

Law School Survival Guide

Civil Procedure

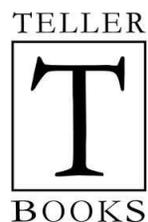
Outlines and Case Summaries

2010
Edition

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Civil Procedure

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CIVIL PROCEDURE
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Some judicial decisions discussed in this book, due to their ambiguity, are subject to different interpretations. Other authors may come to conclusions different from those presented herein. No representation is therefore made that these materials reflect a definitive statement of the state of the law or of the views that will be applied by any court in any particular case or jurisdiction.

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)	JT	Joint tenant/tenancy
AGI	Adjusted gross income	K	Knowledge (criminal law) or Contract (all other law)
AP	Adverse possession	K.B.	King's Bench (UK)
A/R	Assumption of the risk	KSC	Knowledge to a substantial certainty
B	Buyer	L	Loss in value
BFP	Bona fide purchaser or bona fide purchase	L1	First landlord
C	Constitution	Lat.	Latin
CIF	Cause-in-fact	LE	Life estate
Cl.	Clause	LED	Life estate determinable
CLEO	State Chief Law Enforcement Officer	LLC	Limited liability company
Court (cap.)	United States Supreme Court	LLP	Limited liability partnership
CP	Court of Pleas (UK)	LRM	Least restrictive means
CR	Contingent remainder	MPC	Model Penal Code
CSD	Common Scheme of Development	MSAJ	Motion to set aside the judgment
CSI	Compelling state interest	N	Negligence
Ct.	Court	N.B.	Nota bene
Ct. App.	Court of Appeals	NIED	Negligent infliction of emotional distress
Ct. Chan.	Court of Chancery (England)	O	Original owner, or grantor (in present estates and future interests)
ED	Emotional distress	OLQ	Owner of the <i>locus in quo</i>
EI	Executory interest	OO	Original owner
Eng.	England	P	Purpose or purchaser
ES	Equitable Servitude	PE	Privity of Estate
FI	false imprisonment	PJ	Personal jurisdiction
FLSA	Fair Labor Standards Act	PJI	Pattern Criminal Jury Instruction
FMLA	Family and Medical Leave Act	PK	Privity of Contract
FQJ	Federal question jurisdiction	Q.B.	Queen's Bench (UK)
FRAP	Federal Rules of Appellate Procedure	R	Recklessness
FRCP	Federal Rules of Civil Procedure	RAP	Rule against perpetuities
FRCrP	Federal Rules of Criminal Procedure	RC	Real Covenant
FRE	Federal Rules of Evidence	Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
FS	Fee simple absolute (fee simple)	RFRA	Religious Freedom Restoration Act of 1993
FSCS	Fee simple on condition subsequent	RIL	Res ipsa loquitur
FSD	Fee simple determinable	RPP	Reasonable prudent person
FS EL	Fee simple on executory limitation	Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
FT	Fee tail	§	Section
H.L.	House of Lords (England)	S	Sublessee or seller
IIED	Intentional infliction of emotional distress	S.Ct.	Supreme Court or US Supreme Court Reporter
IT	Intentional tort	SF	Statute of Frauds
JMOL	Judgment as a matter of law	SJ	Summary judgment
JNOV	Judgment non obstante veredicto	SL	Strict liability, or statute of limitations
J/SL	Joint and several liability, or jointly and severally liable		

CIVIL PROCEDURE

SMJ	Subject matter jurisdiction		(compilation of US Supreme Court opinions)
SP	Specific performance		
T1	First tenant	USC	United States Code
TE	Tenant/tenancy by the entireties	VR	Vested remainder
TO	True owner	VR SD	Vested remainder subject to divestment
UCC	Uniform Commercial Code		
US	United States of America or United States Reports		

I. INTRODUCTION

A. INTRODUCTION TO THE LAW OF CIVIL PROCEDURE

1. Defining Civil Procedure

- a. Civil procedure refers to the methods and practices within litigation between private parties.
- b. It can be contrasted to the domain governing the substance or content of the law. It can similarly be contrasted to criminal procedure, which governs cases prosecuted on behalf of the public against a criminal defendant.

