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ENGLISH LEGAL LANGUAGE AND TERMINOLOGY

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I. CHARACTERISTICS OF ANGLO-AMERICAN LEGAL LANGUAGE

A. Text

1. *The Nature and History of the English Legal Language*

Language can be baffling. Words and phrases are forever evolving, and after a generation or two, a word can come to be used quite differently than the way our parents and grandparents used that specific term. Many circumstances influence the evolution of language. Words and descriptions must be found for new inventions and new institutions. English is the native tongue of many different countries, and legal usage has evolved in different ways in each English-speaking country. Many of the new terms and usages from several different legal cultures thus become available to all users of English legal language. English speakers borrow terms from other languages, and immigrant groups in English-speaking countries inject a healthy dose of new terms into their adopted societies. A peculiar brand of legal English is evolving within the European Union. One legal institution can come to have several designations or one term might come to have several meanings. For instance, what exactly is the "**Common Law**"?

First of all, in this course, we will discuss the "common law system" as opposed to the "civil law system." The common law system of jurisprudence is the whole system of law, including caselaw, statutes, codes and equity, which originated in England and was later applied and adapted in the United States and other countries of the English Commonwealth. In contrast, the **civil law** on the European continent descends from Roman Law.

Common Law has several other meanings used within the Anglo-American legal system:

- The "common law" signifies the law common to the whole jurisdiction as opposed to local or customary law, ecclesiastic law and merchant law. Originally this "common law" was the law administered by the royal courts in England, the King's law, common to the whole realm.

- The "common law" also means "case law" as opposed to statutory law. The common law is not set down in codes, statutes and regulations but found in the sum of binding precedents of actual court decisions. In American family law, for instance, we find **common law marriages,** i.e., marriages in which husband and wife share the rights and duties of spouses, not on the basis of a formal ceremony, that is, not **solemnized** in the ordinary way, but by virtue of an agreement between the partners, followed by cohabitation for a certain amount of time. **Statutory rape** is a crime on the basis of a

statute. Such a statute defines rape technically as any sexual intercourse between an adult and a minor, regardless of the minor's **consent**. The minor is conclusively **presumed** to be incapable of consent by reason of her **tender age**. The **statute of limitations** is a common expression referring to any law that fixes the time within which parties must take judicial action to enforce rights or else be **barred** from enforcing those rights. Virtually all actions at law have a **statutory time** beyond which the action may not be brought.

- Finally, the "common law" is also used as opposed to **equity**. Equity in Anglo-American countries is much broader than the concept of "*Treu und Glauben*" in German law. Equity is a complex system of law, formerly administered by its own system of courts. Equity developed as a separate body of law in England in reaction to the inability of the common law courts, in their strict adherence to rigid **writs** and **forms of action**, to offer a **remedy** for every **injury**. The King therefore established the court of **chancery**, the purpose of which was to administer justice according to principles of fairness in cases where the common law would give no or inadequate **redress**. In England and in most of the U.S., courts are no longer divided into common law courts and courts of equity. However, throughout the Anglo-American legal system, distinctions are made between **legal rights and remedies** (as determined by the common law) and **equitable rights and remedies**. For instance, **damages** is a typical legal remedy, whereas **specific performance** and **injunctions** are typical equitable remedies.

The English legal language is characterized by:

- Frequent use of common words with uncommon meanings;
- Tautologies;
- Loan translations;
- Use of Old English and Middle English words;
- French words not in the general vocabulary;
- Terms of art;
- Argot; and
- Latin terms.

Examples of each of these characteristics are included in this chapter under “B. Terminology.” Some of these attributes, such as terms of art, argot and frequent use of common words with

uncommon meanings characterize any legal language. Some characteristics are peculiar to the English legal language. For instance, the abundance of French and Latin phrases actively in use in the English legal language, tautologies and loan translations are hallmarks of the English legal language. These peculiarities result from historical events which took place in England centuries ago.

For over nine hundred years, users of English, French and Latin have vied with one another for dominance of the legal language. When England was conquered by French-speaking Normans in 1066, English had for a long time been a written language used for legal and governmental purposes. In the eleventh century, England's organized local government and strong central government carried out the project which was published as the **Doomsday** (or **Domesday**) Book in 1086. The Doomsday Book contained a record of the extent, value and occupation of the lands of the English King and his tenants. It systematized land-holdings and made England the most completely organized feudal state in Europe. Latin was also a universal and powerful language at this time and was and remained the written language of the law. **Acts, statutes, judicial proceedings** and **court decisions** of England were recorded in Latin until 1731. Around 1118 a work known as the Leges Henrici Primi (Laws of Henry I) was produced. This was a compilation of older materials written in English, which explained the customary and vernacular law of the local courts to the Norman sheriffs and lords in Latin, a language they could understand, in order to make the administration of justice more effective. Latin could be written by most people who could write at all and even the records of the lord of a manor, financial accounts, and court rolls were in Latin.

Although at the turn of the first millennium A.D., Latin was the universal written language, only the learned could speak Latin readily. Latin was inappropriate for **oral proceedings** and **debate** in courts. William the Conqueror and his successors had to decide if these oral legal proceedings should be carried out in French, the native tongue of the royal court and the administration, or in English, the language of the people and the legal tradition of the country.

French was not used as a legal language immediately after the Norman conquest in 1066. For about the first 100 years of Norman rule, English had a good chance of holding its own. The Normans sought to preserve for themselves the older rights and privileges of the English king, incorporated in the older local and central government institutions, and these rights and privileges were expressed in English. However, in 1166 King Henry II passed an act known as the **Assize**

of Novel Disseisin[1]. The Assize of Novel Disseisin gave to every man **dispossessed** of his land the right to seek a **remedy**, not in a local court administered and staffed by fellow landholders in the area, not in a church court, but in a royal court - a French-speaking court.

King Henry's **Assize of Novel Disseisin** marked the beginning of the **Common Law** - that is, the law common to all of the king's realm. The King's Assize granted rights and imposed duties equally on all citizens. The Assize was an exceptionally expedient instrument for the king. In the 12th century, all of England was strewn with greater or lessor lords with their own administration of justice. These local landowners as well as the church were constantly trying to increase their power and land-holdings. If one lord waged war on another and won, he would, of course, take over the lands of his defeated neighbor. After 1166, the defeated lord could take his grievance to the king's court and regain the land taken from him by violence. The waging of war among the lords was no longer profitable, and the King could remain the most powerful authority in the realm.

After the royal court became a popular forum for adjudicating disputes, the triumph of French law terms was secure. In all legal matters, the French element, the royal element, was modern, enlightened, and an improvement over the old, stagnant English element. Rights of the English people were secured in legislation and institutional regulations written in French. By granting the English people rights under his common law, the King controlled the power of the lords and of the church over the people.

Despite the general enthusiasm for the royal French element in legal matters, many people in England did not speak French. Participants in legal matters therefore utilized all three languages - French, English and Latin - in the administration of justice. In legal disputes, an **injured party** (**plaintiff**) and the **accused** (**defendant**) might **state their cases** and bring their **evidence** in English. The case would be **argued, tried** and **judgment rendered** in French and reported to the outside world in Latin. Then, the record of the court proceedings and decision in French had to be translated back into English to inform the parties of their rights and duties. As the law evolved, the language evolved, incorporating legal expressions in all three languages, all in active use. Sometimes for precision, sometimes for clarity, sometimes for emphasis and in the general bilingual fashion of the day, synonyms were joined to produce tautologies, or important

[1] An **Assize** is an ancient **writ** for the recovery of property. The **writ** is a court order to appear in court and answer to **charges** of the **plaintiff**.

expressions were translated directly from the Latin or French into English, producing loan translations.

As mentioned above, further characteristics of legal language include the use of terms of art - words having a precise, specific meaning in a special field and the use of argot. One secret to the professional use of the language is being able to distinguish terms of art from jargon. Some terms are debatable. General rules: terms of art should be used; throw out some of the verbal baggage; jargon should not be used outside the circle of professionals.

As a legal professional you will use language in a number of different situations. You will change your use of the language, depending on the situation you are in. You will talk to your clients in a different manner than to colleagues at a conference. You will write a letter to a client differently than you will write a memorandum to your colleague in the office. You will write the reasoning to a case decision differently than you will write a proposal for a legislative bill.

