is "keeping or maintaining" property pursuant to N. C. Gen. Stat. § 90 – 108(a)(7) which includes: "ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses: payment of repair expenses; and payment of rent". 140 N. C. App. 217, 221, 535 S. E. 2d 870, 873(2000), *disc. review denied*, 353 N. C. 383, 547 S. E. 2d 417(2001). "Occupancy, without more, will not support the element of 'maintaining' a dwelling. However, evidence of residency, standing alone, is sufficient to support the element of maintaining". *State v. Spencer*, 192N. C. App. 143, —, 664 S. E. 2d 601. 605(2008) In *State v. Spencer*,

this Court determined that "a purported confession by defendant to police, that defendant resided at the home at 178 Loggerhead Road.... was substantial evidence that defendant maintained the dwelling". *Spencer at* 664 S. E. 2d at 605. Here defendant told the police that he resided at 1763-B Flat Rock Road, and thus this is "substantial evidence that defendant maintained the dwelling". *See id.*

Furthermore, as to "use", "the determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances". *State v. Mitchell*, 336 N. C. 22, 34, 442 S. E. 2d 24, 30 (1994). In *State v. Rich*. this Court concluded that the evidence showing that defendant resided in the house, that she was cooking dinner, and that she possessed cocaine and materials related to the use and sale of cocaine, is sufficient to allow conviction under G. S. 90 - 108 (a) (7) for maintaining a dwelling used for the keeping or selling of controlled substances.

87 N. C. App. 380, 384, 361 S. E. 2d 321, 324 (1987).

Here, as in *Rich*, there is evidence defendant resided at 1763-B Flat Rock Road. *See id.* There is also evidence that defendant possessed controlled substances, "materials related to the use and sale" of controlled substances, and firearms at 1763-B Flat Rock Road which "is sufficient to allow conviction under N. C. G. S. § 90 - 108 (a) (7) for maintaining a dwelling used for the keeping or selling of controlled substances". *See id.* Therefore, the trial court did not err in denying defendant's motion to dismiss as to the charge of maintaining a dwelling for keeping or selling controlled substances, and this argument is overruled.

Ⅳ. Conclusion

For the foregoing reasons, we find no prejudicial error.

Judges Steelman and Jackson concur.

Notes

1. Rule 403 (of Federal Rules of Evidences): Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence

may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

2. a show cause order: a court order, made upon the motion of an applicant, that requires a party to appear and provide reasons why the court should not perform or not allow a particular action and mandates this party to meet the *prima facie* case set forth in the complaint or affidavit of the applicant. 陈述理由令。是法院根据当事人的申请，要求其就其所要求的事项提供理由的命令。

Exercises

Ⅰ. Answer the following questions.

1. What are the three issues handled by the appellate court?
2. What is the decision of the appellate court regarding the defendant's first argument that the trial court erred by allowing "irrelevant and highly prejudicial" testimony?
3. Why does the appellant court decide the irrelevant evidence did not prejudice defendant's case?
4. Which cases are cited by the court in discussing the "possession" issue? How are they applied to the instant case? What is the court decision?
5. What are the factors which indicate that an individual is "keeping or maintaining" property including a dwelling? Is the court's decision in favor of the defendant regarding the "dwelling" issue?

Ⅱ. Brief the case and present the case brief to the class.

Unit Eleven Intellectual Property Law

Warm-up Exercises: Listening Practice

Words and expressions:

patent	trademark	copyright	intellectual property
article	composition	processes	comprehensive
differentiate	maintaining	assignments	cross-licenses
enforcement	collateral	asset	

I. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

The laws of the United States relating to _____, _____, and _____ protect the various kinds of _____. Sometimes more than one form of protection applies to a single type of property; however, one form of protection is usually more suitable than another.

Patents, for example, are granted on _____, _____, _____, and _____. Copyrights generally apply to literary and artistic works of authors and artists, while trademark owners have _____ to use a specific mark, word, or symbol to _____.

We have prepared this overview to summarize _____ of intellectual property protection _____ in the United States. It is not intended as a comprehensive review of the law, but as a reference tool to help you understand _____ _____ available and to aid you in _____ among them.

Ⅱ. Listen to the passage and complete the following statements.

As with all business-related activities, economics plays a large role in determining whether to pretect intellectual property. Companies must weigh the potential value of an intellectual property right against both _____ and _____ _____.

There are no hard and fast rules that determine the potential value of a given intellectual property right. What is valuable to one individual or company may be worthless to another. There are certain obvious factors that contribute to the potential value of the intellectual property, including: _____ _____.

Text A

Trade Secret and Patent Law

- taking 征用
- personhood 人格
- pen 写作
- the Fifth Amendment to the U. S. Constitution 《美国宪法》第五修正案

The concept of property is well understood in Western society. It is among the oldest institutions of human civilization. It is widely recognized that people may own real property and tangible objects. The common law and the criminal law protect private property from interference by others. The Fifth Amendment to the U. S. Constitution protects private property against takings by the government without just compensation. The philosophical bases for protection of private property are well entrenched in our culture. Private property has been viewed as resulting when labor is applied to nature, as an incentive for discovery, as an essential part of personhood, and as a foundation for an ordered economic system.

Ideas, by definition, are less tangible. They exist in the mind and work of humans. Legal protection for intellectual work evolved much later in the development of human society than did protection for tangible property. The protection of such "intellectual property" raises complex philosophical questions. Should the first person to discover a way of performing an important task—for example, a procedure for closing a wound—be entitled to prevent others from using this procedure? Should the first person to pen a phrase or hum a

melody be entitled to prevent others from copying such words or singing the song? Should such "intellectual property rights" be more limited than traditional property rights (i. e. the fee simple)?

- the fee simple
  永久性财产继承权
- trade secret
  商业秘密
- misappropriation
  非法使用
- akin
  同类的,近似的
- patent
  专利
- copyright
  版权
- subject matter
  标的,客体
- disclose
  泄露,公开
- exemplify
  制定核正副本
- the UTSA
  《统一商业秘密法》

I. Trade Secret

Trade secret laws are state law doctrines that protect against the misappropriation of certain confidential information. As such, they are more akin to traditional tort and contract law than to patent or copyright law. While protection for trade secrets has long been a part of the common law, most states today protect trade secrets by statute. The basic purpose behind protecting trade secrets is to prevent "theft" of information by unfair or commercially unreasonable means. In essence, trade secret law is a form of private intellectual property law under which creators establish contractual limitations or build legal "fences" that afford protection from misappropriation.

The definition of subject matter eligible for protection is quite broad: business or technical information of any sort. To benefit from trade secret protection, the information must be a secret. However, only relative and not absolute secrecy is required. In addition, the owner of a trade secret must take reasonable steps to maintain its secrecy. Trade secrets have no definite term of protection but may be protected only as long as they are secret. Once a trade secret is disclosed, protection is lost.

A trade secret claim can be broken down into three essential elements. First, the subject matter involved must qualify for trade secret protection; it must be the type of knowledge or information that trade secret law was meant to protect, and it must not be generally known at all. On eligible subject matter, the current trend, exemplified once again by the UTSA, is to protect as a trade secret any valuable information. So long as the information is capable of adding economic value to the plaintiff, it can be protected by trade secret law. The requirement that the information not be generally known follows from the label trade secret. The requirement is meant to insure that no one claims intellectual property protection for information commonly known in a trade or industry.

Second, a trade secret plaintiff must also prove that the de-

· deception
欺骗,欺诈
· skullduggery
阴谋诡计
· reverse engineering
反向工程

fendant acquired the information wrongfully—in a word, that the defendant misappropriated the trade secret. That a person's information is valuable does not make it wrong for another to use or disclose. But use or disclosure is wrong, in the eyes of trade secret law, when the information is acquired through deception, skullduggery, or outright theft.

In many cases a defendant's use or disclosure is wrongful because of a pre-existing obligation to the plaintiff not to disclose or appropriate the trade secret. Such an obligation can arise in either of two ways: explicitly, by contract; and implicitly, because of an implied duty. A classic example of an implied duty is the case of an employee. Even in the absence of an explicit contract, most employees are held to have duty to protect their employers' secret practices, information, and the like. Even where the duty arises by explicit contract, however, public policy limitations on the scope and duration of the agreement will often come into play, in some cases resulting in substantial judicial modification of the explicit obligations laid out in the contract.

The third element to be established by the plaintiff in a trade secret case is that the plaintiff, holder of the trade secret, took reasonable precautions under the circumstances to prevent its disclosure. Courts have shown some confusion over the rationale for this requirement. Some see in it evidence that the trade secret is valuable enough to bother litigating; others argue that where reasonable precautions are taken, chances are that a defendant acquired the trade secret wrongfully. Whatever the justification, it is clear that no one may let information about products and operations flow freely to competitors at one time and then later claim that competitors have wrongfully acquired valuable trade secrets. To establish the right to sue later, one must be consistently diligent in protecting information. As always, however, the presence of the term "reasonable" assures close cases and difficult line-drawing for courts.

However, trade secret laws do not protect against independent discovery or invention. Nor do they prevent competitors from "reverse engineering" a legally obtained product in order to determine

the secrets contained inside. Violations of trade secret law entitle the owner to damages and in some cases injunctions against use or further disclosure.

Ⅱ. Patent

Patent law is the classic example of an intellectual property regime modeled on the utilitarian framework. Following the constitutional authorization, patent law creates a limited monopoly to encourage the production of inventions — processes, machines, and compositions of matter. The public benefits directly through the spur to innovation and disclosure of the patented invention. After the term of the patent expires, the innovation becomes part of the public domain, freely available to all.

Patents in the United States are governed by the Patent Act (35 U. S. Code), which established the United States Patent and Trademark Office (the USPTO). The most common type of patent is a utility patent. Utility patents have a duration of twenty years from the date of filing, but are not enforceable until the day of issuance. Design patents protect ornamental designs. Plant patents protect new varieties of asexually reproducing plants.

To obtain protection under U. S. law, the applicant must submit a patent application to the USPTO, where it will be reviewed by an examiner to determine if the invention is patentable. U. S. law grants to patentees the right to exclude others from making, using, or selling the invention.

Requirements The Patent and Trademark Office (PTO) grants a patent when an inventor can show five things: an invention fits one of the general categories of patentable subject matter; it has not been preceded in identical form in the public prior art; it is useful; it represents a nontrivial extension of what was known; and it is disclosed and described by the applicant in such a way as to enable others to make and use the invention.

Patentable subject matter: The U. S. Patent Statute states that processes, machines, articles of manufacture, and compositions of matter are patentable. This wording appears to cover every useful invention imaginable. To a large extent, this is true. Under this

- regime 体制，制度
- utilitarian 有用的
- process 生产过程
- composition 合成物
- spur 刺激
- public domain 共有区域
- the Patent Act 《专利法》
- 35 U. S. Code 《美国法典》第35卷
- the United States Patent and Trademark Office (the USPTO) 美国专利商标局
- enforceable 可实施的，可执行的
- issuance 发给，颁布
- design patent 外观设计专利
- asexually 无性地
- patentable 可取得专利的
- patentee 专利权人
- prior art 先有技术

· novelty
新颖性
· utility
有用,实用性

statute, the United States has one of the broadest standards for what is patentable in the entire world. Most inventors, including those in the software and computer fields, do not have to worry whether their inventions are non-statutory. However, there are certain "inventions" which are not patentable under the Patent Act. Examples relevant to the computer and Internet field are data structures or programs *per se* (which are mere information rather than a computer implemented process or specific machine or computer readable memory as an article of manufacture), compilations or arrangements of non-functional information or a known machine-readable storage medium encoded with such information; and natural phenomena such as electricity and magnetism. These items are considered indistinguishable from abstract ideas and laws of nature, and therefore are unpatentable. Previous interpretations of the statute have also listed the following items as nonstatutory: methods of doing business, and mere printed matter.

Novelty (Newness): In order for an invention to be patentable, it must be new as defined in the patent law. This novelty requirement states that an invention cannot be patented if certain public disclosures of the invention have been made. The statute which explains when a public disclosure has been made (35 U. S. C. Section 102) is complicated and often requires a detailed analysis of the facts and the law. The most important rule, however, is that an invention will not normally be patentable if: the invention was known to the public before it was "invented" by the individual seeking patent protection; the invention was described in a publication more than one year prior to the filing date; or the invention was used publicly, or offered for sale to the public more than one year prior to the filing date.

Utility: The patent law specifies that the subject matter must be "useful". The term "useful" in this connection refers to the condition that the subject matter has a useful purpose and also includes operativeness, that is, a machine which will not operate to perform the intended purpose would not be called useful, and therefore would not be granted a patent. In most cases, the usefulness

requirement is easily met in computer and electronic technologies.

· nonobviousness
无显而易见性
· exploitation
充分利用

Nonobviousness: If an invention is not exactly the same as prior products or processes (which are referred to as the "prior art"), then it is considered novel. However, in order for an invention to be patentable, it must not only be novel, but it must also be a nonobvious improvement over the prior art. This determination is made by deciding whether the invention sought to be patented would have been obvious "to one of ordinary skill in the art". In other words, the invention is compared to the prior art and a determination is made whether the differences in the new invention would have been obvious to a person having ordinary skill in the type of technology used in the invention.

As can be imagined, the determination of whether a particular change or improvement is "obvious" is one of the most difficult determinations in patent law. In order to make such a determination, an examiner in the patent office will normally review previous patents to find those patents which are closest to the invention in which a patent is sought. If all the features of the invention can be found in a single patent, the examiner will reject the patent as lacking novelty (that is, it is exactly the same as what was previously known and therefore is not new). If no patent contains all of the features, the examiner will attempt to combine two or more prior patents, and attempt to find all of the features in a combination of those prior patents. If the examiner is successful in finding such a combination, the examiner will generally reject the invention as an obvious combination of items known in the prior art. However, there must be some reason to combine the two references, and often a rejection based on such a combination can be overcome.

Rights Granted Under U. S. Patent Law Patents issued by the U. S. Patent and Trademark Office confer upon the patent holder "the right to exclude others from making, using or selling the invention throughout the United States" and its territories and possessions.

Since the essence of the right granted by a patent is the right to exclude others from commercial exploitation of the invention, the

- patent holder 专利持有人
- patent license agreement 专利许可协议
- validity 有效
- the United States Claims Court 美国联邦权利申诉法院

patent holder is the only one who may make, use, or sell the invention. Others may do so only with the authorization of the patent holder. Such authorization is usually given through a patent license agreement.

Infringement Infringement of a patent is the unauthorized making, using, or selling of the patented invention within the territory of the United States, during the term of the patent. If a patent is infringed, the patent holder may sue for relief in the appropriate federal court. The patent holder may ask the court for an injunction to prevent the continued infringement and may also ask the court for an award of damages. In such an infringement suit, the defendant may question the validity of the patent, which is then decided by the court. The defendant may also claim that its actions do not constitute infringement. Infringement is determined primarily by the language of the claims of the patent: if what the defendant is making does not fall within the language of any of the claims of the patent, there is no infringement.

Suits for infringement of patents follow the rules of procedure of the federal courts. From the decision of the district court, there is an appeal to the Court of Appeals for the Federal Circuit. The Supreme Court may thereafter take a case by writ of certiorari. If the United States Government infringes a patent, the patent holder has a remedy for damages in the United States Claims Court. The Government may use any patented invention without permission of the patent holder, but the patent holder is entitled to obtain compensation for the use by or for the Government.

(From http://www.bitlaw.com)

Notes

1. The Fifth Amendment to the U. S. Constitution: This amendment guarantees a person accused of a serious crime the right to be charged by a grand jury. Persons cannot be forced to give evidence against themselves. If a person is found not guilty of a crime, he/she cannot be put on trial for the same crime again. The federal government cannot unfairly take peoples' lives, freedom or property. The government must pay a person for any property it takes for public use. "No person

shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". 《美国宪法》第五修正案规定:非经大陪审团提出公诉或告发,不得使任何人接受死罪或有辱声名之罪行的控告,但在陆、海军中或在战时或国家危难时刻服役的民兵中发生的案件,不在此限;不得使任何人因同一罪行处于两次生命或身体的危境;不得在刑事案件中强迫犯人作不利于本人的证词;未经正当法律程序,不得剥夺任何人的生命、自由或财产;非有恰当补偿私人财产不得充公。

2. the fee simple: also known as fee simple absolute, is an estate limited absolutely to a man and his heirs and assigns forever without limitation or condition. 永久性财产继承权(具体内容请参照 Unit Eight)。
3. the UTSA: the Uniform Trade Secrets Act. 《统一商业秘密法》。
4. reverse engineering: the process of taking something (a device, an electrical component, a software program, etc.) apart and analyzing its workings in detail, usually with the intention to construct a new device or program that does the same thing without actually copying anything from the original. 反向工程。
5. public domain: the realm embracing property rights that belong to the community at large. These property rights are unprotected by copyright or patent, and are subject to appropriation by anyone. 共有区域。该区域内的财产归大众所有,不受版权法和专利法的保护。
6. the Patent Act: 《专利法》。
7. 35 U.S. Code: 《美国法典》第 35 卷。
8. the United States Patent and Trademark Office (the USPTO): 美国专利商标局。
9. design patent: patent granted for giving a new and pleasing appearance to an article of manufacture whereby its sale is enhanced. 外观设计专利。
10. prior art: Practical definition of "prior art" is anything intangible form that may properly be relied on by patent office in patent cases in support of rejection on matter of substance, not form, of claim in pending application for patent. 先有技术。
11. the United States Claims Court: court established by act of Congress of October

1st, 1982, to handle cases in which the United States or any of its branches, departments, or agencies is a defendant. The court has jurisdiction over money claims against the United States based on the U. S. Constitution, federal laws, executive regulations, or express or implied contract with the government. 美国联邦权利申诉法院。

Exercises

Check Your Understanding

Answer the following questions according to the text.

1. Why are trade secrets protected?
2. What are the requirements for trade secret protection?
3. What does the plaintiff have to establish in a trade secret action?
4. What is a non-disclosure-and-use obligation? How is it imposed?
5. What are the limitations to trade secret protection?
6. What purpose does patent law serve?
7. What will happen when the patent expires?
8. When an inventor applies for a patent, what elements shall he show?
9. Normally, under what circumstances will an invention be unpatentable under the novelty doctrine?
10. What does nonobviousness mean? What will an examiner do to determine whether the improvement of an invention is obvious? What will happen if nonobviousness is found?
11. Describe the procedure patent suits must follow.

Build Up Your Vocabulary

I. Match the items in the following two columns.

A	B
1. utility	a. the realm or status of property rights that belong to the community at large, are unprotected by copyright or patent, and are subject to appropriation by anyone
2. novelty	b. the quality or condition of being useful; usefulness
3. patentee	c. (of an invention) the quality of being sufficiently different from the prior art that, at the time the invention was made, it would not have been obvious to a person

having ordinary skill in the art relevant to the invention

4. nonobviousness	d. having legal force; effective or binding
5. disclosure	e. secret
6. valid	f. capable or susceptible of being patented
7. issue	g. the quality of being novel; newness
8. confidential	h. to send out officially
9. public domain	i. the act or process of revealing or uncovering
10. patentable	j. the inventor to whom a patent is issued

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

public domain	issuance	filing	misappropriation	patented
reasonable precaution	monopoly	review	patent examiner	term

1. A _____ work is a creative work that is not protected by copyright and which may be freely used by everyone.
2. Through the _____ of patents, we encourage technological advancement by providing incentives to invent, invest in, and disclose new technology worldwide.
3. In making our decisions, we rely on credible information and also exercise _____ to reduce the amount of risk.
4. Governments at the local, state or federal level create _____ by awarding a single firm the exclusive right to supply a good or service.
5. A Travis County Grand Jury indicted a San Marcos police officer on charges of _____ of funds from a police organization.
6. Members of the Maine Gambling Control Board began their _____ Thursday of an application for the state's first gaming license, an application that came with a $200,000 nonrefundable application fee.
7. The European Union's head office proposed new regulations Friday to allow the export of cheap copies of _____ drugs to poor nations fighting AIDS and other killer diseases.
8. The U. S. Patent Classification system provides for the storage and retrieval of every patent document that a _____ needs to review when examining patent applications.
9. Before June of 1995, 35 U. S. C. §154 provided that the _____ of a utility or plant patent ended seventeen years from the date of patent grant.

10. Electronic _____ of patent applications at the USPTO is conditioned on adherence to the promulgated instructions for EFS.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

expiration	patents	prior	term	issuance
filed	article	patented	monopoly	invention

The term of a United States patent is twenty years from the application filing date and is nonrenewable. At the _____ of the term, the invention automatically is dedicated to the public and everyone then has the right to make, use, or sell the invention. An important result of this is that, because of the strong policy in favor of strict observation of the twenty-year period, amendments of _____, reissues, and other modifications of patent applications are retroactively limited so as to date back to the original patent. The _____ period does not begin to run until the actual _____ of the patent. Therefore, competitors are free to use, make, or sell an _____ for which a patent application has been _____, until the actual grant. The words "patent pending" on an _____ give no protection at all during the period _____ to the grant. On the other hand, some courts have rather jealously guarded the interests of the inventor in the last portion of an expiring patent's _____, holding that even gearing up for production may infringe the imminently expiring patent if what is done amounts to testing the completed though unassembled competitor of the _____ device. And Congress, similarly, has defined infringement to include even the filing of certain FDA applications for drugs still under patent.

Translation

Translate the following passages into Chinese.

1. "Trade secret" means information, including a formula, pattern, compilation, program device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
2. Actual or threatened misappropriation may be enjoined. Upon application to the

court an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

3. The term of a patent is now 20 years, measured from the date the patent application was filed. It had been 17 years, measured from the date the patent was issued by the Patent Office. Under certain circumstances, such as interferences and appealed rejections, this term may be extended for up to five years.
4. Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.
5. A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title [35 USC. Sec. 102], if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Text B

Copyright and Trademark Law

Copyright Law

Although the copyright and patent laws flow from the same constitutional basis and share the same general approach — statutorily created monopolies to foster progress — they feature different elements and rights, reflecting the very different fields of creativity that they seek to encourage. In general, copyrights are easier to secure and last substantially longer than patents, although the scope of protection afforded copyrights is narrower and less absolute than that given to patents.

· foster
促进

- U. S. Copyright Act
美国版权法
- works of authorship
原创作品
- originality
原创性
- reproduction
复制
- compilation
汇编物,汇编作品
- sorting
排序,分类
- pantomime
哑剧
- choreographic
舞蹈艺术的
- pictorial
由画组成的
- graphic
用图表示的
- sculptural
雕刻的
- audiovisual
视听的
- fixation
固定

Requirements

Under the current U. S. Copyright Act, copyright protection exists in "original works of authorship fixed in a tangible medium of expression". The ease in which copyright rights are secured under this definition has led to copyrights becoming the most widely available form of intellectual property protection.

Originality: For a work to be protected by copyright law, it must be "original". However, the amount of originality required is extremely small. The work cannot be a mere mechanical reproduction of a previous work, nor can the work consists of only a few words or a short phrase. In addition, if the work is a compilation, the compilation must involve some originality beyond mere alphabetic sorting of all available works. Beyond that, almost any work that is created by an author will meet the originality requirement.

Works of Authorship: The Copyright Act uses the phrase "works of authorship" to describe the types of works that are protected by copyright law. This purposefully broad phrase was chosen by Congress to avoid the need to rewrite the Copyright Act every time a new "medium" was discovered. This intended ambiguity allows the Copyright Act to protect World Wide Web pages and multimedia CD ROMs even though these items did not exist at the time the Copyright Act was written. In order to clarify what was considered a work of authorship, Congress included a list of eight works of authorship in the Act itself: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Although this list is not meant to be all-inclusive, most protected works fall into one of the specified categories. These categories are broader than they initially appear to be. For example, computer programs and most compilations are registered as "literary works", while maps and architectural plans are registered as "pictorial, graphic, and sculptural works".

Fixation: In order for a work to be protectable, it must be

fixed in a tangible medium of expression. A work is considered fixed when it is stored on some medium in which it can be perceived, reproduced, or otherwise communicated. For example, a song is considered fixed when it is written down on paper. The paper is the medium on which the song can be perceived, reproduced and communicated. It is not necessary that the medium be such that a human can perceive the work, as long as the work can be perceived by a machine. Thus, the song is also fixed the moment the author records it onto a cassette tape. Similarly, a computer program is fixed when stored on a computer hard drive. In fact, courts have even held that a computer program is fixed when it exists in the RAM of a computer. This is true even though this "fixation" is temporary, and will disappear once power is removed from the computer.

- RAM (计)随机存取存储器
- reproduction right 复制权
- derivative right 演绎权
- derivative work 演绎作品

Rights Granted Under Copyright Law

The Copyright Act grants five rights to a copyright owner: the right to reproduce the copyrighted work; the right to prepare derivative works based upon the work; the right to distribute copies of the work to the public; the right to perform the copyrighted work publicly; and the right to display the copyrighted work publicly. The rights are not without limit, however, as they are specifically limited by "fair use" and several other specific limitations set forth in the Copyright Act.

Reproduction right: The reproduction right is perhaps the most important right granted by the Copyright Act. Under this right, no one other than the copyright owner may make any reproductions or copies of the work. Examples of unauthorized acts which are prohibited under this right include photocopying a book, copying a computer software program, using a cartoon character on a T-shirt, and incorporating a portion of another's song into a new song. It is not necessary that the entire original work be copied for an infringement of the reproduction right to occur. All that is necessary is that the copying be "substantial and material".

Derivative right: The right to make a derivative work overlaps somewhat with the reproduction right. According to the Copyright

· dramatization
改编的剧作品
· fictionalization
把……编成小说,小说化
· abridgment
删节后的文章
· condensation
缩写
· recast
改写
· adapt
改编
· distribution right
发行权
· the "first sale doctrine"
首次销售原则
· public performance right
表演权

Act, a derivative work is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A derivative work usually involves a type of transformation, such as the transformation of a novel into a motion picture. In the computer industry, a second version of a software program is generally considered a derivative work based upon the earlier version.

Distribution right: The distribution right grants to the copyright holder the exclusive right to make a work available to the public by sale, rental, lease, or lending. This right allows the copyright holder to prevent the distribution of unauthorized copies of a work. In addition, the right allows the copyright holder to control the first distribution of a particular authorized copy. However, the distribution right is limited by the "first sale doctrine", which states that after the first sale or distribution of a copy, the copyright holder can no longer control what happens to that copy. Thus, after a book has been purchased at a book store (the first sale of a copy), the copyright holder has no say over how that copy is further distributed. Thus, the book could be rented or resold without the permission of the copyright holder.

Public performance right: The public performance right allows the copyright holder to control the public performance of certain copyrighted works. The scope of the performance right is limited to the following types of works: literary works, musical works, dramatic works, choreographic works, pantomimes, motion pictures, and audiovisual works. Under the public performance right, a copyright holder is allowed to control when the work is performed "publicly". The public performance right is generally held to cover computer software, since software is considered a literary work under the Copyright Act. In addition, many software programs fall under the definition of an audiovisual work. The application of the public performance right to software has not be fully developed, except that it is clear that a publicly available video game is controlled by this

right.

Display right: The public display right is similar to the public performance right, except that this right controls the public "display" of a work. This right is limited to the following types of works: literary works; musical works; dramatic works; choreographic works; pantomimes; pictorial works; graphical works; sculptural works; and stills (individual images) from motion pictures and other audiovisual works. The definition of when a work is displayed "publicly" is the same as that described above in connection with the right of public performance.

Fair Use

The exclusive rights granted by the Copyright Act are limited by several statutory and Constitutional limitations on copyright law. The most well-known of these limitations is "fair use".

The fair use statute: The doctrine of fair use developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing copying in certain, limited circumstances. This doctrine has at its core a fundamental belief that not all copying should be banned, particularly in socially important endeavors such as criticism, news reporting, teaching, and research. Four factors are to be considered in order to determine whether a specific action is to be considered a "fair use". These factors are as follows: the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. There are some traditional activities which have been used to illustrate when the fair use doctrine would apply. These activities include: small excerpts in a review or criticism for purposes of illustration or comment; a parody which incorporates some elements (but not all) of the work being parodied; quotations from a speech, address, or position paper in a news report; and limited copying made by a student for academic work.

Compulsory Licenses: Generally, the exclusive rights granted

· display right
展览权
· parody
戏仿
· compulsory
强制的

· royalty
版税
· jukebox
投币式自动电唱机
· the Sonny Bono Copyright Term Extension Act of 1998
《1998年索尼·博诺延长版权保护期法》
· the Commerce Clause of the Constitution
《美国宪法》的商业条款

by the United States Copyright Act may be exercised as the copyright owner sees fit. If an author of a manuscript does not want the manuscript published or distributed, the author as the copyright owner can prevent publication and distribution. Similarly, these rights can be controlled through licenses however the copyright owner desires. However, several limited exceptions to this rule have been made in the Copyright Act under the guise of compulsory licenses. These compulsory licenses allow third parties to copy, perform, or distribute certain types of works without the copyright owners permission, in exchange for which the third parties must pay a predetermined royalty amount.

These compulsory licenses are extremely limited, and apply in only five circumstances: the production of new sound recordings based upon an existing nondramatic musical recording; the performance of a nondramatic musical recording in a jukebox; the simultaneous retransmission of television signals by cable television operators; the performance, display and recordal of certain works by public broadcasting entities; and a temporary right to retransmit television signals via satellite to household satellite dishes.

Duration of Copyrights

The duration of copyright protection recently changed as a result of the Sonny Bono Copyright Term Extension Act of 1998. The easiest rule to state is that Copyrights have expired on all United States works registered or published prior to 1923. As a result, all such works have entered into the public domain. Beyond that, however, it is more complicated to determine when a copyright will expire. Like the old provisions, the duration of copyright protection under these new provisions depends upon when the work was created and first published.

Trademark Law

Trademarks are also protected by federal statute, although the source of constitutional authority is different from that of the Patent and Copyright Acts. Rather than deriving from a specific grant of constitutional power, federal power to regulate trademarks and unfair competition stems from the Commerce Clause of the Constitution,

which authorizes Congress to regulate interstate commerce. Unlike patent and copyright protection, trademark law did not evolve from a desire to stimulate particular types of economic activity. Rather, its original purpose was to protect consumers in a world of mass merchandising from unscrupulous sellers attempting to fly under the banner of someone else's well-known logo or identifying symbol.

Trademark law governs the use of a mark (including a word, phrase, symbol, product shape, or logo) by a manufacturer or merchant to identify its goods and to distinguish those goods from those made or sold by another. Service marks, which are used on services rather than goods, are also governed by "trademark law". In the United States, certain common law trademark rights stem merely from the use of a mark. However, to obtain the greatest protection for a mark, it is almost always advisable to register the mark, either with the federal government, if possible, or with a state government. A mark which is registered with federal government should be marked with the ® symbol. Unregistered trademarks should be marked with a "tm", while unregistered service marks should be marked with a "sm".

A mark (such as a word or a logo) can only be considered a trademark or a service mark if it is distinctive. A distinctive mark is one that is capable of distinguishing the goods or services upon which it is used from the goods or services of others. A non-distinctive mark is one that merely describes or names a characteristic or quality of the goods or services. The distinctiveness of a mark can generally be categorized into one of five categories which fall along a spectrum of distinctiveness. From most distinctive to least distinctive, these categories are fanciful, arbitrary, suggestive, descriptive (including surnames), and generic.

Marks that are fanciful, arbitrary, or suggestive are considered distinctive enough to function as trademarks. On the other hand, if a mark is descriptive, the mark can function as a trademark or service mark only if it has obtained secondary meaning. Generic marks can never be a trademark.

Marks that are primarily surnames (such as "SMITH SHOES"

- unscrupulous 毫无顾忌的,全无顾忌的
- logo 标识
- distinctiveness 显著性
- generic 一般的,通用的
- fanciful 想象的
- suggestive 说明性的
- secondary meaning 第二含义

· HYATT MOTEL
凯悦饭店
· confusion
混淆
· incontestible status
无可争辩性

or "RODRIGUEZ COMPUTERS") are treated the same as descriptive marks under U. S. trademark law. As a result, surnames are not given protection as trademark until they achieve secondary meaning through advertising or long use. A trademark is "primarily a surname" if the public would recognize it first as a surname, or if it consists of a surname and other material that is not registrable.

Once a surname achieves secondary meaning, the mark is protectable as a trademark. Others cannot use the mark on confusingly similar goods, even if they have the same name. Thus, Jane McDonald could not open a restaurant called "MCDONALDS", nor could Joel Hyatt open a motel under the name "HYATT MOTEL", since the marks MCDONALDS and HYATT have achieved secondary meaning.

A mark is infringed under U. S. trademark law when another person uses a mark so as to cause confusion as to the source or sponsorship of the goods or services involved. Multiple parties may use the same mark only where the goods of the parties are not so similar as to cause confusion among consumers. Where a mark is protected only under common law trademark rights, the same marks can be used where there is no geographic overlap in the use of the marks. Federally registered marks have a nation-wide geographic scope, and hence are protected throughout the United States.

There are numerous advantages to securing federal registration of a trademark. Perhaps the most important advantage is that federally registered trademarks are national in scope, regardless of the actual geographic use made of the mark. This national scope contrasts greatly with the limited geographic range of common law trademarks.

Additional substantive benefits received through federal registration include: the ability to recover profits, damages and costs for infringement, including the possibility of receiving treble damages in certain circumstances; the ability to recover attorneys fees in infringement actions; the incontestible status that a mark can achieve after five years of registration, which serves to eliminate most arguments that the registrant does not have the exclusive right to utilize

the mark; the right to use the ® symbol in connection with the mark, which may deter potential infringers; increased ease of discovery by those doing trademark searches, which helps to prevent the adoption of confusingly similar marks by third parties; the right to sue for infringement in federal courts; and the ability to have the customs service block the importation of goods bearing an infringing mark.

Federal registration also makes it easier to prove an allegation of trademark infringement by providing *prima facie* evidence of trademark ownership and use. The registration can also be used as evidence that the mark does indeed function as a mark and is not confusingly similar to other registered marks.

The elements for a successful trademark infringement claim have been well established under both federal and state case law. A plaintiff in a trademark case has the burden of proving that the defendant's use of a mark has created a likelihood of confusion about the origin of the defendant's goods or services. To do this, the plaintiff should first show that it has developed a protectable trademark right in a trademark. The plaintiff then must show that the defendant is using a confusingly similar mark in such a way that it creates a likelihood of confusion, mistake and/or deception with the consuming public. The confusion created can be that the defendant's products are the same as that of the plaintiff, or that the defendant is somehow associated, affiliated, connected, approved, authorized or sponsored by plaintiff.

Infringement actions can be defended on the ground that the mark was procured by fraud; that it is being used deceptively; that it has been abandoned or subject to a naked assignment; or that it is being used to violate the antitrust laws. In addition, it can be argued that, through use, the mark has become the generic word for the product.

(From http://www.bitlaw.com)

- *prima facie* evidence
  表面证据
- likelihood of confusion
  混淆的可能性
- naked assignment
  非商誉性商标转让
- antitrust
  反垄断的

Notes

1. U.S. Copyright Act:美国版权法。

2. the Sonny Bono Copyright Term Extension Act of 1998: In the United States, the Sonny Bono Copyright Term Extension Act of 1998 extended the duration of U. S. copyrights by 20 years.《1998 年索尼·博诺延长版权保护期法》。该法把美国的版权保护期延长了 20 年。
3. the Commerce Clause of the Constitution: The provision of U. S. Constitution (Art. I, §8, cl. 3) which gives Congress exclusive powers over interstate commerce.《美国宪法》的商业条款。指《美国宪法》第 1 条第 8 款规定的条款,它授权国会排他性管理各州之间的贸易。
4. secondary meaning: association formed in the mind of consumer which links an individual product with its manufacturer or distributor. 第二含义。
5. HYATT MOTEL: 凯悦饭店。
6. *prima facie* evidence: evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. 表面证据。
7. naked assignment: assigning the mark without its accompanying goodwill. 非商誉性商标转让。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( ) 1. The copyright and patent laws stem from the same origin, so there is no difference in the protection provided by them respectively.

( ) 2. The Congress chose to use the ambiguous term "works of authorship" to cover a new "medium".

( ) 3. A computer program which is temporarily stored in the RAM and deleted when the computer is shut down is not protectable under the Copyright Act.

