MANUAL ON COMMERCIAL LAW

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CHAPTER I

Law in General

1. Scope of this chapter. In this chapter we shall consider the nature, origin and kinds of law; the substance of the law, including rights, wrongs and duties; governmental powers for enforcing the law, including the basic constitutional rights, powers, privileges and limitations; and procedure, or the manner in which rights and duties are enforced and wrongs redressed.

A. Nature, Origin and Kinds of Law

2. Nature and definition of law. Law is rule; such as a rule of action (*laws of physics, chemistry, economics*) or of conduct (*moral law, divine law, municipal law, international law*).

Municipal law deals with rules of conduct governing persons within a sovereign state, as distinguished from *international law* which deals with the conduct of nations and their respective peoples in their intercourse with one another. Municipal law is defined by Blackstone as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and forbidding what is wrong." The word "municipal" in this sense is derived from the Roman "municipium," and is intended to convey the idea of a complete, self-sustained governmental unit.

The law of the land is an expression commonly used to indicate the rules of human conduct by which a civilized community hears before it condemns, proceeds upon inquiry, and renders judgment only after trial, thereby safeguarding each person's life, liberty and property.

3. Substantive and adjective law. *Substantive* law tells us what our rights and duties are and what constitutes a violation of such rights and duties; *adjective* law tells us how we may enforce our rights and duties and redress our wrongs. If you and I enter into an oral agreement by which I am to render

services and you are to pay me $500, the question of whether such an agreement is enforceable is one of substantive law. If we assume that I could enforce such an agreement, the question of how I should go about enforcing it—how one brings the matter to suit, trial and judgment—would be a question of adjective law.

4. Origin and evolution of law. In the history of law, we perceive a common tendency. First we have custom, usage and tradition, reflecting an existing state of morality, followed by an effort to codify and crystallize the accumulated mass of custom and usage into codes or statutes.

This is illustrated by the ancient Hebrew law, which reflected current custom, was crystallized into The Ten Commandments, and was subsequently amplified in the Talmud.

The same tendency characterized the development of law in the civilized states of Greece: first we have custom and precedent established by centuries of habit and tradition growing out of the ancient Greek concepts of morality and religion—habits of life imposed by belief in a hierarchy of virtues and vices embodied in mythical gods—followed by efforts to codify these rules of life and to give them permanence in written form. It was largely from this source that the Romans, great law givers, derived their Twelve Tables.

As times changed, customs changed, and these in turn gave rise to new codes. By the time of the Roman Emperor Justinian, the laws had become so voluminous and unwieldy that it became necessary to condense and digest them into a new code, known as *Corpus Juris Civilis* which, translated into Greek and transformed into yet another code, under the title of *Basilicae,* retained its force in the Eastern Empire until the conquest of Constantinople by the Turks.

In the Western Empire, the laws of Justinian were lost during the dark ages, but about the year 1137 a complete copy of them was found, whereupon they were revived, and formed the basis of jurisprudence for the major part of the continent of Europe. Hence, the present law on the continent of Europe is referred to as the *Roman* or *Civil* law.

English law, derived from Anglo-Saxon custom and from the customs and traditions of the Normans, who invaded and conquered England, developed quite apart from the Roman or

Civil law; but it has reflected the same tendency to crystallize custom-law or precedent-law into codified form.

5. Unwritten law. Law based on precedent alone is commonly referred to as *unwritten law.* Originally formulated by rulers, prophets and priests, it now takes the form of judicial decisions.

Actually, what we call "unwritten" law is today not only written, but printed and published, so that all may consult it. But in less enlightened times, unwritten law was in very truth unwritten. This was particularly so in the dark ages, when justice was administered by appeal to the supernatural. Examples were trial by combat and trial by ordeal. In the former, a trial consisted of physical combat between two litigants, and the verdict went to the strongest lance or the mightiest club; in the latter, guilt or innocence was determined by holding a hot iron with the bare hands (whoever dropped it first was guilty); or, as in the case of witchcraft, by the simple test of ducking the accused in a body of water: if she came out dead, she was innocent, and if she came out alive, she was guilty and burned at the stake.

When, however, reason began to dawn in the administration of justice, and some royal judge, in trying an issue between two litigants, pronounced a principle applicable to the facts and founded in logic, common sense, or a sense of fair play, a true legal precedent was established, to be followed subsequently if the same set of facts transpired.

As these precedents or legal principles grew, they furnished a pattern of unwritten law, inscribed at first only in the memories of judges and lawyers, and either recalled from personal experience, or transmitted by word of mouth.

Mere memory, however, became insufficient, and notes of these cases and legal principles found their way into the memoirs and private records of bench and bar. Some of these notes were compiled and published in the form of commentaries, such as those of Coke, Lyttleton, Blackstone and—in our own country—Kent. By means of these commentaries, together with various digests, Year Books, and so forth, the "unwritten" law took on more definite and coherent shape.

Not only were these precedents thus clarified and given permanence, but they came to be reported and published by

official reporters from the transcribed opinions of the judges. Today they are to be found on our law shelves in the form of volumes published, bound and numbered in sequence, so that they may easily be referred to by volume number and page as a source of law and a guide for determining the application of legal principles to a given set of facts.

Unwritten law embraces four subdivisions:

(a) Common law.
(b) Equity.
(c) International law.
(d) The Law Merchant.

6. Common law. Common law is the earliest branch of unwritten law founded on ancient English usage and custom. As reflected in judicial decisions, modified to suit the changing needs of changing times, and adapted to our own needs and institutions, it continues to serve as a fundamental branch of our law. Its keystone is *stare decisis:* the doctrine that constrains judges to stand by former decisions as far as possible, without following too slavishly the outworn dogma of the past.

7. Common law courts and common law actions. A court in which a common law remedy is sought is known as a *common law court,* or *court of law,* and the action in which such remedy is sought is known as a *common law action,* or, more briefly, a *law action.* The jurisdiction of a court of law extends to those matters which were originally recognized only at common law. Ordinary law actions have for their object the assessment of damages. For example, the ordinary breach of contract action is a law action in which a party sues for money damages. The same applies to tort actions (sec. 29), such as actions for assault and battery, libel, slander, negligence, conversion, replevin, and so on.

8. Equity. Equity is that branch of unwritten law, founded in justice and fair dealing, which seeks to supply a more adequate remedy than that available at (common) law. Ordinary law actions, as stated, have for their object the assessment of damages for wrongs done, but a court of equity reaches beyond mere damages: It seeks to prevent the wrong itself, or, if it has already been committed, to requite it more fully than would be possible by a mere payment of money damages. Among the more common equity actions, which provide remedies not available "at law," are the following:

Injunction suits (the most common remedy obtainable only in equity), wherein the court is asked to restrain a person from doing or continuing to do something that threatens or causes irreparable injury;

Specific performance, wherein a party seeks to compel actual performance of a contract, instead of seeking money damages for the breach;

Partition suits, wherein two or more persons own an undivided interest in lands and seek to have separate interests apportioned among them;

"Bills of peace," wherein it is sought to unite several controversies between the same parties to avoid a multiplicity of suits (as where a series of suits are threatened) all founded on the same facts and the same questions of law, so that the decision of one will determine all;

Reformation, wherein a bill in equity is brought to reform a contract so that it will express correctly the true intent of the parties;

Rescission, wherein a court is asked to annul a contract entered into through fraud or excusable error; and

Actions involving a trust, wherein one person has legal title to property which equitably belongs to another.

9. Maxims of equity. In the course of its development since the early days of English chancery, equity has established certain fundamental principles, or maxims, among which are the following:

He who seeks equity must do equity. One who seeks equitable relief must do what is equitable as a condition for that relief. If I seek the return of a chattel which I was induced to sell through fraud, I must tender back the purchase price. If an infant buys an expensive watch and then decides he wants his money back, he must tender back the watch.

He who comes into equity must come with clean hands. One cannot obtain the aid of a court of equity in respect to any transaction, if his conduct in such transaction has been in any way unconscionable, inequitable or offensive to the dictates of natural justice. If, for example, I persuade you to breach a contract to buy Smith's home, and to buy mine instead, and then you breach my contract, too, I cannot seek the aid of a court of equity to compel specific performance of your contract with me.

Equity aids the vigilant, not those who slumber on their rights. This maxim is akin to the doctrine of *laches* (sec. 102) that, if a person sleeps on his rights, his continued silence indicates acquiescence. The maxim is designed to promote diligence, punish laches, and discourage stale claims.

Equity acts specifically. This is applicable to suits for specific performance (sec. 242). It expresses the fundamental distinction between legal and equitable remedies, that in equity you get the precise thing to which you are entitled, whereas in law you get damages instead.

Equity acts in personam. This means that equity compels a person to do what he should do, instead of penalizing him for not having done it, as in the case of a common law judgment affecting his property. Thus, if a court of equity has jurisdiction of a trustee personally, but the property

of the trust is outside the court's jurisdiction, the court may order the trustee to account for or dispose of such property, and for a failure to obey, may punish the trustee for contempt of court.

Equity follows the law. Except where the common law is clearly inadequate, equity follows the rules and precedents of the common law and the provisions of a governing statute. If a deed or other instrument is void at law, or by statute, the mere fact that an innocent holder has given value for it will not render it valid in equity.

Equity delights to do justice, and not by halves. Once equity acquires jurisdiction, it will retain it so as to afford complete relief. For example, if suit is brought for reformation (sec. 8) of a contract, the court, if the facts warrant, will not only reform the contract but will compel its observance as reformed.

Equity will not suffer a wrong without a remedy. Unlike remedies at law, which are fixed and rigid, remedies in equity are flexible and are designed to tolerate no situation where one has a right without a remedy. Subject to statutory limitations, equity has jurisdiction "in the whole domain of conscience." It can mold its remedies to meet any conditions. It is not dependent on precedent alone: If a party has a right which should be enforced in equity but no precedent for a remedy, equity will invent a remedy to protect the right.

Equity regards that as done which ought to be done. Where necessary to promote justice, equity will treat an uncompleted bargain as if it were already completed. For example, under a land contract calling for delivery of title in the future, equity may regard the purchaser as having acquired the property, and the seller as owner of the purchase price.

Equity regards substance rather than form. Common law is normally governed by legal form. Corporations, for example, are regarded in law as artificial beings, separate and distinct from their stockholders, directors, officers and employees. Equity, however, where necessary to circumvent fraud, to protect the rights of third parties and to accomplish justice, may disregard the corporate fiction and penetrate to the substance of the dispute. (See sec. 870, ex. (2).)

Equity imputes an intent to fulfill an obligation. This means, in the language of a leading authority[1] that wherever a duty rests on an individual, "it shall be presumed that he intended to do right, rather than wrong; to act conscientiously, rather than with bad faith; to perform his duty, rather than to violate it." Thus, in *Lee v. Foushee,* 91 Ark. 468, a party and his mother intended to sign a deed, but upon advice of counsel that the son had no title, the mother alone signed. Later the son, upon learning that he had title, sought the aid of equity to regain possession of the land. The court, in denying relief, ruled that it would impute an intention by the son to sign the deed as originally contemplated.

Equality is equity. In the absence of special circumstances requiring a different result, equity will treat all members of a class as on an equal foot-

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[1] Pomeroy, Eq. Jur., sec. 420.

ing and will distribute benefits among them equally, or in proportion to their respective interests.

Example: Ten persons own a building. Unable to get along, they sue for partition (sec. 8). The building is sold; the clerk deposits half the proceeds in one bank and the other half in another which later fails. All ten owners would share equally in the funds of the solvent bank, as well as any dividends from the insolvent bank.

Between equal equities, the law will prevail. If two parties have an equal claim in equity, and one of them also has a claim recognized at law, the latter will prevail.

Example: I sell a house to Jones, who fails to record his deed (sec. 1051). I then sell the house again to Smith, who is innocent of the prior sale, pays value for the house, and promptly records his deed (thereby acquiring recognition as the legal owner). If Jones, the prior purchaser, sought to have Smith reconvey title, the court would declare that both parties having equal equities, the law (Smith's legal title) would prevail.

Between equal equities, the first in order of time shall prevail. If various persons acquire liens against property (sec. 1128), the one who acquired the lien first (other things being equal) has first claim upon the property.