If you are referring to an English text before a German-speaking audience or translating an English text into German, you will run into some special problems. German law is different from English law, the institutions are different. No exact equivalent institution or translation for a word may be available in German. Use the untranslatable expression and explain similarities to existing German institutions and then the differences.

You should become sensitive to terminological problems when reading legal texts in English. Different areas of law use the same term with different meanings, e.g. "**domestic law**" can mean "family law" or "internal or national law" as opposed to foreign law. Furthermore, English law is different from U.S. American law or even Scots law. Different English-speaking countries use the same terms with different meanings or have different words for a certain legal institution, e.g., **judicial review; comparative negligence**, and **contributory negligence**.

B. Terminology - Characteristics of the language of the law

1. Frequent use of common words with uncommon legal definitions

action --	law suit
alien -	transfer property
consideration -	benefit to promisor or detriment to promisee

counterpart -	duplicate of document
executed -	signed and delivered
hand -	signature
infant	minor
instrument -	legal document
letters -	document authorizing one to act
master -	employer
motion -	formal request for action by a court
of course -	as a matter of right
party -	person contracting or litigating
plead -	file pleadings
prayer -	form of pleading request addressed to the court
presents -	this legal document
provided -	word of introduction to a proviso (a conditional stipulation)
save -	except
serve -	deliver legal papers
servant	employee
specialty -	sealed contract
virtue -	force of authority, as "by virtue of"
without prejudice -	without loss of any rights

2. Tautologies

breaking and entering	keep and maintain
deem and consider	maintenance and upkeep
final and conclusive	null and void
fit and proper	hue and cry
free and clear	aid and abet
give, devise and bequeath	mind and memory
goods and chattels	peace and quiet
had and received	will and testament
pain and penalties	to have and to hold

3. Loan Translations

All of these English translations of foreign legal terms have become terms of art or argot in the English legal language. "Mortmain," amicus curiae," and "lex mercatoria" also remain common as foreign language terms.

action on the case -	action sur le case
against the peace -	contra pacem
burden of proof -	onus probandi
civil death -	mors civilis
damage without injury -	damnum absque injuria
dead-hand -	mortmain
friend of the court -	amicus curiae
go hence without day -	aller sans jour
goods and chattels -	bona et catalla
have and hold -	habendum et tenendum; aver et tener
injury without damage -	injuria absque damno
last will -	ultima voluntas
law merchant -	lex mercatoria
next friend -	prochein ami
notwithstanding the verdict -	non obstante veredicto
on the pain of -	sur peine de
plead not guilty -	plaider de rien culpable

4. Old English and Middle English

You will come across these words frequently in your reading of legal materials. however, it is no longer considered good style to include them in modern legal writing.

aforesaid, aforementioned and forthwith

"here" words - hereafter, herein, hereof, heretofore

whatsoever, whensoever, wheresoever, whosoever

"said" and "such" used as adjectives

thence, thenceforth

"there" words - thereafter, thereat, thereby, therefor, therein, thereto, theretofore, thereupon

"where" words - whereby

witness, in the sense of testimony by signature or oath as in: "In witness whereof, I have set my

hand..."

witnesseth, Old English present indicative, third person singular form - meaning to furnish formal evidence

5. French words not in the general vocabulary

chose in action
demurrer
escrow
estoppel
esquire
fee simple
fee tail
indictment
laches
lien
quash
suit
tort
verdict
voire dire

6. Terms of Art

These are words having specific, precise definitions in a given area of law. The legal field abounds in terms of art and it is important to use the technical word in its proper context. You will also need to learn to distinguish terms of art from mere jargon or argot. Often a word which was at first argot becomes a term of art over the course of time. On the other end of the artful use of legal terms, you should know which terms, although at one time living terms of art, have now become archaic.

agency
appeal
bail
common counts
comparative negligence
contributory negligence
dry trust
eminent domain
felony
fictitious defendant
garnishment
injunction
judicial notice
last clear chance
letters patent
novation
stare decisis
tort

7. Argot

This term referred originally to the spoken language of street vagabonds and petty crooks in France. By extension, it has come to mean the language, spoken and written, that members of any social, occupational, or professional group use to communicate with one another. Argot covers a broad range of legal vocabulary from the almost slangy "horse case" to the almost technically precise "res ipsa loquitur." Although an expression that is considered to be argot fails to rise to the level of a term of art, it is a useful bit of shorthand for presenting ideas that would ordinarily need lengthy explanations. For example, the phrase "case on all fours" means a reported case in which the facts and law are so closely similar to the one to be decided as to be indistinguishable from it. The intended audience should be the primary concern of a lawyer in deciding which words to use to express himself intelligibly. The shorthand phrase, useful as it is to lawyers, remains obscure to virtually all lay persons and should be explained in all written and oral discourse with clients and other interested lay persons.

alter ego
argumentative
at issue
Blackacre / Whiteacre
case at bar
cause of action
clean hands
cloud on title
four corners of the instrument
on all fours
instant case
pierce the corporate veil
prescriptive right
raise an issue
reasonable person
res ipsa loquitur
stale claim
toll the statute
time is of the essence
well settled
without prejudice

8. Latin Terms

Latin terms crowd standard law dictionaries. Some of the Latin found there has become an accepted part of the English language, and a large part of law dictionary Latin is no longer in active use. However, there remains enough of distinctive Latin in the working law vocabulary to make its own mark on the language of the law.

affidavit
alias
alibi
bona fide
caveat
certiorari
Curia advisari vult (Cur. adv. vult)
ex parte
habeas corpus
in re
lex fori
mandamus
mens rea
nolle prosequi (no. pros.)
obiter dicta
pari passu
per capita
per stirpes
prima facie
proviso
quantum meruit
quorum
ratio decidendi
res ipsa loquitur
respondeat superior
stare decisis
status quo
subpoena

C. Review and Discussion

1. Which characteristics are typical of any legal language?

2. To say that legal language is characteristically technical and precise on the one hand but characteristically vague and ambiguous on the other hand appears to be a contradiction. Please discuss.

3. Which characteristics are distinctive of the English legal language?

4. Why do tautologies remain alive in a language? Should tautologies be avoided?

II. LAW AND LANGUAGE

A. Texts

1. Pitfalls and Pratfalls in Legal Usage

In your use of legal English, in particular, in your use of terms of art, that is, words having a precise and specific meaning in the legal field, you will want to avoid falling into the pits of unintelligible and improper usage or taking a pratfall. You also need to separate and discard verbal baggage and to recognize the difference between argot and terms of art.

However, lawyers are "**word mongers**." A "**monger**" is a trader or dealer. Lawyers discuss, argue and define, they twist and turn definitions of terms until the most obvious meaning becomes preposterous and the most absurd meaning suddenly seems reasonable. Word-mongering, though, is a necessary activity in the practice of law. We all strive to gain a superior command of the language and to use it effectively, and we are deeply satisfied if we have succeeded in communicating our insights and knowledge of the law effectively to our clients, colleagues or the court. By identifying typical pitfalls in legal language usage, we can avoid some of the more embarrassing pratfalls. We can present, explain, and argue our causes not only convincingly but also coherently. We are able to draft contracts that will withstand the close scrutiny of the court. Some pitfalls of legalese are:

Semantic ambiguity;
General and vague terms;
Over-specificity;
Solemnity of form;
Words that are obsolete in common usage, still in use in the legal language;
Syntactic ambiguity;
Terms giving rise to emotional effect; and
Too many choices.

Semantic ambiguity refers to the use of indistinct or obscure expressions or use of words that can have more than one meaning in the relevant context. For instance, "day" in the sentence: "The package must be delivered on the day of April 17" could mean (i) after daybreak and before nightfall, (ii) during the working hours or (iii) within the 24-hour period from midnight of April 16 to midnight of April 17. Another example: does a "vehicle" include (i) a bicycle, (ii) a trailer

(a) attached or (b) not attached to a car, (iii) a parked car?

General and vague terms run rampant in legal terminology. Anglo-American law contains innumerable references to "**the average man on the street**," "**morality**," and "**reasonableness**." Is a person's fist or foot, with or without a shoe, a "dangerous" weapon"?