( ) 4. Fair use doctrine is not applicable to copyright. This is because copyright law grants unlimited rights to a copyright owner.

( ) 5. A third party enjoys the performance right and the distribution right after paying predetermined royalty.

( ) 6. Works created at different time enjoy different duration of copyright.

( ) 7. Trademark law originally aimed at protecting the interests of consumers and encouraging economic activities.

( ) 8. Unregistered marks are protected at the federal and state level, but they do not enjoy the same protection as registered marks.

( ) 9. A third party is not allowed to use a mark identical to a federally registered mark in a place where the mark is not commercially used.

( )10. Federal registration is a *prima facie* evidence of trademark ownership.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of the following terms.

English	Chinese
fixation	
	原创性
derivative right	
	复制权
choreographic works	
	强制许可
suggestive mark	
	联邦注册
secondary meaning	
	通用标志

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

priority	duplicate
plagiarism	renewal of registration
moral right	anonymous works
phonogram	adaptations
period of licensing	patent royalty
exclusive right	remuneration
know-how	misuse of copyright
lapse of license	inventive concept

Translation

Translate the following sentences into English.

1. 公民、法人的著作权(版权)、专利权、商标专用权、发现权、发明权和其他科技

成果权受到剽窃、篡改、假冒等侵害的，有权要求停止侵害，消除影响，赔偿损失。

2. 著作权包括下列人身权和财产权：发表权、署名权、修改权、保护作品完整权、复制权、发行权、出租权、展览权、表演权、放映权、广播权、信息网络传播权、摄制权、改编权、翻译权、汇编权及应当由著作权人享有的其他权利。
3. 商标使用的文字、图形或者其组合，应当有显著特征，便于识别。使用注册商标的，并应当标明“注册商标”或者注册标记。
4. 申请注册的商标，凡不符合本法有关规定或者同他人在同一种商品或者类似商品上已经注册的或者初步审定的商标相同或者近似的，由商标局驳回申请，不予公告。
5. 注册商标中含有的本商品的通用名称、图形、型号，或者直接表示商品的质量、主要原料、功能、用途、重量、数量及其他特点，或者含有地名，注册商标专用权人无权禁止他人正当使用。

Case Study

In Re Nantucket, Inc.

United States Court of Customs and Patent Appeals

677 F.2d 95(1981)

- in re 关于
- the Trademark Trial and Appeal Board 商标评审复议委员会
- misdescriptive 错误描述的
- the principal register 主注册簿
- the Lanham Act 《兰哈姆法》

Markey, Chief Judge.

Nantucket, Inc. (Nantucket) appeals from a decision of the Trademark Trial and Appeal Board (board) affirming a refusal to register the mark NANTUCKET for men's shirts on the ground that it is "primarily geographically deceptively misdescriptive". In re Nantucket, Inc; 209 USPQ 868 (TTAB 1981). We reverse.

Background

On March 13, 1978, Nantucket, based in North Carolina, filed application for registration of NANTUCKET for men's shirts on the principal register in the Patent and Trademark Office (PTO).

Refusal to register was based on §2(e)(2) of the Lanham Act, 15 USC 1052(e)(2), as interpreted by the board in In re Charles S. Loeb Pipes, Inc., 190 USPQ 238 (TTAB 1975), and in § §1208.02, 1208.05 and 1208.06 of the Trademark Manual

of Examining Procedure (TMEP).

Section 2(e)(2) provides:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(e) consists of a mark which,... (2) when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them...

TMEP §1208.02 indicates that a mark is primarily geographical, *inter alia*, if it "is the name of a place which has general renown to the public at large and which is a place from which goods and services are known to emanate as a result of commercial activity".

The examiner, citing a dictionary definition of "Nantucket" as an island in the Atlantic Ocean south of Massachusetts, concluded that the mark NANTUCKET was either primarily geographically descriptive or primarily geographically deceptively misdescriptive, depending upon whether Nantucket's shirts did or did not come from Nantucket Island.

Nantucket informed the PTO that its shirts "do not originate from Nantucket Island", and insisted that the mark would not be understood by purchasers as representing that the shirts were produced there because the island has no market place significance vis-a-vis men's shirts. Nantucket further asserted that the phrase "when applied to the goods of the applicant", indicates a congressional intent that "descriptiveness" not be determined in a vacuum, but only in connection with the nature of an applicant's goods. As applied to shirts, it was argued, NANTUCKET is arbitrary and nondescriptive, because there is no association in the public mind of men's shirts with Nantucket Island.

The examiner's final refusal was based on the view that, because the shirts did not come from Nantucket Island, NANTUCKET is "primarily geographically deceptively misdescritpive".

Before the board, Nantucket relied upon a number of cases, of which In re Circus Ices, Inc; 158 USPQ 64 (TTAB 1968), is rep-

· vis-a-vis
与…相对;与…比较;关于
· descriptiveness
描述性

· pertaining to
关于
· connotation
含意

resentative, for its asserted "public association" or "noted for" test. In that case, the board said:

The term "HAWAIIAN", meaning of or pertaining to Hawaii or the Hawaiian Islands, possesses an obvious geographical connotation, but it does not necessarily follow therefrom that it is primarily geographically descriptive of applicant's product within the meaning of Section 2(e).

In determining whether or not a geographical term is primarily geographically descriptive of a product, of primary consideration is whether or not there is an association in the public mind of the product with the particular geographical area, as for example perfumes and wines with France, potatoes with Idaho, rum with Puerto Rico, and beef with Argentina.

In the present case, it has not been made to appear that Hawaii or the Hawaiian Islands are noted for flavored-ice products or that the term "HAWAIIAN" is used by anyone to denote the geographical original of such products.

In referring to Amerise, the board viewed the "noted for" test, mentioned in Circus Ices, as relevant only to whether a geographic term is deceptive under §2(a). Regarding §2(e)(2), the board said:

any term which, when applied to the goods or services of the applicant, conveys to consumers primarily or immediately a geographical connotation is precluded from registration under Section 2(e)(2) notwithstanding the fact that the area or place named is not "noted for" goods or services of that type... Accordingly, the case of In re Circus Ices, Inc., supra, and any other case in which we may have similarly relied upon the "public association" or "noted for" test as the means for determining registrability of a geographic term under Section 2(e)(2), is hereby overruled. *Id.* at 871.

The board concluded that the "term 'NANTUCKET' has a readily recognizable geographic meaning, and... no alternative non-geographic significance... and hence falls within the proscription of Section 2(e)(2)". *Id.*

· registrability
可注册性
· nebulous
模糊的

Issue

Did the board err in refusing registration of NANTUCKET for shirts on the principal register in view of §2(e)(2)?

The Board's Test

The board correctly notes that its test for registrability of geographic terms is "easy to administer" and "minimizes subjective determinations by eliminating any need to make unnecessary inquiry into the nebulous question of whether the public associates particular goods with a particular geographical area in applying Section 2(e)(2)". Ease-of-administration considerations aside, the board's approach does raise the question of whether public association of goods with an area must be considered in applying §2(e)(2). That question is one of first impression in this court. We answer in the affirmative.

The board's test rests mechanistically on the one question of whether the mark is recognizable, at least to some large segment of the public, as the name of a geographical area. NANTUCKET is such. That ends the board's test. Once it is found that the mark is the name of a known place, i.e. that it has "a readily recognizable geographic meaning", the next question, whether applicant's goods do or do not come from that place, becomes irrelevant under the board's test, for if they do, the mark is "primarily geographically descriptive"; if they don't, the mark is "primarily geographically deceptively misdescriptive". Either way, the result is the same, for the mark must be denied registration on the principal register unless resort can be had to §2(f).

The Statute

One flaw in the board's test resides in its factoring out the nature of applicant's goods, in contravention of §2(e)(2)'s requirement that the mark be evaluated "when applied to the goods of the applicant", and that registration be denied only when the mark is geographically descriptive or deceptively misdescriptive "of them"

· atlas
地图册,图表集
· gazetteer
地名辞典

(the goods).

Another flaw in the board's test lies in its failure to give appropriate weight to the presence of "deceptively" in §2(e)(2). If the goods do not originate in the geographic area denoted by the mark, the mark might in a vacuum be characterized as geographically misdescriptive, but the statutory characterization required for denial of registration is "geographically deceptively misdescriptive". Before that statutory characterization may be properly applied, there must be a reasonable basis for believing that purchasers are likely to be deceived.

Now, ivory is descriptive only with respect to the tusks of the elephant. Ivory is descriptive only of ivory. When applied to soap it is perfectly registrable although it is misdescriptive. But the ivory for soap is certainly not descriptive of soap. It is misdescriptive of soap, but it is not deceptive.

The board recognized in its opinion in this case that Section 5 (b) of the Trademark Act of 1905 precluded registration of marks which were "merely a geographic name or term". Sec. 5, 33 Stat. 725-26. Under that Act, a term appearing in an atlas or gazetteer would be refused registration. 1 J. McCarthy, Trademarks and Unfair Competition, §14. 11 at 509 (1973). The board then described the effect of the Lanham Act in narrow terms, saying: "Today registration of a geographic name or term may not properly be refused if the geographic meaning is minor or obscure or if the term has an alternative non-geographic meaning". Nantucket, 209 USPQ at 870. Presumably, the board would also view as registrable the name of an area totally devoid of commercial activity. TMEP 1208.02 instructs examiners to note whether goods (in general) "are known to emanate" from the area. Nothing in the Lanham Act, however, warrants the limitation placed on §2(e)(2) by the Board. Indeed, the board's test, in its concentration on whether the mark is a place name, would resurrect most if not all of the pre-Lanham Act practice with respect to such terms.

Public Association

Geographic terms are merely a specific kind of potential trademark, subject to characterization as having a particular kind of descriptiveness or misdescriptiveness. Registration of marks that would be perceived by potential purchasers as describing or deceptively misdescribing the goods themselves may be denied under §2(e)(1). Registration of marks that would be perceived by potential purchasers as describing or deceptively misdescribing the geographic origin of the goods may be denied under §2(e)(2). In either case, the mark must be judged on the basis of its role in the marketplace.

As the courts have made plain, geographically deceptive misdescriptiveness cannot be determined without considering whether the public associates the goods with the place which the mark names. If the goods do not come from the place named, and the public makes no goods-place association, the public is not deceived and the mark is accordingly not geographically deceptively misdescriptive.

In National Lead Co. v. Wolfe, 223 F.2d 195, 199, 105 USPQ 462, 465 (CA 9), cert. denied, 350 U.S. 883, 107 USPQ 362 (1955), the court held that neither DUTCH, nor DUTCH BOY, as applied to paint, was used "otherwise than in a fictitious, arbitrary and fanciful manner", and noted that "there is no likelihood that the use of the name 'Dutch' or 'Dutch Boy' in connection with the appellant's goods would be understood by purchasers as representing that the goods or their constituent materials were produced or processed in Holland or that they are of the same distinctive kind or quality as those produced, processed or used in that place".

There is no evidence of record to support a holding that the mark NANTUCKET as applied to men's shirts is "deceptively misdescriptive". There is no indication that the purchasing public would expect men's shirts to have their origin in Nantucket when seen in the market place with NANTUCKET on them. Hence buyers

are not likely to be deceived, and registration cannot be refused on the ground that the mark is "primarily geographically deceptively misdescriptive".

Accordingly, the decision of the board is reversed.

Notes

1. the Trademark Trial and Appeal Board (the TTAB): a body within the United States Patent and Trademark Office (USPTO) responsible for hearing and deciding certain kinds of cases involving trademarks. These include appeals from decisions by USPTO examiners denying registration of marks, and opposition proceedings filed against trademark applications. 商标评审复议委员会。负责审理商标争议案件,包括当事人就美国联邦商标审查员作出的不予注册的决定提起的上诉和针对商标注册申请提出的异议。
2. the principal register: The primary register of trademarks is maintained by the United States Patent and Trademark Office. Having a mark registered under the principal register confers certain benefits on the holder of the mark. Among them are:
   - nationwide constructive use and constructive notice, which cuts off rights of other users for similar marks,
   - the possibility of achieving incontestable status after five years, which cuts off certain defenses of potential infringement defendants,
   - the right to bring a federal cause of action for infringement without regard to diversity or amount in controversy,
   - the right to request U. S. Customs and Border Protection officials to bar importation of goods bearing infringing trademarks,
   - provisions for treble damages, attorney fees, and various other remedies.

   Trademarks must be inherently distinctive, or have acquired sufficient secondary meaning, to be registered on the principal register. 主注册簿。美国联邦专利商标局的注册簿分为"主簿"与"副簿"两部分,主簿注册的优势主要体现在:全国范围内的通告、在特定情况下具有不可争辩性、可不考虑当事人的州公民身份及争议数额在联邦法院起诉、在主簿注册商标的注册人有权向海关备案注册商标、阻止非经授权的仿冒商标的商品进口。主簿注册要求申请商标必须具有内在显著性或已经获得充分的第二含义。
3. the Lanham Act: found in Title 15 of the U. S. Code and contains the federal statutes governing trademark law in the United States. 《兰哈姆法》。在《美国法典》

第 15 编,是美国联邦商标成文法。

Exercises

1. Brief the case and present the case brief to the class.
2. Suppose you were an attorney retained by the Nantucket, Inc.. Develop an argument on the basis of the opinion.

Unit Twelve Family Law

Words and expressions:

termination	post-termination	marriage	paternity
adoption	child abuse	divorce	custody
support	nuclear family	extended family	quasi family
alternative family	the Family Court	Family Relationship Centers	
Legal Aid Commissions			

I. Spot dictation. listen to the passage and fill in the blanks according to what you hear.

Family Law is that branch of law consisting of _____ that regulate the creation, ongoing relations, termination, and post-termination consequence of family relationships, and _____ pertaining to such relationships. Direct regulation of family relations including rules governing _____, etc. is the major concern of law school courses and of most family law practice. However, indirect regulation of family relations arises in virtually all other subjects in the law school curriculum, also. The addition of the "_____" to otherwise normal problems of property, evidence, contract, or tort law often creates a new, hybrid dilemma in which the family law issue may _____ the other issues. Historically, the primary focus of state family law regulation has been and still is on _____, though the regulation of relations between persons in analogous relationships such as _____ is increasingly arising in the cases and being discussed in the literature.

Ⅱ. Listen to an interview of Attorney-General Robert McClelland by Steve Vizard, and complete the following statements.

1. One of the most radical changes to the family law system is _____
   _____
   _____.
2. According to Robert, people empower the mediator to resolve matters concerning children because they think _____
   _____
   _____.
3. Vizard says most people think it is necessary to involve a lawyer in the mediation. The reasons are:
   (1) It is a _____ way.
   (2) Most people in the dispute aren't thinking necessarily straight or _____, or _____, or _____.
4. It is _____ who decide to involve a lawyer in the mediation.
5. In answering Vizard's question concerning how the mediation system advantage children, McClelland said _____
   _____
   _____.

Text A

Introduction to Family Law

"Family law" is really a set of disparate subjects grouped under one heading. Taken as a whole, it is a complex field made especially difficult to describe because most of this vast body of law is state law and no two states treat the subject identically.

In recent years, however, the federal government has passed a wide variety of laws that have had a direct impact on local law. Because of this, more of family law today is uniform than at any time in American history.

In all areas of family law, the state invariably looms in the background. Of course, intimate relationships are formed outside the law's authority. However, law determines whether or not these

- disparate 完全不同的
- loom 隐现
- intimate relationship 亲密关系

· wedlock
婚姻
· putative father
公认的父亲
· adoption
收养
· omnipresent
无所不在的
· ubiquitous
无所不在的

relationships will be formally recognized. This determination can be of great significance. It may mean whether the law recognizes a parent-child relationship—as when a child is born out of wedlock and the mother, child or putative father seeks to have the parent-child relationship formally acknowledged. That determination, in turn, will affect a variety of vital matters including the child's right to inherit from the "father", and the father's right to visit with or obtain custody of the child or even to prohibit the child's adoption by others. To a corresponding degree, when the state refuses to recognize an intimate relationship (by making it unlawful for a couple to marry, for example), that determination has significant emotional and financial consequences. It can mean the difference between a person's having no entitlement to any part of another's property, and being entitled to half of all that person earned during the period of the relationship. In this sense, the state is omnipresent in the intimate affairs of Americans. But it looms in the background.

It is in the background in still another sense. Not only are intimate relationships formed without state involvement, they are dissolved that way as well. When relationships break up, the parties are free to agree between themselves on virtually anything about their affairs. Many of these agreements will never be reviewed by state officials. Others will be formally approved, but without meaningful scrutiny. The vast majority of all break-ups are resolved by such private agreements. But these agreements, nonetheless, are made "in the shadow of the law". What the law has to say on certain topic is known by both parties and is, to a greater or lesser degree, taken into account in fashioning an agreement. In these senses, then, law is ubiquitous even in the most private of family affairs.

A. Marriage

Although marriage is among the most intimate of relationships, it is nonetheless highly regulated by law. All states generally require a license in order to enter into a formally recognized marriage contract. In many states, both parties must appear in person to ob-

tain a license and provide information about themselves, including whether they were married before.

Many states also impose a waiting period after the application for marriage is sought and a physical examination, usually limited to a test for sexually transmitted disease. Many couples in a hurry to marry choose to do so in states that have the fewest restrictions, such as Nevada. These states perform thousands of out-of-state marriages each year. A marriage legally entered into by the laws of one state will be recognized by other states.

Though a number of states will recognize a "common law" marriage, —a long-term cohabiting relationship, usually including the couple's public declaration that they are married—even common law marriages must meet certain eligibility criteria. Every state places restrictions on those eligible to marry. The most common concern age; the relationship of the parties to each other (both incest-marriage between blood relatives of a certain degree—and same-sex marriages, for example, are prohibited); and current marital status (all parties must be single when they wish to marry—bigamy and polygamy are prohibited throughout the United States). In recent history, many states prohibited marriages between members of different races; however the Supreme Court ruled these miscegenation laws unconstitutional in 1976.

No state recognizes marriages between two people of the same sex. However, in 1993, the Supreme Court of Hawaii held that a refusal to grant marriage licenses to same-sex couples may offend the state constitution. When couples who wish to marry are unable to do so because of legal restrictions, they are denied opportunities and rights that married couples enjoy. These include such benefits as tax reductions for legal dependents or joint filings; inheritance rights when one partner dies without leaving a will; the right to sue for injuries to the other partner; employment-related health benefits; sick and bereavement leave; and survivorship rights to pension and insurance plans. A number of communities in the United States have passed domestic partnership ordinances which allow for a couple to register as partners once they have met certain requirements.

- a "common law" marriage
  普通法婚姻
- cohabiting relationship
  同居关系
- the most common concern age
  最普遍的结婚年龄
- incest
  乱伦
- blood relative
  血亲
- marital status
  婚姻状态
- bigamy
  重婚
- polygamy
  一夫多妻或一妻多夫
- miscegenation
  不同种族(间)通婚
- tax reduction
  扣减税
- legal dependent
  受赡养(扶养、抚养)人
- joint filing
  共同申请
- bereavement leave
  丧假
- survivorship right
  幸存者财产所得权

· familial
家庭的
· abandonment
遗弃
· adultery
通奸
· irreconcilable
不可调和的

B. Divorce

As changing cultural values in the United States over the past two generations have increasingly tolerated familial breakup and divorce, the laws of divorce in the various states have made it ever easier for couples to end their marriages. When divorce was frowned upon culturally—as it was until the middle of this century in the United States—law treated marriage as a life-long contract which could be breached only upon a few recognized grounds, such as abandonment; adultery; cruelty; or other marital 'fault'. In most states, unless one spouse engaged in conduct that served as grounds to sue for divorce, a couple could not obtain a divorce.

Today, divorce is a common fact of life in the United States, with over one million marriages ending in divorce each year. Although only a few states have done away with fault-based grounds altogether, all fifty states have now added some form of no-fault provisions to their divorce laws. In most states today, it is sufficient that the parties have "irreconcilable differences", or live separately from each other for a prescribed period of time, such as 1 year, to divorce.

As a result of these changes, there are relatively few legal battles fought in American courts about the propriety of the divorce. Instead, what legal battles are fought focus on three principal components of divorce: child custody and visitation; child support and alimony; and property distribution. In fact, relatively few divorces result in any contested dispute. Parents commonly decide custody arrangements on their own, with the help of a mediator or through a process of attorney-assisted negotiations. Mediation, an informal process using a neutral person to assist parties to reach their own agreement, usually is used to resolve custody and visitation matters, although it may also include alimony and property settlements. In some states, even when couples seek judicial assistance to resolve their disputes, court rules require them to use divorce mediation before being allowed to obtain a judicial hearing.

C. Child Custody and Visitation

Because divorce formally requires state action (though the issuance of judicial decree terminating the legal relationship of mar-

riage), courts technically must approve many of the divorce-related agreements, even those consensually made. In particular, judges formally are called upon to ensure that an appropriate arrangement has been made for the custody and support of any minor children of the marriage. However, privately made agreements on these matters are routinely approved by courts in uncontested divorces.

· biological or adoptive parents
生身或养父母

Judicial resources to determine custody or visitation are preserved for cases when parents do not settle the matter privately. In many courts, judges engage psychiatrists, social workers, court-appointed guardians for the child, or other mental health professionals to assist the judge to reach the best result for the child, however, the question before the court is relatively narrow: how should the custody arrangements for the children be allocated between the parents?

In many states, custodial parents are not free to move out of state without obtaining the non-custodial parent's consent or the court's permission. Even in the absence of a statutory restriction, the non-custodial parent may be able to complain that a move would interfere with visitation rights. In some states, there is a presumption against a move, and the parent wishing to move must demonstrate that the child's best interests will not be infringed as a result. Other states presume that a custodial parent is entitled to move to another state unless the opposing parent can prove that the move is sought for the purpose of interfering with visitation.

Not only parents may seek judicial orders to visit their children. Within the last 30 years, every state has enacted legislation granting grandparents the right to petition for visitation of their grandchildren under certain circumstances. Most of these statutes allow grandparents to petition for visitation only when the nuclear family has been disrupted in some way, for example, through divorce or death.

Step-parents have lesser rights to custody or visitation than biological or adoptive parents. However, courts have looked for ways to preserve and protect the continuity of the child's relationship with a step-parent who has served as a significant caregiver. It is easier for a step-parent to obtain visitation than to win custody, and some states expressly authorize step-parent visitation in the event of death

· Census
人口普查
· maintenance
抚养费,赡养费

or divorce.

D. Child Support and Alimony

Parents are obliged to support their children whether or not they have custody of them, even if they never married the children's other parent. Legal disputes often arise when non-custodial parents fail to pay at least what a court would require. Unfortunately, these disputes arise all too commonly in the United States where fewer than half of the custodial parents who have child support orders actually collect the full amount they are owed. Moreover, this figure covers only those parents who have child support orders in the first place. According to Census data, only 72 percent of divorced mothers have support orders. Among never married mothers, the figure is far lower—only 24 percent have an award of support for their children. By far the greatest problem in the child support area is ensuring that custodial parents receive support payments. This section discusses the principal issues and trends in the area of court awarded child support.

Parents are, of course, free to provide their non-custodial children with more than the minimum to be awarded by courts. But children have the right to be supported, and custodial parents are authorized by laws in every state to bring an action for child support on the child's behalf when a non-custodial parent fails to pay adequate support. Child support, technically viewed as a child's right, must be made equally available to out-of-wedlock children and children born of a marriage.

In most states, as a general rule parents must support their children until they are 18 years old. In some states, this age is 19 or even 21. There may be reasons to shorten the time that parents must support their children, such as when a child becomes "emancipated" (for example, by marrying or becoming self-supporting after leaving the parents' home). There also may be reasons to lengthen the period, such as when children are in college.

"Alimony" or "maintenance" is financial support to a former spouse. Once regarded as a right of the wife, it is awarded today on a gender-neutral basis. Women continue to be the more likely re-

cipient of alimony because they are more likely than men to have engaged in nonremunerative tasks during the marriage and, as a result, have diminished earning capacities. Despite this modern justification for its, alimony is currently disfavored and awarded in only a minority of divorces. It is now more commonly termed "maintenance", "spousal support", or "rehabilitative" or "transitional maintenance". About half the states today impose time limits on these payments, commonly limiting them to 10 years or less. These payments are taxable to the spouse who receives them and deductible from the income of the spouse who makes them. By contrast, child support payments are not deductible expenses or includable income, but are relevant in determining which parent may claim the child as a dependent on his or her tax return.

Marital fault, which has otherwise increasingly become an insignificant factor in divorce, may result in a reduction in the amount or length of an alimony award. Alimony is often reduced or eliminated when the person receiving payments chooses to live with another person. However, many courts will not reduce alimony under such circumstances if the person's income has not actually increased. As a general rule, alimony ends when the recipient remarries.

E. Property Distribution

Separating parties are free to make whatever financial arrangements among themselves they choose. Regardless of how many assets a couple has, either party is free to waive all claims to shared property. Courts will not review provisions of property distribution unless they are asked to by one of the parties or unless the distribution is intertwined with issues concerning child support. Although parents cannot waive a child's right to support, they may agree to take less for themselves than a court would order if the matter were contested. In addition, couples occasionally sign contracts—called "prenuptial" or "antenuptial" agreements—before they marry that attempt to clarify which property owned by one person before the marriage is unavailable to the other person. In most states, courts will enforce these agreements if the court considers the agreement to be reasonable. However, courts will not enforce these agreements

- nonremunerative 无偿的
- spousal support 配偶赡养费
- rehabilitative 恢复的
- tax return 纳税申报表
- prenuptial 结婚前的
- antenuptial 结婚前的

· *Marvin v. Marvin*
马文诉马文
· community property
夫妻共同财产

when they completely bar someone from seeking property earned during the marriage.

There are general rules by which courts will decide property distribution matters when separation parties bring such disputes to court. Although this section uses the phrase "marital property", jurisdictions following *Marvin v. Marvin* may allow former partners in non-marital relationships to share assets acquired during the relationship and, for those states, the principles defining "marital assets" also apply to non-marital relationships.

Over the past 20 to 25 years, the clear trend in the United States has been away from technical notions of title to an expansive definition of shared marital property. Eschewing the term "community property", these states have changed their rules by invoking equitable principles that allow courts to distribute property acquired during a marriage without regard to title. "Equitable distribution" authorizes courts to divide all property acquired during the marriage, regardless of who holds title to a particular asset. In most states, today, divisible marital property includes only property acquired as a result of the efforts of one or both spouses during the marriage. Property acquired prior to the marriage, property given as a gift to a spouse by a third party, and, at least in a majority of states, property inherited by the spouse during the marriage continue to be treated as separate property.

Notes

1. intimate relationship: a particularly close interpersonal relationship. It can be defined by these characteristics: enduring behavioral interdependence, repeated interactions, emotional attachment, and need fulfillment. Intimate relationships consist of the people that we are attracted to, whom we like and love, romantic and sexual relationships, and those whom we marry and provide and receive emotional and personal support from. 亲密关系。尤指爱人或恋人关系,或者姻亲关系。
2. a "common law" marriage: a long-term cohabiting relationship, usually including the couple's public declaration that they are married. 普通法婚姻。指长期共同居住并对外宣称已婚的一种形式。

3. the most common concern age: generally no one under 14 years old may marry, and young persons under 18 years of age must have parental permission. 最普遍的结婚年龄。
4. legal dependent: a person who derives principal support from another and usually may invoke laws to enforce that support. 受赡养(扶养、抚养)人。
5. joint filing: Parties may jointly file dispute resolution and approval proceedings when there are common issues of law or fact. 共同申请。
6. Census: The United States Constitution mandates that a census be taken every ten years in order to apportion the number of members of the United States House of Representatives among the several states. Census statistics are also used in order to apportion federal funding for many social and economic programs. 人口普查。《美国宪法》规定的每 10 年举行一次的人口普查。
7. tax return: an income-tax form on which a person or entity reports income, deductions, and exemptions, and on which tax liability is calculated. 纳税申报表。
8. *Marvin v. Marvin*: In 1971, Marvin was sued by his live-in girlfriend, Michelle Triola, who legally changed her surname to 'Marvin'. Though the couple never married, she sought financial compensation similar to that available to spouses under California's alimony and community property laws. Triola claimed Marvin made her pregnant three times and paid for two abortions, while one pregnancy ended in miscarriage. She claimed the second abortion left her unable to bear children. The result was the landmark "palimony" case, *Marvin v. Marvin*, 18 Cal. 3d 660 (1976). 马文诉马文。详见本单元 case study。
9. community property: property owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse holding a one-half interest in the property. Only nine states have community-property systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. 夫妻共同财产。指在婚姻存续期间夫妻共同获得的财产,夫妻各方享有相同份额。不包含一方因继承或赠与而获得的财产。

Exercises

Check Your Understanding

Answer the following questions according to the text.

1. According to the author, why is "family law" difficult to describe?

2. What impact does the law determination have on intimate relationships?
3. What is the role of the states in determining the intimate relationship?
4. Is a couple who married in California recognized in New York? Why or why not?
5. What are the most common concerns regarding the eligibility of marriage?
6. What are the rights that married couples have?
7. How did family law change with the respect of divorce in most states of America?
8. What are the most disputable issues in divorce suit?
9. Who may have right to visitation of the child whose parents are divorced?
10. In America, when do most parents stop supporting their children?
11. Who are most likely to receive alimony, men or women? And why?
12. Under what circumstances is alimony reduced or eliminated?
13. When are courts involved in property distribution between separating parties?
14. What is the purpose of couples entering into "prenuptial" or "antenuptial" agreements? Explain the validity of the agreement.
15. What is the principle established in *Marvin v. Marvin*?
16. What does divisible marital property include in most states in America today?

Build Up Your Vocabulary

I. Match the items in the following two columns.

A	B
1. wedlock	a. the crime of marrying while one has a wife or husband still living, from whom no valid divorce has been effected
2. adoption	b. a noncustodial parent's or grandparent's court-ordered privilege of spending time with a child or grandchild who is living with another person, usually the custodial parent
3. bigamy	c. the state of being married, marriage
4. putative father	d. the statutory process of terminating a child's legal rights and duties toward the natural parents and substituting similar rights and duties toward adoptive parents
5. inheritance	e. a marriage between persons of different races, formerly considered illegal in some jurisdictions
6. miscegenation	f. the care and control of a person for inspection,

	preservation, or security
7. familial	g. the alleged biological father of a child born out of wedlock
8. abandonment	h. property received from an ancestor under the laws of intestacy
9. custody	i. of or relating to a family
10. visitation right	j. the man and woman who conceive a child
11. biological parents	k. the act of leaving a spouse or child willfully and without an intent to return
12. maintenance	l. voluntary sexual intercourse between a married person and a person other than the offender's spouse
13. prenuptial agreement	m. an agreement made before marriage usu. to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse
14. adultery	n. alimony

Ⅱ. Fill in the blanks with the words or expressions given below, changing the form if necessary.

inherit	custody	divorce	adoptive	alimony
marital	distribution	inheritance	wedlock	miscegenation

1. A custodial parent is the parent who is given physical or legal _____ of a child by court order.
2. Two brothers in Hungary who are so poor that they live in a cave are in line to receive a $6.6 billion _____ from a long-lost grandmother.
3. Here you will find information for _____, birth and foster families, and resources for anyone who works with or knows a child through adoption.
4. The new administration _____ the economic problems of the last four years.
5. Payment that a family court may order one person in a couple to make to the other person when that couple separates or _____.
6. Nationwide, the number of couples living together out of _____ has grown from 500,000 in 1970 to more than 5 million today.
7. There are basically three ways in which money or property can change hands between divorced or divorcing spouses: child support, _____, and division of property.
8. The spousal privilege, in the United States, comprises two separate privileges, the

_____ confidences privilege and the spousal testimonial privilege.

9. _____ is a term that refers to the mixing of genes between genotypes of different human races.
10. In some states, a no-fault divorce is allowed and property _____ is not affected by individual actions of the parties.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

awarded	separation	subject	minor	court
abandoned	welfare	joint	parents	guardian

In the first instance, parents are entitled to the custody of their children. They are free to make all decisions relating to the _____ of their child as they see fit, short of violating limited protective laws. Modern statutes and courts have _____ the father's traditional primary role and now give equal "powers, rights and duties" to both _____. In the case of divorce or _____, all rights of decision and control over the child go to the parent _____ custody, except when _____ custody is awarded. In the case of the death of one parent, custody "devolves" on the other. In the case of death of the second parent, the second parent may all but "will" the child to a person of his or her choosing, by appointing that person "testamentary _____". Such appointment is _____ to judicial confirmation, but usually not much investigation. In the absence of a parent or guardian, or in the case of the legally established inadequacy of a parent or, in some jurisdictions "whenever necessary or convenient", or at the request of a _____ above the age of 14, the _____ will appoint a guardian of the person and of the estate of the child. As may be appropriate, different persons may serve as guardian of the child's person and as guardian of the child's estate.

Translation

Translate the following sentences into Chinese.

1. Where the parents do not agree, the court shall award parental authority and physical custody to the parent who the court determines, after a hearing, had performed the principal responsibilities for the care and supervision of the child during the family relationship, unless the court finds under subsection (3) that the other parent is the more appropriate caretaker.
2. The court may grant a maintenance order for either spouse, only if it finds that the

spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

3. Alimony is deductible by the payer from his or her gross income and must be included by the recipient in her or his taxable income, whereas a property settlement or child support is neither deductible to one nor income to the other.
4. Where the father, the mother and the child have lived in a *de facto* family setting, the father has standing to assert appropriate visitation rights.

Text B

Marriage and Property Rights

- intestacy law 无遗嘱继承法
- social security 社会保障
- health care 医疗保健
- ceremonial marriage 仪式结婚
- vitiate 使无效

Couples usually marry for intangible, personal reasons and romantic love plays a major role in the decision to marry in the United States. But there are also certain tangible benefits and legal rights that accrue to those in a valid marriage. For example, the federal income tax system affords special rates to married couples. Further, if one spouse dies intestate, the surviving spouse is entitled to some or all of the decedent's estate under intestacy laws. Similar legal rights exists with respect to social security benefits, pension plans and health care benefits.

1. Ceremonial Marriages

Legal capacity to marry is fulfilled when an individual is of legal age, mentally competent, and not already married. Age requirements vary among states, ranging generally from 16 to 18 years old. Mental competence, which requires that a person understand the nature and consequences of marriage at the time of the act, is presumed unless it is proven that a person either was mentally ill or was involuntarily intoxicated. In the case of someone who is mentally ill, a legal guardian must give consent to the marriage. Both parties must freely consent to the marriage. If one party is coerced under duress to marry the other, the marriage is invalid. Free and voluntary consent may also be vitiated by fraud, jest, sham or some oth-

· perfunctory
例行公事的
· blood relationship
血缘关系
· secular
世俗的

er ulterior motive.

The procedure for marrying begins with the couple obtaining a marriage license issued by the county clerk. This requirement is typically perfunctory unless the applicants have a close blood relationship, are of the same sex, one or both lack legal capacity, or one of the parties is already married. After an application for a marriage license is submitted, most states impose a brief waiting period, usually 3 days to a week, before a license is issued. Many states required a blood test to check for sexually transmitted diseases though the right to marry is not denied based on the results.

Finally, the parties must solemnize their marriage through someone authorized by law to do so. A religious representative will do, such as a priest, rabbi, or minister. Some civil officials have that power, such as a judge or the mayor of a city. Most commonly solemnization involves a ceremony during which the couple announces their intent and desire to be married. The secular purposes for this requirement are to give public notice and to impress upon the parties the serious nature of the commitment they are making to the other person.

2. Common-law Marriages

Approximately one-fourth of the States recognize "common law" marriages which, technically, meet none of the formal requirements described above. Thirty-seven states have either passed statutes or decided by case law to abolish common law marriages. These informal marriages are entered into by the parties pursuant to an agreement to be married, but without formal solemnization. The agreements are almost never written and are rarely agreed to in explicit detail by the parties. Rather, they are implied after the fact by courts, which draw inferences about the existence of an agreement from the conduct of the parties. If a valid common law marriage can be proven, then it will entitle the spouses or children to the same benefits and legal rights outlined above for a ceremonial marriage. The most common situations where common-law marriage is sought to be proved is where one partner dies and the other seeks to claim a share of the estate or some form of other benefits tied to marriage, such as workers' compensation payments or social security benefits.