10. Marshaling assets. One of the well-known rules of equity is that which relates to the marshaling of a debtor's assets where there are several classes of creditors. Where one claimant has two funds to which he may resort to satisfy his claim and another claimant has an interest in only one of the funds, equity may compel the first creditor to collect out of the fund in which the second creditor has no lien, so that both creditors may be paid. If the first creditor acted as a dog in the manger and exhausted the fund in which the other creditor also had a lien, the latter would have nothing and the former, everything. (See sec. 1356.)

Example: Smith has two parcels of land. I hold a first mortgage on both parcels; you hold a second mortgage (subject to my first) on one of them. If I foreclosed on both parcels, I might wipe your mortgage out. The first parcel, on which you hold no mortgage, is worth more than enough to pay me off. A court of equity, marshaling those assets, might force me to foreclose on the parcel covered by my mortgage only, and thus would leave your security intact.

The rule of marshaling assets is commonly applied in distributing assets among creditors upon dissolution of a partnership (sec. 708) and in apportioning rights among several mortgagees (sec. 1158).

11. International law. International law consists of a body of usage and custom arising out of the intercourse of nations

and their peoples with one another, reinforced by treaties, the writings of jurists, international conferences and the declarations, resolutions and decisions of international tribunals.

(a) *Public international law* regulates the conduct of sovereign nations toward one another.

(b) *Private international law* governs the rights of citizens that may be acquired in one country and enforced in another by virtue of a doctrine of international reciprocity known as the *comity of nations.* Private international law is sometimes referred to as *Application of Foreign Law,* or *Conflict of Laws.* It applies not only internationally, but also among the several states of the Union. (See sec. 197.)

12. The law merchant. The law merchant is that branch of the unwritten law which was originally founded on the customs of merchants, mariners and business men generally in their dealings with one another throughout the civilized countries of the world. In the course of time they were recognized and adopted by the common law, and ultimately embodied in statutes such as the Negotiable Instruments Law. Further reference to the law merchant appears in the chapter "Negotiable Instruments" (sec. 258).

13. Constitutions. A constitution is the basic law of the land, to which all other law must conform. Under our system of dual sovereignty (sec. 50), each state is sovereign except as to powers delegated to the Federal Government; and each state has a constitution of its own. Hence, the laws of each state must conform not only to the United States Constitution, but to the constitution of that particular state as well. The subject of constitutionality is more fully discussed in this chapter under the heading "Governmental Powers" (secs. 50 to 70).

14. Treaties. Treaties are solemn contracts or "compacts" between or among two or more nations. Once adopted, they constitute international law so far as concerns the signatory nations and their respective citizens. Treaties between two countries are *bilateral;* among more than two countries, *multilateral.* The Constitution of the United States provides that treaties may be concluded only by the President with the approval of two thirds of the Senate.

15. Statutes. A statute is a formal enactment by a legislative body of some rule or rules of civil conduct. It is referred to as an *act* when adopted by Congress, a *statute* when adopted by a state and an *ordinance* when adopted by a municipal leg-

islative body, such as a board of aldermen or common council. Statutes are *enabling,* if they grant power; *enlarging,* if they extend power; *restraining,* if they limit power; *disabling,* if they take power away or extinguish it; *corrective,* if they remove or correct hardships in existing law; or *declaratory,* if they declare the common law. Many statutes are substantially declarations in codified form of the previous common law on the subject (sec. 4).

Statutory law is a term sometimes used to indicate that the law on a given subject is based on statute rather than on common law.

16. Uniform statutes. Confusion caused by conflicting judicial decisions and statutes has led to the adoption of uniform statutes in various states throughout the country. The matters involved being of state, not Federal, jurisdiction, co-operative state action was necessary to insure uniformity. Model statutes formulated under the direction of a committee of the American Bar Association have been adopted in numerous states, and thereby insure uniformity of legislation on the subject among the adopting states. More than sixty such statutes have been adopted by various states. The more important ones are shown in the table on pages 12-13, with the adopting states and the year of adoption.

17. Business or commercial law. In recent years the terms *business law* and *commercial law* have come into general use to denote rules of law of primary concern to business and to the professions ministering to business. The study of commercial law normally excludes adjective law (sec. 3) and such non-commercial matters as international law, matrimonial rights and duties, and crimes or torts which have no relation to business.

B. Substance of the Law

18. Rights and duties. Every person is a "bundle of rights and duties." These are *reciprocal:* that is, your rights as to me are my duties toward you, and *vice-versa.* Rights are either *natural* or *conventional,* also known, respectively, as *absolute* or *relative.* Natural or absolute rights are those supposed to spring from the nature of our existence. They embrace *personal security, personal liberty* and *property.* Conventional or relative rights are those created by "convention" —literally, the *coming together* of individuals upon a united

UNIFORM STATUTES

Showing eight of the more important statutes formulated under the direction of a Committee on Uniform Legislation of the American Bar Association, with years of adoption by the states where they are now in force.

State	Uniform Negotiable Instruments Act	Uniform Sales Act	Uniform Conditional Sales Act	Uniform Partnership Act	Uniform Limited Partnership Act	Uniform Bills of Lading Act	Uniform Warehouse Receipts Act	Uniform Stock Transfer Act
Alabama	1908	1931	—	—	—	1931	1915	1931
Arizona	1901	1907	1920	—	1943	1921	1921	1943
Arkansas	1913	1941	—	1941	—	1941	1915	1923
California	1917	1931	—	1929	1929	1919	1909	1931
Colorado	1897	1942	—	1931	1931	—	1911	1927
Connecticut	1897	1907	—	—	—	1911	1907	1917
Delaware	1912	1933	1919	—	—	1927	1917	1945
District of Columbia	1899	1937	—	—	—	—	1910	1945
Florida	1897	—	—	—	1943	—	1917	1943
Georgia	1924	—	—	—	—	—	1938	1939
Idaho	1903	1920	—	1920	1920	1915	1915	1928
Illinois	1907	1915	—	1917	1917	1927	1907	1917
Indiana	1913	1929	1935	—	—	1943	1921	1923
Iowa	1902	1919	—	—	1924	1911	1907	—
Kansas	1905	—	—	—	—	—	1909	—
Kentucky	1904	1928	—	—	—	—	1938	1944
Louisiana	1904	—	—	—	—	1912	1909	1911
Maine	1917	1923	—	—	—	1917	1917	1943
Maryland	1898	1910	—	1916	1918	1910	1910	1910
Massachusetts	1899	1909	—	1923	1924	1910	1907	1910
Michigan	1905	1913	—	1917	1931	1911	1909	1913
Minnesota	1913	1917	—	1921	1919	1917	1914	1933
Mississippi	1916	—	—	—	—	—	1920	1946

UNIFORM STATUTES (Continued)

State	Uniform Negotiable Instruments Act	Uniform Sales Act	Uniform Conditional Sales Act	Uniform Partnership Act	Uniform Limited Partnership Act	Uniform Bills of Lading Act	Uniform Warehouse Receipts Act	Uniform Stock Transfer Act
Missouri	1905	—	—	—	—	1917	1911	1943
Montana	1903	—	—	—	—	—	1917	1943
Nebraska	1905	1921	—	1943	1939	—	1909	1941
Nevada	1907	1915	—	1931	1931	1923	1913	1945
New Hampshire	1910	1923	1945	—	1937	1917	1941	1937
New Jersey	1902	1907	1919	1919	1919	1913	1907	1916
New Mexico	1907	—	—	—	—	—	1909	1943
New York	1897	1911	1922	1919	1922	1911	1907	1913
North Carolina	1899	—	—	1941	1941	1919	1917	1941
North Dakota	1899	1917	—	—	—	—	1917	1943
Ohio	1903	1909	—	—	—	1912	1909	1911
Oklahoma	1909	—	—	—	—	—	1915	1945
Oregon	1899	1919	—	1939	—	—	1914	1935
Pennsylvania	1901	1916	1925	1915	1917	1912	1910	1912
Rhode Island	1899	1908	—	—	1930	1914	1908	1912
South Carolina	1914	—	—	—	—	1930	1945	1945
South Dakota	1913	1921	1919	1923	1925	—	1913	1921
Tennessee	1899	1919	—	1917	1920	—	1909	1925
Texas	1919	—	—	—	—	—	1919	1943
Utah	1899	1917	—	1921	1921	—	1911	1927
Vermont	1913	1921	—	1941	1941	1915	1913	1947
Virginia	1898	—	—	1918	1918	—	1908	1924
Washington	1899	1926	—	1945	—	1915	1913	1939
West Virginia	1908	—	1925	—	—	1945	1917	1931
Wisconsin	1899	1912	1919	1915	1919	1917	1909	1913
Wyoming	1905	1917	—	1917	—	—	1917	1945

purpose; for example, rights arising out of the so-called *domestic relations,* and rights created by *contract.*

19. Personal security. Personal security consists in the peaceable enjoyment of life, limb, body, health and reputation. It may be violated both criminally, as in homicide, arson, robbery, burglary, forgery and larceny (sec. 41); and civilly, as in negligence, assault and battery, libel, slander and malicious prosecution (sec. 29).

20. Personal liberty. Under our system of government, no man, save by express law, can be restrained of his liberty, prevented from going where he pleases, compelled to go where he does not want to, or be in any way imprisoned or confined. If an offender is apprehended, he must be given an immediate hearing before the proper magistrate. Only if reasonable probability of guilt appears may the offender be committed to prison and held for trial. Even then, pending trial, the offender (except in capital cases) may secure his liberty on *bail,* by the posting of a bond for appearance to stand trial. Safeguarding the right of personal liberty is the writ of *habeas corpus* (literally, "have with you the body"): a court order available at all times, requiring one having custody of another's person to produce him on short notice for inquiry into the cause of detention.

21. Property. The legal institution known as *property,* namely, the relationship of persons to things which gives persons exclusive control over things, is guaranteed by the United States Constitution, which provides that no person may be deprived of his property, even for a public purpose, save by due process of law and upon just compensation. The subject of property is dealt with in Chapter XI.

22. Domestic relations. The so-called "domestic relations" include those of *husband and wife, parent and child, guardian and ward,* and *master and servant.* For the most part, they deal with matters outside the domain of commercial law (sec. 17). A brief reference to these relationships, however, will be useful, since at times they concern certain phases of business law.

23. Husband and wife. Under the common law husband and wife were one, and he was the "one." The wife had no right to contract, nor to own or dispose of property. Most states have removed these common law disabilities. Married

women may now freely and in their own name make all manner of contracts and acquire, own, sell, mortgage, control, devise and bequeath their entire estate, real and personal. Still surviving in most states, are the following rights and duties:

1. The husband has the duty of support: the wife is by law her husband's agent in purchasing for herself and household, necessities as gauged by the husband's income.

2. Husband and wife have an interest in each other's property upon death.

3. A husband has the right to his wife's earnings under the same roof, on the theory that the husband is entitled to his wife's domestic services; and on same theory, if the wife is injured through another's negligence, the husband (apart from the wife's own suit) may sue the defendant for "loss of services."

24. Parent and child. A parent is *natural guardian* of his children. As such he may control and regulate their *persons,* but not their *property.* However, as he is liable for their support until their majority, so he may until then collect their earnings unless they have been "emancipated" (thrown on their own resources).[2]

Age and status of infancy. An *infant* or *minor* is a person of either sex who has not attained the age of *majority* which marks the status of an adult. The age of majority varies in different states. At common law, and by statute in most states, the age is twenty-one years.[3] By common law precedent, which ignores a fraction of a day, an infant reaches the legal age of twenty-one the day before his twenty-first birthday. In some states, the female age of majority, at least for some purposes, has been fixed at eighteen. State statutes vary as to privileges accorded to infants at varying ages, including those in relation to contracts, wills, marriage, voting, and so on. Infants of sufficient age to understand the nature of their acts are liable for their torts and crimes; and in the purchase of necessaries, for their contracts (secs. 29, 31, 136).

25. Guardian and ward. Besides the natural guardianship of parents, other forms of guardianship include:

1. *Legal guardian.* If an infant has property, the court appoints a legal guardian (usually, but not necessarily, the parent). The legal guardian must give bond for faithful management, must keep true accounts and file periodic reports with the court, must conform to law as to proper depositaries of funds and proper forms of investment, must not sell or mortgage the ward's real property without court order, and must reasonably safeguard the ward's property on pain of treble damages for improvident losses.