To overcome semantic ambiguity and vagueness, terms can be defined and inclusions enumerated. For instance a "small lobster" can be defined as "a lobster 9 inches or less, measured from the tip of the beak to the end of the shell of the center flap of the tail when the lobster is spread as far as possible flat." However, such attempts too often become ***over specific***. The intention to lend certainty and stability to a law, statute or contract fails because it is not possible for a definition to limit the concept in all directions. The legal document is faulty because specific eventualities that should have been included are omitted. The drafters of the instrument failed or were unable to contemplate every possible circumstance or foresee every invention.

In addition to being overly specific, legal drafters use ***solemn forms*** and ***obsolete terms*** to lend stability and certainty to the law. Solemn forms are the most technical words in legal language and are used to give effect to a particular legal transaction. Formerly, the law would not permit words of equivalent meaning to be substituted. For instance, such formulas as "Know all men by these presents" (meaning "this legal document") or "In testimony whereof, I have hereunto subscribed my name and affixed my seal, this 21st day of September, in the year of our Lord, one thousand nine hundred and ninety six." (meaning "signature: ....., date: ....., seal: ....." were formerly used to execute a document. Courts, legislators, or two parties to a contract have used the same words in the same context with the same meaning since time immemorial. Once a term is fixed in meaning and this construction of the term is found to be useful, it will be used over and over again in the exact same manner. The fixed meaning lends certainty, stability and foreseeability to the law and enables the interpreters of the law to treat like cases alike and unlike cases differently.

As mentioned above, however, legal drafters also make ample use of vague and general terms. Whereas formal and specific terminology lends certainty to the law, vague and general terms allow judges and lawyers to interpret the words of the law to fit the individual case and thus come to a just and fair decision. General and vague terms enable and encourage the growth of the law to meet new situations as society changes and new needs arise. The **German Civil Code** and the

U.S. Constitution remain legal documents suitable to solving the problems of modern society because of the abundance of general clauses in these instruments that allow the necessary flexibility in their application to new problems in new times.

Syntactic ambiguity is ambiguity at the sentence level. Sometimes the writer misplaces words or fails to indicate what a word or phrase refers to, so that the reader becomes confused or the sentence can logically have more than one meaning. Sometimes subordinate clauses are misplaced so that it is not clear which words the clause is supposed to modify. Conditionals can be ambiguous if they contain both "and's" and "or's."

Legal drafters can make use of several techniques to overcome syntactic ambiguity. The technique of using "the said," "aforesaid," etc. is no longer considered to be good legal style and should be avoided. It is better to use "this," "that," "it," "she" always with a clear, single-phrase antecedent. Also, the drafters should write short sentences and arrange clauses in an appropriate order to make the sentence clear. Further guidelines for clear legal usage are discussed in Part III of this manuscript.

Another pitfall of legal usage is the inappropriate use of terms that have an unintended ***emotional effect*** on the audience. Consciously substituting a new term for ones that have become laden with ***emotional effects*** and negative connotations shows a sensitivity to changing times, changing contexts and changing linguistic meanings. Sometimes, as is currently common in the United States, groups of people will select a name or denotation that they feel defines their identity accurately, e.g., "Blacks," "Afro-Americans," and "Hispanics." These names should be respected and used.

However, euphemisms as soft and unobjectionable terms substituted in place of harsh or objectionable ones can be unnecessarily mealy-mouthed, roundabout and clumsy. Euphemisms can also be cynical and obscure, such as the phrases "residential establishment where education is provided" instead of "jail for criminal offenders under 18," or "nuclear incident" instead of "nuclear catastrophe," or "revenue enhancement" instead of "tax increase."

Finally, certain areas of law, such as **property law,** seem to offer an inordinate amount of choices in language usage. In addition, many of the terms denoting some legal **interest** in property can be used as either a noun or a verb, e.g., **mortgage** (*Hypothek* or *mit einer Hypothek belasten*), **charge**, **lease**, **let**, **rent**, and **loan**. Some of these terms used as verbs can also be used

in a double sense to express an act of either giving or taking, e.g.: to lease to, to lease from, to rent to, to rent from, to hire to, to hire from. Whereas some of the terms are synonymous and used everywhere in the English-speaking world with equal frequency, others, although synonymous, are used more frequently in one country or another. Some terms have come to refer more often to **real property**, while others usually refer to **personal property**. The usage of these words is currently being influenced by advertising and modern business practices, e.g., "rent a car" or "leasing."

2. The Coexistence of the English and Scots Legal System

The United Kingdom is a unitary state which is made up of the island of Great Britain, i.e., England, Scotland and Wales, and Northern Ireland. The Channel Islands (Jersey, Guernsey, Alderney and Sark) and the Isle of Man are separate dependencies of the British Crown.

England has claimed a lordship over Scotland for the last nine centuries. However England and Scotland remained independent Kingdoms, even when they were linked by a personal union of the Crowns when James VI of Scotland succeeded to the throne of England as King James I in 1603. Political unification of the two countries didn't follow until 1707. At that time the **Treaty of Union** was enacted. The Treaty and subsequent Acts of Union created a single parliament for both countries.

But up to this day, Scots law and English law differ in form and substance. The separate evolution of the two legal systems, both before and after Union, has resulted in different principles, institutions and traditions. In the 16th Century, Scotland joined France and Germany in the reception of Roman Law. Although in modern times Scots law has been greatly influenced by English law, it is still based on principles of Roman or Civil law, on Canon rules and rules of its own feudal or customary law origin. In spite of the existence of a common Parliament for England and Scotland for over 275 years there has been no assimilation of the legal systems of the two countries. Scotland has its own set of courts operating its own law.

In spite of these distinctions, the two systems have had to co-exist within the United Kingdom under one Parliament.

Statutes make some provisions only for England, some only for Scotland and some provisions

which apply to both countries.

The courts co-exist with one another to some extent by applying **private international law** or, better in this context, **conflict of laws** rules. This is not so strange as it may seem at first. The 50 states in the United States of America each has its own legal system and the courts in one state apply conflict of laws rules for disputes that involve some "out-of-state" elements, e.g., when the **residence** of a party to the action is in another state or the **cause of action** arose in another state.

The House of Lords is the ultimate court of appeal in civil matters for both Scotland and England. Two of the **Lords of Appeal Ordinary** are usually Scots lawyers, sometimes there is one from Northern Ireland, and the remainder are English. While the House does apply Scots law in Scottish appeals and English law in English appeals, the fact that the same people are hearing the cases does tend to reduce the differences between the two systems. The decisions of the House in Scottish appeals are, of course, **binding** on all Scottish courts. In English appeals, decisions of the House of Lords on principles of general **jurisprudence** or on the **construction** of a U.K. statute are given great weight by the Scottish courts, but they are not binding unless (i) the **point in issue** is based on legislation which has equal applicability in both courts, or (ii) the House itself states that the decision is to be binding and have the same legal significance in both countries.

A few courts are United Kingdom courts rather than English or Scottish courts, especially in **company law**, **employment law** and **consumer protection**.

English is the official language in both England and Scotland, and there is no great difference between the legal languages of the two countries. However, discrepancies do occur, and the careful reader should be aware of whether the author is Scots or English. For instance, where English law uses assignment, defendant and arbitrator, Scots law uses **assignation**, **defender**, and **arbiter**. Other Scots terms in use until recently have now been supplanted by English terms, e.g., Old Scottish ("OS") **testament** for English ("E") **will**, OS **security** for E **mortgage** or **charge**, and OS **tack** for E **lease**.