2. Alternatives to Civil Litigation

- a. Alternative dispute resolution (ADR);
- b. Negotiation between parties coming to their own settlements;
- c. Mediation under the guidance of a third party; and
- d. Arbitration – dispute resolution “without the law” by a third party that usually has the power to make binding decisions.

3. Getting into Federal Court

- a. There are three ways to get into federal district courts:
 - i. The United States as a party (plaintiff or defendant);
 - ii. Federal question jurisdiction;
 - 1) This includes: (i) federal courts’ exclusive jurisdiction (*e.g.*, on patent and copyright law, bankruptcy law, etc.), and (ii) federal courts’ concurrent jurisdiction (*e.g.*, on the interpretation of the Constitution).
 - 2) The subject matter may involve, for example, questions of diversity, including cases involving admiralty and maritime jurisdiction, public ministers, ambassadors or aliens.
 - iii. Diversity of citizenship of the parties.
- b. In addition, a case involving a question over which the federal courts hold concurrent jurisdiction can be appealed to the U.S. Supreme Court if it has exhausted the state court appeals process.

B. THE HIERARCHY OF SOURCES OF CIVIL PROCEDURAL LAW

1. The U.S. Constitution

- a. Art. VI, cl. 2 (Supremacy Clause): “This Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States . . . shall be the supreme Law of the Land.”

- b. By “Laws,” the Constitution is referring to federal laws. Thus, the Constitution and federal laws trump state laws and municipal ordinances.
2. Federal Statutes
 - a. These are passed by Congress and are contained in 28 USC, which deals with the Judiciary and Judicial Proceedings.
 - b. In addition, they cover federal question jurisdiction (§ 1331); diversity jurisdiction (§ 1332); removal jurisdiction (§1441); supplemental jurisdiction (§ 1367); venue (§ 1391) and the FRCPs.
3. Federal Rules of Civil Procedure (FRCP)
 - a. These rules govern civil actions in the United States district courts (in contrast, the Federal Rules of Appellate Procedure deal with the appeals courts).
 - b. Over half of the states have adopted the FRCP, either in their entirety or with some changes.
 - c. The courts are not given ***the discretion to disregard the federal rules***, even if doing so would be in the interests of justice.
 - i. *See Carlisle v. United States* (U.S. 1872), where Carlisle was declared guilty and sentenced for possession with intention to distribute marijuana. The court granted a motion for judgment of acquittal, even though it was filed by Carlisle’s attorney one day late, because disregarding the motion would have been a “miscarriage of justice.” The Sixth Circuit declared that the District Court did not have the authority to disregard Federal Rule of Criminal Procedure 29, even though Carlisle may have been innocent, and even if the error was due to attorney negligence. On appeal, the Supreme Court affirmed the Circuit Court decision.
4. Local Rules
 - a. FRCP 83(a) states that each district court, “acting by a *majority of its district judges*, may, after giving appropriate public notice and an opportunity for comment, *make and amend rules* governing its practice.”
 - b. When the FRCP are silent on a matter, the local rules fill in the gaps.
 - c. The numbering scheme in the FRCP must be used in the local rules.
 - d. Failing to observe a local rule, such as a deadline for submitting a legal brief, can cause a party to lose rights.
 - e. However, the failure to comply with a requirement of form (*e.g.*, the spacing between paragraphs in a legal brief) will not be enforced in a way that causes a party to lose rights when the non-compliance is not willful (FRCP 83(b)).
5. Standing Orders (FRCP 83b)

- a. A standing order looks forward to and applies to all of the cases pending before a court.
 - b. Some judges issue standing orders on a subject when there is no applicable local rule.
 - c. Standing orders are binding only on parties appearing before the judge who wrote them.
 - d. One often must contact the clerk of the court to obtain them.
 - e. The non-willful non-compliance of standing orders, unlike that of local rules, the FRCP, and statutes, cannot cause the breaching party to lose rights; ignorance is an excuse.
6. Orders
- a. An order is a written direction or command that may be interlocutory or final that is delivered by a court or judge.
 - b. Parties apply to the court or judge for an order by making motions which, unless made during a hearing or trial, must be made in writing (FRCP 7(b)).