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[2] *Riley v. Holmer,* 100 Fla. 938, 131 So. 330.

[3] *Hutchison v. Till,* 212 Ala. 64, 101 So. 676.

2. *Testamentary guardian.* In most states a father and in some states a mother may by will appoint a guardian for a minor child, such guardianship extending to both person and property of the ward until the latter's majority.

3. *Guardian by deed.* A guardian by deed is similar to a testamentary guardian except that appointment is by deed instead of by will. Statutory provisions in some states, copying an early English statute, permit a father to appoint a guardian, by deed, for his infant child, until the latter attains full age.

4. *Special guardian.* A special guardian is one named by the court (usually an attorney at law) to protect the rights of an infant concerned in probate proceedings or having an interest in a decedent estate.

5. *Guardian ad litem.* An infant may not sue or be sued in his own name. If court action is desired by or against an infant, a guardian *ad litem* or "guardian to the action" must first be designated by the court to sue or defend on behalf of the infant.

26. Master and servant. The relationship of master and servant was originally domestic, because upon "indenture" of the servant or apprentice to a master, the latter was made to stand in the place of the parent. This domestic relationship has been almost completely superseded by the contractual relationship of employer and employee (secs. 603 to 615).

27. Wrongs. A wrong is the violation of some right or duty. Wrongs are either *civil* or *criminal,* although the same act may constitute both a civil and criminal wrong; for example, injuring a person by assault and battery, or by reckless driving.

28. Civil wrongs. Civil wrongs invade private rights and duties, hence concern individuals privately rather than the public as a whole. Such wrongs are therefore redressed by private actions, as in *Johnson v. Baker* or *Carr v. Rhodes,* wherein the remedy sought may be at common law for damages or in equity for other forms of redress. Among the more common civil wrongs are *torts* and *breaches of contract.* The latter are discussed in the chapter "Contracts."

29. Torts. A tort is the violation of a *natural* right. Examples are:

Negligence, which violates the right of *personal security* or of *property,* by want of reasonable care;

Assault and battery, which violates the right of *personal security* by physical attack upon one's person;

False imprisonment, which violates the right of *personal liberty;*

Conversion, which violates the right of *property* by wrongfully taking or

withholding possession of another's chattel, an action to recover such chattel being known as an action in *replevin;*

Trespass, which violates the right of *property* by unlawful entry upon or interference with possession of another's real property;

Defamation, which violates the right of personal security ("fair name") by the written or printed word (*libel*) or the spoken word (*slander*);

Malicious mischief, which violates the right of *property* by wilful destruction; and

Malicious prosecution, which violates the right of *personal security* by causing criminal proceedings to be brought against another, with malice and without probable cause.

30. Business torts. Certain wrongful trade practices, actionable at law, have come to be designated as *business torts.* Among them are the following:

Unfair or malicious competition; disparagement. If a person enters a business, not as a business competitor, but for the sole purpose of maliciously destroying a competitor, he commits an actionable wrong.

Businessmen may be restrained from making disparaging remarks about a competitor's product, as when a manufacturer carries on a campaign of disparagement by having his salesmen make false statements about the efficacy of a competitor's product.[4]

Threats or intimidation: unlawful picketing. Organized threats against a business are unlawful, except in support of legitimate claims and by legitimate means. For example, a person believing himself to be the rightful owner of a patent may warn a prospective infringer not to infringe, on pain of legal proceedings. On the other hand, if an anti-vice society warns book and magazine distributors that if they sell a certain periodical the society will have them prosecuted and as a result the periodical loses business, the society will be enjoined from continuing such threats. Picketing is lawful so long as it is conducted peacefully in a genuine labor dispute; but when no real labor dispute is involved, or where the picketing amounts to intimidation, as by molesting customers, parading around in a circle in front of the entrance, lying on the sidewalk or otherwise obstructing the entrance, the picketing amounts to intimidation or molestation and is unlawful.

Tortious interference with contracts. The law imposes a duty not to interfere with the contracts of others. One who maliciously induces a party to breach his contract with another, to the latter's injury, may be held for resulting damages.

31. Crimes. Crimes invade public rights and duties and hence are prosecuted by the people. Crimes are either *felonies* (major criminal offenses) or *misdemeanors* (minor offenses). In general, felonies are crimes punishable by death,

[4] *H. E. Allen Mfg. Co. v. Smith,* 224 App. Div. 187, 229 N.Y. Supp. 692.

or by imprisonment in the state penitentiary. Indictable offenses not amounting to felonies are misdemeanors.

32. Criminal intent. Intent is a necessary element of some crimes; other acts may be made criminal regardless of intent. A person cannot commit murder unintentionally, but his act may be so reckless of life as to constitute manslaughter. On the other hand, purely accidental killing, as in the case of a golfer killed by a ball, would not be classed as criminal.

33. Parties to crime; compounding felonies. The parties to a crime are a *principal,* or one who either directly commits the crime or aids, abets, counsels or procures its commission; and an *accessory,* or one who hinders apprehension of a criminal by concealing him or helping him to escape. *Compounding felonies* or other crimes consists in taking money or reward on an engagement, express or implied, to conceal a crime, withhold evidence or discontinue or delay prosecution; except where compromise is allowed by law.

Forgiveness by employer: when may constitute compounding felony. An employer may forgive an employee's theft, allow restitution, and give him another chance; but if the employer makes restitution part of a bargain for not prosecuting, he is guilty of compounding the offense.

34. Common law crimes. Common law crimes, originally, were those proscribed by precedent only. They were punishable mostly by death. As late as the seventeenth century, there were seven common law felonies in England: homicide, rape, burglary, arson, robbery, theft and mayhem. Except for mayhem and petty larceny (stealing something worth less than twelvepence), these were capital offenses. Though now embodied in penal statutes, these crimes are still referred to as the *common law crimes.* All others are *statutory crimes.*

35. Statutory crimes. Strictly speaking, practically all crimes are now statutory, in the sense that they are defined by statute. Some states have specifically abrogated the common law with respect to crime and have substituted criminal codes, usually with the provision that no act or omission shall be deemed criminal or punishable except as prescribed by statute.

36. Federal crimes. The Constitution of the United States gives Congress power to provide laws and procedure for the punishment of counterfeiting, piracies and felonies on the high seas, offenses against the Law of Nations and infractions of rules and regulations prescribed for the land and naval forces

of the United States. Accordingly, Congress has passed many laws prescribing penalties for acts or omissions in these matters, and these have been compiled into the Criminal Code of the United States.

37. Crimes generally; state penal codes. For all crimes not subject to Federal jurisdiction, state sovereignty is exclusive. Penal statutes of the different states, commonly known as *penal codes,* define and prescribe penalties for a multitude of criminal acts.

38. Criminal jurisdiction; extradition. Crimes must be prosecuted in the place where they are committed. No state can punish for a crime unless it was committed in that state. If a criminal flees the jurisdiction, it is customary, though not compulsory, for the state or foreign country where the criminal is apprehended to surrender the fugitive to the jurisdiction where the crime was committed. This procedure is known as *extradition.*

Inside the state, the county where the crime is committed is the county where the criminal must be tried, unless it can be shown that justice requires trial in another county, in which case a *change of venue* may be directed.

39. Major classifications of crime. Crimes may be against the state and against individuals. In either case, they are offenses against the people.

40. Crimes against the state. Crimes against the state include *treason, bribery* and *perjury.*

Treason against the United States, as defined in the Constitution, consists in "levying war against them, or in adhering to their enemies, giving them aid and comfort." There may also be treason against a state.

Bribery is giving, offering, receiving or asking a reward as inducement to influence official action.

Perjury is false swearing wherever an oath is required or allowed by law.

41. Crimes against individuals. Crimes against individuals are numerous and varied. Among the major ones are:

Homicide: the killing of one human being by another, by direct act, procurement or omission. Homicide may be justifiable, as in self-defense. *Murder in the first degree,* punishable by death except where capital punishment is abolished, is deliberate and premeditated homicide.

Arson: unlawfully setting fire to property. *Arson in the first degree* is unlawfully setting on fire, in the nighttime, a dwelling house, car, vessel or vehicle containing a human being.

Robbery: unlawfully taking personal property by force.

Burglary: breaking and entering into the premises of another with intent to commit some crime.

Forgery: falsely making, counterfeiting, altering or erasing an instrument in whole or in part. Forgery may be in the first degree, second degree, third degree, and so on.

Larceny: taking and carrying away another's personal property with intent to appropriate it. Larceny committed by one who lawfully has possession of personal property and wrongfully misappropriates it, is known as *embezzlement.*

42. Frauds and cheats. State legislatures have been zealous in passing laws designed to curb and punish all forms of frauds and cheats, including, among others, the following:

Fictitious partnership names. A person who transacts business by using the name, as partner, of one not interested as such, or by using the designation "and company" or "& Co." when no actual partner is represented thereby is, in many states, guilty of a misdemeanor. (See secs. 654-655.)

Frauds on hotel keepers, by obtaining credit or accommodations through false pretenses.

Circulating false rumors about the market price of stocks, bonds, and so on.

Fraudulently obtaining employment by false letters of recommendation.

False representation or advertisements of employment opportunities by way of inducement to persons seeking employment.

Selling tickets for balls and entertainments without authority from the institution or organization concerned.

Transactions affecting securities, such as reporting or publishing fictitious transactions, false statements or advertisements, manipulation of prices, trading by brokers against customers' orders ("bucketing").

Hypothecating or selling a customer's securities, by a broker, without the customer's consent, except where the broker has a lien on the securities for an unpaid purchase price. (See sec. 586.)

Issuing fraudulent checks, and so on. (See sec. 390.)

43. Miscellaneous crimes and violations. With the growing complexity of modern existence, public policy has dictated that many acts and omissions not necessarily vicious in themselves be classed as crimes to safeguard the public welfare. In many of these cases, the element of criminal intent is immaterial; otherwise conviction would be difficult, if not impossible. These statutes, for the most part, deal with the following:

Prohibition of antisocial enterprises, such as lotteries, gambling devices, sale of narcotics, sale of liquor and tobacco to minors, and so on.

Professional and technical standards. Many statutes aim to protect the public against incompetent or unscrupulous professional or technical serv-

ices, by regulations in respect to licensing, disciplinary proceedings, suspension or revocation of a license, penalties for practicing without a license, and so on. These services concern certified public accountants (sec. 44), attorneys (sec. 45), physicians, nurses, dentists, pharmacists, osteopaths, veterinarians, optometrists, architects (sec. 161), civil engineers, surveyors, embalmers, chiropractors, chiropodists and others engaged in rendering professional or technical service to the public generally.

Business licenses, certificates of approval, and so on. Statutes may prescribe penalties for engaging in certain businesses without prior public approval, where such businesses are of sufficient public concern to justify such regulation. Examples are the requirement for obtaining government approval before engaging in the banking or insurance business, or in public utilities, such as waterworks, railroad, bus or other transportation services, electric light, telephone or similar public service enterprises. Licenses are commonly required in connection with collection and employment agencies, theaters, hospitals, hotels, investment companies, mining or oil properties, cold storage plants, and so on. State statutes commonly prescribe penalties for doing business under a fictitious or trade name without first registering such name and disclosing the true name of the proprietor.

Public safety. Numerous statutes concerned with public safety prohibit or restrict the sale and possession of firearms; regulate factory conditions, child labor and the employment of women in industry; prescribe rules governing the ownership and operation of motor vehicles and the regulation of traffic; impose regulations to protect against fire hazards; and fix building safety requirements, such as building plans, specifications as to building materials, elevator inspections and similar building precautions.

Sanitation. Many statutes, including local ordinances, deal with plumbing and sewage disposal, meat, fruit and vegetable canneries, food handling and packing under prescribed sanitary conditions by employees free from contagious diseases, purity of foods and drugs and proper labeling and disclosure of their contents, barbers and barber shops, beauty parlors, the sale of secondhand mattresses or upholstered furniture containing padding or stuffing, and numerous other items affecting public health and sanitation.