B. Terminology

1. Do you agree that lawyers are word mongers?

2. Provide short definitions for the following terms.

mortgage
security
loan
mortgagor
debtor
mortgagee
creditor
charge
loan
lend
borrow
rent
hire
bail
let
lease

hire purchase
credit sale
leasing contract
bailment
bailor
bail
bailer
lessor
lessee

C. Review and Discussion

1. Discuss inherent features of language that create difficulties for the law.

2. Discuss the importance of modern languages.

III. GUIDELINES FOR CLEAR AND EFFECTIVE USE OF LEGAL LANGUAGE

1. Use short sentences.
2. Put parts of each sentence in a logical order.
3. Avoid intrusive phrases and clauses.
4. Untangle complex conditionals.
5. Use the active voice.
6. Use verb clauses and adjectives instead of nominalizations.
7. Use the positive unless you want to emphasize the negative.
8. Use parallel structure.
9. Avoid ambiguity in words and sentences.
10. Choose vocabulary with care.
11. Avoid noun strings.
12. Eliminate redundancy and extraneous words; avoid over-specificity

Guideline 1: Write Short Sentences

***Poor**:*

Where, upon the trial of such a case as is indicated above, there was evidence from which the jury was authorized to find that the defendant's agent went to the plaintiff's home and knowing that she, a child of 11 years of age, was at home alone, attempted to gain entrance to the home for the announced purpose of repossessing a television set, and when the child refused to admit him by the front door that he went to the rear door and wrote a note which he exhibited to the child through a window of the door and in which he threatened to go for the police and have her put in jail if she did not admit him so that he could take possession of the television set, and that the child became so frightened by this threat that she became extremely nervous, fearful of leaving the house, and unable to sleep at night, the jury would be authorized to find that the conduct of the defendant's agent, who was acting within the scope of his authority, was willful misconduct under the circumstances, and that the child's resulting nervousness and distress was a natural and probable consequence of such willful misconduct.

Rewrite:

Guideline 2: Put the parts of each sentence in a logical order

***Poor*:**

Whether or not the method of gathering data would be objectionable to the reasonable person is the question that must be asked by the court.

Rewrite:

Guideline 3: Avoid intrusive phrases and clauses

***Poor*:**

In light of the prevailing jurisprudence, including that of the District of Columbia, contrary to our position that the district court should look to District of Columbia law (jurisdiction where the action arose), I conclude that a summary judgment motion relying on the applicability of the limitations provisions of the forum state (Maryland) is more likely to succeed than one relying on the law of the state in which the action arose.

Rewrite:

Guideline 4: Untangle complex conditionals

Poor:

Where a contract is made for the satisfaction of a preexisting contractual duty, or duty to make compensation, the interpretation is assumed in case of doubt, if the pre-existing duty is an undisputed duty either to make compensation or to pay a liquidated sum of money, then only performance of the subsequent contract shall discharge the pre-existing duty; but if the pre-existing duty is of another kind, the subsequent contract shall immediately discharge the pre-existing duty, and be substituted for it.

***Rewrite*:**

Guideline 5: Use the active voice whenever possible

***Poor*:**

An official file shall be established for each client. To the extent that retained copies of documents do not represent all significant actions taken, suitable memoranda or summary statements of such undocumented actions must be prepare promptly and remained in the file.

Rewrite:

Guideline 6: Use verb clauses and adjectives instead of nominalizations

***Poor*:**

The appellee and W. C. Frederick entered into a contract for the delivery of ice by the appellee to Frederick and, before the expiration of the contract, Frederick executed an assignment of the contract to the appellant; and on the refusal of the appellee to deliver ice to the assignee it brought an action on the contract against the appellee.

***Rewrite*:**

Guideline 7: Use the positive unless you want to emphasize the negative

Poor:

- A will shall not be valid unless it is signed by two witnesses.
- There are few lawyers who would not agree that there are situations where "it is more important that the applicable rule of law be settled than that it be settled right."

***Rewrite*:**

Guideline 8: Use parallel structure

***Poor*:**

Upon vacating, the Tenant agrees to pay for all utilities services due and have same discontinued; to see that the property is swept out and all trash or other refuse is removed from the premises; that the doors and windows are properly locked or fasted; and that the key is returned to the Landlord or Agent.

***Rewrite*:**

Guideline 9: Avoid ambiguity in words and sentences

***Poor*:**

- No person shall be a representative who shall not have attained to the age of 25 years, and been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.
- This tax credit may be claimed by any corporation or any limited partnership engaged in interstate commerce which has reinvested not less than the greater of $ 100,000 or 5 percent of its total gross income during the taxable year.

***Rewrite*:**

Guideline 10: Choose vocabulary with care

***Poor*:**

KNOW ALL MEN BY THESE PRESENTS

That the undersigned, individually and as parents or guardians of John Smith, a minor of the age of 12 years, residing at 1800 Oak Street, for and in consideration of the sum of Eight Thousand Dollars lawful money of the United States of America, to them in hand paid for and on behalf of said minor, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever discharge Asa Luntz from any and all claims which are a result of a certain accident or event which occurred on or about June 5th, 1980, at 4700 Chestnut Street.

***Rewrite*:**

Guideline 11: Avoid noun strings

***Poor*:**

The Supreme Court held in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), that the state could prohibit attorney in-person client solicitations.

Rewrite:

Guideline 12: Eliminate redundancy and extraneous words; avoid over-specificity

***Poor*:**

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the aforesaid order and of the previously issued amendments thereto; and all of the said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

***Rewrite*:**

IV. ORGANIZATION OF THE JUDICIARY IN THE UNITED STATES

Federal	Federal (special)	State	State (local)
Supreme Court	U. S. Court of Federal Claims	appeal courts of final review	municipal courts
Courts of Appeals	Court of International Trade	appellate courts	small claims
District Courts	U. S. Tax Court	trial courts	probate, juvenile and family courts
	U. S. Bankruptcy Courts		insolvency courts
	Military Courts (trial and appellate)		justices of the peace
	Court of Veteran Appeals		traffic courts
	Fed. administrative agencies and boards		police courts

A. The Court System

An understanding of the court system of the United States proceeds from an understanding that each of the fifty states of the United States (as well as the U.S. territories) has its own court system as well as its own body of procedural statutes, rules, and caselaw that govern the conduct of litigation in its courts. The federal courts form a further and distinct court system in the United States and are governed by a common set of procedural rules, the **Federal Rules of Civil Procedure**.

The federal and state court systems are made up of trial courts, intermediate appellate courts and an appeals court of final review (e.g., the U. S. Supreme Court). Access to the appeals courts of

final review is usually not of right but rather appeals are heard at the discretion of those courts. In addition, the federal and state court systems have courts with **special jurisdiction** to hear cases concerning specific subject matters or controversies.

1. The Federal Courts

Article III of the United States Constitution addresses the organization and powers of the judiciary. Article III expressly establishes only the **Supreme Court** and leaves it up to Congress to establish inferior federal courts or a court system. Starting with the **First Judiciary Act of 1789**, Congress began creating the federal court system as we know it today. The United States is divided into thirteen federal jurisdictions which are known as **circuits**. In each circuit there is a **Federal Court of Appeals** which hears appeals from **federal district courts**.

The federal court system thus consists of district courts, which are trial courts of **original jurisdiction**, circuit courts of appeals and the Supreme Court. In addition, the U.S. Congress has authorized the creation of courts of specialized jurisdiction which have **exclusive jurisdiction** over certain claims arising out of decisions of federal administration agencies. For example, the **U.S. Court of Federal Claims** has jurisdiction over a variety of claims against the U.S. government, including most claims for monetary damages, disputes over federal contracts, and unlawful taking of private property by the federal government. The **U.S. Court of International Trade** reviews a variety of Federal administrative agency decisions on customs and other international trade-related matters.

a. District Courts

There are ninety-four district courts in the United States. Each court has a geographic territory covering either a state or part of a state. The District of Columbia and Puerto Rico also each have a district court. Federal courts have **limited subject-matter jurisdiction**, i.e., their jurisdiction must be specifically authorized by federal statute. District courts have jurisdiction over disputes that arise under the United States Constitution or federal statutes. In addition, they often hear disputes arising under state laws when the case involves parties of **diverse citizenship** and where the amount in controversy exceeds $75,000. The existence of a question of federal law in a claim can also establish jurisdiction of a federal court.

A federal court must have **personal jurisdiction** over the parties and subject-matter jurisdiction over the controversy. Also, the district in which the court sits must be the proper forum for the action or "**venue**." Venue statutes have been enacted to ensure that cases are heard in convenient geographic locations. Under the general federal venue provisions, an **alien** may be sued in any district of the United States. The Federal Rules of Civil Procedure authorize federal district courts to exercise jurisdiction over any foreign defendant in a case arising under federal law to the extent that the exercise of jurisdiction is consistent with the Constitution of the United States and the defendant is not subject to the jurisdiction of any state

Unless another federal statute provides otherwise, a civil action based on **diversity jurisdiction** may be brought only in: (i) a venue, i.e., a judicial district, where any defendant resides if all defendants reside in the same state; (ii) a venue in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the action is situated; or (iii) a venue in which any defendant is subject to personal jurisdiction at the time the action is commenced if there is no other district in which the action may otherwise be brought.