C. THE STRUCTURE OF THE FEDERAL COURT SYSTEM

1. The U.S. Judicial branch
- a. U.S. district courts may decide the following cases:
 - i. Cases where the U.S. is a party;
 - ii. Cases involving the Constitution, federal laws and treaties (“federal question jurisdiction”). This includes cases involving admiralty and maritime jurisdiction, public ministers, ambassadors or aliens.
 - iii. Questions of diversity.
 - b. The Supreme Court has jurisdiction over:
 - i. Exclusive jurisdiction:
 - 1) Conflicts between two or more states
 - ii. Original jurisdiction:
 - 1) The Supreme Court has original jurisdiction over:
 - a) Conflicts between two or more states;
 - b) Conflicts involving ambassadors, public ministers, or consults of foreign states;
 - c) Conflicts between the U.S. and a state;
 - d) Actions or proceedings by a state against citizens of another state or against aliens.
 - 2) These involve a very small number of cases, usually less than one dozen per year.

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- i. *See Ferens v. John Deere* (U.S. 1990), where the Court allowed the plaintiff to adjudicate a claim in Pennsylvania even though he originally properly brought the claim in Mississippi merely to later transfer it without being subject to the Pennsylvania SL.
- ii. *N.B.*: a defense that the defendant could have raised was that this transfer was against the interests of justice, which are recognized by 28 USC §1404(a).

D. FEDERAL LAW IN STATE COURT

1. When adjudicating *non-exclusive federal question claims*, state courts must apply only those federal procedural laws “essential to effectuate” the purposes behind the federal law.

V. PLEADINGS AND MOTIONS

A. AN OVERVIEW OF PLEADINGS

1. Introduction
 - a. Pleadings are documents filed by a litigant that set forth the material facts and legal arguments of his claims or defenses.
 - b. The purposes of pleadings are to: (i) give notice of the suit; (ii) give factual and legal information about the nature of the claim; (iii) establish jurisdiction; and (iv) narrow the issues.
 - c. The plaintiff initiates suit by filing what most jurisdictions call a “complaint.”
 - d. The defendant may respond to the complaint by:
 - i. Filing her own pleading, called the “answer,” and raising any affirmative defenses;
 - ii. The plaintiff may then respond to any affirmative defenses in his “reply.”
2. Pleadings Allowed; Form of Motions
 - a. Under Rule 7, the following pleadings are required in an action:
 - i. A *complaint* and *answer*;
 - ii. A *reply*, if there is a *counterclaim* (an independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff’s claim) denominated as such;
 - iii. An answer if there is a *cross-claim* (a claim under FRCP 13(g) by one party against a co-party);
 - iv. A *third party complaint*;
 - v. A *third party answer*.
 - b. No other pleadings are permitted, except that the court may order a reply to an answer or a third-party answer. Rule 7(a).