Courts determining whether a common law marriage existed will consider whether the couple held themselves out to the public as husband and wife, whether they cohabited, filed joint tax returns, maintained a joint bank account or undertook any other actions which indicated their intent to be married. The couple must also have manifested a present intent to be husband and wife and must have the capacity to marry. An intent to ceremonially marry in the future may preclude a finding of a present intent to be husband.

A common law marriage will be recognized by all states if it was valid where and when it was entered into. Most courts that have examined this issue rely on the conflicts of law rule that the law of the place of the marriage legally formed in one state will be recognized as valid even by the states that do not permit common law marriage.

3. Marriage and Property Rights

Common Law At common law, the husband dominated virtually all aspects of the marital relationship.

A single woman had legal capacity at common law, but a married woman had none. A married woman could neither enter into contracts, nor could she sue or be sued. Further, any real or personal property belonging to the wife was controlled by the husband upon marriage. The wife's personal property actually became the property of her husband, and on his death passed to his personal representative. Even such items as clothing and jewelry were owned by the husband, although these did come back to the wife if the husband died. While the wife retained the estate of inheritance in real property owned by her prior to the marriage, the husband had control over that property, including any rents or profits generated by the land, for the duration of the marriage.

Married Woman's Property Acts In England, equity courts developed some exceptions to common law rules that limited women's legal capacities. However, these devices were not as widely used by the American courts. Consequently, in the middle of the nineteenth century, state legislatures began enacting statutes to reduce or eliminate the legal disabilities of married woman. These were generally

· emancipation
解放

called "*Married Women's Property Acts*". By 1900, all states had adopted such laws in one form or another, but those laws fell far short of granting married women full legal capacity. Further, courts had a tendency to interpret the statutes as conservatively as possible. This reflected the persistent attitude of the time that married women needed to be protected.

Over time the legislatures passed specific legislation correcting the courts' misinterpretations. Ultimately, the *Married Women's Property Acts* removed all of the married woman's disabilities. She was free to own, convey or sell property, to contract, engage in business, seek employment and keep her own earnings. A married woman could sue or be sued, make a will and testify in court. Finally, she became fully responsible for her own criminal and tortuous conduct. Along with this emancipation, the concept of separate property developed. Under the *Married Women's Property Acts*, the property of each spouse, whether acquired before or during the marriage, remained that spouse's property. A spouse had no interests, therefore, in property individually owned by the other spouse. This meant that the non-wage-earning spouse, typically the wife, had no property interest in the husband's wages. Consequently, the equality of women that these acts sought to achieve remained largely illusory, because the husband, as the sole earner, became the sole owner of all property acquired with his wages.

Modern Common Law or Separate Property Approach The vast majority of the states have followed the common law separate property approach, but courts and legislatures have modified it in the event of divorce to prevent inequity. Today separate property statutes require an "equitable distribution" of the property acquired during marriage to achieve a fair settlement. This approach is based on the idea that a marriage is a shared enterprise and the assets of this enterprise should be divided equitably considering the contributions of each party, including homemaking services and other factors. This treatment of marital assets upon divorce closely resembles the approach taken by "community property" states.

Community Property Approach A minority of the states has

adopted what is called a "community property" approach, borrowed from the civil law systems in Europe. Under this approach, all property acquired during the marriage is community property and both spouses share an ownership interest in it from the time that it is acquired. Property acquired prior to marriage and gifts or inheritances either spouse acquires during marriage remain separate property unless commingled. Also, depending on the state, profits or interests earned on separate property may become community property if commingled. Upon divorce, each spouse retains his or her own property and the community property is divided "equally" or, in several states, "equitably".

Prenuptial Agreements In most community property states and separate property states, the parties may vary the usual rules by agreement. Pursuant to an "prenuptial agreement" (sometimes called an "antenuptial" agreement) the parties may choose to characterize all of their property as separate or community property, or they may specifically characterize certain items of property. Prenuptial agreements are contracts entered into by parties prior to marriage. These contracts, which stipulate a division of property upon the dissolution of the marriage or the death of one partner, are often used when a wealthy person marries someone with considerably less money and desires to protect his or her children's inheritance. Essentially, the agreement was used to prevent the less wealthy spouse from contesting the will.

Recently, prenuptial agreements have had broader purposes. Because of an increasing divorce rate, the existence of multiple marriages in a lifetime, and the opportunity for both spouses to accumulate wealth, both parties may have an interest in setting out beforehand how they would wish their property distributed should the marriage end. Not all states recognize agreements for these purposes, especially if entered into primarily in contemplation of divorce, generally on the grounds of the public policy of encouraging marriage and disfavoring divorce. The Uniform Marriage and Divorce Act allows such agreements to be "considered" in a divorce, though it does not give them binding effect.

- commingle 混同的
- division of property 财产分割
- dissolution of the marriage 婚姻关系解除
- the Uniform Marriage and Divorce Act 《统一结婚离婚法》

At the very least, prenuptial agreement must satisfy the basic requirements of contract law, including the requirement that the agreement be written to satisfy the statute of frauds. However, there are other requirements that some courts insist upon that go beyond the normal requirements of a contract in view of the state's greater interest in marriage. One requirement is a full disclosure of the assets and liabilities of both parties before concluding the agreement. This prevents one spouse from assuming liability for debts, not realizing the extent of that liability, and generally insures that both parties know the financial implications of the agreement. Another requirement is that the provisions of the economic settlement must be fair and reasonable. Courts will refuse to enforce an agreement that is grossly unfair or one-sided, especially when it is evident that one party took advantage of the other party's ignorance or lack of knowledge in business affairs. The courts are more willing to enforce an prenuptial agreement when the parties were each represented by their own lawyers.

Notes

1. social security: primarily a social insurance program providing social protection, or protection against socially recognized conditions, including poverty, old age, disability, unemployment and others. Social security may refer to social insurance, income maintenance, services including medical care, aspects of social work and even industrial relations. 社会保障。是针对贫穷、年迈、残疾、失业等问题而提供的一种社会保障或保险。
2. health care: the treatment and prevention of illness, which is delivered by professionals in medicine, dentistry, nursing, and allied health. 医疗保健。指由医务工作者提供的治疗和预防工作。
3. Uniform Marriage and Divorce Act: an attempt by the National Conference of Commissioners on Uniform State Laws to make marriage and divorce laws more uniform. This is also known as the Model Marriage and Divorce Act(UMDA). It defines marriage and divorce. The greatest significance of UMDA is that it introduced irreconcilable differences as the sole ground for divorce and has had an enormous impact on marriage and divorce laws in all states.《统一结婚离婚法》。它是研究美国婚姻无效制度的重要依据之一。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from text B.

( )1. Mental Competence needs to be proven for one's eligibility of marriage.

( )2. It is just a routine duty of the county clerk to require application for a marriage license.

( )3. Common law marriages are recognized by most of the states in America.

( )4. The spouses and their children within a valid common law marriage are entitled to the same benefits and legal rights offered to the spouses and their children within a ceremonial marriage.

( )5. A common law marriage is recognized as valid only in the states which permit common law marriage.

( )6. At common law, a married woman did not have legal capacity or control over her personal and real property during the marriage.

( )7. The Married Woman's Property Acts removed all of the married woman's disabilities and, therefore, ensured that the husband and wife had equal right to all property acquired within marriage.

( )8. Under community property approach, community property includes all property and interests therein acquired during the marriage, and commingled property and interests therein acquired prior to marriage.

( )9. According to the text, a prenuptial agreement, as a matter of fact, grants protection to a wealthy person's heirs when the person marries someone with less money.

( )10. In some states, courts impose more requirements to enforce prenuptial agreements than general contracts.

Build Up Your Vocabulary

1. Give the corresponding translation of each of the following terms.

English	Chinese
intestacy law	
	夫妻共有财产

(continued)

English	Chinese
social security	
	仪式结婚
spouse	
	同居
prenuptial agreement	
	婚姻关系解除
division of property	
	结婚证
blood relationship	
	分居
marital property	
	离婚率

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

common-law marriage　　plural marriage
putative marriage　　sham marriage
void marriage　　adoptive father
biological father　　legal father
stepfather　　cohabitation
domestic relations　　domestic violence
child support　　divided custody

Translation

Translate the following sentences into English.

1. 夫妻可以约定婚姻关系存续期间所得的财产以及婚前财产归各自所有、共同所有或部分各自所有、部分共同所有。
2. 非婚生子女享有与婚生子女同等的权利，任何人不得加以危害和歧视。不直接抚养非婚生子女的生父或生母，应当负担子女的生活费和教育费，直至子女能独立生活为止。
3. 有下列情形之一，调解无效的，应准予离婚：
   （1）重婚或有配偶者与他人同居的；
   （2）实施家庭暴力或虐待、遗弃家庭成员的；
   （3）……
   （4）因感情不和分居满二年的；
   （5）其他导致夫妻感情破裂的情形。
4. 离婚后，一方抚养的子女，另一方应负担必要的生活费和教育费的一部或全部，负担费用的多少和期限的长短，由双方协议；不能达成协议时，由人民法院判决。
5. 离婚后，不直接抚养子女的父亲或母亲，有探望子女的权利，另一方有协助的义务。

Case Study

Michelle Marvin v. Lee Marvin

Supreme Court of California
575 P.2d 106 (1976)

Tobriner, J.

During the past 15 years, there has been a substantial increase in the number of couples living together without marrying. Such nonmarital relationships lead to legal controversy when one partner dies or the couple separates. Courts of Appeal, faced with the task of determining property rights in such cases, have arrived at conflicting positions: two cases {*In re* Marriage of Cary (1973) 34 Cal. App. 3d 345 [109 Cal. Rptr. 862]; Estate of Atherley (1975) 44 Cal. App. 3d 758 [119 Cal. Rptr. 41]} have held that the Family

· nonmarital relationship
非婚姻关系
· Courts of Appeal
上诉法院

· quantum meruit
按合理价格支付
· aver
陈述、主张

Law Act requires division of the property according to community property principles, and one decision [*Beckman v. Mayhew* (1975) 49 *Cal. App.* 3*d* 529 (122 *Cal. Rptr.* 604)] has rejected that holding. We take this opportunity to resolve that controversy and to declare the principles which should govern distribution of property acquired in a nonmarital relationship.

We conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trust, when warranted by the facts of the case.

In the instant case plaintiff and defendant lived together for seven years without marrying; all property acquired during this period was taken in defendant's name. When plaintiff sued to enforce a contract under which she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for defendant, thus leaving him with all property accumulated by the couple during their relationship. Since the trial court denied plaintiff a trial on the merits of her claim, its decision conflicts with the principles stated above, and must be reversed.

1. The factual setting of this appeal.

(1) Since the trial court rendered judgment for defendant on the pleadings, we must accept the allegations of plaintiff's complaint as true, determining whether such allegations state, or can be amended to state, a cause of action. We turn therefore to the specific allegations of the complaint.

Plaintiff avers that in October of 1964 she and defendant "en-

tered into an oral agreement" that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." Furthermore, they agreed to "hold themselves out to the general public as husband and wife" and that "plaintiff would further render her services as a companion, homemaker, housekeeper and cook to ... defendant".

Shortly thereafter plaintiff agreed to "give up her lucrative career as an entertainer [and] singer" in order to "devote her full time to defendant ... as a companion, homemaker, housekeeper and cook;" in return defendant agreed to "provide for all of plaintiff's financial support and needs for the rest of her life."

Plaintiff alleges that she lived with defendant from October of 1964 through May of 1970 and fulfilled her obligations under the agreement. During this period the parties as a result of their efforts and earnings acquired in defendant's name substantial real and personal property, including motion picture rights worth over $1 million. In May of 1970, however, defendant compelled plaintiff to leave his household. He continued to support plaintiff until November of 1971, but thereafter refused to provide further support.

On the basis of these allegations plaintiff asserts two causes of action. The first, for declaratory relief, asks the court to determine her contract and property rights; the second seeks to impose a constructive trust upon one half of the property acquired during the course of the relationship.

Defendant demurred unsuccessfully, and then answered the complaint.

(2) Following extensive discovery and pretrial proceedings, the case came to trial. Defendant renewed his attack on the complaint by a motion to dismiss. Since the parties had stipulated that defendant's marriage to Betty Marvin did not terminate until the filing of a final decree of divorce in January 1967, the trial court treated defendant's motion as one for judgment on the pleadings augmented by the stipulation.

After hearing argument the court granted defendant's motion

· demur
抗辩，反对
· augment
增大

· illicit relationship
不正当关系

and entered judgment for defendant. Plaintiff moved to set aside the judgment and asked leave to amend her complaint to allege that she and defendant reaffirmed their agreement after defendant's divorce was final. The trial court denied plaintiff's motion, and she appealed from the judgment.

2. (3a) Plaintiff's complaint states a cause of action for breach of an express contract.

In *Trutalli v. Meraviglia* (1932) 215 *Cal.* 698 [12 *P.* 2*d* 430] we established the principle that nonmarital partners may lawfully contract concerning the ownership of property acquired during the relationship. We reaffirmed this principle in *Vallera v. Vallera* (1943) 21 *Cal.* 2*d* 681, 685 stating that "If a man and woman [who are not married] live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property".

In the case before us, plaintiff, basing her cause of action in contract upon these precedents, maintains that the trial court erred in denying her a trial on the merits of her contention. Although that court did not specify the ground for its conclusion that plaintiff's contractual allegations stated no cause of action, defendant offers some four theories to sustain the ruling; we proceed to examine them.

Defendant first and principally relies on the contention that the alleged contract is so closely related to the supposed "immoral" character of the relationship between plaintiff and himself that the enforcement of the contract would violate public policy. He points to cases asserting that a contract between nonmarital partners is unenforceable if it is "involved in" an illicit relationship or made in "contemplation" of such a relationship. A review of the numerous California decisions concerning contracts between nonmarital partners, however, reveals that the courts have not employed such broad and uncertain standards to strike down contracts. The decisions instead disclose a narrower and more precise standard: a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretri-

cious sexual services.

In the first case to address this issue, *Trutalli v. Meraviglia*, *supra*, 215 *Cal.* 698, the parties had lived together without marriage for 11 years and had raised two children. The man sued to quiet title to land he had purchased in his own name during this relationship; the woman defended by asserting an agreement to pool earnings and hold all property jointly. Rejecting the assertion of the illegality of the agreement, the court stated that "The fact that the parties to this action at the time they agreed to invest their earnings in property to be held jointly between them were living together in an unlawful relation, did not disqualify them from entering into a lawful agreement with each other, so long as such immoral relation was not made a consideration of their agreement".

In *Bridges v. Bridges*, *supra*, 125 *Cal. App.* 2*d* 359 [270 *P.* 2*d* 69], both parties were in the process of obtaining divorces from their erstwhile respective spouses. The two parties agreed to live together, to share equally in property acquired, and to marry when their divorces became final. The man worked as a salesman and used his savings to purchase properties. The woman kept house, cared for seven children, three from each former marriage and one from the nonmarital relationship, and helped construct improvements on the properties. When they separated, without marrying, the court awarded the woman one-half the value of the property. Rejecting the man's contention that the contract was illegal, the court stated that: "Nowhere is it expressly testified to by anyone that there was anything in the agreement for the pooling of assets and the sharing of accumulations that contemplated meretricious relations as any part of the consideration or as any object of the agreement". (125 Cal. App. 2d at p. 363.)

Croslin v. Scott (1957) 154 *Cal. App.* 2*d* 767 [316 *P.* 2*d* 755] reiterates the rule established in Trutalli and Bridges. In Croslin the parties separated following a three-year nonmarital relationship. The woman then phoned the man, asked him to return to her, and suggested that he build them a house on a lot she owned. She agreed in return to place the property in joint ownership. The man

· erstwhile
以前的
· reiterate
重申

· Chagall
马克·夏卡尔
· concubine
情妇

built the house, and the parties lived there for several more years. When they separated, he sued to establish his interest in the property. Reversing a nonsuit, the Court of Appeal stated that "The mere fact that parties agree to live together in meretricious relationship does not necessarily make an agreement for disposition of property between them invalid. It is only when the property agreement is made in connection with the other agreement, or the illicit relationship is made a consideration of the property agreement, that the latter becomes illegal".

Although the past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting, we can abstract from those decisions a clear and simple rule.

(4) The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. Thus the rule asserted by defendant, that a contract fails if it is "involved in" or made "in contemplation" of a nonmarital relationship, cannot be reconciled with the decisions.

The three cases cited by defendant which have declined to enforce contracts between nonmarital partners involved consideration that was expressly founded upon an illicit sexual services. In *Hill v. Estate of Westbrook*, *supra*, 95 Cal. App. 2d 599, the woman promised to keep house for the man, to live with him as man and wife, and to bear his children; the man promised to provide for her in his will, but died without doing so. Reversing a judgment for the woman based on the reasonable value of her services, the Court of Appeal stated that "the action is predicated upon a claim which seeks, among other things, the reasonable value of living with decedent in meretricious relationship and bearing him two children. . . . The law does not award compensation for living with a man as a

concubine and bearing him children. . . . As the judgment is at least in part, for the value of the claimed services for which recovery cannot be had, it must be reversed". (95 Cal. App. 2d at p. 603.) Upon retrial, the trial court found that it could not sever the contract and place an independent value upon the legitimate services performed by claimant. We therefore affirmed a judgment for the estate. *Hill v. Estate of Westbrook* (1952) 39 *Cal.* 2*d* 458 [247 *P.* 2*d* 19].

In the only other cited decision refusing to enforce a contract, *Updeck v. Samuel* (1954) 123 *Cal. App.* 2*d* 264 [266 *P.* 2*d* 822], the contract "was based on the consideration that the parties live together as husband and wife". (123 Cal. App. 2d at p. 267.) Viewing the contract as calling for adultery, the court held it illegal.

The alternative holding in Heaps v. Toy, supra, finding the contract in that case contrary to good morals, is inconsistent with the numerous California decisions upholding contracts between nonmarital partners when such contracts are not founded upon an illicit consideration, and is therefore disapproved.

The decision in the Hill and Updeck cases thus demonstrate that a contract between nonmarital partners, even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement. In sum, a court will not enforce a contract for the pooling of property and earnings if it is explicitly and inseparably based upon services as a paramour. The Court of Appeal opinion in Hill, however, indicates that even if sexual services are part of the contractual consideration, any severable portion of the contract supported by independent consideration will still be enforced.

The principle that a contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services not only represents the distillation of the decisional law, but also offers a far more precise and workable standard than that advocated by defendant. Our recent decision in *In re* Marriage of Dawley (1976) 17 Cal. 3d 342 [131 Cal. Rptr. 3, 551 P. 2d 333] offers a close analogy. Rejecting the contention

· distillation
精华

· rendition
执行
· interlocutory decree
中间裁决
· purport
声称
· *ab initio*
从开始起

that an antenuptial agreement is invalid if the parties contemplated a marrriage of short duration, we pointed out in Dawley that a standard based upon the subjective contemplation of the parties is uncertain and unworkable; such a test, we stated, "might invalidate virtually all antenuptial agreements on the ground that the parties contemplated dissolution . . . but it provides no principled basis for determining which antenuptial agreements offend public policy and which do not". (17 Cal. 3d 342, 352.)

Similarly, in the present case a standard which inquires whether an agreement is "involved" in or "contemplates" a nonmarital relationship is vague and unworkable. Virtually all agreements between nonmarital partners can be said to be "involved" in some sense in the fact of their mutual sexual relationship, or to "contemplate" the existence of that relationship. Thus defendant's proposed standards, if taken literally, might invalidate all agreements between nonmarital partners, a result no one favors. Moreover, those standards offer no basis to distinguish between valid and invalid agreements. By looking not to such uncertain tests, but only to the consideration underlying the agreement, we provide the parties and the courts with a practical guide to determine when an agreement between nonmarital partners should be enforced.

(5) Defendant secondly relies upon the ground suggested by the trial court: that the 1964 contract violated public policy because it impaired the community property rights of Betty Marvin, defendant's lawful wife. Defendant points out that his earnings while living apart from his wife before rendition of the interlocutory decree were community property under 1964 statutory law and that defendant's agreement with plaintiff purported to transfer to her a half interest in that community property. But whether or not defendant's contract with plaintiff exceeded his authority as manager of the community property, defendant's argument fails for the reason that an improper transfer of community property is not void *ab initio*, but merely voidable at the instance of the aggrieved spouse.

In the present case Betty Marvin, the aggrieved spouse, had the opportunity to assert her community property rights in the divorce

action. The interlocutory and final decrees in that action fix and limit her interest. Enforcement of the contract between plaintiff and defendant against property awarded to defendant by the divorce decree will not impair any right of Betty's, and thus is not on that account violative of public policy.

(6) Defendant's third contention is noteworthy for the lack of authority advanced in its support. He contends that enforcement of the oral agreement between plaintiff and himself is barred by Civil Code section 5134, which provides that "All contracts for marriage settlements must be in writing..." A marriage settlement, however, is an agreement in contemplation of marriage in which each party agrees to release or modify the property rights which would otherwise arise from the marriage. The contract at issue here does not conceivably fall within that definition, and thus is beyond the compass of section 5134.

(7) Defendant finally argues that enforcement of the contract is barred by Civil Code section 43.5, subdivision (d), which provides that "No cause of action arises for ... breach of promise of marriage". This rather strained contention proceeds from the premise that a promise of marriage impliedly includes a promise to support and to pool property acquired after marriage to the conclusion that pooling and support agreements not part of or accompanied by promise of marriage are barred by the section. We conclude that section 43.5 is not reasonably susceptible to the interpretation advanced by defendant, a conclusion demonstrated by the fact that since section 43.5 was enacted in 1939, numerous cases have enforced pooling agreements between nonmarital partners, and in none did court or counsel refer to section 43.5.

(3b) In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold

all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

In the present instance, plaintiff alleges that the parties agreed to pool their earnings, that they contracted to share equally in all property acquired, and that defendant agreed to support plaintiff. The terms of the contract as alleged do not rest upon any unlawful consideration. We therefore conclude that the complaint furnishes a suitable basis upon which the trial court can render declaratory relief. The trial court consequently erred in granting defendant's motion for judgment on the pleadings.

3. (8a) Plaintiff's complaint can be amended to state a cause of action founded upon theories of implied contract or equitable relief.

...

(Analysis omitted.)

Since we have determined that plaintiff's complaint states a cause of action for breach of an express contract, and, as we have explained, can be amended to state a cause of action independent of allegations of express contract, we must conclude that the trial court erred in granting defendant a judgment on the pleadings.

The judgment is reversed and the case remanded for further proceedings consistent with the views expressed herein.

Wright, C. J., Mccomb, Mosk, Sullivan, and Richardson, JJ., concurred.

Clark, J., Concurring and Dissenting.

(Dissenting opinion omitted.)

Notes

1. Courts of Appeal: California has two types of state courts: Trial Courts and Appellate Courts. Trial Courts are also called "Superior Courts". There are 58 Trial

Courts—one in each county. There are two types of Appellate Courts: Courts of Appeal and California Supreme Court. There are 6 Courts of Appeal and one California Supreme Court. 上诉法院。

2. quantum meruit: a theory or doctrine that permits recovery by a party for services or materials provided despite the absence of an express contract when they were accepted and used by the defendant under circumstances which gave reasonable notice that the plaintiff expected to be paid for them. 按合理价格支付。
3. Chagall: Marc Chagall(1887—1985), was a Russian-French artist. He was one of the most successful artists of the twentieth century. 马克·夏卡尔,法国画家。
4. interlocutory decree: a court judgment which is temporary and not intended to be final until either a) other matters come before the judge, or b) there is a specified passage of time to determine if the interlocutory decree (judgment) is "working" (becomes accepted by both parties) and should become final. Interlocutory decrees were most commonly used in divorce actions, in which the terms of the divorce were stated in an interlocutory decree, which would be in force until a final decree could be granted after a period of time (such as one year after serving the divorce petition). The theory was that this would provide for a period in which reconciliation might be possible, and would also test the efficacy of the original order which might be changed upon a motion of either party. Interlocutory decrees of divorce have been abandoned as a procedure in most states, because they seldom had the desired effect and appeared to waste the parties' time. 中间裁决。多用于离婚案。

Exercises

I. Complete the following statements with the information you get from the judge opinion.

1. The plaintiff asserted two causes of action:

   _____

   _____.

2. The cases cited in favor of the plaintiff are: _____

   _____, _____,

   and _____.

3. The defendant contended that

   a) _____

   _____.

   b) _____

_____.

c) _____

_____.

d) _____

_____.

4. The three cases cited by the defendant in the opinion are _____

_____, _____, and _____

_____.

5. The Court decides _____.

Ⅱ. Brief the case and present the case brief to the class.

Unit Thirteen The Antitrust Law

Warm-up Exercises: Listening Practice

Words and expressions:

viable	marketplace	rule of reason	modify
merger	indicative	transaction	entity
the Sherman Act		the Federal Trade Commission Act	
Horizontal Merger Guidelines			

I. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

There are at least four views of economic markets which provide some _____ to the "relevant market" and subsequent _____ determinations: free market, which holds that (1) market forces produce the best _____ of resources, and (2) the non-anecdotal evidence indicates no _____ between concentration and profits; centrist, which is somewhat similar to the "free market" view that size and _____ don't necessarily signify the intensity of competition, but does believe that collusion is more likely in _____ markets; moderate structuralist, which emphasizes that the greater the number of competitors in a market the more likely there will be downward pressure on prices; and strict structuralist, which _____ that competition is directly and inversely related to concentration levels. The "bottom-line" goal of U. S. antitrust policy should be "to _____ producers to make and sell better products at _____ prices and pass those _____ on to consumers".

Ⅱ. Listen to the passage and answer the following questions according to what you hear.

1. What does antitrust doctrine hold?

_____.

2. What statute(s) contain the provisions on the general prohibitions against monopolization?

_____.

3. What statute(s) contain the provisions regarding the unlawfulness of unfair act in commerce?

_____.

4. What are the two things required for the application of the general prohibitions against monopolization under the Sherman Act?

_____.

5. Where can you find the illustration of the monopoly/monopolization thinking in the Antitrust Division of DOJ and FTC?

_____.

Text A

Guide to the U. S. Antitrust Laws

- monopoly 垄断
- market failure 市场失灵
- business trusts 商事信托

United States antitrust law is the body of laws that prohibits anti-competitive behavior (monopoly) and unfair business practices. Antitrust laws are intended to encourage competition in the marketplace. These competition laws make illegal certain practices deemed to hurt businesses or consumers or both, or generally to violate standards of ethical behavior. Government agencies known as competition regulators, along with private litigants, apply the antitrust and consumer protection laws in hopes of preventing market failure. The term antitrust was originally formulated to combat "business trusts", now more commonly known as cartels. Other countries use the term "competition law". Many countries including most of the Western world have antitrust laws of some form; for example the European Union has provisions under the Treaty of Rome to maintain

fair competition, as does Australia under its Trade Practices Act 1974.

I. Background and History of the Antitrust Laws

A. Federal Antitrust Laws

The first antitrust law enacted in the United States was the Sherman Antitrust Act, in 1890. Perhaps the most significant of the federal antitrust laws, the Sherman Act was intended to combat the "business trusts" of the American economy during the late nineteenth century, and to this day it remains the bedrock of antitrust enforcement in the U. S. The Sherman Act prohibits two broad categories of conduct. First, it declares to be illegal "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". Second, it prohibits efforts to "monopolize,... attempt[s] to monopolize, or ... conspiracies ... to monopolize any part of the trade or commerce among the several States, or with foreign nations". While the Sherman Act is broadly worded to apply to all restraints of trade, the United States Supreme Court has interpreted the Sherman Act as applying only to unreasonable restraints of trade. Penalties for violating the Sherman Act can be either civil or criminal in nature. Only the United States Department of Justice has the authority to criminally prosecute individuals for violating the Sherman Act. Additionally, some states have criminal authority under their own state antirust laws.

In 1914, Congress enacted two new antitrust laws. First, Congress enacted the Federal Trade Commission Act, which created the Federal Trade Commission and gave it the authority to enforce U. S. antitrust laws. Second, Congress enacted the Clayton Antitrust Act, which was intended to supplement and strengthen enforcement of antitrust laws. It added new forms of prohibited conduct, such as "mergers and acquisitions where the effect may substantially lessen competition", and also gave state attorneys general the ability to enforce the federal antitrust laws. The Clayton Act has been amended several times over the years, first by the Robinson-Pitman Act of 1936, to ban certain forms of discriminatory business conduct, and

- the Sherman Antitrust Act
《谢尔曼反托拉斯法》
- combination
联合
- conspiracy
共谋
- in restraint of trade
限制贸易
- the Federal Trade Commission Act
《联邦贸易委员会法》
- the Clayton Antitrust Act
《克莱顿反托拉斯法》
- acquisition
收购

· the Hart-Scott-Rodin Act
《哈特—斯科特—罗迪诺法》
· consummate
完成
· codification
法典编纂
· the United States Department of Justice
美国司法部

then again by the Hart-Scott-Rodin Act in 1976, to require companies intending to merge to notify the federal government before consummating the transaction in order to enable enforcement agencies to review the competitive effects of the merger.

B. State Antitrust Laws

Most states have enacted their own antitrust laws to prohibit anticompetitive conduct affecting commerce within their states and to supplement enforcement of federal antitrust laws. While state and federal antitrust laws are conceptually similar, the codification of state antitrust laws varies widely from state to state. For example, some state antitrust laws, such as those in Washington, substantially track the language of their federal counterparts, whereas other states only incorporate select sections of federal antitrust laws, recite specific types of prohibited acts, or include new areas of substance entirely. In many cases, state antitrust laws are more expansive than the federal antitrust laws in terms of the amount and quality of prohibited conduct. The interpretation of state antitrust laws may, but will not always, substantially mirror the federal antitrust laws.

Ⅱ. Who Enforces the Antitrust Laws?

The antitrust laws are enforced by both public and private parties.

A. Government Enforcement

The United States Department of Justice, Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") share responsibility for investigating and litigating cases under the Sherman Act and they both also review potentially anticompetitive mergers under the Clayton Act. While there is not a formal system by which the DOJ and the FTC divide their enforcement responsibilities, the agencies typically devote resources to particular industries where they have investigated or litigated in the past. For example, typically the DOJ will review mergers in transportation industries, such as airlines or railroads, as well as the telecommunications industry. The FTC generally focuses its enforcement responsibility in the oil and gas, pharmaceutical, and health care industries.

State attorneys general also have authority to enforce federal

and state antitrust laws. Typically, states investigating a matter arising under the federal antitrust laws will jointly investigate with either the DOJ or the FTC, or may conduct a separate investigation. In addition, state attorneys general have the authority to seek restitution on behalf of the citizens of their states that have been harmed as a result of violations of either the federal or state antitrust laws.

· class action
集体诉讼

B. Private Enforcement

The antitrust laws are also enforced by private parties. Under both federal and state antitrust law, any person who is "injured in his business or property" by a violation of antitrust laws is entitled to bring an action in court. A prevailing plaintiff is eligible to recover treble damages, costs of suit, as well as attorneys' fees. Additionally, private parties are also authorized to obtain injunctive relief to prevent threatened losses or damages. The majority of antitrust suits are in fact brought by private litigants seeking damages for violation of federal and state antitrust laws. Because these antitrust actions are often aimed at business practices that affect interstate commerce, private antitrust actions often take the form of a class action seeking damages and restitution for consumers across the country.

Ⅲ. What Do the Antitrust Laws Prohibit?

If you were to read through the Sherman Act, you would see that the Act is not at all explicit about what conduct is prohibited. The Clayton Act is a little more specific about conduct that may be illegal, but only when such conduct substantially lessens competition, or tends to create a monopoly in any line of commerce, neither of which is defined in the statute. Because our state antitrust law substantially tracks the federal antitrust laws, the same interpretive issues arise under those statutes as well.

A. Section 1 of the Sherman Act—Contracts, Combinations or Conspiracies in Restraint of Trade

The Sherman Act broadly prohibits "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". Generally speaking, a restraint of trade is an agreement among two or more persons or entities that affects the competitive

· rule of reason
合理原则
· *per se* offenses
本身违法
· price fixing
价格垄断
· bid rigging
串通投标
· market and/or customer allocations
市场分割和(或)客户分配
· group boycott
联合抵制
· bidder
投标人
· bidding process
招标过程

process. However, under this approach, even contracts for the purchase and sale of a single good would seem to be prohibited by antitrust laws. Therefore, courts have limited the Section 1 of the Sherman Act (and accordingly, the corresponding section of state antitrust law) as applying only to "unreasonable" restraints of trade. Over the years, two different methods have evolved to analyzing conduct under Section 1. Courts now apply either (1) a *per se* analysis, or (2) a broader rule of reason analysis to evaluate whether conduct violates Section 1 of the Sherman Act.

1. *Per Se* Offenses

It has become well settled over the years that certain forms of agreement among competitors are so harmful to competition and consumers that such conduct should be prohibited outright. The antitrust laws deem these types of offenses as *per se* illegal, because they will always or almost always result in consumer harm. Examples of *per se* offenses include price fixing, bid rigging, market and/or customer allocations and group boycotts.

Price fixing Price fixing is an agreement among competitors to raise, lower, or otherwise stabilize the price range, or any other competitive term that will be offered for their products or services. Competitive terms that competitors may not agree to include anything from financing terms and warranties to discounts and shipping fees. What matters is whether there is an agreement, the effect of which is to directly or indirectly affect prices. Price fixing has long been recognized as *per se* illegal under the Sherman Act due to its harmful effect on competition and consumers.

Bid Rigging Bid rigging refers to coordinated conduct among competing bidders that undermines the bidding process. One common form of bid rigging is an agreement among bidders as to who will win the bid.

Market or Customer Allocations A market or customer allocation is an agreement among businesses not to compete for customers. For example, an agreement to allocate or divide sale territories, assign certain customers to particular sellers, or reduce output would be *per se* illegal under the Sherman Act.

In some instances, limited non-compete agreements may be permissible when the agreement is ancillary to a larger transaction. For example, limited non-compete agreements are commonly entered into as part of a sale of a business, where the non-compete may be necessary to protect the value of the business. Notwithstanding these limited permissible uses of non-compete agreements, the non-compete agreement but must still be reasonably limited in time and scope.

Group Boycotts A group boycott is an agreement among competitors to engage in some form of concerted conduct, such as agreeing not to do business with a targeted individual or business, or only on certain agreed-upon terms.

Tying Arrangements A tying arrangement conditions the availability of one item (the "tying" item) upon the purchase of another item (the "tied" item). A tying arrangement is presumed to be illegal where (1) the tying and tied products are separate goods (rather than components of a single product), (2) the availability of the tying item is conditioned on the purchase (or rental or license of the tied item, as the case may be), and (3) the business imposing the tie is in a position to use its strength in the market for the tying item to harm competition in the market for the tied product.

2. The Rule of Reason

Section 1 of the Sherman Act prohibits "every contract, combination... or conspiracy in restraint of trade...." Such a sweeping interdiction, if applied literally, would invalidate practically every commercial arrangement. Accordingly, as early as 1911 the Supreme Court ruled that, despite the all-embracing statutory language, the Sherman Act reached only those trade restraints which are unreasonable. This so-called rule of reason has since been the hallmark of judicial construction of the antitrust laws. Under its aegis, the anticompetitive consequences of a challenged practice are weighed against the business justifications upon which it is predicated and its putative procompetitive impact, and a judgment with respect to its reasonableness is made.

Restraints in the supply chain A restraint in the supply

- ancillary 附属的
- tying 搭售
- interdiction 禁止
- judicial construction 司法解释
- aegis 保护
- putative 假定的
- supply chain 供应链

· vertical agreement
纵向协议
· resale price maintenance
转售价格维持
· price floor
价格下限
· price ceiling
价格上限
· exclusive dealing
独家交易
· foothold
立足点
· market share
市场份额

chain refers to any agreement involving parties along the supply chain(e. g. , supplier and wholesaler or supplier and retailer) who are in a so-called vertical relationship. Vertical restraints generally range from agreements on price or sales territory to how a retailer must display or market a supplier's product.

One form of a vertical agreement is resale price maintenance, which is an agreement between vertical firms on either a price floor (setting a minimum price that a retailer must charge for the supplier's product) or a price ceiling(setting a maximum price that a retailer cannot charge above).

Exclusive Dealing A common form of exclusive dealing is a contract between a supplier and retailer under which the retailer agrees to exclusively carry the supplier's product. In general, the federal antitrust laws view these types of agreements as competitively neutral or even procompetitive, although it will vary from case to case. Exclusive dealing is most likely to be found illegal under federal and state antitrust laws where the one imposing the agreement has market power and uses the exclusive dealing contracts in a manner to distort competition or by making it more difficult for competitors to gain a foothold.