Federal district courts also have what is commonly referred to as "**removal jurisdiction**." Under the removal jurisdiction statute, if a case that is originally brought in a state court could have also been initiated in a federal district court (i.e., a state and a federal court have **concurrent jurisdiction**) that case can be removed from the state court to the federal district court. Any civil action of which the district court would have federal jurisdiction may be removed without regard to the citizenship of the parties. Any other action, such as one over which the district court would have diversity jurisdiction, may be removed from a state court only if none of the defendants is a citizen of the state in which the action is brought. Actions against foreign States may also be removed by the foreign State to the district court sitting in the state.

Only defendants may remove cases from state courts, and there is no corresponding procedure for removing cases in the federal courts to state courts.

b. Courts of Appeals

As mentioned above, the district courts are organized into thirteen judicial circuits, each of which has a court of appeals that reviews decisions of the district courts in its circuit. Twelve circuits are regional and one circuit covers federal claims. The U.S. Court of Appeals for the Federal

Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

The courts of appeals have jurisdiction over appeals from all final decisions or judgments of the district courts of the United States and its territories. Ordinarily, a decision is final only if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. The district court's order must be final as to all parties in the action and all claims.

c. The Supreme Court

The U.S. Supreme Court has very limited original jurisdiction. The bulk of its appellate jurisdiction arises from two principal types of appeals. First, the Supreme Court may review decisions of the Federal circuit courts of appeals by either (1) **writ of certiorari** upon the petition of a party or (2) by **certification** by a court of appeals of a question of law on which instructions are desired. Second, the Supreme Court may by writ of certiorari upon the petition of a party review final judgments or decrees rendered by the highest court of a state if the validity of a United States treaty or statute is at issue or if the validity of the state statute is in question on the ground that it is contrary to the United States Constitution, or treaties, statutes, or laws of the United States.

This second type of appeal is known in the United States as **judicial review**. In general, judicial review is the power of courts to declare legislation contrary to "higher law," or as "unconstitutional." The notion that courts can exercise judicial review and function as the guardian of the constitution or basic law of a State developed in Europe during the Enlightenment together with the rejection of the idea that enacted law is inviolable. One of the first statements of a type of judicial review was made in England in 1610, when **Sir Edward Coke** decided in **Dr. Bonham's case** that an Act of Parliament violated basic principles of the Common Law. England ultimately rejected the principle of judicial review in this form and established the principle of the **Supremacy of Parliament**. Nevertheless, the idea of judicial review found its way to the British colonies in America and was practiced by several colonial courts.

Despite the practice of colonial courts, judicial review was not positively established in the U.S. Constitution. Nowhere does the Constitution explicitly give courts rather than Congress the ultimate power to decide that a given statute conflicts with the Constitution. Rather, the Supreme Court determined itself in 1803 in *Marbury v. Madison* that courts enjoyed the power of judicial

review. Two other related "Great Principles" were established in the *Marbury v. Madison* decision, namely, that the Constitution is the "Supreme Law of the Land" and that the original jurisdiction of the Supreme Court cannot be changed by a simple law of Congress, since that jurisdiction is specifically limited by the language of the Constitution. *Marbury v. Madison* has become known as the **Rib of the Constitution.** The case is still frequently cited not only by courts in the United States, but by courts in all countries where the scope of judicial review is a relevant issue, including Italy, Japan, India, and Germany.

d. The U.S. Court of International Trade

The U.S. Court of International Trade is a federal court having jurisdiction over any civil action against the United States arising from federal laws governing import transactions. The court also has jurisdiction to review terminations as to the eligibility of workers, firms, and communications for adjustment assistance under the federal Trade Act. Civil actions commenced by the United States to recover customs duties or for certain civil penalties alleging fraud or negligence are also within this court's exclusive jurisdiction.

2. State Courts

State Courts are courts of **general subject-matter jurisdiction**. That is, assuming that the matter has not been committed exclusively to the federal courts by statute, state courts may exercise jurisdiction over any legally cognizable claim if the State legislature has authorized the courts to exercise personal jurisdiction over the parties and if the exercise of jurisdiction is consistent with the United States Constitution.

For a defendant to be subject to the general jurisdiction of the court, the defendant must have sufficient "continuous and systematic" contacts with the relevant forum or territory to make the exercise of jurisdiction reasonable. Courts may also exercise "specific jurisdiction" over defendants with respect to specific claims or causes of action. The exercise of specific jurisdiction requires that the claims against the defendant arise out of the defendant's contacts with the forum.

Each state also has a set of statutes setting forth the circumstances in which their courts may exercise jurisdiction over nonresident defendants. These statutes are commonly referred to as "**long-arm" statutes,** which refers to the catch-phrase *the long arm of the law*. Such statutes typically are drafted so as to allow jurisdiction over nonresident defendants to the extent

permissible under the U.S. Constitution. Theses statutes vary from state to state. For instance, § 410.10 of the California Civil Procedure Code provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

The relevant long-arm statute of New York is § 302 of the New York Civil Practice Law and Rules which provides:

> "**(a) Acts which are the basis of jurisdiction.** As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state."

These state long-arm statutes also serve as one of the traditional bases of federal jurisdiction by virtue of their incorporation into the jurisdictional provisions of Rule 4 of the Federal Rules of Civil Procedure. Each federal district court in effect is authorized to "borrow" the personal jurisdiction statutes of the state in which it sits. The relevant provision of Rule 4 (Summons) states:

> "**(e) Service upon Individuals within a Judicial District of the United States**.
>
> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the state;"

In addition, numerous federal statutes creating causes of action, for example, for securities fraud,

specifically allow the exercise of personal jurisdiction in certain circumstances.

One of the most significant issues in American civil procedure is the determination of whether a case falls under the jurisdiction of a federal or state court. This problem is part of the more general problem of the distribution of state and federal power. Where a case can properly be brought in more than one court, the plaintiff will "shop around" to determine which jurisdiction is more apt to render a favorable judgment, a procedure know as **forum shopping**.

B. Analysis

1. Jurisdiction

Jurisdiction

> The **power** of the court to hear and determine a case. This power may be established and described with respect to particular subjects or to parties who fall into a particular category.

By transference of sense, jurisdiction has come to mean additionally the territory within which an authority may exercise its power; for example: "common-law jurisdictions" or "civil-law jurisdictions."

Concurrent jurisdiction

> Jurisdiction exercised by different courts at the same time, over the same subject matter and within the same territory, and where litigants may, in the first instance, resort to either court at their choice.

Diversity jurisdiction

> Jurisdiction in federal courts brought about by the fact that opposing parties come from different states.

Exclusive jurisdiction

> That power which a court exercises over an action or over a person to the exclusion of all other courts. Federal courts have original and exclusive jurisdiction over certain actions (e.g., disputes between two or more states) and concurrent jurisdiction with that of state courts in other action (e.g., actions between citizens of different states).

Federal Question jurisdiction

The jurisdiction of the federal courts arising under Article III of the U.S. Constitution allowing the courts jurisdiction over all cases arising under the Constitution, Laws, and Treaties of the United States.

General jurisdiction

Jurisdiction that extends to all disputes that may be brought before a court within the legal bounds of rights and remedies, as opposed to special or limited jurisdiction.

Limited jurisdiction

Has the same meaning as **special jurisdiction**. Jurisdiction of a court that is limited to specified types of cases as enumerated in statutes.

Original jurisdiction

The jurisdiction of a court to hear a matter in the first instance; for example, the U.S. Supreme Court has original jurisdiction to hear cases affecting ambassadors, other public ministers and counsels, and those in which a state is a party (U.S. Constitution Article III).

Personal (in personam) jurisdiction

Refers to the court's power over the parties involved in a particular lawsuit. The court can obtain in personam jurisdiction over the defendant as a result of the defendant's physical presence within the state or where a defendant's activity can be characterized as meeting the **minimum contacts** test: Minimum contacts include transacting business with the **forum state**, e.g., advertising within the forum, or accepting insurance payments from persons within the forum.