- c. The deadline for service of all of these pleadings is twenty days from the date of receipt.
 - d. When counting days, the following rules must be followed:
 - i. If the amount of time is less than eleven days, weekends and holidays are not counted;
 - ii. If the amount of time is eleven days or more, weekends and holidays are counted.
 - e. Receipt is effectuated by the mailbox rule: the day the pleading is dropped in the mailbox is the day that it is served.
3. General Rules of Pleading
- a. Under Rule 8(a), all pleadings setting forth a claim for relief against another party (original claim, counterclaim, cross-claim, third-party claim) must contain:
 - i. A short, plain statement of the court’s jurisdiction;
 - ii. A short, plain statement of the claim showing that the pleader is entitled to relief; and
 - iii. A demand for judgment.
4. Pleading Inconsistent Facts and Alternative Theories
- a. Under Rule 8(e)(2), the plaintiff may plead inconsistent facts or theories in a complaint when the plaintiff has insufficient knowledge.
 - i. *See McCormick v. Kopmann* (U.S. 1959), where the plaintiff McCormick was permitted to claim that the defendant negligently drove his truck and the plaintiff’s husband was not contributorily negligent or, in the alternative, a co-defendant’s serving him liquor caused his death.
 - b. There are two limitations on pleading inconsistent facts:
 - i. Ethical considerations: one may not plead what he knows to be untrue. Rule 11.
 - ii. Tactical considerations: pleading inconsistent facts may negatively affect the jury’s perception of the case.
5. Form of Pleadings.
- a. All pleadings require a **caption** containing: the name of the court, the file number, the title of the action (*e.g.*, “Smith v. Jones”), and the name of the pleading. Rule 10(a).
 - b. Each set of circumstances must be set forth in separate, enumerated paragraphs. Rule 10(b).
 - c. Statements in a pleading may be adopted by reference to exhibits, which become part of the pleading. Rule 10(c).

B. REQUIREMENTS OF THE COMPLAINT

1. General Requirements
 - a. The complaint, like claims made in other pleadings, must contain a short and plain statement of the court's *jurisdiction*, a claim entitling the plaintiff to *relief*, and a statement of the *relief sought*.
 - b. The complaint requires legal sufficiency in that the case must state a valid claim.
2. Factual (or "Formal") Sufficiency
 - a. Rule 8(f) reflects a policy that places substantive justice over rigid, technical procedural rules.
 - b. Within this context, the Court has taken a relaxed view as to factual, or formal sufficiency, by interpreting the Federal Rules as moving away from the rigid requirements of code pleading.
 - c. The plaintiff need only plead with specificity sufficient to put the defendant on notice of any claims against him.
 - i. *See Dioguardi v. Durning* (2d Cir. 1944), where the plaintiff Dioguardi sued the defendant for conversion. The defendant moved to dismiss for failure to state facts sufficient to constitute a claim. Held: stating facts is not necessary; rather, stating a claim upon which relief may be granted is required and sufficient. Judgment for the plaintiff.
3. Heightened Specificity Requirements in Certain Cases. Rule 9.
 - a. There are two exceptions to the liberal pleading requirements in federal courts:
 - i. When the Federal Rules require heightened specificity (Rule 9(b) fraud or mistake; Rule 9(g) special damages); and
 - ii. When Congress requires it.
 - b. In all other cases outside of these exceptions, the federal courts do not have authority to impose heightened standards. *See Leatherman v. Tarrant County* (U.S. 1993) (lower courts were not permitted to require heightened specificity for actions alleging municipal liability).
 - c. When heightened specificity is required, six questions must be pleaded in the complaint: who, where, what, when, why and how.
4. Rule 41(a) Voluntary Dismissals
 - a. By the Plaintiff
 - i. The plaintiff may file a *notice* to dismiss his own action at any time between his filing of an action and the defendant's filing of an answer or motion for summary judgment (SJ), whichever comes first.

- ii. The dismissal is without prejudice, unless the plaintiff formerly brought and dismissed the same action in any other federal or state court in the United States.
 - b. By Stipulation of the Parties
 - i. The plaintiff may stipulate dismissal with the signatures of all other parties to the action.
 - ii. The dismissal is without prejudice, unless the parties stipulate otherwise.
 - c. By Court Order
 - i. If the plaintiff wishes to dismiss his action *after* the defendant files an answer or a motion for SJ, the court may order such a dismissal without prejudice, unless prejudice is specified in the order.
- 5. Rule 41(b) Involuntary Dismissal
 - a. The defendant may have an action dismissed if the plaintiff violates *any court order* or for his *failure to prosecute*.
 - i. *N.B.:* these are different from Rule 12(b) motions, which are raised by the defendant before he serves his answer, and thus, before the defendant has the opportunity to move to dismiss against the plaintiff for failure to prosecute, for violating court orders, etc.
 - b. Such a dismissal is considered to be with prejudice, unless otherwise specified by the court.
 - c. An action may also be involuntarily dismissed by the initiative of the court.
 - i. *See Link v. Wabash* (U.S. 1962), which established that a court may make an involuntary dismissal *sua sponte* (by order of the court “of its own will” (Lat.), without motions by either party).
 - d. Courts will consider several factors in granting involuntary dismissals, such as whether a lawyer intentionally violated a judge’s order.