B. Section 2 of the Sherman Act—Monopolization

In an effort to gain market share, businesses sometimes may employ forms of conduct or tactics that go beyond competition on the merits, and which may harm or distort normal competition. Sometimes such conduct may be justifiable if it is innovative and actually benefits consumers. However, if there is no valid justification for that conduct other than a business's desire to reduce competition and charge higher prices, antitrust laws operate to prohibit precisely this type of conduct.

Section 2 of the Sherman Act prohibits businesses from monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce. Practically speaking, this means that businesses are prohibited from engaging in competitively unreasonable conduct that would result in giving that business control over prices, restrict output, or engage in other anticompetitive conduct in a particular mar-

ket. Note that, in contrast to Section 1 of the Sherman Act, Section 2 does not require that there be two entities acting together in a joint fashion, although Section 2 can apply to firms acting jointly. Thus, even a single firm acting alone can be found to violate Section 2 of the Sherman Act.

· merger review process
兼购审查程序
· market power
市场势力
· conglomerate merger
混合兼并

C. Anticompetitive Mergers and Acquisitions

One of the most visible areas where antitrust law seeks to ensure competitive markets is through the merger review process. The Clayton Antitrust Act prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly". This provision gives antitrust enforcers the ability to seek a court order preventing businesses from merging in cases where the merger would substantially lessen competition by creating, enhancing, or facilitating the exercise of market power.

The announcement of a merger can be a headline grabbing event, particularly in cases of large public companies or where the transaction has been valued at a substantial amount. Generally speaking, there are three kinds of mergers: (1) a merger between direct competitors (referred to as a horizontal merger), (2) a merger of firms that operate at different levels in the supply chain (referred to as a vertical merger); and (3) a merger of firms that operate in different industries entirely (referred to as conglomerate mergers). Because horizontal mergers generally raise the most significant competitive concerns, it is with these types of mergers with which antitrust laws are most concerned.

To determine whether a merger may harm competition, the basic question antitrust enforcers must answer is whether the companies proposing to merge have products or services that compete with one another (the "product market"), and, if so, where they geographically compete (the "geographic market"). For example, if two companies both produce a special type of running shoe designed for long distance marathons and offer it for sale in stores across the country, and there is evidence that consumers see only those products as each other's alternatives (meaning if the price of one were to increase consumers would likely respond by purchasing more of the

· empirical evidence
经验证据

other) a merger of those two firms may harm competition for consumers. On the other hand, if one company only produced a special running shoe for long distance marathons and the other only produced women's dress shoes, it would likely not be the case that consumers view these products as substitutes, and a merger between the two companies likely would not harm competition. The examples presented here are straightforward and easy to understand; in a real case, ascertaining the product and geographic markets normally requires extensive review of the companies' documents describing their products and market conditions, and interviews (formal or informal) with participants in the industry, as well as understanding any barriers to entry or long term benefits to the merger. It may also be necessary to consult with an economist to determine whether there is empirical evidence of consumers' switching or other harms to competition.

(http://www.atg.wa.gov/antitrustguide.aspx)

Notes

1. the Sherman Antitrust Act: the first U.S. antitrust law. Under Shearman Antitrust Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of felony.《谢尔曼反托拉斯法》。诞生于 1890 年,是美国历史上的第一部反托拉斯法。根据该法,每一个限制各州之间和与外国的贸易往来的契约、以托拉斯或其他形式出现的联手或勾结,都被宣布为非法;并且,每一个将要垄断、企图垄断或与他人联手或勾结起来,以垄断任何环节达到州际或国际贸易往来的人,都被认为犯有重罪。
2. the Federal Trade Commission Act: Released in 1914, the Federal Trade Commission Act (FTCA) prevents unfair competition methods and unfair or deceptive acts that may affect business commerce. Violation of the FTCA are usually proven by showing bad faith, fraud, oppression, or a violation of public policy.《联邦贸易委员会法》,诞生于 1914 年。该法建立了独立的联邦贸易委员会,并授权联邦贸易委员会制定和实施有关禁止不公平竞争和欺诈行为的规定。

3. the Clayton Antitrust Act: The Clayton Antitrust Act of 1914 regulates corporate mergers, and prohibits those mergers that may "lessen competition". Under Clayton Antitrust Act, it will substantially lessen competition to engage in price discrimination, price fixing, restrains of the range of business of another corporation and acquisition, directly or indirectly, of the whole or any part of the stock or other share capital of another corporation engaged also in commerce. The Federal Trade Commission and the Department of Rustice are the agencies to enforce Clayton Act.《克莱顿反托拉斯法》,诞生于 1914 年。根据该法,价格歧视、强迫他人购买指定商品、限制他人的经营范围、通过购买竞争对手的股票以实现兼并以及某公司的董事同时兼任竞争对手的董事等的做法被视为减少竞争的做法,因而被禁止。该法授权联邦贸易委员会和司法部为该法的共同执行机构。
4. the Hart-Scott-Rodino Act: Hart-Scott-Rodino Act established the federal premerger notification program, which provides the FTC and the Department of Justice with information about large mergers and acquisitions before they occur.《哈特—斯科特—罗迪诺法》,这个规定要求涉及大企业的合并在合并前向联邦贸易委员会或者司法部反垄断局进行申报。
5. price fixing: an agreement between participants on the same side in a market to buy or sell a product, service, or commodity only at a fixed price, or maintain the market conditions so that the price is maintained at a given level by controlling supply and demand. 价格垄断。
6. bid rigging: an agreement where, in response to a call or request for bids or tenders, one or more bidders agree not to submit a bid, or two or more bidders agree to submit bids that have been prearranged among themselves. 串通投标。
7. exclusive dealing: a dealing requiring a buyer to purchase all needed goods form one seller. 独家交易。指只向一个卖主购买的交易。
8. empirical evidence: evidence relating to or based on experience or observation. 经验证据。

Check Your Understanding

Answer the following questions according to the text.

1. How many antitrust statutes are there in the U. S. and what do they deal with respectively?
2. What does"rule of reason" mean?

3. What conducts are prohibited under Sherman Antitrust Act?
4. What is new in the Clayton Antitrust Act?
5. How are state antitrust laws different from federal antitrust laws?
6. What is a per se offense?
7. What agreement will be construed to be a price-fixing agreement?
8. What is bid rigging?
9. What effect does an exclusive dealing agreement have on the market competition?
10. What makes a tying arrangement illegal?

Build Up Your Vocabulary

I. Match the items in the following two columns.

A	B
1. market allocation	a. the percentage or proportion of the total available market or market segment that is being serviced by a company
2. bidding process	b. schemes in which competitors divide markets among themselves
3. *per se* offense	c. agreement between firms up or down the supply chain from one another
4. supply chain	d. single stage process undertaken for selection of successful bidder
5. price floor	e. a system of moving a product or service from supplier to customer
6. vertical agreement	f. automatically illegal conduct
7. price ceiling	g. ability of a firm to alter the market price of a good or service
8. market share	h. government-or-group-imposed limit on how low a price can be charged for a product
9. market power	i. action taken together with others as planned
10. conglomerate merger	j. merger between firms that are involved in totally unrelated business activities
	k. an upper limit for the price of a good

Ⅱ. Fill in the blanks with the word or expressions given below, changing the form if necessary.

market domination	*per se* violation	anticompetitive
rule of reason	monopolization	price-fixing
in restraint of trade	acquisition	bid rigging
exclusive dealing		

1. Courts often find intent and motive relevant in predicting future consequences during a _____ analysis.
2. The Clayton Act added the mergers and _____ that substantially reduce market competition to the list of impermissible activities.
3. _____ occurs when bidders agree among themselves to eliminate competition in the procurement process, thereby denying the public a fair price.
4. Congress passed the Sherman Antitrust Act in 1890 to combat anticompetitive practices, reduce _____ by individual corporations.
5. _____ agreements, requiring a retailer or distributor to purchase exclusively from the manufacturer, make it difficult for new sellers to enter the market and find prospective buyers, thus depressing competition.
6. _____ occurs when a company or companies within a given market artificially set or maintain the price of goods or services at a certain level, contrary to the workings of the free market.
7. A _____ requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.
8. The antitrust laws apply to virtually all industries and to every level of business, including manufacturing, transportation, distribution, and marketing. They prohibit a variety of practices _____.
9. Section 2 of the Sherman Antitrust Act prohibits _____, attempts to monopolize, and conspiring to monopolize.
10. Some business practices, however, at times constitute _____ behavior and at other times encourage competition within the market.

Cloze

Choose the proper word from the list below, and then fill in the blanks.

market share	competition	monopoly	acquisition
combination	price fixing	tie-in	restraints of trade
conspiracy	merger		

The antitrust laws apply to virtually all industries and to every level of business, including manufacturing, transportation, distribution, and marketing. They prohibit a variety of practices that restrain trade. Examples of illegal practices are _____, _____, corporate mergers likely to reduce the competitive vigor of particular markets, and predatory acts designed to achieve or maintain monopoly power.

Legislation designed to prevent _____ or business practices limiting free market _____. Although some 40 states have adopted such legislation, the more important acts are these federal laws: (1) the Sherman Antitrust Act of 1890, which outlawed monopolies, _____, and business _____ created for the sole purpose of restricting competition, though it did not define these terms; (2) the Federal Trade Commission Act of 1914, creating the Federal Trade Commission, a federal agency with power to regulate interstate commerce, investigate business activities (except those by banks) and issue enforcement orders; (3) the Clayton Antitrust Act of 1914 and amendments, which banned _____ contracts, interlocking directorates, and certain types of holding company _____.

The U. S. Department of Justice and bank supervisory agencies look closely at deposit account concentration or the _____ an acquirer would gain from a _____. Local deposit share, in an era of nationwide banking and convenient access to non-local banks, is one of several factors the banking regulators examine when approving a merger application. The bank agencies also review mergers for their impact on financial stability and ability to deliver banking services to local communities.

Translation

Translate the following sentences into Chinese.

1. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000 or by imprisonment not exceeding

three years, or by both said punishments, in the discretion of the court.

2. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such Territory or Territories and any state or states or the District of Columbia or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is delared illegal.
3. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.
4. Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
   (1) such conduct has a direct, substantial, and reasonably foreseeable effect —
   A. on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
   B. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
   (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

Text B

Tying Arrangement

by Arik Johnson

I. Introduction

Illegal tying is one of the most common antitrust claims. Although the Supreme Court and the lower courts have regularly addressed the merits of tying claims and much has been written about the basic requirements needed to establish a tying claim, tying claims still remain somewhat unpredictable in nature. Most of the

· nomenclature
术语
· deleterious
有害的

confusion stems from the nomenclature. Tying is often referred to as per se, or automatically, illegal. Nevertheless, tying arrangements may sometimes be justified or subject to rule of reason analysis.

Simply put, a tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different product, or at least agrees that he will not purchase that product from any other supplier. The product that the buyer is required to purchase in order to get the product the buyer actually wants is called the tied product. The product that the buyer wants to purchase is called the tying product. In the most basic sense, the seller has tied two products together, as if in a knot. The only way the buyer can get the one product is to also purchase another product that he or she may or may not want.

Ⅱ. Standard of Analysis

Tying arrangements can violate a number of antitrust laws. The confusion surrounding tying arrangements has arisen not because such arrangement might violate a number of different antitrust laws, but because the courts use confusing language when analyzing tying arrangements.

The antitrust laws are designed to protect competition. In antitrust law, there are some arrangements or restrictions that have such a deleterious effect on competition that courts have ruled them per se or automatically illegal. What this means is that if the basic elements of the antitrust violation are established, the court will consider the arrangement illegal and will not examine any justifications or reasons as to why the arrangement might actually benefit competition in some manner. Tying arrangements are often considered *per se* illegal. The basic requirements that must be met for tying to be per se illegal are as follows:

1. There must be two separate products or services.
2. There must be a sale or an agreement to sell one product (or service) on the condition that the buyer purchases another product or service (or the buyer agrees not to purchase the product or service from another supplier).
3. The seller must have sufficient economic power with respect to

the tying product to appreciably restrain free competition in the market for the tied product.

4. The tying arrangement must affect a "not insubstantial" amount of commerce.

Courts are nearly unanimous in agreeing that these are the basic requirements of a tying claim. The problem is that even though the Supreme Court has called tying a *per se* violation, the Supreme Court and other courts have actually followed a standard of analysis known as the rule of reason. Under the rule of reason, courts will use a balancing test, or a "look at all the facts" approach. The courts will examine both the positive and negative effects of the arrangement to see if one outweighs the other. This type of analysis is not used for per se violations. The third requirement for an illegal tying arrangement, however, requires the courts to examine the degree of market power that the seller has in the various markets. This type of market analysis is used in the rule of reason. Thus, even though courts call tying arrangements *per se* violations, they typically look at the market and balance the procompetitive and anticompetitive effects of the arrangement before determining whether it violates the antitrust laws or not.

· appreciably 相当地
· balancing test 平衡检验

Ⅲ. Basic Requirements

A. Two Separate Products

In order to have a tying arrangement in the first place, there must be two products that the seller can tie together. It would seem easy to determine whether there are two distinct products capable of being tied together, but the actual analysis of the two separate products (or services) issue has proven much more complex in practice. The nature of the problem is easily illustrated by examining the sale of a pair of shoes. Theoretically, the seller could sell each shoe separately and require the buyer of a left shoe to purchase a right shoe in order to get the left shoe. Do the left and right shoes constitute two distinct, separate products? Courts have created and utilized various tests to determine whether, in fact, certain products are actually two separate products that have been tied together by the seller.

The Supreme Court finally created a standard for analyzing

· character of the demand
需求特征
· leverage
影响力

whether there are two separate products, known as the "character of the demand" test. Under this test, the focus is not on how the two products are functionally related to each other (i. e., shoes go together) but on the character of demand by consumers for the two products. That is, would consumers typically demand that the two products be sold together or separately?

Some courts, prior to the character of the demand test, essentially asked if the products (or services) are generally sold together or whether they are generally sold separately. These courts also asked whether there is a separate charge for the products. Other courts often consider whether a packaging of the items or a combining of the products leads to efficiencies or improved quality of the products. These courts still consider these issues and many courts now apply the character of the demand test to determine if there are two separate products that can be tied together.

We should note that in the distribution/franchise situation, the separate product requirement becomes much more involved. While this discussion only focuses on tying generally, we think you should know that tying in the franchise situation raises another set of problems.

B. Coercion or Conditioning

The second element typically required for a *per se* tying violation is the existence of a tie. That is, the plaintiff in a tying case will try to establish that his purchase of a good was conditioned upon the purchase of another good. This requirement is referred to in many different ways. Some courts try to determine if there was a conditioning of the purchase of one product on the purchase of another product. Many courts refer to this requirement as the requirement of coercion. These courts reason that for an unlawful tying arrangement to exist, the plaintiff must establish some level of forcing or leverage exerted by the seller upon the buyers that amounts to coercion. In essence, the tying arrangement is not illegal unless the buyer is forced to purchase the one product in order to get the other product.

Courts have struggled with the terminology to apply to this re-

quirement and the level of proof required to establish coercion or conditioning. Nevertheless, there are a few basic principles that arise from cases considering this requirement. For example, when there is an express condition that the buyer must purchase an additional product to get the product it wants, the existence of conditioning or coercion is fairly easy to establish. Likewise, when there is no express condition of any kind, such as when the buyer is free to purchase either product separately, the arrangement poses no problem. The complex cases do not involve express conditions or the lack of express conditions, but fall somewhere in between. The courts often struggle with the level of conditioning or coercion required in these cases and the result will depend upon the facts in each individual case.

C. Market Power

Arguably the most analyzed requirement for a *per se* tying violation is the requirement of market power. In the tying context, the seller must have sufficient economic power in the tying market to leverage into the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product. The requirement of market power is crucial to a *per se* violation. Once again, however, the requirement proves to be extremely complex. Various courts, including the Supreme Court, have struggled to determine exactly what type of market power must be shown.

The courts have concluded that a showing of market power in the tying market does not require a showing of monopoly power in that market. Rather, the test seems to be that the seller must have "sufficient economic power" in the tying market (the product or service that the buyer actually wants) to be able to impose a restraint in the tied product market (the product that the buyer presumably does not really want). In one case, the Supreme Court examined detailed data about market share conditions—like a typical rule of reason analysis—and concluded that a 30 percent share of the relevant market was not enough power for the seller to be involved in an automatically illegal tying arrangement.

· *de minimis*
微量

Other aspects of products or services may lead the courts to consider that sufficient market power exists for a *per se* tying violation. For example, unique products, such as real estate, are often considered to confer a unique advantage upon their owner. For some courts, such products are unique enough to confer market power on the seller.

The real point to bear in mind is that the issue of whether the seller has sufficient market power to impose a tying arrangement makes the courts' analysis of *per se* tying arrangements different from other *per se* violations where the courts will not go into complex details about market shares and market power. These kinds of inquiries are used under the rule of reason analysis. We need to remember, however, that even though tying might be automatically illegal, the courts are likely to look at all the facts of the situation, including market power, before determining whether such arrangements are illegal.

D. Effect on "Not Insubstantial" Amount of Commerce

The fourth requirement for a per se tying violation is a showing that a "not insubstantial" amount of commerce in the tied product market be affected by the tying arrangements. Although the courts could have stated this in a different way, by requiring a showing that a substantial amount of commerce be affected, they have relied on this language.

Thus, tying arrangements are unreasonable when a "not insubstantial" amount of interstate commerce is affected. This has been clarified so that "substantial" means substantial enough in terms of dollar-volume so as not to be merely *de minimis*.

When the courts have limited their analysis to whether a "not insubstantial" amount of commerce was affected, the analysis has proven relatively easy, even if somewhat anomalous results have been reached by different courts. Courts have relied on absolute dollar amounts in determining whether the requisite amount of commerce has been affected. The dollar amount has varied from case to case. Determining what dollar amounts affect a "not insubstantial" amount of interstate commerce is largely a factual question for the

courts.

Much like the market power requirement, the courts have seemingly made the effect on commerce requirement much harder than it should be. In one case, the Supreme Court appeared to add another element to the effect on commerce in stating that there "must be a substantial potential for impact on competition" before a tying arrangement will be considered automatically illegal. This additional element would require more detailed proof that the tying arrangement affects competition generally. Some courts have followed this reasoning and require a separate showing of an impact on competition while other courts have concluded only that a showing that a "not insubstantial" effect on commerce is required.

E. Economic Interest

Even though most courts agree on the basic elements needed to establish an illegal tying arrangement, there are a few courts that require a showing that the seller has an economic interest in the sale of the tied product—the product the buyer presumably does not want to purchase. This requirement has arisen to deal with situations where the seller of the tying product requires the buyer to purchase a product that the seller has no financial interest in.

In this situation, the element of leveraging or forcing is there, but it does not help the seller expand its power in one market into another market. By requiring the buyer to purchase a product from a third party in order to get the seller's product, the seller does use leverage, but not to its advantage since it does not receive any economic value from the purchase of a product from a third party. Because a few courts require a showing of the seller's economic interest in the tied product, buyers trying to claim that the seller illegally tied two products together must be aware of this additional requirement.

Ⅳ. The Kodak Case

No discussion of tying would be complete without mentioning the case of Eastman Kodak Company v. Image Technical Services, Inc. Although this case dealt with numerous aspects of tying law, the case focused on the requirement of market power in the tying

· primary equipment market
主设备市场
· aftermarket
衍生后续市场
· switching costs
转换成本

market.

Kodak manufactures and sells photocopiers and micrographic equipment and also sells replacement parts and service for its equipment. Independent service organizations (ISOs) also provide service for Kodak equipment, typically at a lower price than that offered by Kodak. Customers of Kodak equipment could buy the replacement parts themselves and hire the ISOs to service the machines or they could hire the ISOs to provide both the replacement parts and the service. Or, customers could use Kodak to obtain the replacement parts and service.

Kodak eventually instituted a policy of selling the replacement parts only to those buyers of Kodak equipment who purchased Kodak services to repair their machines. Kodak tried to limit the access the ISOs had to replacement parts for Kodak machines. This effectively limited the ability of the ISOs to repair Kodak machines for their customers. A number of ISOs finally filed suit, claiming that Kodak unlawfully tied the sale of service for Kodak machines to the sale of parts. Thus, the tying arrangement was allegedly between Kodak's repair service and its parts.

In Kodak, the issue was whether Kodak had sufficient economic power in the tying product market (for Kodak parts) to appreciably restrain competition in the tied product market (Kodak service). Kodak claimed that while it might have a monopoly share of the parts market, it could not actually exercise market power because there was competition in the equipment market, the primary market. Thus, Kodak argued that its lack of market power in the primary equipment market precluded a finding that it had power in a derivative aftermarket, i. e., the market for services for that equipment. The Court rejected this presumption, finding no basic economic reality which dictates that competition in the equipment market cannot coexist with market power in the derivative aftermarket.

Instead, the Court adopted the reasoning of the ISOs, that there were significant information and switching costs that would affect the behavior of consumers seeking to purchase either equipment

or services. For example, there is an information cost that purchasers must understand when they purchase the equipment. In order for consumers to fully consider their servicing needs, they must be able to engage in "lifecycle" pricing, or pricing that takes into account not only the initial cost of the equipment, but also the costs of services needed after the purchase. Likewise, switching costs also affect the market. Consumers who have already purchased one type of equipment are more likely to accept an increase in price for the servicing of that equipment before they will switch to another piece of equipment. Under Kodak, then, market imperfections—or "market realities" as the Supreme Court called them—can provide the necessary economic power in the tying market required for a per se tying violation.

- market imperfections
  市场的不完善
- business justification
  业务正当行为
- business necessity
  业务上的必要
- fledgling industry
  新兴产业

V. Defenses

Another way in which the *per se* rule for tying arrangements is not really a true *per se* rule is that there are defenses to tying arrangements. Under a true *per se* rule, once the required elements of the offense have been established, the conduct automatically violates the antitrust laws. With a true *per se* rule, the defendant cannot attempt to justify his conduct on any grounds. Tying law, however, recognizes a few—albeit very limited—defenses to an otherwise illegal tying arrangement.

Of the two recognized defenses to a *per se* tying violation, the more common is the business justification defense, also sometimes called the business necessity defense. In cases involving the business justification defense, the court may find ample evidence of an illegal tying arrangement. Courts that recognize the business necessity defense, however, may rule that there are sound business interests which justify the otherwise illegal tie. A common illustration used to explain this principle is a one-legged man. As one court put it, it does not seem reasonable that a seller would have to sell only one shoe (out of a pair) to a one-legged man. Rather, the sound business interests of the seller practically require that the shoes be sold as a pair.

Another defense to a *per se* tying violation is known as the fledgling industry defense. The fledgling industry defense arises

when there is a new industry and where to require separate sales of products or services would simply destroy the company and/or the new industry. In this circumstance, the courts may allow the seller to engage in otherwise unlawful tying in order to protect the fledgling industry. This defense is very difficult to establish and is very limited. Companies need to show that they could not achieve the same result as the illegal tying arrangement through less intrusive means and also must demonstrate that the tying arrangement was reasonable throughout the entire period of the tying arrangement. If a company in a fledgling industry engages in a tying arrangement long past the time needed to protect the industry or company, that time period will not be protected by the fledgling industry defense.

(http://www.aurorawdc.com/arj_cics_tying_arrangements.htm)

Notes

balancing test: any judicial test in which the jurists weigh the importance of multiple factors in a legal case. 平衡检验。

Exercises

Check Your Understanding

Mark the following statements with T for true or F for false according to what you have read from Text B.

( )1. A tying arrangement is an agreement by a party to sell two different products together.

( )2. For a tying arrangement to be *per se* illegal, it must, among others, affect a "not insubstantial" amount of commerce.

( )3. Market power is a factor the courts consider in determining whether a tying violates the antitrust laws or not.

( )4. To determine whether two products are separate from each other, the focus is on how the two products are functionally related to each other.

( )5. To prove the existence of an unlawful tying arrangement, the buyer must establish that it is forced to purchase the one product in order to get the other product.

( )6. A showing of market power in the tying market requires a showing of mo-

nopoly power in that market.

( )7. The courts will not take into consideration the market power and other facts of the situation before determining whether a tying arrangement is illegal if the tying is automatically illegal.

( )8. Tying arrangements are unreasonable when a "not insubstantial" amount of interstate commerce is affected.

( )9. Once the required elements of the offense have been established, the conduct automatically violates the antitrust laws.

( )10. The fledgling industry defense is widely used in *per se* tying violations.

Build Up Your Vocabulary

Ⅰ. Give the corresponding translation of each of following terms.

English	Chinese
tying arrangement	
	市场的不完善
per se violation	
	搭售安排
"not insubstantial" effect	
	合理原则
price discrimination	
	需求特征
horizontal merger	
	被搭售品
predatory pricing	

Ⅱ. Put the following terms into Chinese. Some of them are not present in the text.

acquisition　　competition-excluding power

unfair trade practices　　best allocation of resources

price cartel	potential competitive threat
deleterious effect	exclusionary agreement
transaction	pattern of conduct

Translation

Translate the following sentences into English.

1. 根据2003年11月1日施行的《制止垄断行为暂行规定》,经营者之间不得通过协议、决议或者协调等串通方式实行下列价格垄断:
   (1)统一确定、维持或者变更价格;
   (2)通过限制产量或者供应量,操纵价格;
   (3)在招投标或者拍卖活动中操纵价格;
   (4)其他操纵价格的行为。
2. 经营某一市场调节价商品或服务的具体价格,在社会平均成本或者同一地区、同一时间、同一档次、同类商品的一般价格(一般差价率、一般利润率)水平基础上,超过合理幅度,获取非法利润的,属于牟取暴利行为。
3. 经营者不得凭借市场支配地位,以排挤、损害竞争对手为目的,以低于成本的价格倾销;或者采取回扣、补贴、赠送等手段变相降价,使商品实际售价低于商品自身成本。
4. 经营者不得凭借市场支配地位,在向经销商提供商品时强制限定其转售价格;也不得在提供相同商品或者服务时,对条件相同的交易对象在交易价格上实行差别对待。

Case Study

Eastman Kodak Company, Petitioner v. Image Technical Services, Inc., et al

Supreme Court of The United States

504 U.S. 451(1992)

Justice Blackmun delivered the opinion of the Court.

This is yet another case that concerns the standard for summary judgment in an antitrust controversy. The principal issue here is whether a defendant's lack of market power in the primary equipment market precludes — as a matter of law — the possibility of

market power in derivative aftermarkets.

Petitioner Eastman Kodak Company manufactures and sells photocopiers and micrographic equipment. Kodak also sells service and replacement parts for its equipment. Respondents are 18 independent service organizations (ISOs) that in the early 1980s began servicing Kodak copying and micrographic equipment. Kodak subsequently adopted policies to limit the availability of parts to ISOs and to make it more difficult for ISOs to compete with Kodak in servicing Kodak equipment.

Respondents instituted this action in the United States District Court for the Northern District of California alleging that Kodak's policies were unlawful under both §§1 and 2 of the Sherman Act, 15 U. S. C. §§1 and 2. After discovery, the District Court granted summary judgment for Kodak. The Court of Appeals for the Ninth Circuit reversed. The appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets. It rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market. Because of the importance of the issue, we granted certiorari.

I

In 1987, the ISOs filed the present action in the District Court, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in violation of § 2 of that Act.

As to the § 1 claim, the court found that respondents had provided no evidence of a tying arrangement between Kodak equipment and service or parts. See App. to Pet. for Cert. 32B 33B. The court, however, did not address respondents' § 1 claim that is at issue here. Respondents allege a tying arrangement not between Kodak equipment and service, but between Kodak parts and service. As to the § 2 claim, the District Court concluded that al-

· proffer
提供
· free riding on
搭便车

though Kodak had a "natural monopoly over the market for parts it sells under its name", a unilateral refusal to sell those parts to ISOs did not violate § 2.

The Court of Appeals for the Ninth Circuit, by a divided vote, reversed. 903 F. 2d 612 (1990). With respect to the § 1 claim, the court first found that whether service and parts were distinct markets and whether a tying arrangement existed between them were disputed issues of fact. *Id.*, at 615-616. Having found that a tying arrangement might exist, the Court of Appeals considered a question not decided by the District Court: was there "an issue of material fact as to whether Kodak has sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]". *Id.*, at 616. The court agreed with Kodak that competition in the equipment market might prevent Kodak from possessing power in the parts market, but refused to uphold the District Court's grant of summary judgment "on this theoretical basis" because "market imperfections can keep economic theories about how consumers will act from mirroring reality". *Id.*, at 617. Noting that the District Court had not considered the market power issue, and that the record was not fully developed through discovery, the court declined to require respondents to conduct market analysis or to pinpoint specific imperfections in order to withstand summary judgment. "It is enough that respondents have presented evidence of actual events from which a reasonable trier of fact could conclude that ... competition in the [equipment] market does not, in reality, curb Kodak's power in the parts market". *Ibid.*

The court then considered the three business justifications Kodak proffered for its restrictive parts policy: (1) to guard against inadequate service, (2) to lower inventory costs, and (3) to prevent ISOs from free riding on Kodak's investment in the copier and micrographic industry. The court concluded that the trier of fact might find the product quality and inventory reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality related goals. *Id.*, at 618-619. The court also found

Kodak's third justification, preventing ISOs from profiting on Kodak's investments in the equipment markets, legally insufficient. *Id.*, at 619.

II

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier". *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5-6 (1958). Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503 (1969).

For the respondents to defeat a motion for summary judgment on their claim of a tying arrangement, a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that Kodak has tied the sale of the two products.

For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts. *Jefferson Parish Hospital Dist. No.* 2 v. *Hyde*, 466 U.S. 2, 21-22 (1984). Evidence in the record indicates that service and parts have been sold separately in the past and still are sold separately to self service equipment owners. Indeed, the development of the entire high technology service industry is evidence of the efficiency of a separate market for service.

Kodak insists that because there is no demand for parts separate from service, there cannot be separate markets for service and parts. Brief for Petitioner 15, n. 3. By that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires. That is an assumption we are unwilling to make. "We have often found arrangements involving functionally linked

· predominant
主要的

products at least one of which is useless without the other to be prohibited tying devices". *Jefferson Parish*, 466 U. S. , at 19, n. 30.

Kodak's assertion also appears to be incorrect as a factual matter. At least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self service for example, would purchase parts without service. Enough doubt is cast on Kodak's claim of a unified market that it should be resolved by the trier of fact.

Finally, respondents have presented sufficient evidence of a tie between service and parts. The record indicates that Kodak would sell parts to third parties only if they agreed not to buy service from ISOs.

Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. Market power is the power "to force a purchaser to do something that he would not do in a competitive market". *Jefferson Parish*, 466 U. S. , at 14. It has been defined as "the ability of a single seller to raise price and restrict output". *Fortner Inc.* , 394 U. S. , at 503; *United States* v. *E. I. du Pont de Nemours & Co.* , 351 U. S. 377, 391 (1956). The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. *Jefferson Parish*, 466 U. S. , at 17; *United States* v. *Grinnell Corp.* , 384 U. S. 563, 571 (1966); *Times Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611-613 (1953).

1

Respondents contend that Kodak has more than sufficient power in the parts market to force unwanted purchases of the tied market, service. Respondents provide evidence that certain parts are available exclusively through Kodak. Respondents also assert that Kodak has control over the availability of parts it does not manufacture. According to respondents' evidence, Kodak has prohibited independent manufacturers from selling Kodak parts to ISOs, pressured Kodak equipment owners and independent parts distributors to deny ISOs the purchase of Kodak parts, and taken steps to restrict

the availability of used machines.

Respondents also allege that Kodak's control over the parts market has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Respondents offer evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality than the preferred ISO service, and that ISOs were driven out of business by Kodak's policies. Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial on their claim of market power.

2

Kodak counters that even if it concedes monopoly share of the relevant parts market, it cannot actually exercise the necessary market power for a Sherman Act violation. This is so, according to Kodak, because competition exists in the equipment market. Kodak argues that it could not have the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs.

Kodak does not present any actual data on the equipment, service, or parts markets. Instead, it urges the adoption of a substantive legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets". Brief for Petitioner 33. Kodak argues that such a rule would satisfy its burden as the moving party of showing "that there is no genuine issue as to any material fact" on the market power issue. See Fed. Rule Civ. Proc. 56(c).

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case by case basis, focusing on the "particular facts disclosed by the record". *Maple Flooring Mfrs. Assn. v. United States*, 268 U. S. 563, 579 (1925); *du Pont*, 351 U. S., at 395, n. 22; *Continental T. V.*,

· aftermarkets
零部件市场;后续市场

· cross elasticity of demand
需求交叉弹性
· dichotomy
二分法
· ruinous
破坏性的
· optimum price
最优价格

Inc. v. GTE Sylvania Inc., 433 U. S. 36, 70 (1977) (White, J., concurring in judgment). In determining the existence of market power, and specifically the "responsiveness of the sales of one product to price changes of the other", *du Pont*, 351 U. S., at 400; see also *id.*, at 394-395, and 400-401, this Court has examined closely the economic reality of the market at issue.

The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, *i. e.*, the "cross elasticity of demand." See *du Pont*, 351 U. S., at 400; P. Areeda & L. Kaplow, Antitrust Analysis 342(c) (4th ed. 1988). Kodak's proposed rule rests on a factual assumption about the cross elasticity of demand in the equipment and aftermarkets: "If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests". Brief for Petitioner 12. Kodak argues that the Court should accept, as a matter of law, this "basic economic reality", *id.*, at 24, that competition in the equipment market necessarily prevents market power in the aftermarkets.

Even if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets. The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales. Areeda & Kaplow, at 112 and 340(a). Kodak's claim that charging more for service and parts would be "a short run game", Brief for Petitioner 26, is based on the false dichotomy that there are only two prices that can be charged — a competitive price or a ruinous one. But there could easily be a middle, optimum price at which the increased revenues from the higher priced sales of service and parts would more than compensate for the lower revenues from lost equipment sales. The fact that the equipment market imposes a restraint on prices in the aftermarkets by no means disproves the existence of

power in those markets. See Areeda & Kaplow, at 340(b) ("The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power") (emphasis in original). Thus, contrary to Kodak's assertion, there is no immutable physical law — no "basic economic reality" — insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.

We next consider the more narrowly drawn question: Does Kodak's theory describe actual market behavior so accurately that respondents' assertion of Kodak market power in the aftermarkets, if not impossible, is at least unreasonable? Cf. *Matsushita*, *supra*.

To review Kodak's theory, it contends that higher service prices will lead to a disastrous drop in equipment sales. Presumably, the theory's corollary is to the effect that low service prices lead to a dramatic increase in equipment sales. According to the theory, one would have expected Kodak to take advantage of lower priced ISO service as an opportunity to expand equipment sales. Instead, Kodak adopted a restrictive sales policy consciously designed to eliminate the lower priced ISO service, an act that would be expected to devastate either Kodak's equipment sales or Kodak's faith in its theory. Yet, according to the record, it has done neither. Service prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped.

Kodak and the United States attempt to reconcile Kodak's theory with the contrary actual results by describing a "marketing strategy of spreading over time the total cost to the buyer of Kodak equipment". Brief for United States as *Amicus Curiae* 18; see also Brief for Petitioner 18. In other words, Kodak could charge subcompetitive prices for equipment and make up the difference with supracompetitive prices for service, resulting in an overall competitive price. This pricing strategy would provide an explanation for the theory's descriptive failings — if Kodak in fact had adopted it. But Kodak never has asserted that it prices its equipment or parts subcompetitively and recoups its profits through service. Instead, it

· immutable 不变的
· corollary 推论
· recoup 补偿

· lock in
锁定
· intuitively
直觉地
· body of information
大量信息

claims that it prices its equipment comparably to its competitors, and intends that both its equipment sales and service divisions be profitable. See App. 159-161, 170, 178, 188. Moreover, this hypothetical pricing strategy is inconsistent with Kodak's policy toward its self service customers. If Kodak were underpricing its equipment, hoping to lock in customers and recover its losses in the service market, it could not afford to sell customers parts without service. In sum, Kodak's theory does not explain the actual market behavior revealed in the record.

Respondents offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs could create a less responsive connection between service and parts prices and equipment sales.