Forum is another expression for a court of justice or place of litigation. In Roman law the forum was the market place or public paved court in Rome where public business was transacted and trials, elections, markets, and public exchange held.

A **forum state** is one which, through one party's residence, domicile, presence, transaction of business, ownership of real estate, commission of a tort, or other reasonable relationship,

establishes a sufficient minimum contact for the court to exercise jurisdiction.

Special jurisdiction

See **limited jurisdiction**.

Subject-matter jurisdiction

Refers to the competency of the court to hear and determine a particular category of cases.

Territorial jurisdiction

Relates to the a court's power with regard to the territory within which the power is to be exercised and connotes power over property and persons within such territory. Jurisdiction, i.e., the authority of the court, is considered as limited to cases arising or to persons residing within a defined territory.

Venue

A neighborhood; place of trial or the possible or proper place or places for the trial of a suit, as among several places where jurisdiction cold be established. Jurisdiction deals with the authority of a court to exercise judicial power; venue deals with the place where that power should be exercised. Jurisdiction of the court means the inherent power to decide a case, whereas venue designates the particular county or city in which a court with jurisdiction may hear and determine the case. As such, while a defect in venue may be waived by the parties, lack of jurisdiction may not.

Controversy

A dispute. A controversy in the legal sense occurs when there are **adversaries** on a particular issue: an **allegation** on one side and a **denial o**n the other. Courts will only hear and resolve cases and controversies, i.e, there must be a concrete case allowing a definitive determination of legal rights of parties on alleged facts. Claims based merely on assumed potential invasions of rights are not enough to warrant judicial intervention.

Circuit

A circuit is the judicial divisions of a state or the United States; The phrase originally

referred to the practice of having itinerant court. State and federal judges in the U.S. commonly rode circuit or went on circuit, holding court in various locations, through the beginning of the 20th century. There are now thirteen federal judicial circuits in which the United States Courts of Appeal exercise appellate jurisdiction.

2. Sources of Law Establishing and Regulating the Judiciary

a. The United Sates Constitution

Federal courts were established by Article III of the United States Constitution, which states: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish...." From this constitutional mandate, Congress has passed Judiciary Acts, beginning in 1789, to establish federal district and circuit courts.

State courts have been established by the constitutions and laws of the individual states establish the 50 judicial systems of the states. The right of the states to establish and regulate their own courts is part of the guarantee of the Tenth Amendment to the United States Constitution, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

b. The Judiciary Acts

The Judiciary Article (Article III) of the U.S. Constitution grants to Congress the authority to ordain or establish inferior courts. The First Congress established such inferior federal courts under the Judiciary Act of 1789. Subsequent major judiciary acts include the Act of 1875 granting federal question jurisdiction, Act of 1891 establishing circuit courts of appeals and fixing the outline of the contemporary scheme of federal appellate review, the Act of 1911 enacting the **Federal Judicial Code** and the Acts of 1925 and 1988 further narrowing the scope of discretionary review by certiorari of the Supreme Court.

The Federal Judicial Code, comprising Title 28 of the **United States Code**, is concerned with the organization, jurisdiction, venue, and procedures of the federal court system.

The United States Code is a volume containing the positive law of federal legislation. These are arranged into fifty titles. Every six years a new edition of the U.S. Code is published with cumulative supplement volumes being issued during the intervening years. **The United States**

Code Annotated (U.S.C.A.) is a multi-volume publication which includes the complete text of the United States Code, together with case notes of stated and federal decisions which construe and apply specific Code section, cross references to related sections, historical notes, and library references.

c. The Federal Rules of Civil Procedure

Body of procedural rules which govern all civil action in U.S. District Courts and after which most states have modeled their own rules of civil procedure. These rules were **promulgated** by the U.S. Supreme Court in 1938 and have since been frequently **amended.**

3. Access to Courts of Appeals

a. "[N]ot of right but rather at the discretion of those courts."

"Access to appeals courts of final review is usually not of right but rather at the discretion of those courts" means that parties to a suit usually have only one instance of judicial review. The third tier of courts, i.e., the United States Supreme Court and the state appeal courts of final review, can decide whether they will accept a case for review.

b. Significance of Final Judgments.

A judgment or decision is final if a court has determined the rights of the parties and has disposed of all of the issues involved so that no future action by the court is necessary in order to settle and determine the entire controversy. A final judgment is one that can be enforced by the proper enforcement agencies. However, a final judgment can also be appealed to a higher court, taking the case into a further round of litigation.

If a judgment that is final cannot be appealed (because a fixed period for filing an appeal has lapsed or there is no higher instance that can or will accept the appeal) the judgment is said to be **res judicata** ("a thing adjudicated"). Res judicata is a rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. Because the terms "final judgment" and "res judicata" are sometimes used interchangeably, it is best to say "final and non-appealable" when the sense of ***Rechtskräftig*** is to be conveyed.

c. Writ of Certiorari and Certification

These are the two principal means by which the United States Supreme court accepts appeals at its discretion.

A **writ of certiorari** is an order issued by a superior court to an inferior court (in this context: by the Supreme Court to the Court of Appeals) commanding the inferior court to certify and return to the superior court the record of the particular case. Typically, a party initiates an appeal by filing a notice of appeal(or petition) that specifies the portion of the court judgment being appealed. If in its discretion, the Supreme Court decides to hear (**entertain**) the appeal, it issues the writ of certiorari so that it may inspect whether there have been any irregularities in the proceedings of the lower court.

Certification, generally, is a writing made in one court, by which notice of its proceedings is given to another court, usually by transcript. In our context, the court of appeals may certify at any time any question of law in any case for which instructions are desired. The power is that of the court of appeals and it is considered improper for the parties to move for certification. certification is limited to questions of law, and the questions must be distinct and definite.

4. Dual System of Courts in the United States Compared to the Unilateral System of Courts in Germany.

The dual system of courts or judicial power connotes two separate closed court systems operating independently of one another. In their three-tier systems, state courts adjudicate controversies, for which there is no appeal to a federal court. In other words, each state system has its own court of last resort that has the last word on what state law is. Only on issues of federal law, arising originally either in federal or state court, can it be said that there is the semblance of a unified single judicial system with one court, the United States Supreme court, serving as the court of last resort.

Unilateral court systems such as in Germany have only one court system that is three, or even four-tier, namely local, regional, and federal, with one federal court as the highest appellate court of review (the Federal Court of Justice, ***Bundesgerichtshof***). The unilateral system is appropriate for Germany because most of its law, i.e., procedural, civil, commercial, social, labor, and

criminal is federal law.

C. Review and Discussion

1. *Why is access to appeals courts of final review usually not of right but rather at the discretion of those courts?*

2. *What criteria does a court employ to decide whether to review a lower court decision?*

3, *Summarize the differences between the jurisdiction of state courts and that of federal courts.*

4. *Why is determination of proper jurisdiction important? What is the consequence of a judgment rendered by a court lacking proper jurisdiction?*

5. *Can a plaintiff choose the court before which it files suit?*

6. *On what bases can a defendant object to a court hearing a case?*

7. *When does a court look to a long-arm statute to exercise jurisdiction over a case?*

V. JUDICIAL PROCEDURE IN THE UNITED STATES

A. Overview

The term "judicial procedure" encompasses all acts of a court, from the beginning of the proceeding to its end.

1. ***Initiating an action / filing a complaint***: The party initiating the action, the plaintiff, summarizes the facts of the controversy and asserts a right.

2. ***Service of process***: The complaint and instructions of the court are delivered to defendant, *i.e.*, the party named in the complaint as being responsible for the violation of the plaintiff's right. The principle object of this delivery is to give the party to whom it is addressed notice of the proceeding. This party is thus afforded an opportunity to appear before the court and be heard by the court in the defense of its person, property and rights. Proper service on the defendant of the complaint and the summons to make an appearance must be made in accordance with special procedures, in order to charge that person with notice of receiving it.

3. ***Pleadings***: Pleadings refers to the allegations made by the parties to an action or proceeding for the purpose of presenting the issue to be tried and determined, whether the issue be one of law or of fact. Pleadings are designed to develop and present the points in dispute between the parties. The object of pleadings is to notify the opposite party of the facts which the pleader intends to prove so that the person sued is not misled in preparing its case.