Consumer protection. A variety of statutes and local ordinances prescribe standards governing the size of containers, true weights and measures and similar items helpful in protecting consumers against unscrupulous manufacturers, producers and dealers.

Sunday laws. State laws and particularly local ordinances aim at restricting business activities on Sunday. Violations are generally punishable by fines. Exceptions are usually made in the case of services and supplies of "public convenience and necessity," such as medical and surgical attendance, emergency repairs, church subscriptions, Sunday newspapers, drugs, motion picture and other entertainment, and (subject to local regulation) dairy, delicatessen and other foods within limited hours.

Bankruptcy crimes. The Bankruptcy Act prescribes penalties for a variety of illegal business practices connected with bankruptcy. (See secs. 1348-1349.)

Of special note are statutes governing the unlawful practice of accountancy and of law, and certain offenses commonly designated "business crimes."

44. Unlawful practice of accountancy. Legislation governing the practice of accountancy in the United States is far from uniform. Usually it provides for restrictions on the use of the designation "Certified Public Accountant" or "C.P.A.," rather than on the practice of accountancy itself.

A minority of states have adopted statutes restricting practice to state-licensed public accountants. These states include Maryland and Louisiana (1924), North Carolina, Tennessee and Michigan (1925), Illinois and Florida (1927), Virginia (1928), Iowa (1929), Mississippi (1930), Arizona (1933), Wisconsin (1935) and Colorado (1937).

New York. The New York statute provides for examination and admission to practice as certified public accountants through the issuance of state certificates by a board of certified public accountant examiners appointed by the state regents. Penalties are provided for engaging in the public practice of accountancy as a certified public accountant without having been certified as such by the state. Anyone who, without being certified, holds himself out as a certified public accountant engaged in the public practice of accountancy or who uses the title "certified public accountant" or "C.P.A." is guilty of a misdemeanor punishable by imprisonment for not more than one year, or by a fine of not more than $500, or by both, for each separate offense. In addition, the attorney-general may recover a civil penalty from such person of $100 for each offense, whether separate offenses are committed on the same day or not. Certified public accountants convicted of a felony, or of the misdemeanor of having previously practiced without a state certificate, or of any atrocious crime, are automatically subject to revocation or suspension of their C.P.A. certificates. The New York statute makes no effort, however, to restrict the practice of public accountancy itself.

Illinois. The Illinois statute (as amended in 1943) makes it unlawful to practice public accountancy except as a registered public accountant. Corporations cannot practice public accountancy (except those registered before the law was passed). In addition, the University of Illinois issues certificates, upon examinations for such purpose, of qualification as expert public accountants, holders of which are entitled to the designation "certified public accountant" or "C.P.A." Each of the following acts constitutes a misdemeanor punishable by a fine of not less than $100 nor more than $1000, or by imprisonment for not more than six months, or both:

(a) Practicing, without license, as a public accountant.

(b) Obtaining registration by fraud.

(c) Using the designation "certified public accountant" or "C.P.A." without certificate from the University.

(d) Use by a partnership of the designation, "certified public accountant" or "C.P.A.," unless all partners have received certificates from the University and are registered as public accountants.

(e) Using the designation "public accountant" or an abbreviation thereof without registration.

(f) Use by a partnership of the designation "public accountant" or an abbreviation thereof unless all partners are registered.

45. Unlawful practice of law. Anyone may be his own lawyer, but if he acts or holds himself out as authorized to act as a lawyer for another, or if he engages in the practice of furnishing legal advice or drawing up legal papers other than on his own behalf without having been admitted to the practice of the law, he is guilty of practicing law unlawfully and punishable accordingly. The New York statute in this connection is typical. It makes it unlawful for anyone not duly licensed:

(a) To practice, or to appear in court as attorney or counsellor-at-law, except on his own behalf;

(b) To hold himself out to the public as being entitled to practice law;

(c) To assume, use or advertise the title of lawyer, attorney and counsellor-at-law, or similar title;

(d) To ask or receive, directly or indirectly, compensation for preparing deeds, mortgages, assignments, discharges, leases, wills, and so on, or pleadings (sec. 73) of any kind.

Violation of any of these provisions is a misdemeanor.

Solicitations of retainers or legal business, directly or indirectly, are likewise prohibited. The New York statute provides:

(a) An attorney must not buy, procure an assignment of, or in any way be interested in buying or acquiring, a bond, promissory note, bill of exchange, or other claim for the purpose of bringing suit on it.

(b) An attorney must not offer any valuable consideration as an inducement for bringing him legal work.

(c) Corporations and collection agencies are forbidden to deal in claims for lawsuit purposes.

Any attorney guilty of deceit or collusion with intent to deceive the court or any party, or who wilfully delays his client's suit for his own benefit, or who wilfully receives money or allowance on account of moneys not really laid out by him, is not only guilty of a misdemeanor but may forfeit treble damages to the party injured.

An agreement to share legal fees between a lawyer and a layman, whether the latter be an individual, partnership, corporation or association, makes all participants guilty of a misdemeanor.

46. Falsifying records. Most states prescribe severe penalties for falsifying books and records. The New York statute is

typical of many others. A person is guilty of forgery in the third degree punishable by imprisonment for not more than five years if:

(A) As an individual, officer or employee of a corporation, association or partnership, he falsifies or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of account, records or other writing pertaining to the business of said individual, corporation, and so on;

(B) With intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, he does any of the following things:

(1) Alters, erases, obliterates, or destroys an account, book of accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership or individual; or,

(2) Makes a false entry in any such account or book of accounts; or,

(3) Wilfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him or under his direction.

Similar alterations are declared to constitute forgery in the third degree if made:

(a) With intent to defraud creditors, or

(b) To conceal a crime, or

(c) To conceal from creditors or stockholders or other persons interested, matters materially affecting the financial condition of any individual, corporation, association or partnership, or

(d) To provide a basis for obtaining credit.

The foregoing provisions do not apply to a clerk, bookkeeper or other employee who, without personal profit or gain, merely executes the orders of his employer.

The effect of these penal provisions is to aggravate crimes which are accompanied by false record entries.

Example: Two cashiers steal different sums from their corporate employer. *A* takes currency received by him as the proceeds of a note receivable which has never been entered on the corporation's books. *B* takes currency from the cash drawer and makes an entry charging the withdrawal on the corporation's books to an expense account. *A* is guilty of larceny by embezzlement, but *B* is guilty not only of larceny but of forgery in the third degree.

47. Unexplained shortage in accounts. A mere unexplained shortage in accounts is not necessarily criminal, because it does not of itself establish a fraudulent intent to deprive the owner of anything: the shortage might be due to carelessness. Thus, if a cashier is found to be short in his accounts and admits the fact, but is unable to explain the deficiency, he cannot be con-

victed of embezzlement unless there is additional proof that he has deliberately appropriated the difference.

48. **False financial statements.** Penal statutes throughout the country generally prescribe fines and imprisonment for obtaining credit by false financial statements. Again the New York statute is characteristic. It makes the following classes of persons liable under the statute:

(a) A person who, to secure credit, *knowingly makes or causes to be made* a false written statement concerning the financial condition or ability to pay of himself or of some other person, firm or corporation in which he is interested or for whom he is acting;

(b) A person who, *knowing that such a statement has been made* concerning himself or some other person, firm or corporation in which he is interested or for whom he is acting, procures money, property or credit on the faith of such statement; and

(c) A person who, knowing that a written statement has been made concerning the financial condition or ability to pay of himself or some other person, firm or corporation in which he is interested or for whom he is acting, *"represents on a later day, either orally or in writing, that such statement theretofore*[5] *made, if then again made on said day, would be then true, when in fact, said statement if then made would be false,"* and who procures money, property or credit upon the faith of such oral or written statement.

C. Governmental Powers and Limitations

49. **Force essential to law.** Without the force of authority, law would be a mere collection of rules. Hence "the supreme power in a state" not only prescribes rules of civil conduct, but enforces them. The organization of this supreme power is Government.

50. **Dual sovereignty: delegation of authority.** Our system of government represents a dual sovereignty: the states, originally sovereign, have by the United States Constitution delegated certain paramount authority to the United States Government, reserving to themselves all sovereign authority not thus delegated. Hence each state, while sovereign, is subject not only to its own constitution but also to the United States Constitution, which is "the supreme law of the land." Under each state constitution, governmental power may be further delegated to subordinate units for local government, such as

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[5] The original statute, as reported in *McKinney's Consolidated Laws,* reads "therefore," but undoubtedly "theretofore" was intended.

counties, cities, towns and villages. Such delegated authority is circumscribed by constitution, statute and charter.

For example, in determining the validity of a municipal bond issue, we must ascertain whether the delegation and exercise of sovereign authority are within constitutional limits: "whether the municipality was authorized to issue the bonds, for the purpose under consideration; whether the debt limit has been exceeded, whether the preliminary steps required by law have been taken; whether proper provision has been made for the payment of the bonds; whether the bonds are in the proper form; whether they have been duly executed and delivered by the proper officers; and whether they have been sold or disposed of in accordance with law." [6]

51. **Constitutionality.** Any act of Congress which fails to conform to the United States Constitution, and any state statute or municipal ordinance which fails to conform to both Federal and state constitutions, is "unconstitutional" and void. It is therefore of paramount importance that we understand the basic framework of the Constitution of the United States.

52. **Basic framework of Constitution.** The Constitution of the United States does three things: (1) it prescribes the form and specifies the powers of the government it creates; (2) by way of guaranty and safeguard it limits the powers not only of the government it creates (the Federal government) but also, in certain respects, of the states themselves; and (3) it provides for amendments. Every act of Congress must find its authority in these powers. Every act of government, Federal, state or local, is subject to these limitations.

53. **Constitutional powers and functions.** The Constitution distributes all Federal powers and functions into three separate departments, executive, legislative and judicial. For any of these departments to transgress the others is to violate the Constitution.

54. **Congressional powers: in general.** Congress may: raise money by taxation and duties on a uniform basis throughout the country, borrow money on credit, regulate commerce among the states and with foreign nations, establish uniform rules on naturalization, enact bankruptcy laws, coin and issue money and punish for counterfeiting, fix standards of weights and measures, establish post offices and post roads, enact copy-

[6] 44 *Corpus Juris* 1226.

right and patent laws, establish Federal courts inferior to the United States Supreme Court, punish for crimes committed on the high seas and acts in violation of international law, declare war, raise and support armies, provide and maintain a navy, govern the district which is the seat of the government (District of Columbia) and make all laws necessary and proper for carrying into effect the foregoing powers.

55. **Congressional powers: valid exercise.** Every act of Congress must fall within the framework of its specifically delegated powers.

For example, provisions for corporate reorganizations (sec. 1350) and for individual and corporate "arrangements" (sec. 1353) fall within the power given to Congress to enact bankruptcy laws.

The following acts of Congress were passed under its constitutional power to regulate interstate commerce:

Sherman Anti-Trust Act (1890), which declared every combination in restraint of trade illegal.

Clayton Act (1914), which was designed to strengthen the Sherman Anti-Trust Act and which established the Federal Trade Commission to investigate unfair business practices and check monopolistic tendencies.

Robinson-Patman Act (1936), intended to strengthen and supplement the Clayton Act by making it unlawful directly or indirectly to discriminate in price between buyers, large or small, of commodities of like grade and quality (sec. 1363).

Tydings-Miller Act (1937), which modified the Sherman Anti-Trust Act by legalizing resale price maintenance agreements upon certain conditions (sec. 1363).

Securities Act (1933), which was designed to accomplish two objectives: (1) to provide full and fair disclosure to prospective investors of the character of new securities or new offerings and (2) to prevent fraud or misrepresentation in the sale of securities, old and new.

Securities Exchange Act (1934), which was adopted: (1) to establish Federal regulation over securities exchanges and markets, (2) to prevent unfair practices on such exchanges and markets, (3) to discourage and prevent the use of credit in financing excessive speculation in securities, (4) to compel corporations to furnish adequate information on securities publicly traded in and (5) to control unfair use of information by corporate insiders.

Fair Labor Standards Act (Wage and Hour Act), passed in 1938, fixing minimum wages and maximum hours for employees engaged in interstate commerce or in producing goods for interstate commerce.

National Labor Relations Act (1935), designed to safeguard the right of labor to bargain collectively (sec. 614).