For the service market price to affect equipment demand, consumers must inform themselves of the total cost of the "package" — equipment, service and parts — at the time of purchase; that is, consumers must engage in accurate lifecycle pricing. Lifecycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "downtime" and losses incurred from downtime.

Moreover, even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to compile the information. Similarly, some consumers, such as the Federal Government, have pur-

chasing systems that make it difficult to consider the complete cost of the "package" at the time of purchase. State and local governments often treat service as an operating expense and equipment as a capital expense, delegating each to a different department. These governmental entities do not lifecycle price, but rather choose the lowest price in each market. See Brief for National Association of State Purchasing Officials et al., as *Amici Curiae*; Brief for State of Ohio et al., as *Amici Curiae*; App. 429-430.

· patronage
惠顾

As Kodak notes, there likely will be some large volume, sophisticated purchasers who will undertake the comparative studies and insist, in return for their patronage, that Kodak charge them competitive lifecycle prices. Kodak contends that these knowledgeable customers will hold down the package price for all other customers. Brief for Petitioner 23, n. 9. There are reasons, however, to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too. As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the service market could make it profitable to let the knowledgeable consumers take their business elsewhere. More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed. A seller could easily price discriminate by varying the equipment/parts/service package, developing different warranties, or offering price discounts on different components.

Given the potentially high cost of information and the possibility a seller may be able to price discriminate between knowledgeable and unsophisticated consumers, it makes little sense to assume, in the absence of any evidentiary support, that equipment purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine.

Indeed, respondents have presented evidence that Kodak practices price discrimination by selling parts to customers who service their own equipment, but refusing to sell parts to customers who

· outlay
费用

hire third party service companies. Companies that have their own service staff are likely to be high volume users, the same companies for whom it is most likely to be economically worthwhile to acquire the complex information needed for comparative lifecycle pricing.

A second factor undermining Kodak's claim that supracompetitive prices in the service market lead to ruinous losses in equipment sales is the cost to current owners of switching to a different product. See Areeda & Turner, at 519a. If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in", will tolerate some level of service price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked in customers were high relative to the number of new purchasers.

Moreover, if the seller can price discriminate between its locked in customers and potential new customers, this strategy is even more likely to prove profitable. The seller could simply charge new customers below marginal cost on the equipment and recoup the charges in service, or offer packages with life time warranties or long term service agreements that are not available to locked-in customers.

Respondents have offered evidence that the heavy initial outlay for Kodak equipment, combined with the required support material that works only with Kodak equipment, makes switching costs very high for existing Kodak customers. And Kodak's own evidence confirms that it varies the package price of equipment/parts/service for different customers.

In sum, there is a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another.

We conclude, then, that Kodak has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It is clearly reasonable to infer that Kodak has

market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so. It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long term loss. Viewing the evidence in the light most favorable to respondents, their allegations of market power "make ... economic sense". Cf. *Matsushita*, 475 U. S., at 587.

· plausible
似合理的

For the foregoing reasons, we hold that Kodak has not met the requirements of Fed. Rule Civ. Proc. 56(c). We therefore affirm the denial of summary judgment on respondents' § 1 claim.

III

In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

It is so ordered.

Notes

cross elasticity of demand: In economics, cross elasticity of demand measures the responsiveness of the demand for a good to a change in the price of another good. 需求交叉弹性。它表示一种商品的需求量变动对另一种商品价格变动的反应程度。

Exercises

I. Read the case and answer the following questions.

1. Why were customers forced to switch to Kodak services even though they preferred ISO service?
2. How did Kodak violate § 1 of the Sherman Act?

3. What is the reason for the District Court to rule that Kodak did not violate § 2 of the Sherman Act? What is the ruling of the Court of Appeals on that issue?
4. When are service and parts considered two distinct products?
5. How do you understand "cross elasticity of demand"?

Ⅱ. Brief the case and present the case brief to the class.

Appendix I : Tapescripts

Unit One Legal Systems

Warm-up Exercises: Listening Practice

I. Spot dictation. Listen to the passage carefully and fill in the blanks with the words you hear.

The difference between the common law and civil law systems

In England, the legal system is based on common law. Over the centuries, English judges have unified and developed laws using a system of precedent and established practice. By contrast, in the rest of Europe, civil law forms the bases for most legal systems. Civil systems generally feature a code setting out basic rights and duties and in some cases, can be traced right back to Roman law. In 2004, the unreliable evidence set out to explore the differences between the two systems. Here's the presenter Clive Anderson, introducing his panel of experts.

(Anderson) To discuss laws, common and uncommon, civil and uncivil, I'm joined by a Congressman Simon, one of the English judges in European Court of Justice. Hue Massa is a barrister specialized in EU competition law, public and private international law. He's appeared in cases involving European Commission. Prof. Bessel Maxis, who has joined in our program before, is a leading expert on comparative law. Prof. John Bell is another distinguished academic expert, currently professor of Lord Canterbury College of Cambridge. Welcome a distinguished panel. Prof. Maxis, an ordinary person, maybe an ordinary litigant, to recognize the differences of the court on historical bases of civil law or common law.

(Maxis) I would put it in this way. Our concept of the law, the people who tell us what the law is in the continental European systems are the academics of the universities and in the common law systems are the practitioners and the judges. That's very important difference. Because academics go for system, logic, structure and theory and therefore tend to be system-builders while our lawyers are practitioners. They

look for the problems and they try to find the right remedies. So they are problem-solvers.

(Anderson) What are the differences between the ways a town or city might develop England using old rules and gradually building up one supposed to be a new town which is laid up on a great pattern?

(Maxis) Yes, I think it is true to say that our system has developed without the kind of structure that the European systems have from the beginning largely for the reasons you said they inherit from Roman law. But these differences are being a tenuated practice, and gradually, I think, will all move together. Let's give a take. We are adapting to their ideas and they are taking many of ours.

Ⅱ. Listen to the passage again and decide whether the following statements are True or False according to what you hear.

Unit Two Constitutional Law

Warm-up Exercises: Listening Practice

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

Rosa Parks—mother of civil rights

(VOICE ONE) I'm Pat Bodnar.

(VOICE TWO) And I'm Steve Ember. Today, we tell about Rosa Parks, who has been called the mother of the American civil rights movement.

(VOICE ONE) Until the 1960s, black people in many parts of the United States did not have the same civil rights as white people. Laws in the American South kept the two races separate. These laws forced black people to attend separate schools, live in separate areas of a city and sit in separate areas on a bus.

On December 1st, 1955, in the southern city of Montgomery, Alabama, a 42 years old black woman got on a city bus. The law at that time required black people seated in one area of the bus to give up their seats to white people who wanted them. The woman refused to do this and was arrested.

This act of peaceful disobedience started protests in Montgomery that led to legal changes in minority rights in the United States. The woman who started it was Rosa

Parks. Today, we tell her story.

(VOICE TWO) She was born Rosa Louise McCauley in 1913 in Tuskegee, Alabama. She attended local schools until she was 11 years old. Then she was sent to school in Montgomery. She left high school early to care for her sick grandmother, then to care for her mother. She did not finish high school until she was 21.

Rosa married Raymond Parks in 1932. He was a barber who cut men's hair. He was also a civil rights activist. Together, they worked for the local group of the National Association for the Advancement of Colored People. In 1943, Missus Parks became an officer in the group and later its youth leader.

Rosa Parks was a seamstress in Montgomery. She worked sewing clothes from the 1930s until 1955. Then she became a representation of freedom for millions of African-Americans.

(VOICE ONE) In much of the American South in the 1950s, the first rows of seats on city buses were for white people only. Black people sat in the back of the bus. Both groups could sit in a middle area. However, black people sitting in that part of the bus were expected to leave their seats if a white person wanted to sit there.

Rosa Parks and three other black people were seated in the middle area of the bus when a white person got on the bus and wanted a seat. The bus driver demanded that all four black people leave their seats so the white person would not have to sit next to any of them. The three other black people got up, but Mrs. Parks refused. She was arrested.

Some popular stories about that incident include the statement that Rosa Parks refused to leave her seat because her feet were tired. But she herself said in later years that this was false. What she was really tired of, she said, was accepting unequal treatment. She explained later that this seemed to be the place for her to stop being pushed around and to find out what human rights she had, if any.

(VOICE TWO) A group of black activist women in Montgomery was known as the Women's Political Council. The group was working to oppose the mistreatment of black bus passengers. Blacks had been arrested and even killed for violating orders from bus drivers. Rosa Parks was not the first black person to refuse to give up a seat on the bus for a white person. But black groups in Montgomery considered her to be the right citizen around whom to build a protest because she was one of the finest citizens of the city.

The women's group immediately called for all blacks in the city to refuse to ride on city buses on the day of Mrs. Parks's trial, Monday, December 5th. The result

was that forty thousand people walked and used other transportation on that day.

That night, at meetings throughout the city, blacks in Montgomery agreed to continue to boycott the city buses until their mistreatment stopped. They also demanded that the city hire black bus drivers and that anyone be permitted to sit in the middle of the bus and not have to get up for anyone else.

(VOICE ONE) The Montgomery bus boycott continued for 381 days. It was led by local black leader E. D. Nixon and a young black minister, Martin Luther King, Junior. Similar protests were held in other southern cities. Finally, the Supreme Court of the United States ruled on Mrs. Parks's case. It made racial separation illegal on city buses. That decision came on November 13th, 1956, almost a year after Mrs. Parks's arrest. The boycott in Montgomery ended the day after the court order arrived, December 20th.

Rosa Parks and Martin Luther King, Junior had started a movement of non-violent protest in the South. That movement changed civil rights in the United States forever. Martin Luther King, Junior became its famous spokesman, but he did not live to see many of the results of his work. Rosa Parks did.

(VOICE TWO) Life became increasingly difficult for Rosa Parks and her family after the bus boycott. She was dismissed from her job and could not find another. So the Parks family left Montgomery. They moved first to Virginia, then to Detroit, Michigan. Mrs. Parks worked as a seamstress until 1965. Then, Michigan Representative John Conyers gave her a job working in his congressional office in Detroit. She retired from that job in 1988.

Through the years, Rosa Parks continued to work for the NAACP and appeared at civil rights events. She was a quiet woman and often seemed uneasy with her fame. But she said that she wanted to help people, especially young people, to make useful lives for themselves and to help others. In 1987, she founded the Rosa and Raymond Parks Institute for Self-Development to improve the lives of black children.

Rosa Parks received two of the nation's highest honors for her civil rights activism. In 1996, President Clinton honored her with the Presidential Medal of Freedom. And in 1999, she received the Congressional Gold Medal of Honor.

(VOICE ONE) In her later years, Rosa Parks was often asked how much relations between the races had improved since the civil rights laws were passed in the 1960s. She thought there was still a long way to go. Yet she remained the face of the movement for racial equality in the United States.

Rosa Parks died on October 24th, 2005. She was 92 years old. Her body lay in

honor in the United States Capitol building in Washington. She was the first American woman to be so honored. 30,000 people walked silently past her body to show their respect.

Representative Conyers spoke about what this woman of quiet strength meant to the nation. He said: "There are very few people who can say their actions and conduct changed the face of the nation. Rosa Parks is one of those individuals."

(VOICE TWO) Rosa Parks meant a lot to many Americans. 4,000 people attended her funeral in Detroit, Michigan. Among them were former President Bill Clinton, his wife Senator Hillary Rodham Clinton, the Reverend Jesse Jackson, and Nation of Islam leader Louis Farrakhan.

President Clinton spoke about remembering the separation of the races on buses in the South when he was a boy. He said that Rosa Parks helped to set all Americans free. He said the world knows of her because of a single act of bravery that struck a deadly blow to racial hatred.

Earlier, the religious official of the United States Senate spoke about her at a memorial service in Washington. He said Rosa Parks's bravery serves as an example of the power of small acts. And the Reverend Jesse Jackson commented in a statement about what her small act of bravery meant for African-American people. He said that on that bus in 1955, "She sat down in order that we might stand up and she opened the doors on the long journey to freedom".

(VOICE ONE) This program was written by Nancy Steinbach. It was produced by Lawan Davis. I'm Pat Bodnar.

(VOICE TWO) And I'm Steve Ember. Join us again next week.

Ⅱ. Spot dictation. Listen to the passage again and fill in the blanks with the words you hear.

Unit Three Criminal Law

Warm-up Exercises: Listening Practice

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

Crimes are categorized into classes that are defined by their punishments.

A petty offense is a sub-group of misdemeanor. Petty offenses typically may be tried before a magistrate in a summary proceeding as the matter typically is handled all on the date of the first appearance by the defendant in court. The defendant may be denied the right to a jury trial without violation of constitutional rights. Offenses such as minor traffic tickets, parking violations, and minor infractions of local ordinances are treated as petty offenses. The typical punishment for violation of a petty offense is the imposition of a fine.

Violation of a misdemeanor law can result in imposition of punishment greater than that of a petty offense but not as severe as that of a felony.

A felony crime can result in the imposition of the greatest punishment for violation of law, such as a jail sentence greater than one year and fines exceeding $1 000.

The class of a crime is important to consider since the governing substantive law and procedural law are different between the classes. Petty offenses are provided the least amount of protections while felonies have numerous protections built into their treatment by the court system. The punishment for a petty offense is much smaller than the punishment for a felony—which can result in loss of life (death penalty) or liberty (jail).

Ⅱ. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

Most legal systems distinguish criminal from civil wrongs: wrongs that ground a criminal prosecution, from those that ground a civil case for damages brought by the injured party. We can clarify the concept of crime by focusing on this distinction. The same conduct often constitutes both a criminal and a civil wrong, as is shown most dramatically when, after a failed prosecution or a decision not to prosecute, the victim or her family bring a civil case for damages against the alleged wrongdoer: but

we can still usefully ask what the difference is between defining and treating conduct as a criminal wrong and defining and treating it as a civil wrong.

Unit Four Criminal Procedure Law

Warm-up Exercises: Listening Practice

I. Listen to the passage and then answer the questions according to what you hear.

Criminal procedure refers to the methods used to investigate and prosecute a crime. In addition, criminal procedure protects the rights of the defendant. There are two types of criminal procedure—for federal and state crimes.

Individuals accused of committing federal crimes are prosecuted using federal criminal procedure. This means that the defendant is afforded certain rights contained in the Constitution, specifically, the Bill of Rights. The Fourth, Fifth, Sixth, and Eighth Amendments provide the basis for federal procedural rights. The Federal Rules of Criminal Procedure enacted by Congress in 1945 are a supplement to the rights provided by the Constitution.

Individuals accused of committing state crimes are prosecuted using state criminal procedure. This procedure can vary from state to state, but is typically very similar to federal criminal procedure. State Criminal Procedure is defined by the state constitution, statutes, rules, and judicial decisions of each state.

Once federal or state crimes have been committed, reported, investigated, and an arrest has been made, there are several criminal procedures that a defendant will undergo. These procedures include booking, arraignment, bail, preliminary hearing, trial, sentencing, punishment and appeal.

Questions:

1. What does "criminal procedure" refer to?
2. How many types of criminal procedure are there? What are they?
3. What rights are afforded a defendant accused of federal crimes?
4. How is state criminal procedure defined?
5. When does a defendant begin to undergo criminal procedures?

Ⅱ. Listen to the passage and complete the following statements.

Criminal law can be divided into three general groups.

First, there is felony criminal law. This is the most serious type of criminal law, focusing on the most significant type of crime. The penalties associated with committing a felony or breaking a criminal law classified as a felony, include prison time, large fines and, in some instances, a sentence of death.

Second, a lesser type of criminal law is a misdemeanor. This involves a less serious crime but can still result in a jail sentence (usually less than a year) and fines.

Finally, there is what is known as an infraction. This is a type of illegal conduct. However, some scholars do not classify it as a true crime. An example of an infraction is a ticket for a traffic infraction.

Unit Five Civil Procedure Law

Warm-up Exercises: Listening Practice

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

Civil procedure is the body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits. These rules govern how a lawsuit or case may be commenced, what kind of service of process (if any) is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function.

Criminal procedure and civil procedure are different. In criminal actions, prosecutions are nearly always started by the state, in order to punish the defendant. Civil actions, on the other hand, are started by private individuals, companies or organizations, for their own benefit. The cases are usually in different courts, and juries are not so often used in civil cases.

In Anglo-American law, the party bringing a criminal charge is called the "prosecution", but the party bringing most forms of civil action is the "plaintiff" or "claimant". In both kinds of action the other party is known as the "defendant".

Evidence from a criminal trial is generally admissible as evidence in a civil

action about the same matter. For example, the victim of a road accident does not directly benefit if the driver who injured him is found guilty of the crime of careless driving. He still has to prove his case in a civil action. In fact he may be able to prove his civil case even when the driver is found not guilty in the criminal trial, because the standard to determine guilt is higher than the standard to determine fault. However, if a driver is found by a civil jury not to have been negligent, a prosecutor may be estopped from charging him criminally.

If the plaintiff has shown that the defendant is liable, the main remedy in a civil court is the amount of money, or "damages", which the defendant should pay to the plaintiff. Alternative civil remedies include restitution or transfer of property, or an injunction to restrain or order certain actions.

Ⅱ. Listen to the passage again, and complete the following chart according to what you hear.

Unit Six Tort Law

Warm-up Exercises: Listening Practice

1. Spot dictation. Fill in the blanks according to what you hear.

Torts are civil wrongs recognized by law as grounds for a lawsuit. These wrongs result in an injury or harm constituting the basis for a claim by the injured party. While some torts are also crimes punishable with imprisonment, the primary aim of tort law is to provide relief for the damages incurred and deter others from committing the same harms. The injured person may sue for an injunction to prevent the continuation of the tortious conduct or for monetary damages. Among the types of damages the injured party may recover are: loss of earnings capacity, pain and suffering, and reasonable medical expenses. They include both present and future expected losses.

There are numerous specific torts including trespass, assault, battery, negligence, products liability, and intentional infliction of emotional distress. Torts fall into three general categories: intentional torts; negligent torts; and strict liability torts. Intentional torts are those wrongs which the defendant knew or should have known would occur through their actions or inactions. Negligent torts occur when the defendant's actions were unreasonably unsafe. Strict liability wrongs do not depend on

the degree of carefulness by the defendant, but are established when a particular action causes damage.

Ⅱ. Why do we need tort law?

1. Listen to the first part of the passage and complete the chart. In the chart below listed part of the examples given by the speaker in addressing the outcome if there were no legal system to deal with injuries. Fill in the chart according to what you hear.

What if we had no legal system to deal with injuries like these? First, people would have less incentive to avoid injuring other people. Sometimes injuries would occur intentionally; more often, the injuries would be accidental, because people would have less incentive to be careful. An auto manufacturer would have an incentive to cut back on safety measures if it knew it would not be liable for injuries that were caused by defective cars. Drivers might be less careful, and property owners might be less inclined to repair their sidewalks. Conversely, businesses and individuals who did act safely would be penalized for their good behavior because it is often more expensive to act carefully with no corresponding reduction in liability.

Second, the victims of accidents would be left to their own resources to pay for medical expenses, lost wages, property damage, and other consequences of injuries they suffer. For most victims the cost would be significant; for the unlucky few, the cost would be catastrophic. Stella Liebeck's misadventure with hot coffee, for example, would cost her tens of thousands of dollars in hospitalization and doctor bills.

Third, it just would not seem fair that people could freely inflict harm on other people, either intentionally or carelessly. The careless driver would get away with acting wrongfully if he did not have to pay for his actions, and the innocent victim would have to suffer the consequences.

2. Listen to the passage again, and complete the following sentences.

Unit Seven Contract Law

Warm-up Exercises: Listening Practice

Ⅰ. Listen to the passage carefully and decide whether the following statements are True or False according to what you hear.

Contract law concerns all aspects of the making, keeping, and breaking of promi-

ses and agreements. People make promises and agreements all the time. However, the promises and agreements, and the millions more that people make every day, are vastly different from each other. Agreeing to come to dinner is different than buying a fleet of bombers. Taking a part-time job flipping burgers at the local McDonald's is different than signing an employment contract to become president of McDonald's Corporation.

Contract law governs different types of agreements without regard for who made them or what their subject matter is, but some types of agreements are excluded from its scope. For example, contract law governs the employment contract between the president of General Motors and the company, but a specialized body of law, known as labor law, governs the collective bargaining agreement between GM and the United Auto Workers, the union that represents GM's factory workers. The agreement among the partners in a law firm is a contract, but partnership law, rather than general contract law, controls the agreement. The rules and principles of contract law underlie labor law and partnership law, but they have been adapted to meet the needs of the specialized subject matter.

Contract law's focus on promises and agreements distinguishes it from the two other major areas of private law: property law and tort law. Promises and agreements look to the future. Therefore, contract law is concerned with what will be. When someone makes a promise and fails to keep it, contract law makes her pay because she has failed to bring about a future state of affairs to which her promise committed her. Property law, on the other hand, deals with what is. When a trespasser enters someone's property without permission, the trespasser is liable for interfering with an existing state of affairs—the owner's right to use the property and to exclude others from using it. Tort law looks to what was—the past state of affairs before harm occurred. A driver who negligently injures a pedestrian is liable because he has made the pedestrian worse off than he was before by taking away something the pedestrian had before the accident, such as his health or earning capacity.

Ⅱ. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

Contract law is initially concerned with determining what promises the law will enforce or recognize as creating legal rights. In the United States, a promise is enforceable if it is made as a bargained exchange for some legally sufficient consideration. This requires agreement between the contracting parties, which may take the form of an offer by one party and an acceptance by the other. The agreement may be

either written or oral and thus be an express contract. If a promise evolves not from oral or written words but from the parties' conduct or a combination of words and conduct, it is characterized as an implied contract. Promises resulting from either express or implied agreements can be enforced.

Unit Eight Property Law

Warm-up Exercises: Listening Practice

I. Listen to the passage, and then answer the questions according to what you hear.

The concept of ownership of things was central to the common law of property for several hundred years. Property law concerned the different things people could own and the ways in which they could own them. Almost anything tangible can be the subject matter of property. However, property isn't limited to tangible things. If someone is an author, he or she has a copyright in the novels he or she writes. This is an intangible form of intellectual property; he or she doesn't own the books, but he or she does own the right to produce the books. People may also own stocks, bonds, and mutual fund shares. Financial instruments like these are the most prevalent form of property in modern society, even though they are intangible.

Nevertheless, property is not really about the ownership of things. Instead, property is about relationships among people with respect to valuable resources. Property law involves a bundle of rights; no single concept of ownership prevails. Instead, there are a variety of legal relationships that people can have with respect to valuable interests.

The bundle of potential rights defines what interests an owner can have in an item of property. Think of the bundle of rights as a bundle of sticks. If an individual is holding all of the sticks with respect to a certain subject of property, tangible or intangible, then we think of that person as the owner of the property. Even if they do not hold all of the sticks, if they hold most of them, or some particularly important sticks, we might still think of them as owning the property. The most important sticks, or interests in property that one might have are:

Liberty to use.

Right to exclude.

Power to transfer.

Immunity from damage.

The most important of the bundle of rights is the right to exclude. Therefore, any entry upon your land without your permission or without a legal privilege to enter is a trespass. If someone walks across your land, throws garbage on it, or even walks a dog on your lawn, it is a trespass.

Questions:

1. What can be the subject matter of property?
2. What are the typical forms of intangible property?
3. What is property about?
4. What does property law involve?
5. What can property law be described as?
6. What are the most important interests in property a property owner might have?
7. Among all the important interests in property, which one is the most important?

Ⅱ. Spot dictation. Listen to the passage and then fill in the blanks with the words you hear.

Traditionally, a landowner was thought to own not only the surface of the land but also all property extending down the center of the earth and up "to the heavens". The former is still true; your neighbor cannot dig a tunnel under your land, or dig diagonally to extract minerals under your land. The latter concept has been eroded; however, it is not a trespass for an airplane to fly over your house at 30, 000 feet, or for a satellite to orbit the Earth above your property.

A property owner not only has the right to exclude a physical invasion of the property, but also can exclude some other type of entry, like noise, smells, smoke, or vibrations, if the infringement on your enjoyment of your property is deemed to be unreasonable. The invasions of your property are called nuisances. They may also violate local ordinances or state law specifically directed at these kinds of problems.

So property law is not about things, or even in a simple sense about the ownership of things. Instead, property law is about the allocation of value in society. It is inevitably tied to questions about economics, politics, and our vision of the good society. We need to explore what qualifies as property, what it means to say something is property, and how the answers to those questions tie in to social relations, power, and justice.

Unit Nine The Law of Corporations

Warm-up Exercises: Listening Practice

Ⅰ. Listen to the passage, and then answer the questions according to what you hear.

Unlike many civil legal systems, American law does not draw any distinctions between different forms of corporations. Differences do exist between commercial and noncommercial enterprises; the latter, called non-profit corporations, are often formed for charitable or religious purposes and are subject to special statutory provisions. Commercial enterprises, "corporations" in the strict sense, may be either "public" (that is, their shares are traded on public exchanges) or "close" (closely-held) corporations, for instance, family enterprises. However, they do not differ in their legal organizations; there is only one form of corporation. In a number of states corporations are governed by the Uniform Business Corporation Act.

A corporation is established by one or several persons who conclude the corporate contract and charter and subscribe to the share capital. Even if the statute requires more than one founder, the subsequent transfer of all shares to a single owner and, with it, the establishment of one-man company, is permissible.

The corporate charter determines the amount of the corporation's capitalization. This is the so-called "authorized capital" which need not be subscribed in the full amount. Rather, it constitutes the upper limit within which the company may issue new shares for the purpose of raising more money without needing to change the corporate charter. Shares may be issued in different classes, that is, therefore also with rights of preference (preferred shares); ordinarily only the owners of common stock have the right to vote in shareholder's meetings for the election of the company's management.

Questions:

1. Under the American law, are there any differences between different forms of corporations? Is it the same with civil law?

2. What is the difference between commercial corporations and noncommercial ones under the American law?

3. What is a public corporation, and what is a close corporation?

4. In terms of legal organizations, how many forms of corporations are there?

5. What determines the amount of a corporation's authorized capital?

Ⅱ. Spot dictation. Listen to the passage and then fill in the blanks with the words you hear.

A corporation is managed by a board of directors headed by a chairman. The board employs the management, for instance, the corporation's president and other leading managers. The number of directors is usually specified by statute; however, the charter may specify a lesser number, for instance, for the case of a one-man company.

The board of directors is elected by the shareholders. It derives its competence from corporate charter and State legislation and therefore is not directly responsible to the shareholders. The latter only have the right of election as well as the right to seek compensation in tort for damages incurred by them individually. However, they do not have the right to intervene, for instance by suit, in the management of the corporation itself. Such an intervention by shareholders is made possible in a different manner. The directors have the obligation to manage the company with the greatest possible care, that is, they are subject to a fiduciary duty. This obligation can be enforced against them by the shareholders in the name of the company (but not their own). This concept is closely related to equity law (the enforcement of a fiduciary duty); since this suit of intervention is in the name of the company, it is therefore designated as a shareholder's "derivative suit".

Unit Ten Evidence Law

Warm-up Exercises: Listening Practice

Listen to the dialogues and fill in the blanks according to what you hear.

Dialogue One

Cross-examiner : During your direct testimony you said that the Ford had the green light when it entered the intersection, didn't you?

Witness : Yes.

Cross-examiner : Two days after the accident you signed a statement under oath that the Chevrolet had the green light, didn't you?

Witness : I was confused.

Cross-examiner : Move to strike, your honor, as non-responsive, and will your honor instruct the witness to answer the questions that are asked?

Judge : The response is stricken; jurors, you are to disregard the witness' previous answer; and, witness, you should listen to the question and answer only what is asked. If there are explanations required, you may be asked about them on redirect examination.

Dialogue Two

Proponent : Dr. Green, when did you first see the patient?

Opponent : Objection.

Judge : Sustained.

Proponent : Your honor, may I request that counsel state a specific ground for objection, so that I can ask the question in a proper form?

Judge : What is the basis for the objection?

Opponent : No foundation.

Proponent : Your honor, that is still a general objection. Counsel should specify what type of foundational objection is being made.

Opponent : No foundation has been laid for the witness's use of the notes to refresh memory or as past recollection recorded.

Proponent : Mr. Green, would you indicate on the diagram where you were standing at the time of the collision?

Opponent : Objection, no foundation.

Judge : Sustained.

Proponent : Your Honor, may I approach the bench?

Judge : Yes.

Proponent : Your Honor, I am having problems here. I think that the witness's testimony would be admissible if I could put the questions in the proper form. Could you give me some guidance about how to proceed?

Unit Eleven Intellectual Property Law

Warm-up Exercises: Listening Practice

Ⅰ. Spot dictation. Listen to the passage and then fill in the blanks with the words you hear.

The laws of the United States relating to patents, trademarks, and copyrights protect the various kinds of intellectual property. Sometimes more than one form of protection applies to a single type of property; however, one form of protection is usually more suitable than another.

Patents, for example, are granted on manufactured articles, machines, compositions of matter, and industrial processes. Copyrights generally apply to literary and artistic works of authors and artists, while trademark owners have the exclusive right to use a specific mark, word, or symbol to identify their products and services.

We have prepared this overview to summarize the various forms of intellectual property protection available in the United States. It is not intended as a comprehensive review of the law, but as a reference tool to help you understand the types of intellectual property protection available and to aid you in differentiating among them.

Ⅱ. Listen to the passage and complete the following statements.

As with all business-related activities, economics plays a large role in determining whether to protect intellectual property. Companies must weigh the potential value of an intellectual property right against both the probability of realizing that value and the costs of securing, enforcing, and maintaining that right.

There are no hard and fast rules that determine the potential value of a given intellectual property right. What is valuable to one individual or company may be worthless to another. There are certain obvious factors that contribute to the potential value of the intellectual property, including the potential value of exclusive or other rights, assignments, or licenses, cross-licenses, enforcement against infringers, and as collateral for securing financing.

Unit Twelve Family Law

Warm-up Exercises: Listening Practice

Ⅰ. Spot dictation: listen to the passage and fill in the blanks according to what you hear.

Family Law is that branch of law consisting of the substantive and procedural rules that regulate the creation, ongoing relations, termination, and post-termination consequence of family relationships, and the legal rights, privileges, benefits, duties, limits and restrictions pertaining to such relationships. Direct regulation of family relations including rules governing marriage, paternity, adoption, child abuse and neglect, divorce, custody, support, etc. is the major concern of law school courses and of most family law practice. However, indirect regulation of family relations arises in virtually all other subjects in the law school curriculum, also. The addition of the "family factor" to otherwise normal problems of property, evidence, contract, or tort law often creates a new, hybrid dilemma in which the family law issue may overshadow the other issues. Historically, the primary focus of state family law regulation has been and still is on the nuclear family, though the regulation of relations between persons in analogous relationships such as extended, quasi, and alternative families is increasingly arising in the cases and being discussed in the literature.

Ⅱ. Listen to an interview of Attorney-General Robert McClelland by Steve Vizard, and complete the following statements.

(VIZARD) The family in crisis. When the social unit that underpins our society falls to pieces there is nothing worse. The family looks to our legal system, typically the Family Court for resolution. These are resolutions about things that often defy equitable resolution. How we're going to fairly deal with the family home, with children, with income, with jobs, with possessions, in fact with our lives.

In one of the most radical changes to the Family Law system, the Federal Attorney-General is proposing to introduce from next year a system that means that separating couples with children are going to be able to choose arbitration, that's where a mediator can decide on custody, rather than go through the traditional legal process.

I'm talking to the Attorney-General, Robert McClelland now. Robert, thanks for

joining me.

(McCLELLAND) That's my pleasure.

(VIZARD) Robert, can you briefly explain what the proposed changes are.

(McCLELLAND) Essentially it's about giving families options. You've got in Family Relationship Centres and Legal Aid Commissions, already quite a sophisticated mediation process. But they don't go that final step of actually making a decision that sets out how the arrangement should apply in the future. So we're giving people the option of saying, alright, we've come this far in the mediation. We still can't agree, we're going to agree to you the mediator making a decision that will apply to us. We think that's going to have time and cost savings but will also avoid the litigious approach which often isn't the best way of resolving matters concerning children.

(VIZARD) You'll give the mediator, which currently isn't the case, the power to make the binding decision. Is that what's proposed?

(McCLELLAND) That's right. The parties would agree to empower the mediator to do that and that would set the framework for the future arrangements in respect to their children.

(VIZARD) Where would a lawyer fit into this? Because I think most people would favour the idea that there's a mediator who can perhaps deal with these things at a more personal, quicker, expedient and cost-effective way. But equally on the other side most people who are in the dispute are, you know, aren't thinking necessarily straight or in their best interests, or in their long term interests, or with a full knowledge of the law. So where would an individual, a parent who's talking about the future of his kids, or his house, or his entire life, be able to check what's happened in the mediation with independent legal advice on the way through?

(McCLELLAND) Certainly we're quite happy for lawyers to be involved. But it would be at the discretion of the parties and the mediator. So, for instance, we wouldn't like to see an inequality of legal representation for instance. We wouldn't like to see one party represented and the other not. But if both parties agree to legal representation, the mediator agreed that was appropriate, certainly we see lawyers playing a constructive role in this process.

(VIZARD) Finally, Robert, I guess a very simple question, but probably the most complex question. How will your new system aid those who are most at risk? I'm talking ahout the children, the interests of children. Property can be carved up, income can be re-earned, things that we can touch and feel, that we own, can be read-

justed. But kids are most at stake here. How will your new mediation system advantage children?

(McCLELLAND) We very much see this as being a hands-on function. Families will have more resources to bring up the kids because if you haven't got each side owing literally thousands and thousands of dollars, obviously the family has more resources available to apply to themselves and bringing up children. So that's essentially the philosophy.

(VIZARD) Less for the lawyers, more for the kids. Attorney-General, Robert McClelland, I really appreciate your time this morning and it's a very interesting suggested change. We look forward to following it closely.

(McCLELLAND) That's my pleasure.

Unit Thirteen The Antitrust Law

Warm-up Exercises: Listening Practice

Ⅰ. Spot dictation. Listen to the passage and fill in the blanks with the words you hear.

There are at least four views of economic markets which provide some context to the "relevant market" and subsequent monopolization determinations: free market, which holds that (1) market forces produce the best allocation of resources, and (2) the non-anecdotal evidence indicates no correlation between concentration and profits; centrist, which is somewhat similar to the "free market" view that size and distribution don't necessarily signify the intensity of competition, but does believe that collusion is more likely in concentrated markets; moderate structuralist, which emphasizes that the greater the number of competitors in a market the more likely there will be downward pressure on prices; and strict structuralist, which holds that competition is directly and inversely related to concentration levels. The "bottom-line" goal of U. S. antitrust policy should be "to encourage producers to make and sell better products at lower prices and pass those savings on to consumers".

Ⅱ. Listen to the passage and answer the following questions according to what you hear.

Antitrust doctrine holds that viable competition will best protect consumers. It is

only concerned with the viability of individual competitors insofar as their fates affect marketplace competitiveness. Moreover, the Rule of Reason generally modified "competition" with "reasonable". Viewed in the context of the Rule of Reason, the general prohibitions against monopolization and attempted monopolization contained in section 2 of the Sherman Act and against monopolization in section 7 of the Clayton Act, and the unlawfulness of "unfair acts" in commerce under section 5 of the Federal Trade Commission Act, require two things: first, an inquiry into whether an entity is in fact a monopolist; and second, whether that monopolist has unlawfully monopolized the market(s) within which it operates (the applicable, "relevant market", which may be either product or geographically based, or both). This article will touch on the monopoly/monopolization thinking in the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), as illustrated in (1) statements on merger enforcement made by current antitrust enforcement officials, since such expressions are generally indicative of the agencies' concerns about competitive conditions and the effect of various market transactions, (2) the 1992 Horizontal Merger Guidelines, and (3) some observations on the Government actions against the Microsoft and Intel Corporations.

- **Questions:**

1. What does antitrust doctrine hold?

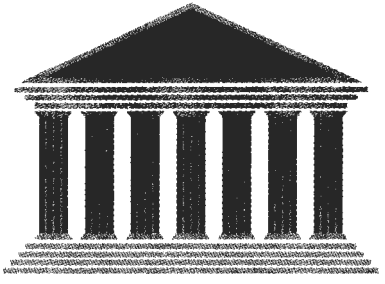
2. What statute(s) contain the provisions on the general prohibitions against monopolization?