(i) ***Complaint***: Sometimes also called a “statement” or "declaration" of claim, or "petition" and signifies the pleading by which the plaintiff sets out the **cause of action** and **invokes the jurisdiction** of the court. The complaint contains a statement of the facts necessary to state a cause of action in the plaintiff's favor and against the defendant, followed by a demand for relief to which the plaintiff claims to be entitled.

(ii) ***Statement of Defense***: In response to the complaint the defendant is allow to respond with a statement of defense, also called an "answer" or "plea." The purpose of the statement of defense is to bring forward whatever defense the

defendant may have and may wish to interpose in order to bar the plaintiff's claim, to raise issues against the plaintiff, and to develop all issues between the parties.

(iii) ***Reply***: The plaintiff usually has a right to respond to the defendant's answer in a pleading known as the "reply." The purpose of the reply is to deny allegations made by the defendant in its answer and to fortify the complaint by new facts rendered necessary by the defendant's pleading.

4. ***Depositions and Discovery***: Depositions and discovery are procedures by which the parties search out information on facts to be litigated as an aid to their preparation of a case or a defense. Parties may obtain discovery by oral examination of and written questions to witnesses, production of documents and things, permission to enter upon land or other property, and physical and mental examinations. By these means, the parties can narrow and clarify the basic issues in the case, ascertain facts, and obtain information as to the existence or whereabouts of facts. The parties are educated in advance of trial of the real value of their claims and defenses.

5. ***Motions***: A "motion" is an application by a party to a court for the purpose of obtaining a ruling or order. It is not regarded as an order. Motions generally relate to procedural issues. If discovery reveals that the parties do not dispute the facts of the case, and the only question to be decided is whether the relief sought is merited by law, one of the parties can make a motion for **summary judgment**.

6. ***Pretrial Conference***: A pretrial conference is held before a judge or the judge's referee by the parties or their counsel. The purpose is to shorten the time required to reach trial and the time required at trial. Typical issues considered at pretrial conferences are (i) simplification of the issues; (ii) amending the pleadings; (iii) obtaining admissions of fact thus avoiding unnecessary proof at trial; (iv) limitation in the number of witnesses to be called; and (v) any other matters which facilitate an expeditious disposition of the action. Pretrial conferences may also aid in the negotiation of a settlement between the parties.

7. ***Submission of Trial Briefs***

8. ***Trial***: A jury trial is a proceeding in which the jurors are the judges of facts and the court is the judge of law. When a jury is selected to hear a trial it is referred to as a trial or

"petit" jury (to distinguish it from a **grand jury**). When a case is tried by a judge alone, sometimes referred to as a "**bench trial**," the court makes findings of fact and conclusions of law in rendering its judgment.

(i) ***Jury selection / Impaneling the jury / voir dire examination***: "Impaneling" the jury is the process for selection of persons to serve on the trial of a particular case. Jury selection is conducted either by the court or the attorneys for the parties, depending on the jurisdiction, who examine and challenge the jurors. This opportunity to see and hear the jurors answer questions is known as the "voir dire" examination. After their selection, the jurors are **sworn in**.

(ii) ***Opening statements by counsel***:

(iii) ***Presenting evidence***

(a) ***Testimony of witnesses***

(b) ***Cross examination***

(iv) ***Parties "rest" their cases***: After the party with the burden of proof has presented all of its evidence, it is said to "rest," and the other party is given an opportunity to present its evidence and then rest. After each party has rested, counsel may make motions; for instance, counsel for the plaintiff may make a motion for a **directed verdict** based on unrefuted evidence or counsel for the defendant may **motion to dismiss** for plaintiff's failing to prove the case.

(v) ***Closing arguments***: If the case is not dismissed or a directed verdict is not ordered, counsel have an opportunity to make closing arguments.

(vi) ***Court instruction to the jury***: At the conclusion of trial, the judge instructs or "**charges**" the jury with respect to the law and their duty.

(vii) ***Jury deliberation***:

(vii) ***Verdict***: The jury's findings on the facts.

9. ***Judgment***: The court's determination of the case upon the verdict (the findings on the facts) and on the court's conclusion of law.

B. Pretrial Discovery and Judicial Confrontation between the U.S. and Europe

Pretrial discovery takes place after the complaint and initial pleadings have been filed, but before the trial or oral hearing is held. Discovery constitutes the backbone of American legal proceedings, because the pleadings filed with the court to initiate a civil action are not very extensive and only of limited value in defining the issues of the subsequent litigation.

The nature of discovery can be perplexing to a foreign lawyer. Just like the participation of the jury in a civil trial, discovery is deeply rooted in the history of Anglo-American law and in the mentality of the American population. Discovery has its historical roots in the pleadings of English equity, to which the plaintiff attached a questionnaire to be answered by the defendant. From these English "written interrogations" the practice developed in the United States for the parties to identify the issues of the litigation by means of a comprehensive mutual exchange of information prior to the trial.

According to the U. S. **Federal Rules of Civil Procedure**, discovery is an obligatory element of American civil procedure. It is essential for two reasons. First, the complaint is a short and plain statement of the grounds for complaint and a demand for judgment for relief with otherwise little meaningful content. The purpose of the complaint is to get the lawsuit started. After that, it is the task of discovery to define the issues, determine the facts and gather evidence. Discovery expedites litigation by educating the parties in advance of trial and allowing them to reevaluate their claims and defenses. This procedure encourages settlements and assures that judgments rest upon the merits of causes. Second, the trial itself is extremely concentrated. The trial must be conducted within a single block of time because of the defendant's right to a jury trial, and the jury cannot remain together indefinitely. Such a concentrated trial is feasible only when the parties have been able to prepare comprehensively beforehand.

A further element in the development of discovery is the adversary system of litigation in the United States. American civil procedure leaves it primarily up to the parties to gather the facts that are essential to substantiate the statement of claim and the defense. The court cannot order discovery measures on its own initiative, but rather the parties alone bear the responsibility for gathering information.

Discovery methods include:

- **Depositions upon oral or written questions:**

  written, audio-taped or video-taped testimony of a witness under oath, taken in question and answer form as it would be in court, with opportunity given to the adversary to be present and cross-examine the witness. Such statements are the most common form of discovery, and may be taken of any witness, whether or not a party to the action. Parties to an action may be required to give witness testimony under the same rules as any non-party witness. The strict limitations on party testimony as practiced in German civil procedure is unknown in the U.S.

- **Written interrogatories:**

  written questions from one party that are served on the adversary, who must answer by written replies under oath. Interrogatories can only be served on parties to the action.

- **Production of documents or things:**

  the request by one party, served on the other party to produce and permit the requesting party to inspect and copy any designated documents in its possession or control. The request must include the individual items or categories to be inspected and describe each with "reasonable clarity." Under special procedures laid down in Rule 45, a person not party to the action can be compelled to produce documents and things.

- **Requests for admission:**

  a device by which one party asks another for a positive affirmation or denial of material facts or allegations at issue.

  Permission to enter upon land or other property for the purpose of inspection or copying as well as physical and mental medical examinations are also allowed as pretrial discovery procedures.

German or other foreign businesses engaged in activities in the U.S. can become involved in a lawsuit pending in a U.S. court and be served with discovery requests by legal counsel of the opposing party. Legal counsel for these foreign clients must advise them whether such discovery requests must be answered. The proper advice to these clients will depend on whether the U.S.

forum has jurisdiction over the foreigner, and if not, whether the request has been made through the proper channels.

U. S. Federal and state long-arm statutes might provide the basis for jurisdiction of U.S. courts over foreign parties. Long-arm statutes allow courts to find that they have **personal jurisdiction** over foreign parties based either on **sufficient contacts** to the forum such as doing business in the state or on the presence of a subsidiary or parent corporation in the state. Federal courts may in some instances claim personal jurisdiction based on the contacts a party has with the entire United States when federal law claims are asserted and a federal jurisdictional statute is relied on.

If a U.S. court finds that it has jurisdiction over a foreign party, that foreign party must comply with discovery requests from the opposing party. If the foreign party refuses to comply with a discovery request, the requesting party can apply to the court for a **discovery order**. The court may enter a **default judgment** against a party if it refuses to comply with a discovery order. German courts will enforce a default judgment entered by the U. S. court for the defendant's failure to comply with discovery orders if the usual enforcement requirements under Section 328 of the German Code of Civil Procedure are met.