56. Congressional powers: invalid exercise. Two outstanding examples of the invalid exercise of Congressional powers are:

National Industrial Recovery Act (*N.R.A.*), passed in 1933. This act permitted trade and industry to police themselves by drawing up codes of fair competition subject to approval by the President of the United States. The act was declared unconstitutional because (1) it delegated *legislative* power to the *executive* department and (2) it sought to regulate business not truly *interstate*. (But see sec. 59.)

First Agricultural Adjustment Act (*1st AAA*), passed in 1933. This act sought to restore the farmer's purchasing power by adjusting production to demand and compensating farmers who cut down their crops, out of a fund raised through taxes on processing the farm product. The act was declared unconstitutional on the following grounds: (1) Farming is not interstate commerce; (2) the tax was not collected for government support generally but took from one group for the benefit of another; and (3) the act invaded the reserved rights of the states. The *Second Agricultural Adjustment Act* (*2nd AAA*), however, which omitted the processing tax and restricted marketing of farm products to a volume determinable by the Department of Agriculture, was upheld.

57. Limitations on Congressional powers. The Constitution of the United States imposes specific limitations on Congressional power. Congress may not: suspend the writ of habeas corpus, take away the property of a person condemned to death (bill of attainder), pass criminal laws to govern acts committed prior to the enactment of the law (*ex post facto* laws), tax exports, give preference to any domestic port or compel vessels doing an interstate business to pay duty, grant titles of nobility (an officeholder may not accept any present, office, or title from any foreign land or its head without the consent of Congress).

58. Limitations on states. In addition to prohibitions in respect to attainders, *ex post facto* laws and titles of nobility, no state may make treaties, issue money, pass any law impairing the obligation of contracts, lay import or export duties, tax marine tonnage, keep armies or warships in peacetime, or engage in war unless actually invaded or in imminent danger.

59. Expansion of commerce clause. Most debated, perhaps, of all Federal powers is that embodied in the clause which gives Congress power to regulate interstate commerce. Both words, "commerce" and "interstate," have been broadened considerably by judicial interpretation.

Commerce, it was originally contended, means trade. Chief

Justice Marshall broadened the definition[7] to include not only merchandise carried in trade but the carriers as well. From carriers of merchandise the interpretation broadened to carriers of passengers, later to the transmission of intelligence or electric power by wire (including telegraph, telephone and power companies), and still later to motor transportation, radio broadcasting and airplane travel and transportation. The Supreme Court even defined news as commerce when it held that the National Labor Relations Board could order the Associated Press to rehire employees who had been discharged because of union activity.[8]

The interpretation of "commerce" is no longer confined to trade, transportation, or the transmission of power or intelligence. Congress is held to have power to regulate all forms of interstate business and industry: to pass antitrust laws (sec. 55), to legislate on trade-marks and trade names, to quarantine cattle, prohibit interstate traffic in lottery tickets or the shipment of mislabeled food and drugs, and to legislate on all phases of labor directly or indirectly concerned with interstate business—hours, wages, fair practices and collective bargaining.

Interstate, literally, means between states, as distinguished from *intrastate,* which means within a state. The original concept of intrastate commerce was that of commerce inside the borders of a single state, as opposed to commerce between states. The expansion of the "interstate" concept is illustrated in the following cases:

In *Hammer v. Dagenhart* (1918),[9] the United States Supreme Court voided an act of Congress which sought to prohibit interstate shipment of goods made in factories employing child labor. Congress, said the Court, had no such power under the commerce clause. But in *United States v. Darby Lumber Company* (1941),[10] the Supreme Court, in approving the Fair Labor Standards Act (sec. 55), held that if a person *produced* goods for interstate commerce he was subject to Federal regulation—specifically reversing its prior decision in *Hammer v. Dagenhart.*

In the *N.R.A. Case* (*Schechter Poultry Corp. v. U.S.*),[11] decided in 1935, the National Recovery Administration sought to fine dealers for violating the poultry code. The poultry was slaughtered in New York, sold to re-

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[7] *Gibbons v. Ogden,* 9 Wheat., 1.
[8] *Associated Press v. National Labor Relations Board,* 301 U.S. 103.
[9] 247 U.S. 251.
[10] 312 U.S. 100.
[11] 295 U.S. 495.

tailers in New York, and resold to consumers in New York; but the business had a competitive influence outside New York. The Supreme Court, as already noted (sec. 56), invalidated the act, not only on the ground that it delegated legislative power to the executive department but also on the ground that it sought to regulate *intrastate* commerce. Indirect effect on interstate commerce was held immaterial. But in *U.S. v. Wrightwood Dairy Co.*[12] (1942), the Supreme Court held that milk processed exclusively in Illinois, in competition with interstate handlers in that area, *indirectly affected* interstate commerce and was therefore subject to Federal regulation.

Other decisions which have broadened the scope of interstate commerce are as follows:

N.L.R.B. v. Fainblatt[13] (1939). A small New York clothing manufacturer bought all his raw material in New York and sold all his garments to a New York concern, which shipped to customers, some of whom were outside the state. The Court held that the clothing manufacturer was subject to Federal labor regulation because labor disputes might lead to strikes, strikes might reduce output, and reduced output might curtail interstate shipments.

Wickard v. Filburn[14] (1942). A small farmer exceeded his wheat-raising allotment under the Agricultural Adjustment Act by twelve acres, for which he was assessed. To the farmer's plea that his wheat-raising was for local consumption, the Supreme Court replied that such consumption might affect interstate commerce, hence was subject to Federal regulation.

Kirschbaum v. Walling[15] (1942). The Supreme Court held that the wages and hours of porters, elevator operators, and night watchmen in a New York City loft building were subject to Federal regulation under the Fair Labor Standards Act, because: (1) Some of the tenants were engaged in interstate commerce, hence (2) the building employees were engaged in occupations necessary to the production of goods for interstate commerce.

60. Constitutional guaranties and safeguards. Embedded in the Constitution are certain fundamental guaranties, safeguards and limitations, serving as a bulwark to protect minorities against oppression. These include:

Personal, civil and political rights and safeguards: personal liberty, personal security, freedom of religion, freedom of speech and the press, right of assembly and petition, equal protection of the laws and the prohibition of special privileges, immunities and class legislation.

Specific guaranties affecting property rights, including the provision against impairing the obligation of contracts and certain restrictions on the exercise of such dominant powers as eminent domain and taxation.

[12] 315 U.S. 110.
[13] 306 U.S. 601.
[14] 317 U.S. 111.
[15] 316 U.S. 517.

61. Liberty and security. Reference has already been made to the "natural" rights of personal liberty (sec. 20) and personal security (sec. 19), including the safeguards of bail and *habeas corpus*. The guaranty of personal liberty, implicit in numerous provisions of the Constitution, is specifically mentioned in the Fifth Amendment, which provides that no person shall be deprived of life, liberty or property without due process, and the Fourteenth Amendment, which reiterates the prohibition as to the states. Personal security is safeguarded by the following restrictions:

Criminal prosecution. No person may be held for a capital or infamous crime save on "presentment or indictment of a grand jury" (except in military and naval cases under wartime conditions).

Double jeopardy. No person may be twice put in jeopardy of life or limb for the same offense. A person acquitted cannot be tried again for the same offense.

Self incrimination. No person may be compelled in any criminal case to be a witness against himself.

Cruel and inhuman punishments are prohibited by the Constitution. Hence confessions tortured out of a prisoner are frequently kept out of evidence.

Excessive fines and bail are prohibited by the Constitution.

Ex post facto laws. Any law which imposes punishment for an act not punishable when committed, or new punishment for an act in addition to that in force when the act was committed, is forbidden.

62. Freedom of religion. The first of the ten amendments (Bill of Rights) provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The sixth article of the Constitution further provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

63. Freedom of speech and the press. The First Amendment provides that Congress shall make no law abridging the freedom of speech or of the press. No law may be passed which limits our right, by the spoken or written word, to criticise any public or private act. On the other hand, as the Supreme Court observes, "The freedom of speech and the press does not permit the publication of libels, blasphemous or indecent articles or other publications indecent to public morals or private reputation."

64. Right of assembly and petition. The First Amendment guarantees the right of any and all persons, individually or collectively, to apply to any officer or department of government for relief or the redress of grievances—free of all penalty for having sought or obtained it.

65. Equal protection of the laws. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It is a denial of equal protection to pass legislation which discriminates against some persons in favor of others (see sec. 56, First Agricultural Adjustment Act). In this sense, "persons" includes corporations. The law may discriminate, however, where real differences exist, such as differences in age, sex, professions and trade.

66. Privileges, immunities, and class legislation. The Fourth Article of the Constitution provides that "the Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." For example, a state law giving priority to its own creditors is void.[16] The Fourteenth Amendment further provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Hence no statute may prevent a citizen from passing freely from one state to another or from doing business in any state other than his own.

Who are citizens: Persons are citizens of the United States if they are (1) born in the United States, or (2) born abroad of parents who are American citizens, or (3) duly naturalized. Persons may be naturalized (a) by personal compliance with civil naturalization laws, including five years' residence, declaration of intention and oath of allegiance, (b) by parent's naturalization, or (c) by military service in the armed forces of the United States. Formerly, a female alien acquired citizenship upon marriage to an American citizen. Under the act of Congress of 1922, as amended in 1930, 1931 and 1934, citizenship is not acquired by marriage, but if an alien spouse is otherwise eligible, he or she may become a citizen upon full compliance with the naturalization laws, without declaration of intention, and upon three years' residence prior to filing of petition instead of the normal five-year period.

Corporations are not included within this constitutional provision. The provision relates to *citizens.* Although corporations have been judicially declared to be *persons,* they are not and cannot be citizens. Hence any state may refuse, limit, or regulate the right of corporations organized in other states to enter that state and conduct business therein (secs. 872-873).

[16] *Blake v. McClung,* 172 U.S. 239, 247; 176 U.S. 59.

67. Impairing obligation of contracts: police power. The Constitution provides that "no state shall . . . pass any . . . law impairing the obligation of contracts." The provision is directed at state action, including state constitutions and statutes. It does not apply to Congress.

Police power. The constitutional limitation on state impairment of contract obligations is subject to the implied reservation of state sovereignty and all necessary measures to protect it, which come under the general designation "police power," or the dominant power of a sovereign government to pass laws for the promotion of public health, safety, morals and general welfare. Hence tenement house legislation, sanitary laws, emergency rent laws and laws fixing maximum or minimum prices for public necessities may impair the obligation of contracts without violating the Constitution.

68. Eminent domain. The right of a sovereign power to take private property for public use is limited by the Fifth Amendment, which commands *just compensation* to the owner, and by the *due process clause,* which provides that no person may be deprived of his life, liberty or property without due process of the law. The power of eminent domain may be exercised by a government directly, as where it condemns property for a post office, courthouse or public road, or it may be delegated to a corporation or individual together with the delegation of some public duty or function, as in the case of railroad, telegraph or telephone rights of way. There can be no right of eminent domain unless the purpose is truly public.

Condemnation proceedings. Where a property owner resists surrender of his property, either because he challenges the purpose as not truly public or because of disagreement in the amount of compensation, condemnation proceedings must be instituted. Such proceedings may vary in detail. The Constitution of the State of New York, for example, provides several ways of determining compensation: (1) by a jury, (2) by the state supreme court with or without a jury, and (3) by not less than three commissioners appointed by a court of record. The property taken must be free and clear of all claims, including not only the owner's interest, but also all liens (Chapter XIII), easements (sec. 1035), and leaseholds (sec. 1118); and the amount awarded must be distributed among these claimants, unless there is an agreement with the owner (as in some leases) that in case of condemnation proceedings the owner takes all.. The award also embraces all improvements, including fixtures which have become part of the realty (sec. 1364).

69. Taxation. The power to tax is essential to the very existence of a state. Hence, taxes may with constitutional impunity cut into property and contract rights provided their

purpose is public and their imposition uniform. A fundamental distinction in taxing power should be noted between Federal and state governments: each state has the unlimited power to tax which goes with sovereignty, but Federal taxation must be limited to the specific purposes delegated by the United States Constitution. Taxes may be collected upon the basis of an *assessment,* as in the case of real and personal property taxes; or upon the basis of a *return,* made out and filed by the taxpayer, usually accompanied by his remittance; civil and criminal penalties being imposed for failure to make the return. Many taxpayers are required to furnish complete accounting information, balance sheets, and so on, as a basis for tax computation.