3. What statute(s) contain the provisions regarding the unlawfulness of unfair acts in commerce?

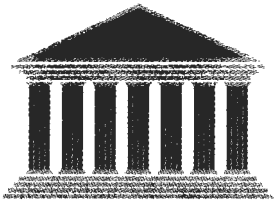
4. What are the two things required for the application of the general prohibitions against monopolization under the Sherman Act?

5. Where can you find the illustration of the monopoly/monopolization thinking in the Antitrust Division of DOJ and FTC?

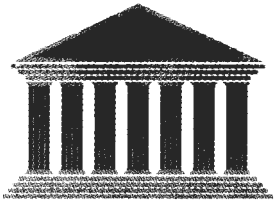
Appendix Ⅱ : Overview of the State and Federal Court System



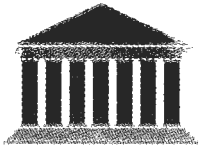
U.S.Supreme Court



State Supreme Court



U.S. Court of Appeals



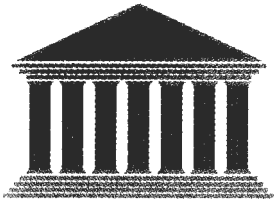
Intermediate Level
Court of Appeals

U.S. District Court
(Bench Trial or Jury Trial)

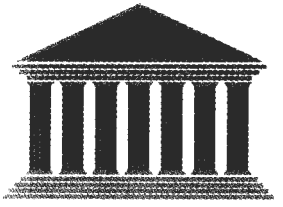
State Trial Court
(Bench Trial or Jury Trial)

Sample for a Particular Jurisdiction: Chicago, Illinois

U.S.Supreme Court
(U.S.)



Supreme Court of Illinois
(Ill.)



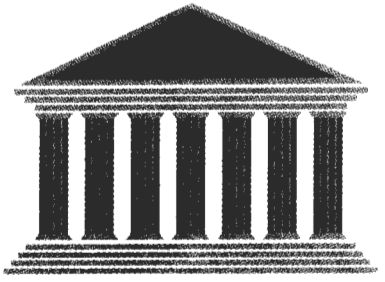
U.S. Court of Appeals
for the Seventh Circuit
(7th Cir.)

Illinois Appellate Court
First District
(Ill.App.Ct.)

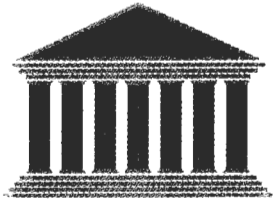
U.S. District Court for the
Northern District of Illinois
(N.D.Ill.)

Cook County Circuit Court

Sample for a Particular Jurisdiction: New York, New York

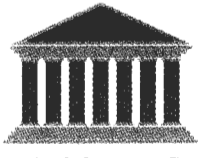


U.S.Supreme Court
(U.S.)



New York Court of Appeals
(N.Y.)

U.S. Court of Appeals
for the Second Circuit
(2nd Cir.)



New York Supreme Court
Appellate Division
First Department
(N.Y.App.Div.)

U.S. District Court for the
Southern District of New York
(S.D.N.Y)

New York Supreme Court
(N.Y.Sup.Ct.)

Appendix Ⅲ: Model Contract

Independent Contractor Agreement

Agreement entered into this _____ day of _____, 20 _____, between X Chemical, Inc. (the "Company"), of _____, and _____ ("Contractor") of _____.

Recitals

Company operates an industrial chemical business and wishes to hire Contractor as an independent contractor to sell chemicals on behalf of the Company.

Contractor is willing to perform sales services for the Company as an independent contractor.

In consideration if the mutual covenants set forth below, the parties hereby agree as follows:

1. Description of Work. Contractor shall devote his full time and use his best efforts to make sales of chemical products to the Company's customers.

2. Territory. Contractor shall contact only customers whose principal place of business is located in the following territory:

_____

In case of doubt Contractor shall notify the Company and obtain permission to contact a customer. If Contractor learns of customers in other territories who are interested in purchasing the Company's products, Contractor shall promptly notify the Company of the names of these customers.

3. Commission. Company shall pay to Contractor a commission of six percent (6%) of gross sales. Payment shall be made on the 15th of each month for sales made during the previous month.

4. Relationship of Parties. The parties intend that an independent contractor-employer relationship will be created by this contract. The Company is interested only in the results to be achieved, and the conduct and control of the work will lie solely with the Contractor.

5. Expenses and Benefits. Contractor shall be responsible for all expenses in-

volved in performing duties under this agreement and shall not be entitled to any employee benefits, such as social security, workers' compensation, or insurance.

6. Liability. The work to be performed under this contract will be performed entirely at Contractor's risk. For the duration of this contract, Contractor will carry public liability insurance naming Company as an additional insured in the following amount: _____. Contractor agrees to indemnify and hold the Company harmless against any liability or loss arising from Contractor's negligence.

7. Duration and Termination. This contract shall continue for one year from its execution. It shall be automatically renewed for additional one-year periods unless either party gives written notice of termination at least three months before the anniversary of the execution of this agreement. Provided, however, either party may terminate this agreement at any time for good cause.

8. Entire Agreement. This document constitutes the entire agreement between the parties. No agreements between the parties are binding on them unless incorporated in a writing signed by both parties. This agreement may be modified only in writing signed by both parties.

In witness whereof, the parties have executed this agreement on the day and year first written above.

CONTRACTOR:

_____

X CHEMICAL, INC.

By: _____

Authorized Agent

Appendix Ⅳ: Deed

General Warranty Deed

I, Tom Doe, hereby grant to Mary Roe and her heirs and assigns forever, for $10 and other good and valuable consideration, the following real estate situated in _____ County, State of _____, described as follows:

[Insert description of land]

To have and to hold the premises, with all the privileges and appurtenances belonging thereunto, to the use of the grantee and her heirs and assigns forever.

The grantor, for himself and his heirs and assigns, covenants:

1. that the grantor is lawfully seized in fee simple of the premises,

2. that he has a good right to convey the fee simple,

3. that the premises are free from all encumbrances,

4. that the grantor and his heirs and assigns will forever warrant and defend the grantee and her heirs and assigns against every person lawfully claiming the premises or any part thereof,

5. that the grantor and his heirs and assigns will guarantee the quiet enjoyment of the premises to the grantee and her heirs and assigns, and

6. that the grantor and his heirs and assigns will, on demand of the grantee or her heirs or assigns, execute any instrument necessary for the further assurance of the title to the premises that may be reasonably required.

Dated this _____ day of _____, 20 _____.

Tom Doe

_____

[signature of grantor]

Acknowledgement

State of _____

County of _____

I hereby certify that on this day before me, a notary public, personally appeared

the above named Tom Doe, who acknowledged that he voluntarily signed the foregoing instrument on the day and year therein mentioned.

In testimony whereof, I hereunto subscribe my name and affix my official seal on this _____ day of _____, 20 _____.

[signature of notary]
Notary Public in and for
_____ County,
State of _____
My commission
expires _____

[affix notarial seal]

Appendix V: Corporate Forms—Simple Form of Certificate of Incorporation

CERTIFICATE OF INCORPORATION
OF

FIRST. The name of the corporation is _____.

SECOND. The address of the corporation's registered office in the State of Delaware is One Rodney Square, Tenth and King Streets, P. O. Box 551 in the City of Wilmington, County of New Castle 19801. The name of its registered agent at such address is _____.

THIRD. The purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH. The total number of shares which the corporation shall have authority to issue is 1, 000 shares of capital stock, and the par value of each such share is $1.00 per share.

FIFTH. The name and mailing address of the incorporator is _____, Wilmington, Delaware 19899.

SIXTH. The Board of Directors of the corporation is expressly authorized to make, alter or repeal by-laws of the corporation, but the stockholders may make additional by-laws and may alter or repeal any by-law whether adopted by them or otherwise.

SEVENTH. Elections of directors need not be by written ballot except and to the extent provided in the by-laws of the corporation.

The undersigned incorporation hereby acknowledges that the foregoing certificate of incorporation is his act and deed and that the facts stated therein are true.

Appendix Ⅵ: About Case Citations

A citation identifies a legal authority or reference work, such as a constitution, statute, court decision, administrative rule, or treatise. In order to find the legal authority or precedent we need, we must know how to read and understand citations. Here, we just introduce how to read and understand a case citation.

A standard case citation contains:

1. the name of the case;
2. the published sources in which we can find the case;
3. information in parentheses indicating
   A. the year the decision was issued, and
   B. when not apparent from the name of the cited reported volume, the court which issued the decision; and
4. the prior or subsequent history, if any, of the case.

Here's an example of a citation to a federal case:

Jackson v. Metropolitan Edison Co., 384 F. Supp. 954 (M. D. Pa. 1972), *aff'd*, 483 F. 2d 754 (3d Cir. 1973), *aff'd*, 419 U. S. 345 (1974).

Court decisions are complied chronologically by date of issuance and published in volumes called case reporters. The abbreviations in this citation indicate the case reporters. For example, "F. Supp. "refers to *Federal Supplement*, the case reporter which indicates United States District Court decisions.

The numbers in the citation also have meanings. Using "384 F. Supp. 954" from the example, the first number refers to the volume in the series, and the second number refers to the page in that volume where the report of the decision begins. Here, we may find a decision in the case of *Jackson v. Metropolitan Edison Company* in volume 348 of the *Federal Supplement* series, beginning at page 954 in that volume.

Finally, "v. "stands for "versus" (that is, "against"), as in "Jackson versus (or against) Metropolitan Edison Company".

Now, here's what the example tells us:

A decision in the case of *Jackson v. Metropolitan Edison Company* is reported in volume 348 of the *Federal Supplement*, beginning at page 954 of that volume. This decision was issued by the United States District Court for the Middle District of Pennsylvania [M. D. Pa.] in 1972. The District Court's decision was affirmed [*aff'd*] on review by the United States Court of Appeals for the Third Circuit [3d Cir.], with the Third Circuit's decision issued in 1973 and published in volume 483 of the *Federal Reporter*, *Second Series* [F. 2d], beginning at page 754 in that volume. The Third Circuit's decision was reviewed and affirmed [*aff'd*] by the United States Supreme Court, whose decision was issued in 1974 and published in volume 419 of *United States Reports* [U. S.], beginning at page 345 in that volume.

Note that the parenthetical information after the citation to "419 U. S. 345" does not include the name of the court issuing the decision, i. e. the United States Supreme Court, because that is the only court whose decisions are published in the series called *United States Reports*. By contrast, the citations to "348 F. Supp. 954" and "483 F. 2d 754" do identify the courts issuing the decisions—the United States District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit, respectively—because the series *Federal Supplement* and *Federal Reporter*, *Second Series* each contain the published decisions of more than one court.

Two more points about case citations need to be noted. First, sometimes a case citation seems to have extra number. For instance, a particular reference to the District Court decision in *Jackson v. Metropolitan Edison Company* may look like this: 348 F. Supp. 954, 955. As we know, the first number after "F. Supp" is the page on which the decision begins. The second and any subsequent numbers (as in 348 F. Supp. 954, 955, 957-58) refer to particular pages the writer of the citation wants us to examine in the decision. If a writer wants someone to look at a whole case in general, the citation would be the basic one with only the first page of the opinion included—for example, 348 F. Supp. 954. But if a writer wants to direct someone's attention to a particular part of the opinion, the citation would include the specific pages along with the first page of the opinion—for example, 348 F. Supp. 954, 956.

The remaining point to note about case citations is that many opinions (especially those from state courts) are reprinted in more than one source. Citations to these other sources are known as *parallel citations*; they direct the reader to other verbatim reprints of the same decision, not to different decisions rendered at other stages of the

proceeding (not, for example, to a subsequent decision affirming or reversing the original decision).

An example of a parallel citation is:

State v. Yoder, 49 Wis. 2d 430, 182 N. W. 2d 539(1971).

This example shows that *State v. Yoder* is reprinted at 49 Wis. 2d 430 ("Wis. 2d" stands for *Wisconsin Reports*, 2*d Series*). The example also shows that *Yoder* is reprinted *verbatim* at 182 N. W. 2d 539, which is the parallel citation("N. W. 2d" stands for *North Western Reports*, 2*d Series*).

The function of a citation is to help a reader to do legal researches, which serves to help the reader locate a legal authority or reference work. As long as we can extract the minimum information necessary to find that source—for example, the name of the reporter and the volume and the page numbers where the case we need appears in the reporter—the citation serves its principal purpose.

(Extracted from *The Legal Research Manual*, by Christopher G. Wren & Jill Robinson Wren, 2nd edition, Legal Education Publishing, 1986)

Appendix Ⅶ: Vocabulary

Unit One

accessible /əkˈsesəbl/ *a.* that can be reached, used, etc. 可得到的

accumulate /əˈkjuːmjəleit/ *v.* gradually get or gather together an increasing number or quantity of(sth.)积累;积攒

adjacent /əˈdʒeisnt/ *a.* situated near or next to sth. 邻近的;毗连的

adjudication /əˌdʒuːdiˈkeiʃn/ *n.* the legal process of resolving a dispute; judgment (法院的)宣告;宣判;审判;裁定

adversary /ˈædvəˌsəri/ *n.* opponent in a contest 对手

affirm /əˈfəːm/ *v.* approve(a lower court's judgment, order, or decree)by an appellate court 维持(原判)

ambiguous /æmˈbigjuəs/ *a.* uncertain in meaning or intention 含糊不清的,引起歧义的

analogy /əˈnælədʒi/ *n.* partial similarity between two things that are compared 类比,类推,类似

analogous /əˈnæləgəs/ *a.* partially similar or parallel 相似的

arbitration /ˌɑːbiˈtreiʃn/ *n.* a method of dispute resolution involving one or more neutral third parties who are chosen by or agreed to by the disputing parties, and whose decision is binding 仲裁

argumentation /ˌɑːgjumənˈteiʃn/ *n.* process of arguing 论证

brief /briːf/ *n.* a written statement setting out the legal contentions of a party in litigation, esp. on appeal 案例提要

code /kəud/ *n.* a systematic collection or revision of laws, rules, or regulations 法典

constitution /ˌkɔnstiˈtjuːʃn/ *n.* the fundamental and organic law of a nation or state, establishing the conception, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exer-

cise 宪法

creek /kri:k/ *n.* (US) small river; stream 小河；溪流

curb /kə:b/ *v.* prevent (sth.) from getting out of control 控制，约束，抑制

default /di'fɔ:lt/ *n.* the omission or failure to perform a legal or contractual duty 缺席

delict /'di:likt/ *n.* a tort 不法行为；侵权行为

devise /di'vaiz/ *v.* think out; invent 想出，设计；发明

dictum /'diktəm/ *n.* (pl. dicta) a statement of opinion or belief held to be authoritative because of the dignity of the person making it 法官的附带意见

distinguish /dis'tiŋgwiʃ/ *v.* recognize the difference between (people or things) 区别于

embrace /im'breis/ *v.* (of things) include; accept or take willingly 包含，收买，信奉

empire /'empaiə(r)/ *n.* group of countries or states under a single ruler or ruling power 帝国

enact /i'nækt/ *v.* make or pass (a decree) 制定(法律)

enactment /i'næktmənt/ *n.* law 制定法，成文法

entertain /ˌentə'tein/ *v.* give judicial consideration to 审理

enticing /in'taisiŋ/ *a.* attractive or tempting 有吸引力的；迷人的

exception /ik'sepʃn/ *n.* thing that does not follow a rule 不合规则的事物，例外

executive /ig'zekjutiv/ *n.* the branch of government responsible for effecting and enforcing laws 行政机构

fraudulently /'frɔ:djuləntli/ *ad.* deceitfully or dishonestly 欺骗地；诈骗地

hearing /'hiəriŋ/ *n.* a judicial session, usu. open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying 庭审

hypothetical /ˌhaipə'θetikəl/ *a.* of or based on a hypothesis; not necessarily true or real 假设的；未必是事实的

identical /ai'dentikl/ *a.* exactly alike 相同的

identify /ai'dentifai/ *v.* show, prove, etc. who or what sb./sth. is; recognize sb./sth. (as being the specified person or thing) 确认

impartially /im'pɑ:ʃəli/ *ad.* not favoring one person or thing more than another 不偏不倚地

inheritance /in'heritəns/ *n.* receiving property from an ancestor under the laws of intestate succession upon the ancestor's death 继承

innocuous /i'nɔkjuəs/ *a.* causing no harm 无害的

integration /ˌintiˈgreiʃn/ *n.* combining sth. in such a way that it becomes fully a part of sth. else 结合；整合；一体化

internal /inˈtəːnl/ *a.* of political, economic, etc. affairs within a coutry, rather than abroad; domestic 国内的

interpret /inˈtəːprit/ *v.* explain (sth. which is not easily understandable) 解释

issue /ˈiʃuː/ *n.* a material point in a dispute 争议点

judgment /ˈdʒʌdʒmənt/ *n.* a court's final determination of the rights and obligations of the parties in a case 判决

judiciary /dʒuːˈdiʃəri/ *n.* the branch of government responsible for interpreting the laws and administering justice 司法机构

jurist /ˈdʒuərist/ *n.* one who has thorough knowledge of the law; esp., a judge or an eminent legal scholar 法学家

juror /ˈdʒuərə(r)/ *n.* a person serving on a jury panel 陪审员

jury /ˈdʒuəri/ *n.* a group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them 陪审团

legislation /ˌledʒisˈleiʃn/ *n.* the law enacted in written form, according to some type of formal procedure, by a branch of government constituted to perform this process 立法

legislative /ˈledʒislətiv/ *a.* of or relating to lawmaking or the power to enact laws 立法的

legislature /ˈledʒisleitʃə(r)/ *n.* an officially elected or otherwise selected body of people vested with the responsibility and power to make laws for a political unit, such as a state or nation 立法机构

level /ˈlevl/ *v.* make a horizontal surface; make flat 使平坦

litigant /ˈlitigənt/ *n.* a party engaged in a lawsuit 诉讼当事人

litigation /ˌlitiˈgeiʃn/ *n.* the process of carrying on a lawsuit 诉讼

mediation /ˌmiːdiˈeiʃn/ *n.* a method of alternative dispute resolution in which a neutral third party helps resolve a dispute 调停，调解

millennium /miˈleniəm/ *n.* period of 1 000 years 一千年

material /məˈtiəriəl/ *a.* important; relevant 重要的；相干的

move /muːv/ *v.* make an application to (a court) for a ruling, order, or some other judicial action 动议

muddy /ˈmʌdi/ *a.* not clear; confused 模糊不清的；混乱的

murky /ˈməːki/ *a.* not known but suspected of being immoral or dishonest 可疑

的，不可告人的

nuisance /ˈnjuːsns/ *n.* a use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance, or inconvenience 滋扰

overrule /ˌəuvəˈruːl/ *v.* to annul, to make void 推翻；否决；宣布……无效

penal /ˈpiːnl/ *a.* of or relating to penalty or punishment, esp. criminal punishment 刑法的

perception /pəˈsepʃn/ *n.* way of seeing or understanding sth. 认识，观念

posture /ˈpɔstʃə(r)/ *n.* way of looking at sth.; attitude 看法，态度

precedent /ˈpresidənt/ *n.* a judicial decision that may be used as a standard in subsequent similar cases 判例

predictability /priˌiktəˈbiləti/ *n.* saying in advance that(sth.)will happen; forecast 可预见性

premises /ˈpremisiz/ *n.* a house or building, along with its grounds 房产；房屋（及其附属建筑、地基等）

prevail /priˈveil/ *v.* to win out 获胜优先

prohibitive /prəˈhibətiv/ *a.* intended to or tending to prevent the use or purchase of sth. 禁止使用或购买

procedure /prəˈsiːdʒə(r)/ *n.* a specific method or course of action 程序

pronouncement /prəˈnausmənt/ *n.* formal statement or declaration 宣言；公告

reappraise /ˌriːəˈpreiz/ *v.* re-examining sth. to see whether it or one's attitude to it should be changed; re-evaluate 重新评估

resurrect /ˌrezəˈrekt/ *v.* revive(a practice, etc.)恢复旧风俗、习惯等；复兴

revenue /ˈrevənjuː/ *n.* income, esp. the total annual income 收入；岁入

ratify /ˈrætifai/ *v.* to approve and sanction formally 批准，认可

render /ˈrendə(r)/ *v.* give sth. as sth. which is due 作出

representation /ˌreprizənˈteiʃn/ *n.* a presentation of fact, either by words or by conduct, made to induce someone to act, esp. to enter into a contract 陈述

sheriff /ˈʃerif/ *n.* (in the US) chief officer responsible for enforcing the law in a county（美国的）县治安官

sit /sit/ *v.* to hold court or perform official functions 审理（案件）

stare decisis /ˈstɛəri diˈsaisis/ (*Latin*) the doctrine of precedent, under which it is necessary for the courts to follow earlier judicial decisions when the same points arise again in litigation 遵循先例的原则

statute /ˈstætjuːt/ *n.* a law established by an act of the legislature 成文法，立法

summary /ˈsʌməri/ *a.* without the usual formalities 简易的

summon /ˈsʌmən/ *v.* order(sb.) to attend a lawcourt 召集

synopsis /siˈnɔpsis/ *n.* summary or outline of a book, play, etc. 摘要，大纲

terrain /təˈrein/ *n.* stretch of land, with regard to its natural features 地形

testimony /ˈtestiməni/ *n.* declaration, esp. in a law court, testifying that sth. is true 证言；证词（尤指在法庭上所做者）

tort /tɔːrt/ *n.* damage, injury, or a wrongful act done willfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought 侵权、侵权行为

trespasser /ˈtrespəsə/ *n.* one who commits a trespass; who intentionally and without consent or privilege enters another's property 侵犯者；非法侵入者；侵害者

uniform /ˈjuːnifɔːm/ *a.* not changing in form or character; unvarying 统一的

undue /ˌʌnˈdjuː/ *a.* not just, proper, or legal 不合理的，不正当的，不合法的

verbatim /vəːˈbeitim/ *a.* exactly a spoken or written; word for word（完全）照字面的，逐字的

witness /ˈwitnəs/ *n.* one who gives testimony under oath or affirmation, either orally or by affidavit or deposition 证人

Unit Two

abridge /əˈbridʒ/ *v.* make shorter, esp. by using fewer words 删节，节略

ambassador /æmˈbæsədə(r)/ *n.* diplomat sent from one country to another either as a permanent representative or on a special mission 大使，使节

amendment /əˈmendmənt/ *n.* a legislative change in a statute or constitution, usu. by adding provisions not in the original 修正，修正案

apportion /əˈpɔːrʃn/ *v.* give sth. as a share 分配，分派

attorney /əˈtəːni/ *n.* one who practice law; lawyer 律师

choice-of-law /tʃɔis-əv-lɔː/ in conflict of laws, the question of which jurisdiction's law should apply in a given case 法律选择

commerce /ˈkɔməːs/ *n.* the exchange of goods and services, esp. on a large scale involving transportation between cities, states and nations 商业

confession /kənˈfeʃn/ *n.* a criminal suspect's acknowledgment of guilt, usu. in writing and often including a disclosure of details about the crime 坦白

congress /ˈkɔŋgres/ *n.* a formal meeting of delegates or representatives; the legislative body of the federal government, created under U. S. Const, art, I, § 1 and consisting of the Senate and the House of Representatives 国会

constitutional /ˌkɔnstiˈtjuːʃənl/ *a.* of or relating to a constitution 宪法的，符合

宪法的

constitutionality /ˌkɔnstiˌtjuːʃəˈnæləti/ *n.* being constitutional 合宪性

convention /kənˈvenʃn/ *n.* an assembly or meeting of members belonging to an organization or having a common objective 大会

counsel /ˈkaunsl/ *n.* one or more lawyers who represent a client 律师

covert /ˈkʌvət/ *a.* concealed; not open; secret 秘密的

delegate /ˈdeligət/ *n.* one who represents or acts for another or a group of others 代表

deprive /diˈpraiv/ *v.* take sth. away from sb. 剥夺

dispatch /diˈspætʃ/ *v.* send sb./sth. off to a destination or for a special purpose 派遣，发送

distinction /diˈstiŋkʃn/ *n.* difference or contrast between one person or thing and another 区别

draft /drɑːft/ *v.* to prepare legal documents that sent forth the rights, duties, liabilities, and entitlements of persons and legal entities 起草

effects /iˈfekts/ *n.* movable property; goods 财产

enjoin /inˈdʒɔin/ *v.* to legally prohibit or restrain by injunction 禁止

equality /ˈikwɔləti/ *n.* the state of being the same in size, amount value, number, degree, status, etc. 平等

explicitly /ikˈsplisitli/ *ad.* clearly and fully expressed 明示的

federalism /ˈfedərəlizm/ *n.* the relationship and distribution of power between the individual states and the national government 联邦制

harassment /həˈræsmənt/ *n.* making repeated attacks on 骚扰

detention /diˈtenʃn/ *n.* maintenance of a person in custody or confinement, esp. while awaiting a court decision 羁押

hierarchy /ˈhaiərɑːki/ *n.* system with grades or authority or status from the lowest to the highest 等级制

immunity /iˈmjuːnəti/ *n.* any exemption from a duty, liability, or service of process; esp. such an exemption granted to a public official 豁免

impeachment /imˈpiːtʃmənt/ *n.* accusing a public official of a crime in office by presenting a written charge called article of impeachment 弹劾

impoverish /imˈpɔvəriʃ/ *v.* make sb. poor 使贫困

infringe /inˈfrindʒ/ *v.* violate another's right or privilege, esp. of an intellectual property right 侵犯他人权利

judicial /dʒuˈdiʃl/ *a.* of, relating to, or by the court 司法的

malicious /məˈliʃəs/ *a.* feeling, showing, caused by, malice 恶意的

minister /ˈministə(r)/ *n.* person at the head of a government department or a main branch of one 部长

mutilation /ˌmju:tiˈleiʃn/ *n.* injury, damage or loss caused by breaking, tearing or cutting off a necessary part 损伤，残缺，损毁

oath /əuθ/ *n.* a solemn pledge by which the person swearing to a statement implicitly invites punishment from a supreme being if the person is untruthful 誓言

overt /əuˈvə:t/ *a.* open and observable; not concealed or secret 公开的

pardon /ˈpɑ:dn/ *n.* the act or an instance of officially mollifying punishment or other legal consequences of a crime 大赦

partition /pɑ:ˈtiʃn/ *n.* the action of dividing 划分，隔离

Pentagon /ˈpentəgən/ *n.* the five-side building near Washington that is the headquarter of the U. S. Department of Defense and the U. S. armed forces 五角大楼

persecute /ˈpə:sikju:t/ *v.* treat sb. cruelly, esp. because of his race, his political or religious beliefs, etc. 迫害

pervade /pəˈveid/ *v.* to spread to and be perceived in every part of(sth.) 遍布

presidency /ˈprezidənsi/ *n.* the position of a president 总统职位

president /ˈprezidənt/ *n.* the chief political executive of a government; the head of state 总统

press /pres/ *n.* newspapers, periodicals and the news sections of radio and television 出版

privacy /ˈpraivəsi/ *n.* freedom from interference or public attention 隐私

province /ˈprɔvins/ *n.* area of learning, activity or responsibility 范围

provision /prəˈviʒn/ *n.* condition or stipulation in a document 规定

pursuance /pəˈsju:əns/ *n.* while performing sth.; in the course of sth. 遵循

registrar /ˈredʒistrə(r)/ *n.* a person who keeps official records, esp. a school official who maintains academic and enrollment records 登记官

representative /ˌrepriˈzentətiv/ *n.* one who stands for or on behalf of another; a member of a legislature, esp. of the lower house 代表

reverence /ˈrevərəns/ *n.* feeling of deep respect or(esp. religious) veneration 尊敬;崇敬

review /riˈvju:/ *n.* consideration, inspection, or re-examination of a subject or thing 审查

scandalous /ˈskændələs/ *a.* disgraceful 极不公正的

senate /ˈsenət/ *n.* the upper house of a bicameral legislature 参议院

strip /strip/ *v.* take away (property, honors, etc.) from sb. 剥夺

subversive /səbˈvəːsiv/ *a.* trying or likely to weaken or destroy a political system, an accepted belief, etc. 颠覆性的

testify /ˈtestifai/ *v.* give evidence as a witness 作证

treaty /ˈtriːti/ *n.* a formally signed and ratified agreement between two nations or sovereigns 条约

tribunal /traiˈbjuːnl/ *n.* a court or other adjudicatory body 法庭

usurp /juˈzəːp/ *v.* unlawfully seize and assume another's position, office, or authority by force 利用

Unit Three

accidental /ˌæksiˈdentl/ *a.* happening unexpectedly and by chance 偶然的；意外的

adulterate /əˈdʌltəreit/ *v.* make impure, make poor in quality, by adding sth. of less value 以低级品掺进

aforethought /əˈfɔːθɔːt/ *v.* plan in advance 预谋

aggravate /ˈægrəveit/ *v.* make worse or more serious 使更严重

ambit /ˈæmbit/ *n.* extent 范围

array /əˈrei/ *n.* series 系列

arson /ˈɑːsn/ *n.* act of setting sth. on fire intentionally and unlawfully 纵火；放火

assume /əˈsjuːm/ *v.* take as true before there is proof, undertake (在未证实前)假定；以为；承担

assault /əˈsɔːlt/ *n.* violent and sudden attack 猛烈而突然之攻击

allegiance /əˈliːdʒəns/ *n.* duty, support, loyalty, due (to a ruler or government)(对统治者或政府之)忠诚；忠贞；忠顺；效忠

battery /ˈbætəri/ *n.* (legal) attack upon or threatening touch (to sb.) (法律)殴打

bribe /braib/ *n.* sth. given, offered or promised to sb. in order to influence or persuade him (often to do sth. wrong) in favour of the giver 贿赂

bribery /ˈbraibəri/ *n.* giving or taking of bribes 贿赂；行贿；受贿

blameworthy /ˈbleimˌwəːði/ *a.* deserving blame 应受责备的

coexist /kəuigˈzist/ *v.* exist at the same time (与……)同时存在；共存

coincidence /kəuˈinsidəns/ *n.* the condition of coinciding; instance of this, happening by chance 同时发生；巧合；巧合之事

concur /kənˈkəː/ *n.* agree in opinion (与某人)(在某件事上)意见一致；同意

consent /kənˈsent/ *n.* give agreement or permission 同意

consolidate /kən'sɔlideit/ *v.* make or become solid or strong; combine or unify into one body (使)巩固; (使)坚强; 合并

constitute /'kɔnstitju:t/ *v.* make up(a whole); be the component of 构成

convert /'kɔnvə:t/ *v.* assume unlawful rights of ownership of (personal property) 非法占有

corruption /kə'rʌpʃən/ *n.* corrupting or being corrupt 腐败

culpability /kʌlpə'biləti/ *n.* a state of guilt 罪责

defraud / di'frɔ:d/ *v.* trick(sb.) out of what is rightly his 骗取

disregard /dis'rigɑ:d/ *v.* pay no attention to; show no respect for 不注意; 忽视

delineate /di'lini,eit/ *v.* show by drawing or describing 描绘

embezzle /im'bezl/ *v.* use (money placed in one's care) in a wrong way for one's own benefit 挪用(公款); 盗用

enrage /in'reidʒ/ *v.* full with rage 激怒; 触怒

falsehood / 'fɔ:lshud/ *n.* lie, untrue statement 谎言

felony /'feləni/ *n.* major serious crime, eg murder, armed robbery, arson 重罪(例如谋杀、持械抢劫、纵火)

furnish /'fə:niʃ/ *v.* supply or provide 供给

fury /'fjuəri/ *n.* violent excitement, esp. anger 狂暴; (尤指)愤怒

gloss /glɔs/ *v.* write explanations on 解释

grenade /gri'neid/ *n.* a small bomb thrown by hand or fired by a rifle 手榴弹; 枪榴弹

harsh /hɑ:ʃ/ *a.* severe 严厉的

impinge /im'pindʒ/ *v.* make an impact on 冲击

impute / im'pju:t/ *v.* consider as the outcome of 归于

inadvertent /,inəd'və:tənt/ *a.* (formal) not paying or showing proper attention; (of actions) done thoughtlessly or not on purpose (正式用语)不注意的; 不当心的; (指行动)疏忽或无意中所做的

incarceration /in,kɑ:sə'reiʃən/ *n.* imprisonment 监禁

incongruous /in'kɔŋgruəs/ *a.* not in harmony or agreement 不一致的

inflict /in'flikt/ *v.* give (a blow, etc.); cause to suffer, impose 予以(打击)等; 使受痛苦; 强加之于

innocuous /i'nɔkjuəs/ *a.* causing no harm 无害的

intangible /in'tændʒəbl/ *a.* that cannot be grasped 无形的

loosely /'lu:sli/ *ad.* not strictly, not exactly 不严格地; 不精确地

larceny /'lɑ:sni/ *n.* (legal) 盗窃罪; 偷窃

levy /'levi/ *v.* impose; collect by authority or force 征收；征集；强迫收集；发动（战争）

licit /'lisit/ *a.* lawful 合法的

malicious /mə'liʃəs/ *a.* showing desire to harm others 出于恶意的

manslaughter /'mænˌslɔ:tə/ *n.* killing of people 杀戮

mayhem /'meihem / *n.* crim of maiming 暴力伤害罪

misbrand /mis'brænd/ *v.* brand or label erroneously 贴加标签

misdemeanor /ˌmisdi'minə/ *n.* (legal) offense less serious than a felony (法律) 较轻的犯罪行为；轻罪

motive /'məutiv/ *n.* that which cause sb. to act 动机

negate /ni'geit/ *v.* (formal) deny; nullify (正式用语)否定；使无效

notary /'nəutəri/ *n.* (often public) official with authority to perform certain kinds of legal transactions, esp. to record that he has witnessed the signing of legal documents (法律上的)公证人

outweigh /aut'wei/ *v.* be greater in weight, value or importance than 比……更重；比……更重要、更有价值

penitentiary /ˌpeni'tenʃəri/ *n.* (US) prison for persons guilty of serious crimes, esp. one in which reform of the prisoners is the main aim (美)监狱(尤指以感化犯人为主要目的者)

peril /'peril/ *n.* serious danger 冒险

precaution /pri'kɔʃən/ *n.* care taken in advance to avoid a risk 预防；防备

provincial /prə'vinʃəl/ *a.* narrow in outlook 见解褊狭的

rescue /'reskju:/ *v.* deliver, make safe (from danger, etc.); set free (从危险中)救出；解救；使免于

reckless /'reklis/ *a.* rash; not thinking of the consequences 鲁莽的；不考虑后果的

rage /reidʒ/ *n.* (outburst of) furious anger; violence 盛怒(之爆发)；狂暴

ransom /'rænsəm/ *n.* sum of money, etc., paid for freeing of a captive 赎金

seizure /'si:ʒə/ *n.* act of taking possession of by force or the authority of the law 依法占有；抢占；没收；查封；控制

shield /ʃi:ld/ *n.* person or thing that protects 保护之人或物

stark /stɑ:k/ *a.* bluntly plain 明显的

subornation /ˌsʌbɔ:'neiʃən/ *n.* inducing (a person) by bribery or other means to commit perjury 以贿赂或其他方法使(人)作伪证或为其他不法行为；买通某人

stringent /ˈstrindʒənt/ *a.* (of rules) strict, server; that must be obeyed(指规则)严格的；必须遵守的

thrust /θrʌst/ *v.* push suddenly or violently 用力推

treason /ˈtri:zn/ *n.* treachery to; betrayal of, one's country or ruler; disloyalty; betrayal of trust 叛国；叛逆；不忠；背信

transient /ˈtrænʃənt/ *adj.* lasting for a short time only 短暂的

unbeknownst /ˌʌnbiˈnəunst/ *a.* without knowledge 不知的

underlying /ˈʌndəˌlaiiŋ/ *a.* of the basis of (a theory, conduct, behavior, doctrine)(理论、行为、举止、主义的)基础的

untoward /ʌnˈtəuəd/ *a.* inappropriate 不恰当的

Unit Four

abide /əˈbaid/ *v.* to accept and obey a decision, rule, agreement etc., even though you may not agree with it 遵守(法律)；信守(协议)

accusatorial /əˌkju:zəˈtɔ:riəl/ *a.* 控告人一方的

acquit /əˈkwit/ *v.* give a legal decision that (sb.) is not guilty 判定无罪

admissibility /ædˌmisəbiliti/ *n.* acceptable or allowed trait, especially in a court of law 可采纳性，可接受性