C. VERACITY IN PLEADING

- 1. Introduction
 - a. Attorneys and unrepresented parties must sign their pleadings, written motions, and other papers. Rule 11 (a).
 - b. By presenting a document to the court, they are representing that to the best of their knowledge (a subjective element), formed after reasonable inquiry (an objective element):
 - i. It is not being presented for any improper purpose;
 - ii. The claims and defenses are warranted by existing law or there are non-frivolous arguments for the extension, modification, or reversal of existing law;

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VI. PARTIES, JOINDER, AND SUPPLEMENTAL JURISDICTION

- b. It is therefore different from an amended pleading, which includes facts or legal theories that *a party could have included* in the original pleading, but did not.
- c. Permission for a supplemental pleading may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it will order such pleading. Rule 15(d).

VI. PARTIES, JOINDER, AND SUPPLEMENTAL JURISDICTION

A. INTRODUCTION

1. Background

- a. **Joinder** is the uniting of distinct claims or parties in an action. SMJ, venue and PJ all may affect the possibility of joinder.
- b. Joinder is possible when: (i) the FRCP's permit it; and (ii) the court has power (SMJ) to hear the case.

2. Rule 17 Real Party in Interest and Capacity

a. Real Party in Interest

- i. A suit may generally only be brought if a party has suffered injury.
- ii. However, the person suing is not always the person who will receive the benefit of a favorable judgment. Examples when the two do not align include:
 - 1) When a trustee sues on behalf of a real party in interest;
 - 2) When a claim is assigned by *subrogation*, by operation of law, as often occurs in insurance cases.

b. Capacity to Sue or Be Sued

- i. The capacity to sue or be sued is determined by the state law of the individual's domicile.
- ii. In all other cases, it is to be determined by the law of the state in which the district court held, except that: (i) partnerships may be sued in their common name to enforce rights they have under the Constitution; and (ii) Title 28 governs receivers appointed by U.S. courts.
- iii. *N.B.*: generally, all states include infants and incompetent persons among those who lack capacity to sue or be sued.

B. CLAIM JOINDER BY PLAINTIFFS AND DEFENDANTS (RULE 18)

1. Procedural Aspects

- a. Under Rule 18(a), a party may join "as many claims ... as the party has against an opposing party." They do not need to be transactionally related.

- b. Since claims may be joined to “an original claim, counterclaim, cross-claim, or third-party claim,” any party, including the defendant, may use joinder.
- c. The standard is permissive in that parties are not *required* to join claims.
- d. When a claim is cognizable only after another has been prosecuted to a conclusion, the two claims may be joined. Rule 18(b).
- e. This applies not only to the original plaintiff, but also to any party seeking relief against another party, whether it is through a counterclaim, a cross-claim, or a third-party claim.
- f. However, an unrelated cross-claim may not be asserted under Rule 18(a) unless it is being added to a valid, related cross-claim under Rule 13(g).