Taxation must be for a truly public purpose. If the levy is on one group for the benefit of another (sec. 56), the tax is unconstitutional.

70. Due process. All dominant government powers, including eminent domain, the police power and the power to tax, as well as all private rights and powers, are subject to the all-inclusive constitutional limitation of due process. The Fifth Amendment, as noted (sec. 61), provides that no person shall "be deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment applies the provision specifically to the states. The term "due process" has been given widely varying interpretations, but the concept corresponds roughly to that of "the law of the land" (sec. 2).

D. Procedure

71. Prosecutions *v.* lawsuits. The state punishes a criminal by apprehending him, bringing him to trial and, if guilty, imposing sentence. The procedure is known as a "prosecution." A "lawsuit," on the other hand, or "civil" suit, involves a private dispute wherein a person wronged by another seeks redress against the latter in the form of money damages, recovery of property, or some special form of equitable relief, such as injunction, specific performance, partition, foreclosure, accounting, rescission, or the enforcement of a trust.

72. Criminal prosecution. A criminal prosecution is usually instituted either by a warrant for a person's arrest, or by a sworn "information" on which a magistrate issues a summons or writ directing the accused to appear before him. In minor

cases the magistrate tries the accused and either acquits him or imposes a penalty; in serious cases, he has jurisdiction only to commit the accused to prison (subject to bail), to await grand jury action.

The grand jury usually consists of twenty-three men convened from time to time to investigate charges of crime laid before it. Proceedings before a grand jury are not in the nature of a trial, but are one-sided, that is, the district attorney, representing the state, merely presents the evidence. If the grand jury finds that a crime has been committed, it draws up a written accusation ("finds an indictment") on which the accused is tried. If, as sometimes happens, the evidence comes before the grand jury in the first instance, the criminal being at large, an indictment is found, and the authorities endeavor to arrest the criminal and bring him to trial on the indictment.

On the trial, three things must be established: (1) the *corpus delicti,* or body of the offense, that is, the commission of the crime itself; (2) the connection of the accused with the crime; and (3) guilty motive or intent, except where intent, under the statute, is not a necessary element of the crime (sec. 32). As to intent, the law presumes that everyone contemplates the natural consequence of his act. In criminal cases, guilt must be established beyond a reasonable doubt.

73. Lawsuits and judgments. The object of a lawsuit is to obtain a legal determination requiring a person to do or refrain from doing some thing.

Summons, parties, jurisdiction. A lawsuit is started by the service of a *writ* or *summons.* The person suing (*plaintiff*) causes the writ to be handed to ("served on") the person sued (*defendant*), and this requires the latter to appear in court on or by a given date. This gives the court "jurisdiction."

Pleadings, issues, court calendar. The wrong to the plaintiff is set forth in a complaint (known as "declaration" in some states), to which the defendant must serve his answer ("plea" in some states), and also, if he sees fit, any cross-charge or *counterclaim* to the plaintiff's complaint, to which the plaintiff may *reply.* These charges, defenses and cross-charges are known as the *pleadings,* which create the *issues* in a case. These issues are brought to trial by being put upon the *court calendar.*

Trial. Upon the "call" of the calendar, the case is tried when reached. The attorneys for both sides select or *impanel* a jury; then "open" to the jury, that is, explain the nature of their respective contentions. The plaintiff's attorney puts on plaintiff's witnesses in any order he may select, elicits their testimony in the first instance by "direct examination," then

must submit them to "cross-examination" by the defendant's attorney. The defendant's attorney then puts on defendant's witnesses, who likewise testify upon direct and cross-examination. The plaintiff need not establish his case, as in a criminal prosecution, beyond a reasonable doubt but by a preponderance of evidence, which is not measured by the number of witnesses but by the quality of their testimony. The attorneys then *sum up* the evidence, the court *charges* (instructs) the jury on the law, and the jury "retires" to deliberate on the facts.

Judgment, execution, levy. If the jury finds for the defendant, the case is *dismissed;* if for the plaintiff, a *judgment* is entered for the amount found, and the judgment is carried out by *issuing execution* to a sheriff or marshall, who must make demand for payment and, if such demand is not met, seize or *levy upon* defendant's property and cause it to be sold to satisfy the judgment.

Supplementary proceedings. If the sheriff or marshall, unable to find property belonging to the defendant, *returns the execution unsatisfied,* plaintiff's attorney may obtain a court order, or, in some states, may issue his own subpoena, for the examination in *supplementary proceedings* of the *defendant* (now known as *judgment debtor*), to ascertain, if possible, the existence of any property or income which might make the judgment collectible.

Garnishment. If the judgment debtor has no money or property in his possession, but money or property is due him from a third party, the *judgment creditor* (successful plaintiff) may institute *garnishment* proceedings to satisfy his judgment. The third party who owes the debt to the judgment debtor and against whom such proceedings are brought, is called the *garnishee* (sec. 1365, subd. *a*). Where the garnishee is an employer owing wages to the judgment debtor, the proceedings are sometimes referred to as *execution against income.* An employer need not withhold the entire wage, but only a percentage (usually 10%) fixed by statute. Any excess over such percentage which the employer may have withheld belongs to the employee (sec. 1365, subd. *b*). Statutes generally prescribe a fixed minimum wage which is not subject to garnishment.

Attachment. In exceptional situations (as, for example, where the defendant is a nonresident or threatens to leave the jurisdiction, an action may be begun by a writ of attachment, commanding the sheriff to seize the defendant's property as security for the satisfaction of such judgment as the plaintiff may recover.

74. **Courts.** A court consists of judge and jury. The judge expounds the law; the jury finds the facts. Equity or *chancery* cases are usually tried by a judge without a jury; and where the facts are involved, detailed or complicated, as they frequently are in patent and other litigation, the court may refer the case for fact-finding purposes to a *master in chancery* or *referee.* A court has no power over a party unless it obtains *jurisdiction,* or authority to render a binding decision. The

jurisdiction of the various courts depends on various factors: residence of the parties, amount in suit, nature of case, location of property (in real property cases), and so on. Jurisdiction may be *original* (for trial in the first instance) or *appellate* (for review of a lower court).

75. **Evidence: object of.** All testimony given upon a trial must conform to certain rules of evidence, the object of which is to establish the truth or falsity of a given charge or assertion.

Judicial notice. Certain matters of common knowledge need not be proved; the court will take "judicial notice" of them.

76. **Burden of proof.** The *burden of proof* is on the party holding the affirmative (usually the plaintiff); that is, he must go forward with enough proof so that if nothing were shown to the contrary, he would win. This puts the burden on the defendant. If the defendant fails to meet the burden with equal proof to the contrary, the plaintiff is entitled to judgment. If the defendant meets the burden and the plaintiff fails to present additional proof to outweigh the defendant's, the case is dismissed.

77. **Classifications of evidence.** There are numerous classes of evidence, including, among others, the following: *prima facie,* conclusive, direct, indirect or circumstantial, real, relevant, material, competent, primary or "best," secondary and hearsay.

78. **Prima facie evidence.** *Prima facie* evidence is evidence which, standing alone, unexplained or uncontradicted, establishes the proposition or conclusion to support which it is introduced. For example, *prima facie* evidence of a debt is evidence which, if not controverted by evidence to the contrary, establishes the existence of the debt.

79. **Conclusive evidence.** Conclusive evidence is evidence which is incontrovertible (a) as a matter of law, such as the presumption of ownership from adverse use (sec. 1041), or (b) as a matter of fact, such as evidence from which only one reasonable conclusion can be drawn.

80. **Direct evidence.** Direct evidence consists of testimony by persons who saw, heard or sensed the matter in controversy, so that they can testify on direct knowledge. "If, for example, it is desired to ascertain whether the accused has lost his

right hand and wears an iron hook in place of it, one source of belief on the subject would be the testimony of witnesses who had seen the arm." [17]

81. Indirect or circumstantial evidence. Indirect or circumstantial evidence is evidence which tends to establish a fact, not by direct proof of its existence but by indirect proof from which a logical inference may be drawn. To use Wigmore's illustration again, the mark of the hook on something carried by the accused would furnish circumstantial evidence that the accused wore a hook in place of his hand.

82. Real evidence. Real evidence is that derived from personal observation by the court and jury. Again using Wigmore's illustration, if the jury inspected the accused's arm and saw the hook, this would constitute real evidence.

83. Relevant and material evidence. Relevant and material evidence are closely akin. Evidence is relevant when it touches the issues and assists in determining their truth, material when it is not only relevant but also has a direct bearing on the decision. "The practical conditions under which cases are tried do not always permit the court to hear all facts which may be in any degree logically relevant to the issue, but requires that the facts received shall have a somewhat higher degree of probative force, which may be termed 'legal relevancy' or 'materiality.' The rule in this connection is that whenever the court feels that a fact is not of probative value commensurate with the time required for its use as evidence, either because too remote in time, or too uncertain or too conjectural in its nature, the fact may in the exercise of a sound discretion be rejected." [18]

84. Competent evidence. "By competent evidence," says Greenleaf,[19] "is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of inquiry." If proof is incompetent, it is inadmissible, however relevant it may be. Thus, in a breach of contract action, testimony on the contents of a written contract may be relevant, yet if the contract itself is available, the testimony will be incompetent and hence inad-

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[17] *Wigmore on Evidence,* sec. 1150.
[18] 22 *Corpus Juris* 162-4.
[19] *Evidence,* 16th Ed., sec. 2.

missible, because the contract itself will be the proper evidence.

Competent *testimony* is distinguished from competent *evidence,* in that it relates to the witness rather than to the evidence. Incompetent witnesses may include insane persons, infants of tender age, and persons in a complete state of intoxication. Witnesses interested in the event (a plaintiff or defendant, for example) are deemed biased but not necessarily incompetent, except as against the estate or survivors of a deceased person, in which case, "since death has silenced the one, the law will silence the other."

85. Privileged communications. Because of their peculiarly confidential relationships, certain parties are made incompetent by law to testify as to "privileged" communications between them.

Attorney and client. An attorney or counsellor at law is not allowed to disclose a communication made to him by his client or his advice to the client thereon. This includes any clerk, stenographer or other person employed by the attorney, such as an interpreter (sec. 1369, subd. *b*). The client, however, may waive this privilege, and if he does, the attorney may be compelled to testify.

Physician and patient. Physicians are forbidden to disclose information acquired in a professional capacity, unless the patient waives the privilege.

Clergymen and penitent. Confessions or admissions made to a clergyman or priest in his professional capacity are privileged. (Some states refuse to recognize this privilege.)

Husband and wife. At common law, the husband or wife of a party to an action was wholly incompetent to testify as a witness. Statutes have largely qualified this rule. Husband and wife may now generally testify for or against each other except as to confidential matters between them. Neither may testify against the other in divorce actions except to prove the marriage or to disprove accusations or defenses to accusations.

86. Communications not privileged. The mere fact that a communication is imparted in confidence does not make it privileged. Hence confidential information imparted to or acquired by bookkeepers, detectives, merchants, bankers, agents, copartners or business employees generally cannot be refused on the witness stand, though to disclose it voluntarily might constitute a breach of contract or breach of faith. "No pledge of privacy nor of secrecy can avail against the demand for truth in a court of justice." [20]

[20] *Wigmore on Evidence,* sec. 2286.

Newspaper editors and reporters. "The rule of privileged communications does not apply to communications to a newspaper editor or reporter, for, although there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, it is subject to qualification and must yield when in conflict with the interests of justice. Accordingly, a witness before the grand jury on a complaint for libel published in a newspaper may be required to disclose the name of the writer, which he admits he knows, over the objection that it is an office regulation that the editors of the paper are not to give the name of the writer of articles published in it."[21]

Accountants. Under the common law (that is, in the absence of statute), there is no privilege with regard to communications made to an accountant. "The information given to the witness and to the accountants in his employ for the purpose of making financial statements and doing other work characteristically performed by accountants is not privileged, despite the fact that the witness may also have rendered legal advice on the basis of such data."[22] However, in some states communications to accountants in their confidential capacity have been made privileged by statute. In Illinois the statute provides: "A public accountant shall not be required by any court to divulge information which has been obtained by him in his confidential capacity as a public accountant."[23] Other states which have adopted similar statutes are: Colorado, Florida, Iowa, Maryland and New Mexico.[24]

87. Primary or best evidence. Primary evidence is the best evidence of which a case, in its nature, is susceptible.[25] If a witness is personally available for testimony, his own direct testimony on a pertinent fact is the best evidence. A writing itself is the primary or best evidence of its contents.