adversarial /ædˈvəsəriəl/ *a.* an adversarial system, esp. in politics and the law, is one in which two sides oppose and attack each other (政治法律)对手的；对抗的

affidavit /æfiˈdeivit/ *n.* a written statement made under oath, for use as a proof in a court of law 书面证词，宣誓书

afoul /əˈfaul/ *a.* (formal) to cause problems by doing sth. that is against the rules or that goes against people's beliefs 和……发生冲突；和……抵触

bail /beil/ *n.* money left with a court of law to prove that a prisoner will return when their trial starts 保释金

cocaine /kəuˈkein/ *n.* a drug, usually in the form of a white powder, that is taken illegally for pleasure or used in some medical situations to prevent pain 可卡因

concede /kənˈsi:d/ *v.* admit, often unwillingly, that sth. is true 勉强承认

counsel /ˈkaunsəl/ *n.* a type of lawyer who represents client in court 辩护律师；法律顾问

cross-examine /ˌkrɔs igˈzæmin/ *v.* ask detailed questions of someone, especially a witness in a trial, in order to discover if they have been telling the truth (在法庭上诘问证人)盘问，交叉质询

culpability /ˌkʌlpəˈbiliti/ *n.* the quality of deserving blame 应受谴责性；应受谴责的状态

ex parte /ˈeksˌpɑːtiː/ *a.* (*Latin*) 单方面的

exculpatory /eksˈkʌlˌpətəri/ *a.* removing blame from somebody 开脱罪责的

exhibit / igˈzibit/ *n.* document, object, etc. produced in a law court and referred to in evidence (法庭上提出之)证件；物证

fathom /ˈfæðəm/ *v.* get to the bottom of 彻底了解

habeas corpus /ˌheibiəsˈkɔːpəs/ *n.* (*Latin*)人身保护令(状)，人身保护法，人身保护权

impartial /imˈpɑːʃəl/ *a.* not supporting any of the sides involved in an argument 公正的

imprisonment /imˈpriznmənt/ *n.* the state of being in prison, or the time someone spends there 囚禁；关押，监禁

incompetence /inˈkɔmpitəns/ *n.* lack of ability, Knowledge, legal qualification, or fitness to discharge a required duty professional obligation 无行为能力；法律上无资格

indictment /inˈdaitmənt/ *n.* an official written statement charging someone with a criminal offence; the act of officially charging someone with a criminal offence 起诉书，控告书；诉状

indigent /ˈindidʒənt/ *a.* extremely poor 极端贫困的

information /infəˈmeiʃən/ *n.* statement by which a magistrate is informed of the offence for which a summons or warrant is required. In general, any person may lay an information, unless there is a statutory rule to the contrary. An information will suffice if it merely describes the alleged offence in ordinary, non-technical language. It is usually in writing and may be substantiated on oath and includes the name of the party charged, the offence (when and where committed)(公诉人对一项刑事犯罪提出的)控告书

incriminate /inˈkrimineit/ *v.* say that sb. is guilty or wrongdoing 控告

institute /ˈinstitjuːt/ *v.* start legal proceeding against sb. 对某人提窃诉讼

jeopardy /ˈdʒəpədi/ *n.* in danger of being damaged or destroyed 危险

layman /leimæn/ *n.* not expert 非专业人员

lectern /ˈlektən/ *n.* a high sloping surface for putting an open book or notes on while you are giving a lecture, sermon etc. 面板倾斜的讲桌；读经台

magistrate /ˈmædʒistreit/ *n.* a person who acts as a judge in a law court that deals with crimes that are not serious 治安法官；地方法官

molest /məˈlest/ *v.* touch or attack someone in a sexual way against their wishes 骚扰

muster /ˈmʌstə/ *v.* produce or encourage especially an emotion or support 聚集

nolo contendere /ˈnəuləu kənˈtendəri/ (*Latin*) I do not wish to contend. (刑事诉讼中)被告不愿争辩但又不承认犯罪的抗辩，无罪申诉

obviate /ˈɔbvieit/ *v.* (formal) remove a difficulty, especially so that action to deal with it becomes unnecessary 排除(困难)；避免

pending /ˈpendiŋ/ *a.* about to happen or waiting to happen 即将发生的

per curiam /pəˈkjuəriəm/ (*Latin*, by court) (意见、判决等)由法庭(即全体参审法官)共同决议的

petition /pəˈtiʃən/ *n.* a document signed by a large number of people demanding or requesting some action from the government or another authority; a formal letter to a court of law requesting a particular legal action 请愿书；(向法院递交的)诉状

portion /ˈpɔːʃən/ *n.* a part or share of something larger 部分

presumption /priˈzʌmpʃn/ *n.* an act of thinking that something is true because it is very likely; the act of thinking something is true because it is very likely, although there is no certain proof 假定；(法律)无证据推定

probation /prəˈbeiʃən/ *n.* a period of time when a criminal must behave well and not commit any more crimes in order to avoid being sent to prison 缓刑

prosecutor /ˌprɔsiˈkjuːtə/ *n.* a legal representative who officially accuses someone of committing a crime, especially in a court of law 检察官；公诉人

punitive /ˈpjunitiv/ *a.* intended as a punishment 惩罚性的

quasi-judicial /ˈkweizaiˌdʒuːˈdiʃl/ *a.* 准司法的(指在某种程度上或一定范围内具有立法性质的，一直虽为立法性质但不在立法机关权限内的)

remand /riˈmɑːnd/ to send back (a case) to a lower court with instructions about further proceedings 发回重审

reversal /riˈvəːsl/ *a.* the act or an instance of changing or setting aside a lower court's decision by a higher court 更高级法院作出的改变或废弃较低法院裁决的行为或实例

session /ˈseʃən/ *n.* a formal meeting or series of meetings of an organization such as a parliament or a law court 一届会议；开庭期

stipulation /ˌstipjuˈleiʃən/ *n.* a specific condition that is stated as part of an agreement 条款，规定，约定

substitute /ˈsʌbstitjuːt/ *n.* a thing or person that is used instead of another thing

or person 替代物；替代者

subscribe /səbˈskraib/ *v.* agree with 同意，赞成

tour de force /ˈtuədəˈfɔːs/ (*Latin*)精心杰作

unanimous /juːˈnænimәs/ *a.* all agree about one particular matter or vote the same way, and if a decision or judgment is unanimous, it is formed or supported by everyone in a group 一致同意的

verdict /ˈvəːdikt/ *n.* an opinion or decision made after judging the facts that are given, especially one made at the end of a trial 裁决

victim /ˈviktim/ *n.* someone or something which has been hurt, damaged or killed or has suffered, either because of the actions of someone or something else, or because of illness or chance 受害者

voir dire /ˌvwɑːˈdiə/ (*Latin*)(法院对证人或陪审员的)预先审查(程序)

warrant /ˈwɔrənt/ *n.* written permission from a court of law allowing the police to take a particular action 搜查证，逮捕证

wrap up /ræp ʌp/ finish or complete a job, meeting etc. 完成，结束（工作、会议）

zealous /ˈzeləs/ *a.* marked by active interest and enthusiasm 热衷的

Unit Five

action /ˈækʃn/ *n.* legal process; lawsuit 诉讼

administer /ədˈministə / *v.* give or apply in a formal way 执行，施行

alimony /ˈæliməni/ *n.* allowance that a court may order a man to pay to his wife or former wife before or after a legal separation or divorce(经法院判决在分居或离婚以前或以后男方付给妻子或前妻的)赡养费

allegation /ˌæliˈgeiʃən/ *n.* the assertion, declaration or statement of a party of what he can prove 断言，主张，指控

alternative /ɔːlˈtəːnətiv/ *a.* allowing or necessitating a choice between two or more things 二选一的；两者(或两者以上)择一的

appeal / əˈpiːl / *n.* a request to a supervisory court, usually composed of a panel of judges, to review a lower court's decision 上诉

appellant /əˈpelənt/ *n.* the party bringing the action to court (usually an appellate/appeal court) 上诉人；控诉人

appellee /ˌæpəˈliː/ *n.* the party responding to an appeal 被上诉人

append /əˈpend/ *v.* add as a supplement or an appendix 附加，添加

assert /əˈsəːt/ *v.* state (sth.) clearly and forcefully as the truth 清楚而有力地表

明(某事物)为事实；声称

assess /ə'ses/ *v.* decide or fix the amount of sth. 确定，评定(某数额)

avail /ə'veil/ *v.* make use of sth.；take advantage of sth. 使用某事物；利用某事物

calculated /'kælkju,leitid/ *a.* made or planned to accomplish a certain purpose; deliberate 有意的，故意的

challenge /'tʃælindʒ/ *v.* question the truth, rightness or validity of (sth.); dispute 怀疑(某事的)真实性、正确性或有效性；提出异议

n. formal objection (提出)反对

commence /kə'mens/ *v.* begin; start 开始；启动

complaint /kəm'pleint/ *n.* initial document filed by the plaintiff in a civil case stating the claims against the defendant 起诉书

comply /kəm'plai/ *v.* to act in accordance with another's command, request, rule, or wish 顺从，答应，遵守

compute /kəm'pju:t/ *v.* determine an amount or number 计算

count /kaunt/ *n.* in a complaint or similar pleading, the statement of a distinct claim 诉讼请求

counterclaim /'kauntə,kleim/ *n.* a claim by a defendant in a civil case that the plaintiff has injured him or her 反诉

credibility /,kredi'biliti/ *n.* the quality, capability, or power to elicit belief 可信性

custody /'kʌstədi/ *n.* the act or right of guarding, especially such a right granted by a court 保护；监护权

damages /'dæmidʒiz/ *n.* money paid or claimed as compensation for damage, loss or injury 损害赔偿金

declaratory /di'klærə,təri/ *a.* declarative 宣告的，公告的

defamation /,defə'meiʃn/ *n.* the act of harming the reputation of another by making a false statement to a third person 诽谤

defendant /di'fendənt/ *n.* the person against whom a lawsuit is filed 被告

defense /di'fens/ *n.* the action of the defendant in opposition to complaints against him or her 答辩

deficiency / di'fiʃənsi/ *n.* the quality or condition of being deficient; incompleteness or inadequacy 缺乏，不足

deliberate /di'libəreit/ *v.* consult with another or others in a process of reaching a decision 商讨；评议

de novo /ˌdi:ˈnəuvəu/ *a.* (*Latin*) anew 再次的；重新的

deposition /depəˈziʃən/ *n.* the sworn testimony of a witness taken before trial held out of court with no judge present 证明书；宣誓证词；证言

deter /diˈtə:/ *v.* to prevent or discourage from acting, as by means of fear or doubt 阻止；妨碍

discharge /disˈtʃɑ:dʒ / *v.* officially allow a person to go 正式准许离开

discovery /disˈkʌvəri/ *n.* part of the pre-trial litigation process during which each party requests relevant information and documents from the other side in an attempt to "discover" pertinent facts. Generally discovery devices include depositions, interrogatories, requests for admissions, document production requests and requests for inspection. 信息披露

discretion /disˈkreʃən/ *n.* freedom to decide for oneself what should be done 自由裁量

dismissal /disˈmisʃ/ *n.* action of dismiss 不予理会；驳回

disqualification /disˌkwɔlifiˈkeiʃən/ *n.* the act of disqualifying or the condition of having been disqualified 不适格，无资格，资格被取消

domain /dəuˈmein/ *n.* the field of thought, knowledge, or activity 领域；范畴

effectuate /iˈfektjueit/ *v.* bring about; effect 实现；招致

emergence /iˈmə:dʒəns/ *n.* action of emerging 出现；兴起

enumerate /iˈnju:məreit/ *v.* name (things on a list) one by one; count 列出；列举

equitable /ˈekwitəbl/ *a.* just, fair; existing in equity 公平的；公正的；衡平法的

estop /isˈtɔp/ *v.* bar or prevent by estoppel 禁止反悔

exemplary /igˈzempləri/ *a.* serving as a warning; admonitory 警告性的；惩戒的

expedite /ˈekspidait/ *v.* speed up the progress of; facilitate 加速……的进程

facilitate /fəˈsiliteit/ *v.* make easy or less difficult 使容易或减少困难

file /fail/ *v.* carry out the first stage of (a lawsuit, for example) 提起申请进行(如诉讼)的第一阶段

foreperson /ˈfɔ:ˌpə:sən/ *n.* the chair and spokesperson for a jury 首席陪审员，陪审团主席和发言人

foresee /fɔ:ˈsi:/ *v.* see or know that sth. is going to happen in the future; predict 预见；预知

franchise /ˈfræntʃaiz/ *n.* a privilege or right officially granted a person or a group by a government, especially 特许权

genuine /ˈdʒenjuin/ *a.* real; not fake or artificial 真的；非伪造的；非人工的

hale /heil/ *v.* to compel (someone) to go 迫使……去；强迫

impose /im'pəuz/ *v.* establish or apply as compulsory; levy 征税，强加

incur /in'kə:/ *v.* suffer or bring on oneself (a liability or expense), sustain 招致；引起；造成

inference /'infərəns/ *n.* the act or process of deriving logical conclusions from premises known or assumed to be true 推论

injunction /in'dʒʌŋkʃən/ *n.* an order of the court prohibiting (or compelling) the performance of a specific act to prevent irreparable damage or injury 强制令，禁制令

instrument /'instrumənt/ *n.* a legal document 文书，法律文件

interrogatory /ˌintə'rɔgətəri/ *n.* a formal or written question, as to a witness, usually requiring an answer under oath 向证人提出的正式或书面问题，通常要求以宣誓回答，质问，质询

intrastate /ˌintrə'steit/ *a.* (existing) within one state, esp. of the USA(存在于)州内的(尤指美国)

invoke /in'vəuk/ *v.* use (sth.) as a reason for one's action; call upon for help 援用；求助于

itemize /'aitəmaiz/ *v.* set down item by item; list 逐条记载

liability /ˌlaiə'biliti/ *n.* any legal responsibility, duty or obligation 责任，义务

libel /'laibəl/ *n.* a false publication in writing, printing, or typewriting or in signs or pictures that maliciously damages a person's reputation 诽谤

mandatory /'mændətəri/ *a.* required or commanded by authority; obligatory 命令的，强制的

mechanism /'mekənizəm/ *n.* a habitual manner of acting to achieve an end 手法，技巧；机制

memorandum /ˌmemə'rændəm/ *n.* note made for future use, esp. to help oneself remember sth.; record of an agreement that has been reached but not yet formally drawn up and signed 备忘录；协议记录；意向书

merit /'merit/ *v.* be worthy or deserving 值得

n. (pl.) the elements of grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case 案件的是非曲直

motion /'məuʃən/ *n.* a request asking a judge to issue a ruling or order on a legal matter (诉讼人向法院提出的)请求，申请

negligence /'neglidʒəns/ *n.* the failure to use reasonable care 疏忽

objection /əb'dʒekʃən/ the act of taking exception to some statement or procedure

in trial used to call the court's attention to improper evidence or procedure 反对

oppression /əˈpreʃən/ *n.* oppressing or being oppressed 压迫；压制

option /ˈɔpʃən/ *n.* the right or power to choose 选择权

partition /pɑːˈtiʃən/ *n.* the act of dividing; esp., the division of real property held jointly or in common by two or more persons into individually owned interests 财产分割

peremptory /pəˈremptəri/ *a.* (of commands) not to be disobeyed or questioned (指命令)不容抗拒的；强制的

perilously /ˈperələsli/ *ad.* full of risk; dangerously 非常危险地

plaintiff /ˈpleintif/ *n.* the person who initiates a lawsuit 起诉人，原告

pleading /pliːdiŋ/ *n.* a formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses 答辩；诉答

poll /pəul/ *v.* ask one's opinion; to ask to vote 做民意调查；投票

preclude /priˈkluːd/ *v.* exclude or prevent (someone) from a given condition or activity 排除

prerequisite /ˌpriːˈrekwizit/ *n.* thing required as a condition for sth. to happen or exist 前提；先决条件；必备条件

probate /ˈprəubeit/ *n.* official process of proving that a will is correct 遗嘱检验；遗嘱认证

procedural /prəˈsiːdʒərəl/ *a.* of or concerning procedure, especially of a court of law or parliamentary body 程序的，尤指法庭或议会机构的程序的

progeny /ˈprɔdʒəni/ *n.* offspring 子女；后代

prospective /prəˈspektiv/ *a.* expected to be or to occur 可能的；预期的

proximate /ˈprɔksimit/ *a.* nearest 最接近的

quash /kwɔʃ/ *v.* reject (sth.) (by legal procedure) as not valid; to declare (sth.) not to be enforceable by law (依法)撤销(某事物)；宣布(某事物)无效

questionnaire /ˌkwestʃəˈnɛə(r)/ *n.* written or printed list of questions to be answered by a number of people, esp. to collect statistics or as part of a survey 问卷；调查表

rebuttal /riˈbʌtəl/ *n.* the introduction of contrary evidence; the showing that statements of witnesses as to what occurred is not true; the stage of a trial at which such evidence may be introduced 辩驳，举反证

remittitur /riˈmititə/ *n.* 减免赔偿额

requisite /ˈrekwizit/ *a.* required by circumstances or necessary for success(情况)需要的;(成功)必要的

reside /riˈzaid/ *v.* have one's home (in a certain place); live 定居于(某处);居住

retire /riˈtaiə(r)/ *v.* retreat or go away, esp. to somewhere quiet or private 退下,退出,离开(尤指到僻静处)

reversible /riˈvəːsəbl/ *a.* that can be reversed 可撤销的

sanction /ˈsænkʃən/ *n.* that part of a law which inflicts a penalty for its violation, or bestows a reward for its observance 制裁

scrutinize /ˈskruːtinaiz/ *v.* examine or observe with great care; inspect critically 细看,仔细检查

serve /səːv/ *v.* deliver a legal document, such as a complaint, summons or subpoena 送达

solicit / səˈlisit/ *v.* try to obtain 设法获得;招揽

stipulate /ˈstipjuleit/ *v.* state or agree 规定;约定

stipulation /ˌstipjuˈleiʃən/ *n.* an agreement between parties to a dispute or court action that a certain fact is true or uncontested, also an agreement between parties to a specific procedure or action such as a stipulation to extend time to answer a complaint 规定,契约;(双方辩护律师对有关审理事项达成的书面)协议书

streamline /striːmlain/ *v.* simplify 使简单化

subpoena /səbˈpinə/ an order directed to an individual commanding him to appear in court on a certain day to testify or produce documents in a pending lawsuit 传票

sustain /səˈstein/ *v.* decide that (a claim, etc.) is valid; uphold 确认(某项要求等)正当有效;认可;准许

template /ˈtempleit/ *n.* pattern or gauge, usu. of thin board or metal, used as a guide for cutting or drilling metal, stone, wood, etc. 样板;模板;型板

two-pronged /tuːprɔŋd/ *a.* 两方面的

ultimately /ˈʌltəmitli/ *ad.* in the end; finally 最后;终于

valid /ˈvælid/ *a.* legally sufficient; binding 有效的

vehicular /viˈhikjulə/ *a.* intended for or consisting of vehicles 供车辆使用的;车辆的

visitation /ˌvisiˈteiʃən/ *n.* a relative's, esp. a noncustodial parent's, period of access to a child 探视

waive /ˈweiv/ *v.* abandon or forsake a right 放弃

warrant /ˈwɔrənt/ *v.* guarantee the quality, accuracy, or condition of 保证

whereby /wɛəˈbai/ *conj.* in accordance with which; by or through which 与……一致；通过……，借以

Unit Six

abate /əˈbeit/ *v.* reduce in amount, degree, or intensity 减少，减轻

accommodation /əˌkɔməˈdeiʃən/ *n.* adaptation and adjustment 调整，通融

adverse /ˈædvəːs/ *a.* contrary to one's interests or welfare; harmful or unfavorable 不利的；有害的或不利的

allure /əˈljuə/ *v.* attract with something desirable; entice 诱惑；引诱

amorphous /əˈmɔːfəs/ *a.* of no particular type; anomalous 难归类的；奇怪的

anguish /ˈæŋgwiʃ/ *n.* agonizing physical or mental pain; torment 剧痛，身体上或精神上的剧痛；极度痛苦

annoyance /əˈnɔiəns/ *n.* the act of annoying or the state of being annoyed 恼怒的行为，被打扰的状态

apprehension /ˌæpriˈhenʃən/ *n.* fearful or uneasy anticipation of the future; dread 担心，忧虑；对未来充满恐惧或焦虑；忧惧

blameless /ˈbleimlis/ *a.* free of blame or guilt; innocent 无可责备的；无辜的

boulder /ˈbəuldə/ *n.* a large rounded mass of rock lying on the surface of the ground or embedded in the soil 岩石块

chattel /ˈtʃætl/ *n.* an article of personal, movable property 动产

causation /kɔːˈzeiʃən/ *n.* the fact of being the cause of something produced or of happening ; the act by which an effect is produced 因果关系；原因

conversion /kənˈvəːʃən/ *n.* the unlawful appropriation of another's property 非法挪用他人财产

contributory /kənˈtribjutəri/ *a.* helping to bring about a result 有助于……的，辅助的

defamation /ˌdefəˈmeiʃən/ *n.* the act of defaming; calumny 诽谤；中伤

defect /diˈfect/ *n.* the lack of sth. necessary or desirable for completion or perfection 瑕疵

derogatory /diˈrɔgətəri/ *a.* disparaging; belittling 毁谤(性)的，贬抑(性)的

detriment /ˈdetrimənt/ *n.* damage, harm, or loss 损害，损失

easement /ˈiːzmənt/ *n.* a right, such as a right of way, afforded a person to make limited use of another's real property 地役权

feedlot /ˈfiːdlɔt/ *n.* a plot of ground on which livestock are fattened for market 将

备卖牲畜养肥的饲养地

hefty /ˈhefti/ *a.* of considerable size or amount 异常大的或相当多的

hogpen /ˈhɔgpen/ *n.* 猪圈

immediate /iˈmiːdiət/ *a.* without intervening medium or agent; direct 直接的，最近的

impair /imˈpɛə/ *v.* cause to diminish, as in strength, value, or quality 削减，减弱

indemnify /inˈdemnifai/ *v.* make compensation to for damage, loss, or injury suffered 赔偿；补偿

intentional /inˈtenʃənəl/ *a.* done deliberately; intended 故意的

intervene /ˌintəˈviːn/ *v.* occur as an extraneous or unplanned circumstance 干扰，介入

laches /ˈlætʃiz/ *n.* 疏忽，怠慢

liberal /ˈlibərəl/ *a.* generous 慷慨的

malarial /məˈlɛəriəl/ *a.* (有)瘴气的

manure /məˈnjuə/ *n.* 肥料，粪便

microscopic /maikrəˈskɔpik/ *a.* too small to be seen by the unaided eye but large enough to be studied under a microscope 非用显微镜不可见的；微观的用肉眼不可见的但是可以用显微镜观察的

misconduct /misˈkɔndʌkt/ *n.* behavior not conforming to prevailing standards or laws; impropriety 违法行为，不端行为

narcotic /nɑːˈkɔtik/ *n.* 致幻毒品

negligent /ˈneglidʒənt/ *a.* lacking attention, care, or concern 疏忽的

nuisance /ˈnjuːsns/ *n.* a use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance, or inconvenience 滋扰，防害

offensive /əˈfensiv/ *a.* causing anger, displeasure, resentment, or affront 令人愤怒的

per se /pəːˈsei/ *ad.* (*Latin*) of, in, or by itself or oneself; intrinsically 本身

possession /pəˈzeʃən/ *n.* the act or fact of possessing 拥有

prescriptive /priˈskriptiv/ *a.* making or giving injunctions, directions, laws, or rules 规定的

prescription /priˈskripʃən/ *n.* the process of acquiring title to property by reason of uninterrupted possession of specified duration (依据传统或长期使用而)要求权利；获得权利

profanity /prəˈfæniti/ *n.* vulgar or irreverent speech or action 亵渎

rationale /ˌræʃəˈnɑːli/ *n.* fundamental reasons; the basis 基本原理；根据

recover /riˈkʌvə/ *v.* receive a favorable judgment in a lawsuit 胜诉

relief /riˈliːf/ *n.* redress awarded by a court 救济

remedy /ˈremidi/ *n.* a legal order of preventing or redressing a wrong or enforcing a right 法律补救方法，救济

reprehensible /ˌrepriˈhensəbl/ *a.* deserving rebuke or censure; blameworthy 应受指责的

repute /riˈpjuːt/ *n.* reputation 名声

restatement /riˈsteitmənt/ *n.* 重述

riparian /raiˈpɛəriən/ *a.* of, on, or relating to the banks of a natural course of water 河岸的，水边的

shadow /ˈʃædəu/ *v.* follow, especially in secret; trail 跟踪

shaft /ʃɑːft/ *n.* 井筒

shoplifting /ˈʃɔpˌliftiŋ/ *n.* the act of stealing goods from a shop during shopping hours 入店行窃

slander /ˈslɑːndə/ *n.* oral communication of false statements injurious to a person's reputation 造谣，诽谤指口头传播错误的言论以对某人的名誉造成伤害

sobriety /səuˈbraiəti/ *n.* the state or quality of being sober 清醒

temperament /ˈtempərəmənt/ *n.* the manner of thinking, behaving, or reacting characteristic of a specific person 气质，性情，脾气

therein /ðɛərˈin/ *ad.* in that place, time, or thing 在那儿，那时，在那件事中

tort /tɔːt/ *n.* damage, injury, or a wrongful act done willfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought 侵权行为

tortfeasor /ˈtɔːtˈfiːzə/ *n.* a party who has committed a tort 侵权人

trait /treit/ *n.* a distinguishing feature 特征，显著的特点

tranquility /træŋˈkwiliti/ *n.* a state of peace and quiet 宁静

trespass /ˈtrespəs/ *n.* to commit an unlawful injury to the person, property, or rights of another, with actual or implied force or violence, especially to enter onto another's land wrongfully 非法侵入

vicious /ˈviʃəs/ *a.* savage used chiefly of animals 野蛮的

waft /wɑːft/ *v.* convey or send floating through the air or over water 飘浮在空气中或水上漂浮着传或送

wiretap /ˈwaiəˌtæp/ *v.* to install a concealed listening or recording device or use it

to monitor communications 窃听

zealously /ˈzeləsli/ *ad.* 积极地，狂热地

Unit Seven

acceptance /əkˈseptəns/ *n.* an agreement, either by express act or by implication from conduct, to the terms of an offer so that a binding contract is formed 承诺

accountable /əˈkauntəbl/ *a.* required or expected to give an explanation for one's actions, etc.; responsible 应作解释的；应作说明的；应负责任的

adhesion /ədˈhiːʒən/ *n.* being or becoming attached to sth. 黏着；附着

aggrieved /əˈgriːvd/ *a.* harmed; injured 受侵害的；受损害的

appropriate /əˈprəupriət/ *a.* suitable; right and proper 适当的；合适的；正当的

assent /əˈsent/ *n.* agreement; approval 同意；赞成

assign /əˈsain/ *v.* transfer (property, rights, etc.) to sb. 将(财产、权利等)转让

assurance /əˈʃuərəns/ *n.* statement expressing certainty about sth.; promise 保证；担保

bargain /ˈbɑːgin/ *n.* agreement 协议；交易

bilateral /baiˈlætərəl/ *a.* having two sides 双边的

billiards /ˈbiljədz/ *n.* game for two people played with cues and three balls on an oblong cloth-covered table 台球戏；弹子戏

bona fide /ˈbəunə faid/ *a.* (*Latin*) genuine; without fraud or deception 真实的；真诚的；诚意的

butcher /ˈbutʃə/ *v.* kill and prepare (animals) for meat 屠宰

chamber /ˈtʃeimbə/ *n.* room; judge's room 内室；法官的办公室

cholera /ˈkɔlərə/ *n.* infectious and often fatal disease causing severe diarrhoea and vomiting, common in hot countries 霍乱

commission /kəˈmiʃən/ *n.* payment to sb. for selling goods which increases with the quantity of goods sold 佣金；回扣；酬劳金

compromise /ˈkɔmprəmaiz/ *n.* giving up of certain demands by each side in a dispute, so that an agreement may be reached; settlement reached in this way 妥协；和解

concealment /kənˈsiːlmənt/ *n.* keeping from being seen or known about; hiding sth. 隐瞒；隐藏

consideration /kənsidəˈreiʃən/ *n.* sth. of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee 对价

contemporaneous /kən,tempə'reinjəs/ *a.* existing or happening at the same time 同时存在或发生的；同时期的

contention /kən'tenʃən/ *n.* assertion made in an argument 论点

controversy /'kɔntrəvə:si/ *n.* public discussion or argument, often rather angry, about sth. which many people disagree with 公开辩论；论战

counteroffer /'kauntə,ɔ:fə/ *n.* an offeree's new offer that varies the terms of the original offer and therefore rejects the original offer 反要约

deem /di:m/ *v.* consider; regard 认为；视为

disaffirm /,disə'fə:m/ *v.* declare (a voidable contract) to be void 宣告(合同)无效

due /dju:/ *a.* owing or payable; constituting a debt 应履行的；应付的

enrich /in'ritʃ/ *v.* make sb./sth. rich or richer 使某人/某物赋予或更富裕

Exchequer /iks'tʃekə/ *n.* government department in charge of public money 财政部

executor /ig'zekjutə/ *n.* a person named by a testator to carry out the provisions in the testator's will 遗嘱执行人

executory /eg'zekjutəri/ *a.* to be performed at a future time; yet to be completed 待生效的；尚未履行的

extort /iks'tɔ:t/ *v.* obtain sth. by violence, threats, etc. 强夺；强抢；勒索；敲诈

extortion /iks'tɔ:ʃən/ *n.* action of extorting 强夺；强抢；勒索；敲诈

extrinsic /eks'trinsik/ *a.* from outside sources 外在的；间接的

forbearance /fɔ:'bɛərəns/ *n.* the act of refraining from enforcing a right, obligation, or debt 不行使某项权利；放弃某项权利

foreseeability /fɔ:,siə'biliti/ *n.* the quality of being reasonably anticipatable 可预见性

forthcoming /fɔ:θ'kʌmiŋ/ *a.* about to happen or appear in the near future 即将发生或出现的

frivolous /'frivələs/ *a.* lacking a legal basis or legal merits; not serious 没有法律依据的；无意义的；不严肃的

frustration /frʌs'treiʃən/ *n.* the prevention or hindering of the attainment of a goal, such as a contractual performance (目的)落空；目的实现受阻

gratuitous /grə'tju(:)itəs/ *a.* done or performed without obligation to do so; given without consideration 自愿的；单方受益的

holdup /'həuldʌp/ *n.* stoppage or delay 停顿；延搁

illusory /iˈluːsəri/ *a.* deceptive; based on a false impression 虚假的；空洞的

impracticability /imˌpræktikəˈbiliti/ *n.* a fact or circumstance that excuses a party from performing an act, esp. a contractual duty, because (though possible) it would cause extreme and unreasonable difficulty 不可行性；不能实行

induce /inˈdjuːs/ *n.* persuade, influence, lead or cause sb. to do sth. 引诱；劝诱；招致；促使

infirm /inˈfəːm/ *a.* physically weak caused by age or disease 体弱的；虚弱的

insecurity /ˌinsiˈkjuəriti/ *n.* the state of being not secure or safe 不安全

intoxicated /inˈtɔksikeitid/ *a.* caused to lose self-control as a result of alcohol or drug consumption; drunken 失去自制力的；醉的

irreplaceable /ˌiriˈpleisəbl/ *a.* that cannot be replaced if lost or damaged 不能替代的

jackplane /ˌdʒækplein/ *n.* (木工用的)粗刨；大刨

justifiably /ˈdʒʌstifaibli/ *ad.* that can be justified 正当地；法律认可地

lapse /læps/ *n.* the termination of a right or privilege because of a failure to exercise it within some time limit or because a contingency has occurred or not occurred (权利或物权的)终止，失效

literally /ˈlitərəli/ *ad.* exactly; (used to intensify meaning), actually 确实地；(用于加强语气)简直

majority /məˈdʒɔriti/ *n.* the status of one who has attained the age of majority (usu. 18) 成年

manifestation /ˌmænifesˈteiʃən/ *n.* showing clearly; action or statement that shows sth. clearly 显示；表明；证明

medium /ˈmiːdjəm/ *n.* means by which sth. is expressed or communicated 媒介；方法；手段

minority /maiˈnɔriti/ *n.* the state or condition of being under legal age 未成年

misrepresentation /ˈmisˌreprizenˈteiʃən / *n.* an intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally 虚假陈述

mitigate /ˈmitigeit/ *v.* make less severe or intense 减轻

mutual /ˈmjuːtjuəl/ *a.* directed by each toward the other or others; reciprocal 相互的

offer /ˈɔfə/ *n.* a promise to do or refrain from doing some specified thing in the future; a display of willingness to enter into a contract on specified terms, made in

a way that would lead a reasonable person to understand than an acceptance, having been sought, will result in a binding contract 要约

parol /pəˈrəul/ *a.* oral; unwritten 口头的；非言语的

perseverance /ˌpəːsiˈviərəns/ *n.* continued steady effort to achieve an aim; steadfastness 坚持不懈；不屈不挠

prescribe /prisˈkraib/ *v.* declare with authority that (sth.) should be done or is a rule to be followed 规定；制定

press /pres/ *v.* make (one's case, etc.) urgently or repeatedly 竭力要求，主张；坚持；强调

procure /prəˈkjuə/ *v.* obtain sth., esp. with care or effort; acquire 取得；获得

provoke /prəˈvəuk/ *v.* cause to occur 激起；导致

quasi-contract /ˈkweizaiˈkɔntrækt/ *n.* an obligation imposed by law because of the conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched 准合同；准契约

rejection /riˈdʒekʃən/ *n.* a refusal to accept a contractual offer 拒绝接受要约

repudiation /riˌpjuːdiˈeiʃən/ *n.* a contracting party's words or actions that indicate an intention not to perform the contract in the future; a threatened breach of contract 拒绝履行合同

rescind /riˈsind/ *v.* abrogate or cancel (a contract) unilaterally or by agreement 撤销；解除

rescission /riˈsiʒən/ *n.* a party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach; an agreement by contracting parties to discharge all remaining duties of performance and terminate the contract 撤销；解除

restitution /ˌrestiˈtjuːʃən/ *n.* return or restoration of some specific thing to its rightful owner or status 返还原物；恢复原状

revoke /riˈvəuk/ *v.* withdraw an offer by the offeror 撤销；撤回；取消

revocation /ˌrevəˈkeiʃən/ *n.* withdrawal of an offer by the offeror 撤销；撤回；取消

said /sed/ *a.* aforesaid; above-mentioned 上述的

sheriff /ˈʃerif/ *n.* (in the US) chief officer responsible for enforcing the law in a county (美国的)县治安官

shove /ʃʌv/ *v.* put (sth.) casually (in a place) 随意将(某物)放在(某处)

specify /ˈspesifai/ *v.* state or name clearly and definitely 确切说明；明确规定；详述

speculate /ˈspekjuˌleit/ *v.* form opinions without having definite or complete knowledge or evidence; guess 思考；思索；推断；推测

stimulant /ˈstimjulənt/ *n.* (drink containing) a drug that increases physical or mental activity and alertness 兴奋剂

suretyship /ˈʃuərətiʃip/ *n.* guarantee that sb. will pay his debts, perform a duty, etc. 保证关系

suspend /səsˈpend/ *v.* temporarily keep (a person) from performing 暂停；中止

synonymous /siˈnɔniməs/ *a.* having the same meaning 同义的

terminology /ˌtəːmiˈnɔlədʒi/ *n.* technical terms of a particular subject 专门用语；术语

testator /tesˈteitə/ *n.* a person who has made a will; esp. a person who dies leaving a will (死后)留有遗嘱的人

transaction /trænˈzækʃən/ *n.* the act or an instance of conducting business or other dealings; something performed or carried out; a business agreement or exchange 交易；业务

unconscionability /ʌnˈkɔnʃənəˈbiliti/ *n.* extreme unfairness; the principle that a court may refuse to enforce a contract that is unfair or oppressive 极不公平

unconscionable /ˌʌnˈkɔnʃənəbl/ *a.* (of a person) having no conscience; unscrupulous; (of an act or transaction) showing no regard for conscience 不道德的