2. Jurisdictional Aspects

- a. A claim must first have SMJ before being joined.
- b. When there is no independent basis for an additional claim, there may be a basis for SMJ through supplemental jurisdiction.
 - i. In any civil action over which the district courts have original jurisdiction, they will also have supplemental jurisdiction over all other claims that arise from the same case or controversy under article III of Constitution
 - 1) Such supplemental jurisdiction will include claims that involve joinder or intervention of additional parties.
 - 2) However, even when an additional claim or party arises from the same claim, 28 USC § 1367(b)-(c) limit supplemental jurisdiction.
 - ii. Yet when jurisdiction is based only on diversity, there is no supplemental jurisdiction when diversity is destroyed by additional claims by the plaintiffs (but not third party plaintiffs, etc.) against persons made parties under Rules 14, 19, 20, 24.
 - 1) But when a claim is brought by the defendant as a cross-claim against a second the defendant, there is supplemental jurisdiction even if it destroys diversity in an action based solely on 28 USC § 1332, as long as the additional claim arises from the same transaction or occurrence as the original claim.
 - 2) *N.B.*: 28 USC § 1367(b) makes efforts to protect diversity only when:
 - a) The original claim is brought *only* under § 1332 diversity; *and*

VI. PARTIES, JOINDER, AND SUPPLEMENTAL JURISDICTION

- b) The joined claim is one brought by a plaintiff. Thus, claims brought by the defendants may destroy diversity, yet still be joined.
- iii. The district courts may decline supplemental jurisdiction over claims under § 1367(a) in certain circumstances, such as when the additional claim is one that involves a novel state law question.

C. COMPULSORY JOINDER (NECESSARY AND INDISPENSABLE PARTIES) (RULE 19)

1. Procedural Aspects

- a. Rule 19 applies when a party *must* be joined.
- b. A party is considered *necessary* in an action when:
 - i. Complete relief cannot be accorded absent the party; or
 - ii. It is a person with an interest in the subject matter of the action such that his absence may (i) impede his ability to protect that interest; or (ii) leave those parties that are already named subject to substantial risks.
 - 1) A joint tortfeasor is not considered to be a “necessary” party under Rule 19(a).
 - 2) *See Temple v. Synthes Corp.* (U.S. 1990), where the plaintiff’s claim was dismissed for failure to join a joint tortfeasor. On appeal, the court held that jointly and severally liable defendants are not indispensable under Rule 19; the plaintiff *may* join any or all of them, but is not required to do so. Reversed and remanded.
- c. A *necessary* party *must* be joined when it is *feasible* to join him: he can be found and served with process, is subject to PJ, and does not affect diversity jurisdiction.
- d. If it is *not* feasible to join him, the court must determine whether it should proceed in equity and good conscience without him or whether there is a way to get around the problem (*e.g.*, by transferring the case to a court in another state).

2. Jurisdictional Aspects

- a. Under Rule 19, there is always a common case or controversy; 28 USC § 1367(a) is met as a matter of course.
- b. Jurisdiction may, however, be limited by § 1367(b), which requires that parties joined under Rule 19 by plaintiffs *not destroy diversity*.
- c. In such an event, the plaintiffs may sometimes align the parties to preserve diversity. Courts may react to this by “realigning” parties to where they should have been.

D. PERMISSIVE PARTY JOINDER BY PLAINTIFFS (RULE 20)

1. Procedural Aspects

- a. Rule 20 allows additional parties to be joined.
 - i. Permissive joinder
 - 1) All persons may join in one action as plaintiffs if:
 - a) As plaintiffs, they assert any right to **relief jointly, severally, or in the alternative**, or, as defendants, there is asserted against them any right to relief jointly, severally, or in the alternative;
 - b) Arising out of the same **transaction or occurrence**; and
 - c) A **common question of law or fact** to all these persons will arise in the action. Rule 20(a).⁶
 - 2) The plaintiff or the defendant need not be interested in obtaining or defending against all the relief demanded.
 - 3) Judgment may be given for one or more plaintiffs or defendants, according to their respective rights and liabilities.
 - ii. Under Rule 20(b), the court may order **separate trials** and make other orders to:
 - 1) Prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party; or
 - 2) Prevent delays or prejudice.
 - iii. Usually, it is not difficult to determine whether a right to relief arises out of the same transaction or occurrence.
 - 1) However, some ambiguous situations may arise.
 - 2) *See Schwartz v. Swan* (Ill. Ct. App. 1965), where Swan and Brey injured the plaintiff Schwartz in an auto accident, and on a separate occasion, Polivick exacerbated the plaintiff's injuries in a second accident. The plaintiff sued Swan and Brey, and joined Polivick under Rule 20. The trial court severed the joinder, holding that the two incidents were not the same transaction or occurrence. On appeal, the court held that the claims could be joined because the accident with Polivick had an effect on the injuries caused by the accident with Swan and Brey. It would be impossible for Schwartz to prove who caused which injuries, since the two were so closely intertwined.
 - iv. Rule 42 (Consolidation; Separate Trials) parallels Rule 20 in that it allows for actions involving a common question of law or fact to be joined for hearing or trial.