Best evidence rule. Testimony on the contents of a document is inadmissible if the document is available, because the document itself is the best evidence.

Example: A party sues for trespass in cutting down his trees. If he is asked, on direct examination, "Do you own the farm?" the question is objectionable because the deed to the farm is the best evidence. Whenever it becomes necessary to prove the contents of a document, it must be produced or its absence accounted for.

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[21] 70 *Corpus Juris* 377-8.

[22] *In re Fisher,* 51 Fed. (2d) 424, 425.

[23] Illinois Revised Statutes, Ch. 110½, sec. 51, as amended July 22, 1943.

[24] In 1938, a Committee of the American Bar Association on Improvements in the Law of Evidence recommended "that the legislatures refuse to create any new privileges for secrecy of communications in any occupation; and particularly we recommend against any further recognition of (A) Privilege for information obtained by *Accountants;* (B) Privilege for information obtained by *Social Workers;* (C) Privilege for information obtained by *Journalists.*"

[25] *Landon v. Morehead,* 34 Okl. 701, 126 P. 1027, 1032.

88. Secondary evidence. If a witness is not personally available for testimony, as where he resides outside the jurisdiction or is dead, secondary evidence may be used; as, in the case of nonresidents, depositions properly taken, or, in the case of a deceased person, testimony by another (not interested in the event) on what such deceased person had said that is competent and material to the issue. If it can be proved that an original writing is lost, destroyed, or physically unavailable, secondary evidence of its contents is admissible, either by producing a copy with proof that it corresponds to the original or by oral testimony on the contents of the original writing.

89. Hearsay evidence. Hearsay evidence is evidence on a fact based, not on the witness's own knowledge or observation of the fact, but on what someone else told him about it. Such evidence is objectionable because it cannot be tested by oath or cross-examination. The witness cannot swear or respond on cross-examination as to the truth of the alleged fact, but only as to the truth of someone having told him about it; for example, in the suit for trespass previously referred to (sec. 87), if the question were asked, "Did you see the defendant chop down the trees?" the answer, "No, but my wife saw it and told me about it" would have to be stricken out as hearsay.

90. Exceptions to hearsay evidence rule. There are numerous exceptions to the hearsay evidence rule, such as confessions, admissions against interest, dying declarations, declarations of a testator (sec. 1167), and so forth. Exceptions of interest to students of business law include: book entries, statistical tables, charts and analyses, and expert testimony.

91. Book entries: the shop book rule. Declarations in the form of book entries are hearsay, but, when made in the regular course of business, they carry some presumption that they reflect the facts they record. Such a presumption is of course *prima facie* only: subject to rebuttal.

This rule of evidence is known as "the shop book rule." It is hedged about by a variety of conditions, some of which have been retained in some states, dropped in others.

For example, books of account were originally admissible in New York only on the following conditions: (a) The party kept no clerk; (b) some of the articles charged had been de-

livered; (c) the books produced were the regular account books of the party and (d) the party could show, by those who had dealt with him, that he kept fair and honest accounts. These conditions have been dropped from the New York statute, which now provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation, and calling of every kind." [26]

92. **Statistical tables.** Standard statistical tables commonly accepted as authentic may be admissible as proof of the facts therein tabulated. Examples are mortality tables, stock exchange quotations, census tables, and so on.[27]

93. **Charts and analyses.** As an aid to the court, statistical charts and analyses of properly established facts are frequently admitted into evidence, provided a proper foundation is laid for their admissibility, showing how they were prepared, who prepared and checked them, and so on.

94. **Opinion evidence: expert testimony.** Ordinarily, a witness may testify on facts only; his opinions are inadmissible. However, an important exception is furnished in the case of experts, who may either (a) testify to specialized facts only and let the jury draw its own conclusions or (b) testify to specialized facts and give their expert conclusions as well. The latter category includes testimony by doctors, lawyers, certified public accountants, scientists, engineers, merchants with knowledge of values, fingerprint and handwriting experts, and

[26] *Civil Practice Act,* sec. 374a.

[27] In a recent case, the author introduced in evidence a statistical compilation showing relative popularity ratings of different types of radio programs, taken from a standard statistical publication commonly used in radio advertising.

all persons generally who possess specialized knowledge of the subject under inquiry.

Qualifying the expert. The attorney who puts an expert on the stand must first "qualify" him, that is, ask questions the answers to which will show that the witness is qualified to testify as an expert. A medical expert, for example, will be examined on his education, training, and experience. An accountant will show that he has been duly certified by an official examining board (sec. 1367).

Hypothetical questions. Experts are not called to testify upon the particular facts of a case, but upon their opinion on an assumed state of facts, which must have some relevance to the facts under inquiry. Such testimony is elicited by putting a *hypothetical question* to the witness reflecting the facts which counsel assumes to have been proved on the trial and then asking the expert his opinion on such an assumed state of facts (sec. 1367).

E. Bars to Recovery

95. In general. One may be wronged, yet have no legal remedy if he waits too long to seek redress, or if his suit is inconsistent with prior conduct. In the former case, a remedy may be barred by the *statute of limitations* or by *laches;* in the latter, by *estoppel.*

96. Statute of limitations: definition and object. The "statute of limitations" is really a collection of statutory provisions, fixing a limited period of time within which to sue. Upon the expiration of such period, a cause of action is said to be "outlawed" (sec. 1376). The object of statutes of limitation is to expedite the prosecution of legitimate causes of action and to discourage the bringing of stale claims. The theory underlying such statutes is that it is the general experience of mankind that claims which are valid are not usually allowed to remain neglected, and that a lapse of years, without any attempt to enforce a demand, creates a presumption against its original validity, or that it has ceased to exist. Furthermore, the neglect of a plaintiff is advanced as an additional ground for barring him from enforcing his remedy. The basic principle on which such statutes are most generally justified is that they tend to prevent fraudulent and stale claims from springing up at great distances of time and surprising parties or their representatives, when all the proper vouchers or evidences which might be introduced in defense of the claim, or the facts which might bear upon the claim, have

STATUTES OF LIMITATION
(In Number of Years)

State	Open Accounts	Promissory Notes	Contracts		
			Ordinary		Under Seal
			Oral	Written	
Alabama	3	6	6	6	10
Arizona	3	6	3	6	6
Arkansas	3	5	3	5	5
California	4(a)	4	2	4	4
Colorado	6	6	6	6	6
Connecticut	6	6-17(b)	3	6	17
Delaware	3	6	3	3	20
District of Columbia	3	3	3	3	12
Florida	3	5(c)	3	5	20
Georgia	4	6	4	6	20
Idaho	4	5	4	5	5
Illinois	5	10	5	10	10
Indiana	6	10	6	10-20(d)	10-20(d)
Iowa	5	10	5	10	10
Kansas	3	5	3	5	5
Kentucky	5(e)	15(f)	5	15	15
Louisiana	1-3(g)	5	(g)	(g)	(h)
Maine	6	6(i)	6	6	20
Maryland	3	3	3	3	12
Massachusetts	6	6(j)	6	6	20
Michigan	6	6	6	6	6(k)
Minnesota	6	6	6	6	6
Mississippi	3	6	3	6	6
Missouri	5	10	5	10	10
Montana	5	8	5	8	8
Nebraska	4	5	4	5	5(l)
Nevada	4	6	4	6	6
New Hampshire	6	6	6	6	20
New Jersey	6	6	6	6	16-20(m)
New Mexico	4	6	4	6	6
New York	6	6	6	6	6
North Carolina	3	3	3	3	10
North Dakota	6	6	6	6	6
Ohio	6	15	6	15	15
Oklahoma	3	5	3	5	5
Oregon	6	6	6	6	10
Pennsylvania	6	6	6	6	20
Rhode Island	6(n)	6	6	6	20
South Carolina	6	6	6	6	20(o)
South Dakota	6	6	6	6	20
Tennessee	6	6	6	6	6
Texas	2-4(p)	4	2	4	4
Utah	4	6	4	6	6
Vermont	6	6(q)	6	6	8
Virginia	3(r)	5	3	5	10

STATUTES OF LIMITATION (Continued)

State	Open Accounts	Promissory Notes	Contracts		
			Ordinary		Under Seal
			Oral	Written	
Washington	3	6	3	6	6
West Virginia	5	10	5	10	10
Wisconsin	6	6	6	6	10-20(s)
Wyoming	8	10	8	10	10

(a) Supported by book entries.
(b) Negotiable and unsealed 6 years; all others, 17 years.
(c) Under seal, 20 years.
(d) On contracts, sealed or unsealed, for payment of money, 10 years; on contracts to convey land, 15 years; on contracts sealed or unsealed, other than for payment of money or to convey land, 20 years.
(e) Due date computed from January 1, following date of purchase.
(f) On negotiable promissory note not actually negotiated, 15 years; on negotiable promissory note actually negotiated, sealed or unsealed, 5 years.
(g) Depends on nature.
(h) Depends on nature, generally 10 years.
(i) Witnessed notes, 10 years.
(j) Notes issued by banks, and notes witnessed but not negotiated to third parties, 20 years.
(k) Except state or municipal bonds or notes, bonds of public officers, covenants in deeds and mortgages, and bonds or notes of public or quasi-public corporations (see sec. 000), when 10-year period applicable.
(l) Actions on official or statutory bonds, 10 years.
(m) Action for rent where lease under seal, for debt under sealed obligation for payment of money only, and on sealed award by arbitrators, 16 years; on surety bonds, 20 years.
(n) Except account concerning merchandise or trade between merchants, 20 years.
(o) Other than sealed note or personal bond for payment of money only, 6 years.
(p) On accounts between merchants, 4 years; others, 2 years.
(q) Witnessed notes, 14 years.
(r) Except accounts between merchants or partners, when period is 5 years.
(s) When cause of action accrues within state, 20 years; outside, 10 years.

become obscure. Under such circumstances, such factors as lapse of time, defective memory, death, or removal of witnesses might constitute serious impediments to justice.

97. **Statute of limitations: period.** The period of the statute of limitations varies with the type of action and the state having jurisdiction. It would be impracticable to list here the numerous variations in the different states or the different types of actions involving different periods in the different states. A tabulation showing the statutory periods in the different states for the most common types of commercial transactions is shown on pages 44-45. Variations as to types of action in a single state (New York) are shown in the table on pages 46-47.

Claims by or against decedent estates. A cause of action in favor of or against a person, which is barred by the statute of limitations at the time of death, is not revived by the fact of death. Some states have adopted statutes which provide in effect that the time which elapses between death and the granting of "letters" (sec. 1187)—during which interval the estate

cannot sue nor be sued—must be added to the statutory period. Other states provide a specific time after death which must be added to the statutory period. In New York, for example, the statute provides that if a person who has a cause of action dies before the statute of limitation expires, and the action is not of a type which dies with the person, the es-

STATUTE OF LIMITATIONS

Maximum Periods for Commencing Suit in New York

Period (years)	Type of Action
40	Action by State, or by grantee from State, affecting real property.
20	Action on judgment of court of record (for example, action in New York on judgment procured in an Illinois court of record). Action on judgment of court not of record but docketed in County Clerk's office (for example, action on judgment in Justice of the Peace Court which has been docketed in County Clerk's office). Action for dower (within 20 years from death of husband).
15	Action by individual to recover real property adversely held (sec. 1041) by another. Action by owner or someone claiming under him to redeem real property from foreclosed mortgage on ground that owner was not barred by foreclosure proceedings.
10	Action for which no other limitation is expressly prescribed by statute. (This includes many actions in equity, such as actions for specific performance, injunction, partition, reformation of an instrument, and so on.)
6	Action on bond or mortgage. Action on contract obligation or liability, express or implied, sealed or unsealed, except judgments (for example, actions on debts and open accounts, breach of contract, promissory notes, checks, and so on). Action to recover on a statutory liability (except a penalty or forfeiture). Action to recover damages for personal injury not arising out of negligence (for example, nuisance). Action to recover chattel ("replevin"). Action to procure judgment on ground of fraud. (Period does not begin to run until discovery of the fraud.) Action to establish will. (Where will has been lost, concealed or destroyed, period does not begin to run until discovery of the facts.) Action on judgment in court not of record, unless docketed in County Clerk's office. Action by or on behalf of corporation against director, officer, or stockholder for an accounting (except as to waste or injury to property), or on fraud, or for penalty or forfeiture.
5	Action to annul marriage on ground of physical incapacity. (Must be commenced within five years from date of marriage.) Action for divorce. (Must be commenced within five years after discovery by plaintiff of offense charged.)