ult. (ultimo 的缩略语) /ˈʌltiməu/ *a.* in or of the month preceding the current one 上月的

unfounded /ʌnˈfaundid/ *a.* with no basis in fact; groundless 毫无根据的

unilateral /ˈjuːnilætərəl/ *a.* one-sided; relating to only one of two or more persons or things 单方的；单方面的；单边的

vague /veig/ *a.* imprecise; not clear; uncertain 模糊的；不清楚的；不确定的

virtually /ˈvəːtjuəli/ *ad.* in every important respect; almost 事实上；实际上

void /vɔid/ *a.* of no legal effect; null 无效的

voidable /ˈvɔidəbl/ *a.* valid until annulled; capable of being affirmed or rejected at the option of one of the parties 可撤销的

vulnerability /ˌvʌlnərəˈbiləti/ *n.* the state that can be hurt, wounded or injured; being exposed to danger or attack 易受伤害性；易受攻击性

whim /wim/ *n.* sudden desire or idea 冲动，心血来潮

Unit Eight

adjoin /əˈdʒɔin/ *v.* be next or nearest to and joined with (sth.) 临近；邻近；毗连

adjudicate /əˈdʒuːdikeit/ *v.* act as a judge in a court; judge and give a decision on 判决；裁决；裁断；裁定

affix /əˈfiks/ *v.* stick, fasten or attach sth. 粘上，贴上，固定于

aggregate /ˈægrigit/ *n.* total amount 总计；总量；合计

alienate /ˈeiljəneit/ *v.* transfer the ownership of (property) from one person to another 转让(财产)所有权；让渡

allocate /ˈæləukeit/ *v.* decide officially that a particular amount of money, time etc. or something such as a house or job etc. should be used for a particular purpose 分配，配给

alteration /ˌɔːltəˈreiʃən/ *n.* act or result of changing 改变；更改；变更；修改

assignment /əˈsainmənt/ *n.* act of assigning (esp. property, rights, etc.) 转让

auction /ˈɔːkʃən/ *n.* method of selling things in which each item is sold to the person who offers the most money for it 拍卖

bailee /ˌbeiˈliː/ *n.* a person who receives personal property form another as a bailment 受托人

bailment /ˈbeilmənt/ *n.* a delivery of personal property by one person to another who holds the property for a certain purpose under an express or implied-in-fact contract 寄托

categorize /ˈkætigəraiz/ *v.* place (sth.) in a category 将(某事物)分类

claimant /ˈkleimənt/ *n.* one who asserts a right or demand, esp. formally 请求权人；权利请求人；主张权利人

clear /kliə/ *v.* (of a drawee bank) pay (a check or draft) out of funds held on behalf of the maker 结算；清偿

concrete /ˈkɔnkriːt/ *a.* definite; positive 明确的；确定的

confer /kənˈfəː/ *v.* give or grant to sb. 给予；授予

convey /kənˈvei/ *v.* transfer or deliver (sth., such as a right or property) to another, esp. by deed or other writing 转让；让与

conveyance /kənˈveiəns/ *n.* the transfer of a right or of property 转让

corroborate /kəˈrɔbəreit/ *v.* confirm or give support to 证实；支持

covenant /ˈkʌvinənt/ *n.* a promise made in a deed or implied by law; esp. an obligation in a deed burdening or favoring a landowner 协议；契约

deed /diːd/ *n.* a written instrument by which land is conveyed; in common law, any written instrument that is signed, sealed, and delivered and that conveys some interest in property 契据

demarcation /ˌdiːmɑːˈkeiʃən/ *n.* (marking of a) limit or boundary 划界线；界线

descend /di'send/ *v.* (of properties, etc.) pass from father to son; be inherited by sb. from sb. 遗传；继承

donative /'dəunətiv/ *a.* giving (property or money) without receiving consideration for the transfer 赠与性的

ejectment /i'dʒektmənt/ *n.* a legal action by which a person wrongfully ejected from property seeks to recover possession and damages 收回土地之诉；驱逐之诉

encroach /in'krəutʃ/ *v.* enter by gradual steps or stealth into the possessions or rights of another; to trespass or intrude (逐步或暗中地)侵占；侵犯；侵害

encroachment /in'krəutʃmənt/ *n.* an infringement of another's rights or intrusion on another's property 侵占；侵犯；侵害

entity /'entiti/ *n.* thing with distinct and real existence 实体

excavation /ˌekskə'veiʃən/ *n.* the activity of excavating 挖掘；发掘；开掘

extinguish /iks'tiŋgwiʃ/ *v.* cause to stop; end the existence 灭失；不复存在

fixture /ˌfikstʃə/ *n.* personal property that is attached to land or a building and that is regarded as an irrevocable part of the real property, such as fireplace built into a home (不动产的)附着物；固定装置

grantee /grɑ:n'ti:/ *n.* one to whom property is conveyed 受让人

grantor /grænta / *n.* one who conveys property to another 让与人；转让人

guarantee /ˌgærən'ti:/ *n.* the assurance that a contract or legal act will be duly carried out 保证；担保

heir /ɛə/ *n.* a person, who under the laws of intestacy, is entitled to receive an intestate decedent's property 法定继承人；继承人

inaccessibility /'inækˌsesə'biliti/ *n.* the state that is very difficult or impossible to reach, approach, access, etc. 难以达到；不可及；不可接触

inadvertently /inəd'və:təntli/ *ad.* by accident; unintentionally 偶然地；非故意地；无意地

infeasible /in'fi:zəbl/ *a.* not practicable; impossible 不可行的；不实际的

inhabitancy /in'hæbitənsi/ *n.* the state of living in, occupying 居住；栖息

inheritable /in'heritəbl/ *a.* capable of being inherited 可继承的；可遗传的

inheritance /in'heritəns/ *n.* inheriting(sth. from sb.) 继承

intrinsic /in'trinsik/ *a.* belonging naturally; existing within, not coming from outside 固有的；内在的；本质的

lateral /'lætərəl/ *a.* of, at, from or towards the side(s) 侧面的；从侧面的；向侧面的

lease /li:s/ *n.* contract by which the owner of land, a building, etc. allows another

person to use it for a specified time, usu. in return for rent (土地、房屋等的)租赁，租约

lessee /leˈsi:/ *n.* person who holds a building, land, etc. on a lease 承租人；租户

lessor /ˈlesɔ:(r)/ *n.* person who lets a property to be used on a lease 出租人

leasehold /ˈli:shəuld/ *n.* a tenant's possessory estate in land or premises 租赁保有；租赁保有权；租赁保有产

licensee /laisənˈsi:/ *n.* one who has permission to enter or use another's premises, but only for one's own purposes and not for the occupier's benefit 被许可人

lien /ˈli(:)ən/ *n.* a legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied 留置权；优先权

littoral /ˈlitərəl/ *a.* of or relating to the coast or shore of an ocean, sea, or lake 沿(海或湖)岸的

mortgage /ˈmɔ:gidʒ/ *n.* a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms; a lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms 抵押；抵押权

mortgagee /ˌmɔ:gəˈdʒi:/ *n.* one to whom property is mortgaged; the mortgage creditor, or lender 抵押权人

mortgagor /ˈmɔ:gidʒə/ *n.* one who, having all or some part of title to property, by written instrument pledges that property for some particular purpose such as security for a debt 抵押人

mow /mau/ *v.* cut (grass, etc.) using a machine with blades 割(草等)

notorious /nəuˈtɔ:riəs/ *a.* (of the possession of property) so conspicuous as to impute notice to the true owner 公开占有财产的

perimeter /pəˈrimitə/ *n.* (length of the) outer edge of a closed geometric; boundary of an area 周边；边缘；界限

perpetual /pəˈpetjuəl/ *a.* continuing indefinitely; permanent 永久的；永恒的

personalty /ˌpə:səˈnæləti/ *n.* personal property as distinguished from real property 动产

predecessor /ˈpri:disesə/ *n.* one who goes or has gone before 祖先；先辈

realty /ˈriəlti/ *n.* a brief term for real property or real estate 不动产

repel /riˈpel/ *v.* drive (sb./sth.) back or away 驱逐；赶走；击退

servitude /ˈsə:vitju:d/ *n.* an encumbrance consisting in a right to the limited use of a piece of land without the possession of it; a charge or burden on an estate for

another's benefit 地役；役权；地役权

spouse /spauz/ *n.* husband or wife 配偶

subjacent /sʌb'dʒeisənt/ *a.* located underneath or below 垂直的

sublease /'sʌb'li:s/ *v.* lease to a third party by a lessee 转租；分租

subleasee /'sʌble'si:/ *n.* a third party who receives by lease some or all of the leased property from a lessee 转租人；分租人

sublet /sʌb'let/ *v.* lease to a third party by a lessee 转租；分租

subordination /sə,bɔ:di'neiʃən/ *n.* sth. less important 从属；次要

subsequent /'sʌbsikwənt/ *a.* (of an action, event, etc.) occurring later; coming after sth. else 后来的；随后的；后继的

subterranean /,sʌbtə'reiniən/ *a.* under the earth's surface; underground 地下的；地面下的

survivorship /sə'vaivəʃip/ *n.* the right of a surviving party having a joint interest with others in an estate to take the whole 生存者权利

toxic /'tɔksik/ *a.* poisonous 有毒的

transferable /træns'fə:rəb(ə)l/ *a.* capable of being transferred, together with all rights of the original holder 可转让的

transferee /,trænsfə:'ri:/ *n.* one to whom an interest in property is conveyed 受让人

trust /trʌst/ *n.* a property interest held by one person at the request of another for the benefit of a third party 信托

underbrush /'ʌndəbrʌʃ/ *n.* mass of shrubs, bushes, etc. growing closely on the ground, esp. under trees 灌木丛

utensil /ju(:)'tensl/ *n.* implement or container, esp. for everyday use in the home 用具；器皿

vacate /və'keit/ *v.* surrender occupancy or possession; move out or leave 腾出；搬出；空出

vest /vest/ *v.* confer ownership of (property) upon a person 授予；赋予；给予

vigilant /'vidʒilənt/ *a.* watchful and cautious; on the alert; attentive to discover and avoid danger 警惕的；警觉的；警戒的

will /wil/ *n.* a document by which a person directs his or her estate to be distributed upon death 遗嘱

Unit Nine

abuse /ə'bju:z/ *v.* wrong or bad use 滥用；妄用

account /ə'kaunt/ *v.* explain the cause of sth. 解释

alter ego /ˈɔːltəˈiːgən/ (*Latin*) other self 第二个我

approach /əˈprəutʃ/ *v.* go to (sb.) for help or support or in order to offer sth. 接近

block /blɔk/ *n.* large quantity of things regarded as a single unit (被看做一个单一整体的)大量事物

co-mingle /kəuˈmiŋgl/ *v.* mix together 混合在一起；绞在一起

commissioner /kəˈmiʃənə/ *n.* member of a commission, esp. one with particular duties; public official of high rank 委员；长官；高级官员

comprise / kəmˈpraiz/ *v.* have as parts or members; be made up of 包括；包含；构成；组成

confidential /ˌkɔnfiˈdenʃəl/ *a.* to be kept secret; not to be made known to others 机密的；保密的

derivative /diˈrivətiv/ *a.* derived from sth. else 派生的；衍生的；非直接的

disperse /disˈpəːs/ *v.* go in different directions; scatter; break up 散开；消散；驱散

dissolution /disəˈljuːʃən/ *n.* breaking up; dissolving 分解；瓦解；解散；解除

dividend /ˈdividend/ *n.* a portion of profits distributed to shareholders in a company 红利；股息

embryonic /ˌembriˈɔnik/ *a.* in an early stage of development 初期的；胚胎的

entail /inˈteil/ *v.* make necessary; involve 使必要；牵涉

executrix /igˈzekjutriks/ *n.* female executor; a woman who has been appointed by will to execute such will or testament 女执行者；女遗嘱执行人

fiduciary /fiˈdjuːʃəri/ *a.* of the nature of a trust; having the characteristics of a trust 信托的；信用的；受信托的；受委托的

n. one who owes to another the duties of good faith, trust, confidence or candor 受托人

figurative /ˈfigjurətiv/ *a.* used in an imaginative or metaphorical way rather than literally 比喻的

forfeit /ˈfɔːfit/ *v.* lose or give up as a consequence of or punishment for having done sth. wrong 失去；丧失；剥夺

formality /fɔːˈmæliti/ *n.* action required by convention or law 形式；手续

hereafter /hiəˈɑːftə/ *ad.* from now on; following this 自此以后；此后

immaterial /ˌiməˈtiəriəl/ *a.* not important; irrelevant 不重要的；不相干的

inception /inˈsepʃən/ *n.* start or beginning of sth. 开始；开端

incorporation /inˌkɔːpəˈreiʃən/ *n.* formation of a legal corporation 组成公司；设立法人

incorporator /inˈkɔːpəreitə(r)/ *n.* person who takes part in the formation of a cor-

poration 公司创办人

inherent /in'hiərənt/ *a.* existing as a natural or permanent feature or quality of 内在的；本来的；固有的

initial /i'niʃəl/ *a.* of or at the beginning; first 开始的；最初的

integrity /in'tegriti/ *n.* condition of being whole or undivided 完整；整体

ledger /'ledʒə/ *n.* book in which a bank, business firm, etc. records its financial accounts 分类账；分户账

letterhead /'letəhed/ *n.* name and address of a person or an organization printed as a heading on stationary; stationary printed with such a heading 信笺抬头；印有抬头的信笺

liquidation /ˌlikwi'deiʃən/ *n.* the act of settling a debt by payment or other satisfaction 清算；清偿；结算

manipulate /mə'nipjuleit/ *v.* control or influence 操纵；控制；影响

merger /'mə:dʒə/ *n.* joining together 合并；归并

merit /'merit/ *n.* quality of deserving praise or reward; worth; excellence 长处；优点；价值

minute /mai'nju:t/ *n.* brief summary or record of what is said and decided at a meeting 会议记录

personality /ˌpə:sə'næliti/ *n.* characteristics and qualities of a person seen as a whole 人格；个性

pierce /piəs/ *v.* go into or through; make through 穿透；刺透；进入

proxy /'prɔksi/ *n.* document that gives authority to represent sb else in voting 委托他人投票的授权书；委托书

prudent /'pru:dənt/ *a.* acting with or showing care and foresight; showing good judgment 审慎的；有先见之明的；判断力强的

receipt /ri'si:t/ *n.* act of receiving or being received 收到

reimburse /ˌri:im'bə:s/ *v.* pay back to sb 补偿；偿还

relegate /'religeit/ *v.* dismiss sb./sth. to a lower or less important rank, task or state 降级；降低；降职

relitigate /ri'litigeit/ *v.* litigate again 再诉讼；再诉诸法律

revenue /'revinju:/ *n.* income, esp. the total annual income 收入；岁入

sham /ʃæm/ *n.* sth. that is not what it seems; a counterfeit 假装；欺骗；虚伪

signatory /'signətəri/ *n.* person, country, etc. that has signed an agreement 签约人；签约国

substantially /səb'stænʃ(ə)li/ *ad.* considerably; essentially 相当地；实质上；大

体上；基本上

substitute /ˈsʌbstitjuːt/ *v.* replace 代替；替代

successor /səkˈsesə/ *n.* a person or thing that comes after and takes the place of 接替者；后继者；继承人

tier /tiə/ *n.* any of a series of rows or parts of a structure placed one above the other 排；层

trifling /ˈtraifliŋ/ *a.* unimportant; trivial 不重要的；琐碎的

veil /veil/ *n.* covering of fine net or other material worn to protect or hide the face 面纱

Unit Ten

adage /ˈædidʒ/ *n.* a saying that sets forth a general truth and that has gained credit through long use 格言，古语

admission / ədˈmiʃən/ *n.* the act of admitting or allowing to enter; a confession, as of having committed a crime 准许进入；坦白

ambit /ˈæmbit/ *n.* sphere or scope 范围

aphorize /ˈæfəraiz/ *v.* express oneself in or as if in aphorisms 精练地陈述

asymptomatic /ˌeisimptəˈmætik/ *a.* neither causing nor exhibiting symptoms of disease 无症状的

augmentation /ˌɔːgmenˈteiʃən/ *n.* the act or process of augmenting 增大行为或过程

bearing /ˈbɛəriŋ/ *n.* relevant relationship or interconnection 关系

circumstantial /ˌsəːkəmˈstænʃəl/ *a.* of, relating to, or dependent on circumstances 与依照环境的有关的，间接的

contraband /ˈkɔntrəbænd/ *n.* anything prohibited by law from being imported or exported 走私货，禁运品

crux / krʌks/ *n.* a puzzling or apparently insoluble problem 疑难或明显不能解决的问题

custodian / kʌsˈtəudjən/ *n.* one that has charge of something; a caretaker 监护人；照顾者

demeanor / diˈmiːnə/ *n.* the way in which a person behaves; deportment 举止，行为人行动的方式

discrete / disˈkriːt/ *a.* constituting a separate thing; distinct 分离的，个别的

dominion /dəˈminjən/ *n.* the power or right of governing and controlling 支配权，管辖权

dormant /ˈdɔːmənt/ *a.* inactive 不活跃的

eavesdropper /ˈiːvzˌdrɔpə/ *n.* 偷听者

entrench / inˈtrentʃ/ *v.* fix firmly or securely 确立

exhibit / igˈzibit/ *n.* to submit (evidence or documents) in a court 在法庭提交证据或文件

forgery /ˈfɔːdʒəri/ *n.* the act of forging, especially the illegal production of sth. counterfeit 伪造，尤指非法制造赝品

genital /ˈdʒenitl/ *a.* of or relating to biological reproduction 生物生殖的，与之相关的

gory /ˈgɔːri/ *n.* full of or characterized by bloodshed and violence 血腥的，充满流血或暴力的，或以此为特征的

harassment /ˈhærəsmənt/ *n.* 骚扰，侵袭

hearsay /ˈhiəsei/ *n.* evidence based on the reports of others rather than the personal knowledge of a witness and therefore generally not admissible as testimony 传闻证据

herpes /ˈhəːpiːz/ *n.* 疱疹

inflammatory / inˈflæmətəri/ *a.* arousing passion or strong emotion, especially anger, belligerence, or desire 有煽动性的

informant /inˈfɔːmənt/ *n.* a person who informs or gives information; informer 报告者

intendment /inˈtendmənt/ *n.* the true or correct meaning of sth. 真正含义

intoxication / inˌtɔksiˈkeiʃən/ *n.* 醉酒状态

jigsaw /ˈdʒigsɔː/ *n.* 拼图玩具

loiter /ˈlɔitə/ *v.* stand idly about; linger aimlessly 闲逛

materiality / məˌtiəriˈæliti/ *n.* the state or quality of being material 重要，重要性

minimal /ˈminiməl/ *a.* small in amount or degree 小的，少的

movant /ˈmuːvənt/ *n.* the party who makes a motion 动议方

officious / əˈfiʃəs/ *a.* informal; unofficial 不正式的；非官方的

perpetrator / pəːpiˈtreitə/ *n.* 犯罪者，作恶者

predisposition / priːdispəˈziʃən/ *n.* tendency, inclination, or susceptibility 趋势；倾向或敏感性

probative /ˈprəubətiv/ *a.* furnishing evidence or proof 用作证明或证据的

proponent / prəˈpəunənt/ *n.* one who argues in support of sth.; an advocate 辩护者

relevancy /ˈreləvənsi/ *n.* the quality or state of being relevant; pertinency 相关性

remorse / riˈmɔːs/ *n.* moral anguish arising from repentance for past misdeeds; bitter regret 悔恨

reproach / ri'prəutʃ/ *v.* disgrace; shame 丢脸；羞耻

sequester / si'kwestə/ *v.* segregate 隔离

surveillance /sə'veiləns/ *n.* a watch kept over a person, group, etc. over a suspect, prisoner, or the like 监视

syllogism /'siləʤizəm/ *n.* 三段论

treatise /'tri:tiz/ *n.* a formal work on a subject, esp. one that deals systematically with its principles and conclusions 专著，专题论文

toiletry /'tɔilitri/ *n.* an object or cosmetic used in making up, dressing, etc. 化妆品

undercover /ˌʌndə'kʌvə/ *a.* performed or occurring in secret 秘密的，暗中进行的

underpinning /'ʌndəˌpiniŋ/ *n.* a support or foundation 支撑，基础

umpire/'ʌnpaiə / *n.* 仲裁人，裁判员

veracity / və'ræsiti/ *n.* conformity to fact or truth; accuracy or precision 真实性；精确或准确

virus /'vaiərəs/ *n.* 病毒

Unit Eleven

abridgment / ə'briʤmənt/ *n.* a written text that has been abridged 删节、节略一篇缩写后的文章

adapt / ə'dæpt/ *v.* make suitable to or fit for a specific use or situation 调整，改编

akin / ə'kin/ *a.* having a similar quality or character; analogous 同类的；近似的；相似的

antitrust /ˌænti'trʌst/ *n.* opposing or intended to regulate business monopolies, such as trusts or cartels 反托拉斯的，反垄断的

asexually / æ'seksjuəli/ *ad.* in an asexual manner 无性地

atlas /'ætləs/ *v.* a book or bound collection of maps, sometimes with supplementary illustrations and graphic analyses 地图册，图表集

audiovisual /ˌɔ:diəu'viʒuəl/ *a.* of or relating to materials, such as films and videotapes, that present information in audible and pictorial form 视听的

choreographic /ˌkɔriə'græfik/ *a.* of or concerned with choreography (有关)舞蹈艺术的

compilation /ˌkɔmpi'leiʃən/ *n.* sth. such as a set of data, a report, or an anthology, that is compiled 汇编物

composition /ˌkɔmpə'ziʃən/ *n.* the result or product of composing; a mixture or compound 合成物

compulsory / kəmˈpʌlsəri/ *a.* employing or exerting compulsion 强制的

condensation /ˌkɔndenˈseiʃən/ *n.* the reduction of a book, speech, statement or the like, to a shorter or tenser form 缩写

confusion /kənˈfjuːʒən/ *n.* disturbance of consciousness charaterized by inability to engage in orderly thought or by lack of power to distinguish, choose, or act decisively 混淆

connotation /ˌkɔnəuˈteiʃən/ *n.* an idea or meaning suggested by or associated with a word or thing 含意

copyright /ˈkɔpirait/ *a.* the legal right granted to an author, a composer, a playwright, a publisher, or a distributor to exclusive publication, production, sale, or distribution of a literary, musical, dramatic, or artistic work 版权

deception / diˈsepʃən/ *n.* the use of deceit 欺骗，欺诈

descriptiveness /disˈkriptivnəs/ *n.* 描述

disclose / disˈkləuz/ *v.* make known (sth. heretofore kept secret) 揭露，使(以前保密的事)公开，泄露，透露

distinctiveness /disˈtinktivnəs/ *n.* utter dissimilanity 显著性

dramatization /ˌdræmətaiˈzeiʃən/ *n.* a work adapted for dramatic presentation 改编成的剧作品

enforceable / inˈfɔːsəbl / *a.* capable of being enforced 可执行的

exemplify / igˈzemplifai/ *v.* make a certified copy of (a document)制定核正誊本，制定盖有公章证明的誊本

exploitation /ˌeksplɔˈteiʃən/ *n.* the act of employing to the greatest possible advantage 充分利用的

fanciful /ˈfænsiful / *a.* imaginative 想象的

fictionalization /ˌfikʃənəlaiˈzeiʃən/ *n.* a literary work based partly or wholly on fact but written as if it were fiction 把……编成小说

fixation / fikˈseiʃən/ *n.* the act or process of fixing or fixating 固定

foster /ˈfɔstə/ *v.* to promote the growth and development of 促进

gazetteer /ˌgæziˈtiə/ *n.* a geographic dictionary or index 地名辞典

generic / dʒiˈnerik/ *a.* relating to or descriptive of an entire group or class; general 一般的，通有的；普遍的

graphic /ˈgræfik/ *a.* of, relating to, or represented hy or as if by a graph. 用图表示的

incontestable /ˌinkənˈtestəbl/ *a.* impossible to contest; unquestionable 无可争辩的；无疑问的

in re / in'ri:/ *prep.* in regard to 关于

issuance /'iʃu(:)əns/ *n.* the act of giving out 发给，颁布

jukebox /'dʒu:kbɔks/ *n.* 投币式自动电唱机

logo /'lɔgəu/ *n.* a name, symbol, or trademark designed for easy and definite recognition, esp. one borne on a single printing plate or piece of type 标识

misappropriation /'misə,prəupri'eiʃən/ *n.* illegal use 非法使用

misdescriptive / mis,dis'kriptiv/ *a.* characterized by false description 错误描述的

nebulous /'nebjuləs/ *a.* lacking definite form or limits; vague 模糊不清的；模糊的

nonobviousness /,nʌn'ɔbviəs/ *n.* 非显而易见性

novelty / nɔvlti/ *n.* newness 新颖性

originality /,əridʒ'næliti/ *n.* the quality of being original 独创性

pantomime /'pæntəmaim/ *n.* the telling of a story without words, by means of bodily movements, gestures, and facial expressions 哑剧

parody /'pærədi/ *n.* a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule 戏仿

patent /'peitənt/ *n.* a grant made by a government that confers upon the creator of an invention the sole right to make, use, and sell that invention for a set period of time 专利，专利权

patentable /'peitəntəbl/ *a.* capable or susceptible of being patented 可取得专利的

patentee /,peitən'ti:/ *n.* the party that possesses or has been granted a patent 专利权人

pen / pen/ *v.* write 写作

personhood /'pə:sənhud/ *n.* the state or condition of being a person, especially having those qualities that confer distinct individuality 人格

pertain / pə(:)'tein/ *v.* have reference; relate 关于

pictorial / pik'tɔ:riəl/ *a.* composed of pictures 由画组成的

prima facie /'praimə'feiʃii:/ *a.* (*Latin*) true, authentic, or adequate at first sight; ostensible 初看是真实的，可靠的或合适的

process /'prɔses/ *n.* a series of operations performed in the making or treatment of a product 生产过程

RAM: (random-access memory)(计)随机存取存储器

recast /,ri:'kɑ:st/ *v.* set down or present (ideas, eg.) in a new or different arrangement 重塑，改写

regime / reiˈʒiːm/ *n.* a system of principles, rules, or regulations for administration 体制，制度

registrability /ˌredʒistrəˈbiliti/ *n.* the quality or state of being registrable 可注册性

reproduction /ˌriprəˈdʌkʃən/ *n.* the act of reproducing or the condition or process of being reproduced; sth. reproduced, especially in the faithfulness of its resemblance to the form and elements of the original 复制；复制品

royalty /ˈrɔiəlti/ *n.* a share paid to a writer or composer out of the proceeds resulting from the sale or performance of his or her work; a share in the proceeds paid to an inventor or a proprietor for the right to use his or her invention or services 版税；专利权税

sorting /ˈsɔːtiŋ/ *n.* the process of arranging data into some desired order according to rules dependent upon a key or field contained in each item 排序，分类

sculptural /ˈskʌlptʃərəl/ *a.* relating to or consisting of sculpture 雕刻的

skullduggery / skʌlˈdʌgəri/ *n.* crafty deception or trickery or an instance of it 欺诈，阴谋诡计

spur / spəː/ *n.* sth. that serves as a goad or an incentive 刺激，激励

suggestive /səˈdʒestiv/ *a.* conveying a hint (of sth.) 暗示性的

taking /ˈteikiŋ/ *n.* a seizure of private property or a substantial deprivation of the right to its free use or enjoyment that is caused by government action and esp. by the exercise of eminent domain and for which just compensation to the owner must be given according to the Fifth Amendment to the U. S. Constitution 征用

unscrupulous / ʌnˈskruːpjuləs/ *a.* devoid of scruples; oblivious to or contemptuous of what is right or honorable 毫无顾忌的，全无顾忌的

utilitarian /ˌjuːtiliˈtɛəriən/ *a.* of, relating to, or in the interests of utility 有用的

utility / juːˈtiliti/ *n.* the quality or condition of being useful; usefulness 有用，实用性

validity / vəˈliditi/ *n.* the quality or state of being valid 有效

vis-a-vis /ˈviːzaːviː/ *prep.* face to face; compared with; in relation to 与……相对；与……比较；关于

Unit Twelve

ab initio / æbiˈniʃiə/ (*Latin*) from the beginning 从开始起

aver / əˈvəː/ *v.* allege as a fact 陈述，主张

abandonment / əˈbændənmənt/ *n.* the act of abandoning a person: as a: failure to have contact with a spouse that is intended to create a permanent separation;

b: failure to communicate with or provide financial support for one's child over a period of time that shows a purpose to forgo parental duties and rights 遗弃

adoption / əˈdɔpʃən/ *n.* the act of bringing (a person) into a specific relationship, esp. to take (another's child) as one's own child 收养

adultery / əˈdʌltəri/ *n.* voluntary sexual intercourse between a married person and someone other than his or her lawful spouse 通奸

antenuptial /ˌæntiˈnʌpʃəl/ *a.* before marriage 结婚前的

augment / ɔːgˈment/ *v.* make larger; enlarge in size, number, strength, or extent 增大的

bereavement / biˈriːvmənt/ *n.* the condition of having been deprived of sth. or sb. valued, esp. through death 丧失亲人

bigamy /ˈbigəmi/ *n.* the crime of marrying while one has a wife or husband still living, from whom no valid divorce has been effected 重婚

biological /ˌbaiəˈlɔdʒikəl/ *a.* related by blood, as in a child's biological parents 有血缘关系的

commingle / kəˈmiŋgl/ *v.* mix or mingle together 混同

concubine /ˈkɔŋkjubain/ *n.* a woman who cohabits with a man to whom she is not legally married, esp. one regarded as socially or sexually subservient; mistress 情妇

demur / diˈməː/ *v.* raise an objection by entering a demurrer 抗辩，异议

disparate /ˈdispərit/ *a.* essentially different 完全不同的

distillation / distiˈleiʃən/ *n.* a concentrated essence 精华

emancipation / iˌmænsiˈpeiʃən/ *n.* the act of freeing or state of being freed; liberation 解放

erstwhile /ˈəːstwail/ *a.* former; of times past 以前的

familial / fəˈmiljəl/ *a.* of, pertaining to, or characteristic of a family 家庭的

illicit / iˈlisit/ *a.* not legally permitted or authorized; unlicensed; unlawful 非法的

incest /ˈinsest/ *n.* sexual intercourse between closely related persons 乱伦

intimate /ˈintimit/ *a.* very private; closely personal 亲密的，密切的

interlocutory /ˌintəˈlɔkjutəri/ *a.* pronounced during the course of an action, as a decision; not finally decisive of a case (判决等)在诉讼期间判决的

intestacy / inˈtestəsi/ *a.* (of a person) not having made a will, (of property) not disposed of by will 无遗嘱的，无遗嘱继承的

irreconcilable / iˌrekənˈsailəbl/ *a.* not able to be reconciled 不可调和的

loom / luːm/ *v.* appear indistinctly 隐现

maintenance /'meintinəns/ *n.* alimony or child support 抚养费，赡养费

miscegenation /ˌmisidʒi'neiʃən/ *n.* marriage or cohabitation between a man and woman of different races, esp., in the U. S., between a black and a white person 不同种族间通婚

nonremunerative /'nɔnri'mju:nərətiv/ *a.* not affording renumeration 无偿的

omnipresent / ɔmni'prezənt/ *a.* present in all places at the same time 无所不在的

perfunctory/pə'fʌŋktəri/ *a.* performed merely as a routine duty 例行公事的

polygamy / pə'ligəmi/ *n.* the practice or condition of having more than one spouse, esp. wife, at one time 一夫多妻或一妻多夫

prenuptial / pri'nʌpʃəl/ *a.* before marriage 结婚前的

purport /'pə:pɔt/ *v.* claim (to be a certain thing, etc.) by manner or appearance, esp. falsely 声称

putative /'pju:tətiv/ *a.* commonly regarded as such; supposed 推定的，被公认的

quantum meruit /'kwɔntum mə'ru:t/(*Latin*)按合理价格支付

reiterate / ri:itəreit/ *v.* say or do again or repeatedly 重申

rehabilitative / riˌhəbili'teitiv/ *a.* 恢复的，使复原的

rendition / ren'diʃən/ *n.* the execution of a judicial order by the directed parties 执行

secular /'sekjulə/ *a.* of or pertaining to worldly things or to things that are not regarded as religious, spiritual, or sacred 世俗的

spousal /'spauzəl/ *a.* of or relating to marriage 婚姻的

ubiquitous / ju'bikwitəs/ *a.* having or seeming to have the ability to be everywhere at once; omnipresent 无所不在的

vitiate /'viʃieit/ *v.* make legally defective or invalid 使无效

wedlock /'wedlɔk/ *n.* the state of marriage 婚姻，已婚

Unit Thirteen

acquisition / ækwi'ziʃən/ *n.* acquiring 获得；得到；收购

aftermarket /'ɑ:ftəˌmɑ:kit/ *n.* the market for replacement parts, accessories, and equipment for the care or enhancement of the original product; any additional market created by a product after the primary market 零部件市场；后续市场

ancillary / æn'siləri/ *a.* helping, providing a service to those carrying on the main business of an enterprise 辅助的；附属的

acumen / ə'kju:mən/ *n.* sharpness and accuracy of judgment; ability to under-

stand clearly 敏锐及正确的判断力；清晰的了解力；聪明才智

appreciably / ə'pri:ʃəbli/ *ad.* considerably 相当地

bid / bid/ *n.* statement of price for a piece of work, etc. 投标(承建工程等)

codification / kɔdifə'keiʃən/ *n.* the act, process, or result of stating the rules and principles applicable in a given legal order to one or more broad areas of life in this form of a code 法典编纂

consummate / kən'sʌmit/ *v.* accomplish 完成

construction / kən'strʌkʃən/ *n.* meaning; sense in which words, statements, acts, etc. are taken 意义；个人对于词、句、行为等的解释

conspiracy / kən'spirəsi/ *n.* act of making secret plans 阴谋；共谋；谋反

conglomerate / kɔn'glɔmərit/ *a.* (made up of) a number of things or parts come together in a mass 由许多部分或东西聚成的；一团；一块

corollary / kə'rɔləri/ *n.* natural sequence or outcome of sth. 推论

deal / di:l/ *n.* an act of buying and selling 买卖；交易

deleterious /ˌdeli'tiəriəs/ *a.* harmful 有害的

dichotomy / dai'kɔtəmi/ *n.* division into two 两分法

elasticity / elæs'tisəti/ *n.* flexibility 弹性

empirical / em'pirikəl/ *a.* relying on observation and experiment 全凭观察和实验的；经验的

exigency /'eksidʒənsi/ *n.* condition of great need; emergency 急迫需要；紧急

foothold /'futhəuld/ *n.* a secure position 立足点

foreclose / fɔ:'kləuz/ *v.* cancel the right to do sth. 取消……的权利

immutable / i'mju:təbl/ *a.* cannot be changed 不变的

interdiction / intə(:)'dikʃən/ *n.* (formal) prohibition, forbidding (正式用语)禁止(行动)；禁止(某物的使用)

innocuous / i'nɔkjuəs/ *a.* causing no harm 无害的

intuitive / in'tju:itiv/ *a.* perceived by, resulting from, or involving intuition 直觉的

leverage /'levridʒ/ *n.* power or ability to act or to influence people, events, decisions, etc. 影响力

monopoly / mə'nɔpəli/ *v.* complete possession of 垄断

nomenclature /'nəumənˌkleitʃə/ *n.* system of naming 术语

outlay /'autlei/ *n.* spending 开销，花费，费用

plausible /'plɔ:zəbl/ *a.* seeming to be right or reasonable 似真实的；似合理的

predominant / pri'dɔminənt/ *a.* 主要的

putative /ˈpjuːtətiv/ *a.* commonly reputed to be 一般公认的；推定的

proffer /ˈprɔfə/ *v.* offer 提供，提出

patronage /ˈpætrənidʒ/ *n.* customer's support (to a shopkeeper, etc.) 惠顾

predatory /ˈpredəˌtəri/ *a.* (formal) (of people) plundering and rubbing (正式用语)(指人)抢劫的；掠夺的

recoup / riˈkuːp/ *v.* compensate; make up for 赔偿；补偿

ruinous /ˈruːinəs/ *a.* destructive 破坏性的

transitory /ˈtrænsiˌtəri/ *a.* transient 短暂的；片刻的

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