⁶ This element will generally be met if the right asserted arises out of the same occurrence or transaction.

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GLOSSARY

Ad coelum doctrine Under this doctrine, for the purpose of immovable minerals, “to whomever the soil belongs, he also owns to the sky and to the depths.” It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An unconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the “but-for” test (*i.e.*, “but for A, B would not have occurred”). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion See *RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow See CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff’s claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

Ex post facto law (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malice aforethought *and* premeditation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

if she recognizes the perpetrator of a crime in court.

Indictment Since a defendant may not cross-examine witnesses presented against him in a grand jury indictment, the Confrontation Clause does not apply. Compare PRELIMINARY HEARING.

Infant A person who has not yet reached the legal age of majority (generally, eighteen years of age); a minor.

Intent (torts) The *mens rea* element for intentional torts, which is formed when the defendant possesses either: (i) purpose (a wanting or desiring) that a certain result come about; or (ii) knowledge to a substantial certainty that a result is substantially certain to come about as a result of his act (based on belief or knowledge).

Intervening cause An act that intervenes in the series of events after an act, such that it alters the resulting consequence. When intervening causes are strong enough to relieve wrongdoer of liability, they become SUPERSEDING CAUSES.

Involuntary manslaughter An *unintentional* killing lacking malice aforethought committed either with criminal negligence or during the commission of an unlawful act.

Issue preclusion See COLLATERAL ESTOPPEL.

Joinder The uniting of distinct claims or parties in an action.

Knowledge to a substantial certainty (torts) Knowledge of an extremely high risk that a particular consequence will materialize as a result of one's act. It may be based on knowledge or belief and, like purpose, satisfies the *mens rea* required in intentional torts.

Larceny A specific intent crime consisting of the unlawful taking and carrying away of the property of another with the intent to permanently deprive him thereof.

Leasehold estate An estate where the possessor is not the owner of the property (*e.g.*, in the case of a rental property). Possession will spring back to the owner after the current possessor's lease or rental comes to a close.

License (property law) A right to use another's property that is terminable at the will of the possessor of the land.

Malum in se (Lat., "a wrong in itself"). An inherently evil or immoral act, regardless of whether it is prohibited.

Malum prohibitum (Lat., "a prohibited wrong"). An act or offense which is prohibited but is not inherently wrong (*e.g.*, failing to stop at a stop sign).

Merchantable title Title not subject to such reasonable doubt that it would create a just apprehension of its validity in the mind of a reasonable prudent person. Merchantable title is not necessarily good title; it may have *slight defects*.

Mortgage Security for a debt given by a mortgagor (a debtor) to a mortgagee (a creditor) to secure a loan given to the mortgagor, usually for the purpose of purchasing land or some other real estate.

Mortgagee In a mortgage, the creditor, loan company, or bank that lends to the debtor, or mortgagor.

Mortgagor In a mortgage, the party that borrows from a creditor, loan company, or bank; a debtor.

Negligence per se Negligence established as a matter of law such that the plaintiff need not establish duty and breach. The violation of civil and criminal statutes gives rise to negligence *per se* in most states, such that the jury is instructed that the violation of a statute constitutes the breach of duty for the purposes of negligence.

Nonjusticiable political question A question that involves the exercise of *discretionary*

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