STATUTE OF LIMITATIONS (Continued)

Period (years)	Type of Action
3	Action against sheriff, coroner, constable, or other officer for nonpayment of money collected upon an execution. Action against constable upon any other liability incurred while acting in his official capacity, or for omission of an official duty, except an escape. Action upon statutory penalty or forfeiture (except where statute fixes a different limitation). Action against a director or stockholder of a moneyed corporation, or banking association, to recover penalty or forfeiture or to enforce liability created by statute or common law. Action against executor, administrator, or receiver, or against the trustee of an insolvent debtor, to recover a chattel, or damages for the taking, detention, or injury of such chattel. Action for personal injuries resulting from negligence. Action for property damage resulting from negligence or otherwise, except where differently prescribed. Action for violation of right of privacy (for example, for use of a person's name, portrait, or picture for advertising or trade purposes without his written consent). Action by or on behalf of corporation against director, officer, or stockholder to recover damages for waste, injury to property, or for an accounting in connection therewith.
2	Action for assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution, or malpractice. Action upon a statute for a forfeiture or penalty to the people of the State.
1	Action against sheriff or coroner upon liability incurred by him by doing an act in his official capacity or by the omission of an official duty (except nonpayment of money collected upon an execution, referred to in three-year group, above). Action against officer for escape of prisoner. Action for penalty given to a common informer who will prosecute for same. Action for libel or slander.

tate may bring suit within one year after the person's death, though the statutory period has expired in the meantime. The statute also allows additional time to sue where a prospective defendant dies. (See sec. 1377.)

However, executors and administrators (sec. 1181) need not hold up the administration of an estate until all possible statutory periods shall have elapsed. The law usually fixes a specified period (which may be shortened by advertising) within which creditors must present their claims if they wish to charge an executor or administrator with the assets of the estate. In New York, for example, the statute provides that if creditors do not present claims within a six months' publication period, or, if no notice be published, within seven months from the date letters were issued,

"the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such claim was presented."

The filing of a claim with an executor or administrator has the same effect as the commencement of suit: the statute stops running forthwith. (See sec. 99.)

Federal statutes: tax delinquencies. In addition to the state statutes of limitations, various statutory periods are provided by Federal law (sec. 1372). For example, the statute of limitations on Federal Income Tax assessments, or for a proceeding in court without an assessment, is three years from the date when the return was filed. The statutory period for a proceeding in court or for a *distraint* (seizure of personal property) *after* an assessment has been made is six years additional. In case of a false or fraudulent return, or no return at all, the statutory period is "suspended" (does not run).

Actions by or against states. Generally, states may invoke the statute of limitations in suits against themselves, but others may not invoke the statute of limitations in defending a suit brought by a state against them. "Since a state cannot be sued without its consent, a statute of limitations does not begin to run in its favor until it has consented to be sued." [28] Thus, if an audit of an estate's assets revealed $10,000 in Pennsylvania highway bonds which were in default over a considerable period, such period would not run in favor of the State unless it had consented to be sued.

Criminal prosecutions. Generally, time does not run against prosecutions for murder, kidnapping or embezzlement of public moneys. For other felonies, the period varies from three to five years. For misdemeanors, it is generally one or two years from the time the act was committed.

98. When statute of limitations starts to run. The period of the statute of limitations starts to run when a cause of action "accrues" (that is, when one's right to sue begins). This, in a debt action, is the date when the debt is due and unpaid; in an action on contract, when the breach occurs; in a fraud action, when the fraud was or should have been discovered; in a tort action (sec. 29), when the tort is committed.

Promissory notes. In an action on an ordinary promissory note (sec. 268) due at some future time, the statute starts to run, not from the date of the note, but from the date of its maturity.

Demand notes. A demand note (sec. 267) is due forthwith. The statute of limitations begins to run from the date of the note. This is the prevailing rule throughout the country.[29]

Open accounts. "An open account, within the meaning of the various statutes of limitation, is one in which some term of the contract is not set-

[28] 59 *Corpus Juris* 320.
[29] 10 *Corpus Juris Secundum* 744.

tled by the parties, or where there are current dealings between them, and the account is kept open because of some contemplated future dealings, whether the account consists of one or many items. The account must be mutual, open, and current between the parties in order that it may fall within the purview of the statute, and transactions treated by the parties as distinct from each other do not constitute an open running account."[30] In an action brought to recover a balance due upon an open account, the statute starts to run *from the date of the last item of the account* at the point where the continuity of the account has been broken and a final balance may be said to be due.

What constitutes break in continuity of account. A demand for payment constitutes a break in the continuity of an account current. In an action to recover a balance due upon a mutual open and current account, reciprocal demands between the parties for payment of the balances allegedly due are necessary to constitute a break in the continuity of such account, upon discontinuance of the usual transactions of business. Only then is the account so closed as to start the statute of limitations running. When that happens, the last item in the account draws to itself all prior items, and these will be barred only when the statute has run *against the last item.*[31]

A demand may take any form showing an intent to discontinue the account unless payment is forthcoming. For example, an oral demand, if properly proved, would be sufficient. So, of course, would a written demand. The commencing of a lawsuit would constitute such a demand. A statement showing the amount due, followed by refusal to extend credit until the balance is paid, would likewise be the equivalent of such a demand.

99. Suspending the statute of limitations. Factors which suspend the statutory period are: (a) disability of the plaintiff to sue (such as infancy or insanity) and (b) absence of the defendant from the jurisdiction so that he is not amenable to process. In the former case, it would be unjust to count time against one unable to sue, and in the latter, to wipe out a debt in favor of one who placed himself in a position where he could not be sued.

Claims by or against decedent estate. The filing of a claim with an executor or administrator suspends the running of the statute until the claim is finally determined in the surrogate's or probate court.

Example: A claim for medical services was filed with a New York executor. The executor rejected the claim. Seven years later the claimant sought payment by filing a petition for compulsory accounting. The executor contended that the claim was outlawed by the six-year statute of

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[30] 37 *Corpus Juris* 768-9.

[31] 37 *Corpus Juris* 865-6; *Green v. Disbrow,* 79 N.Y. 1, 13, cited with approval in *Minion v. Warner,* 238 N.Y. 413, 418-9; *Adams v. Olin,* 140 N.Y. 150.

limitations, but the court sustained the validity of the petition: the filing of the claim had suspended the statute.[32]

100. Tolling the statute of limitations. To "toll" the statute of limitations is to start it running all over again, though the entire period or some part of it has already run. Factors which will toll the statute are:

A written acknowledgment of the debt, from which the inference of a new promise to pay may be drawn. This revives the statute for the full period, starting with the date of the acknowledgment. But such acknowledgment must contain nothing inconsistent with the debtor's intention to pay. If it is accompanied by a refusal to pay, or by the contention, "The claim is outlawed, so you can't collect," or a declaration of unwillingness or inability to pay, or an offer to compromise, it will not toll the statute. The effect of a written acknowledgment in reviving the debt is not dependent on the presence or absence of consideration (sec. 1378).

Payment on account, either of principal or interest, from which a promise to pay the debt may be implied. Thus, payment of interest by the maker of a promissory note (sec. 280) tolls the statute anew against the *maker*[33] but *not against an indorser,* unless he has authorized or consented to such payment.[34]

101. Claims not barred by statute of limitations. Certain claims are not subject to the statute of limitations, including, among others:

(a) An action upon a bill, note or other evidence of debt circulating as money;

(b) An action brought by the Federal Government, or by a state, except where the government specifically prescribes a time limit (see page 46, forty-year period);

(c) Enforcement of an existing property right or lien (sec. 643). For example, if I own a diamond ring, your possession of it for more than six years will not defeat my title; or if I pledged it with you more than six years ago, you would still have the right to foreclose.[35]

(d) Federal Income Tax delinquencies, where a false or fraudulent return, or no return at all, is filed (sec. 97).

(e) Prosecutions for murder, kidnapping, or embezzlement of public moneys (sec. 97).

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[32] *Matter of Schorer's Estate,* 272 N.Y. 247.

[33] *Stevens v. Lord,* 84 Hun 353, aff'd 146 N.Y. 398.

[34] *McMullen v. Rafferty,* 89 N.Y. 456.

[35] *Conway v. Caswell,* 121 Ga. 254, 48 S.E. 956; *Pollack v. Smith,* 107 Ky. 509, 54 S. W. 740; *Townsend v. Tyndale,* 165 Mass 293, 43 N.E. 107; *U.S. v. Mercantile Trust Co.,* 213 Pa. 411; *Connecticut Mut. L. Ins. Co. v. Dunscomb,* 108 Tenn. 724; *Goldfrank v. Young,* 64 Tex. 432; *Roots v. Mason City Salt Min. Co.,* 27 W.Va. 483.

102. **Laches.** Where a person delays in bringing suit, but the delay does not equal the period of the statute of limitations, a court of equity may yet hold that the claimant was guilty of unreasonable delay in pursuing his remedy, and may thus bar the claimant by reason of such delay, or *laches.*[36] To plead *laches,* one must show that he has suffered some prejudice by the delay.

103. **Estoppel.** There are many cases where one wronged is not guilty of delay in seeking redress, yet is barred or *estopped* from bringing suit by reason of previous conduct. Estoppel thus operates as a bar to prevent a person from taking a position inconsistent with one he has previously taken, where such inconsistency will work an injustice to an innocent person who relied on the position previously taken.

Three kinds of estoppel are: (1) equitable estoppel, (2) estoppel by judicial record, (3) estoppel by deed.

(1) *Equitable estoppel* (estoppel *in pais*) is one raised against a person who, having taken a given position (by assertion, denial, or failure to speak when there was a duty to speak), will not be allowed to reverse his position in such a way as to injure a person who relied on the position previously taken. Examples are: agency by estoppel (sec. 553), partnership by estoppel (sec. 646) and corporation by estoppel (sec. 751).

(2) *Estoppel by judicial record* exists where a person sues on one theory on which a judgment is entered and later seeks to proceed on another theory contrary to the judgment. A judicial record "imports absolute verity, and all parties thereto are estopped from denying its truth."[37] For example, after a judgment is rendered, the facts established thereby may not be denied by any party to the action, except by way of appeal. Other examples: admissions by a party in court,[38] agreed facts upon the basis of which a trial is had, stipulations of counsel, affidavits made by a party to a judicial proceeding (which the affiant or party making the affidavit is not later allowed to deny).

(3) *Estoppel by deed* exists where a person recites certain facts, assurances or covenants in a deed, which he later seeks to dispute.

Example: I sell you a house, which I do not own. I give you a full covenant and warranty deed, in which I warrant, among other things, that I have title. You take possession. Later, I obtain actual title from the true owner, who gives me a deed so that I become the true owner. I then seek to eject you on the ground that I am now the true owner, and you

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[36] *Steinhauer v. Botsford,* 327 Ill. App. 296, 64 N.E. 2d 187.

[37] 21 *Corpus Juris* 1064.

[38] *New Jersey Suburban Water Co. v. Town of Harrison,* 122 N.J. Law 189, 3 A.2d 623.

are not. My ejectment proceedings would fail: I would be estopped by my prior deed from now disputing what I formerly warranted, namely, that when I sold you the property, I was then the true owner.

A person who invokes the doctrine of estoppel must show that he has been misled by the prior representation and that he will be damaged if the person who made it is permitted to reverse himself.[39]