If a foreigner is not a party to litigation, but is named as a witness, U.S. courts can order depositions and witness testimony before the court only if the court has personal jurisdiction over the non-party witness, for instance on the basis of residency or sufficient contacts to the forum. If the court does not have jurisdiction over the witness, testimony can be taken only by the procedures set forth in the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (**Hague Evidence Convention)**. Article 1 of the Hague Evidence Convention provides:

> "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act."

German judicial authorities will not grant requests for deposing witnesses by legal counsel or for the production of documents. Witnesses must be **summoned** to a German court for examination. The German municipal court will apply German procedure unless special procedures are requested such as a literal transcription of the proceedings or cross-examination by legal counsel.

Aerospatiale[1]

In the 1970s, trading partners of the United States set their expectations for relief from U.S. discovery methods on the Hague Evidence Convention. These expectations were based on two considerations. First, they expected that it would be possible with the help of the discovery reservation in Article 23 of the Hague Evidence Convention to escape the clutches of U.S. courts on evidence located abroad. Article 23 of the Convention provides:

> "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries."

Second, the Europeans hoped that it would be generally accepted that U.S. courts might seek access to evidence abroad solely by means of the channels provided by the Hague Evidence Convention, regardless of whether the evidence is in the hands of a party or a non-party witness. When Germany ratified the Hague Evidence Convention in 1979 it declared - as did most other signatory states - that it will not execute a Request for pretrial discovery of documents. German lawyers reveled for a time in the illusion that United States courts must always apply the Hague Evidence Convention when requested documents were located in Germany or the party or witness resided in Germany.

Aerospatiale was a product liability case and concerned claims by persons injured in an airplane crash in Iowa. The airplane was produced in France and the two plaintiffs requested construction documents from the defendant French airplane manufacturer. The defendant was of the opinion that the documents were accessible only through the channels of judicial assistance on the basis of the Hague Evidence Convention. This was also the official point of view presented to the Supreme Court in **amicus curiae briefs** submitted by the United Kingdom, France, Switzerland and the Federal Republic of Germany

The Supreme Court was not impressed. The majority of the court decided that the Hague Evidence Convention served to facilitate the taking of evidence abroad. It does not change the internal procedural law of a Contracting State which obliges a party to bring evidence into the forum for the purpose of taking evidence. A general duty of the forum to try to gather evidence

[1] Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa; Supreme Court of the United States, 1987, 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461.

located abroad under the Hague Evidence Convention (first attempt rule) cannot adequately do justice to a number of cases. A court must use its discretion in deciding in a concrete case whether the Hague Evidence Convention procedures for taking evidence should have priority over the forum court's direct order for the production of evidence.

From an American point of view, judicial assistance through foreign courts solely in accordance with the Hague Evidence Convention embodies serious disadvantages when compared to the direct request for discovery as initiated by the parties. The disadvantages were enumerated in the 1987 Supreme Court decision in *Aerospatiale* (note 25):

> "The opposite conclusion of exclusivity would create three unacceptable asymmetries. First, within any lawsuit between a national of the United States and a national of another contracting Party, the foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that [m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947).
>
> Second, a rule of exclusivity would enable a company which is a citizen of another contracting State to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court. Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter.
>
> Third, since a rule of first use of the Hague Convention would apply to cases in which a foreign party is a national of a contracting State, but not to cases in which a foreign party is a national of any other foreign state, the rule would confer an unwarranted advantage on some domestic litigants over others similarly situated."

In summary, legal counsel for German clients confronted with a U.S. discovery request should advise: If a U.S. court finds that it has personal jurisdiction over parties to the dispute or over a witness, that foreign party or witness must comply with discovery requests from the opposing party or an order of the court. If the U. S. court does not have jurisdiction over the witness, testimony can be taken only by the procedures laid down in the Hague Evidence Convention in accordance with German procedural rules.

Conclusion:

It is not only a challenge to explain American civil procedure to Germans, but also to explain German civil procedure to Americans. For citizens of both countries, the administration of justice and the procedural law regulating the administration of justice is equal to the mandate and authority of the State to pass judgment on the citizens' actions. It is sacred ground. Citizens of one country may not be able to wholeheartedly embrace the procedures of the other legal system, but understanding the reasoning behind those procedural rules will enable parties and their legal counsel to respond constructively in the pursuit of just and practical resolutions of transnational disputes.

C. Review and Discussion:

1. What are major differences between the Anglo-American mode of trial and procedures in civil-law countries such as Germany

2. Discuss advantages and disadvantages of the adversarial trial as practiced in the United States.

3. Discuss "pretrial discovery."

VI. READING U.S. CASES

A. Publication of Court Decisions in the United States

The lawyer working within the U.S. legal system has at her disposal a comprehensive system of publication of the complete texts of all important court decisions of the federal courts as well as of the higher courts of the individual states. The Anglo-American legal system demands a comprehensive publication of all important decisions because the courts conclude the law in any present case through cases of precedent. The other primary source of Anglo-American law - statutes - must be interpreted by the court and a precedent established before an American lawyer feels secure that she knows what the statute really means.

The Doctrine of Stare Decisis: Binding Caselaw

The doctrine of stare decisis (*stare decisis et non quieta movere* - remain with the decision), and the whole complex of caselaw, developed only gradually. Although the origins of the doctrine can be traced back to the reign of Henry II (1154-1189), the strict rules governing the application of stare decisis and their strict observance resulted only at the end of the eighteenth and the beginning of the nineteenth century, when the orderly and consistent publication of court decisions in England and in the U.S.A. began.

The stare decisis doctrine is based on the principle that within the framework of proper jurisdiction, all courts are bound in their decisions by the decisions of the higher courts The decisions, or more precisely, the rules of law contained in the opinions of the court, must be followed regardless of ´whether the reasoning and decision appear correct or erroneous to the lower court. A decision is binding until: (i) it is overruled by a later decision of the same court; (ii) it is set aside by the decision of a higher court; or (iii) legislation is passed which changes the law.

Court Structure

In order to work with American caselaw, the lawyer must understand the structure and hierarchy of the state and federal court system as discussed above in Part I. A decision is binding only within a specific sphere of jurisdiction, i.e., federal courts are fundamentally bound only by the decisions of higher federal courts; state courts are bound only by the decisions of higher courts in their own state, but not by decisions of federal courts or courts of other states. There are,

however, some lateral ties. Insofar as the federal courts must apply state common law, the federal courts are bound by the interpretation of the respective state courts. On the other hand, the Supreme Court has the authority to declare the unconstitutionality of state law, which binds the courts of the relevant state.

Courts of appeal and appellate courts of final review in the United States are not bound by their own decisions, i.e., they can alter their caselaw.

Application of Precedents

The observation is often made that application of precedents is less a science than an art, or as Oliver Wendell Holmes once said: "The life of the law is not logic, it is experience." In applying the stare decisis doctrine, the full opinion of the court is by no means of significance as a source of law. Only the grounds upon which the decision is based, i.e., the grounds without which the case would have had to be decided differently, are considered the **ratio decidendi**. The ratio decidendi has a double nature. On the one hand, it is the rule according to which the present case is decided (**descriptive ratio**) and on the other hand, it is the rule which will be taken from the present case as a precedent for future decisions (**prescriptive ratio**). The ratio decidendi gives information on what contribution the decided case delivers to the **substantive law**. In order to derive the substantive rule, the opinion must be interpreted narrowly. The individual issues must be separated. Only the general rules of law upon which the decision is based and which are valid not only for the present case, but also for analogous or comparable cases, can be ratio decidendi. Every statement of the court that is not essential to the decision has no binding effect. All further-going and nonessential discussion in the opinion are **obiter dicta**.

Opinions of the Court

If the court is composed of several judges, each judge may give his or her own reasoning for the judgment. To differentiate are (i) **concurring opinions** and (ii) **dissenting opinions**. A concurring opinion is given by a judge when he concurs with the result of the **majority opinion** of the court, but not with the reasoning on every point. If several judges give concurring opinions, the different points of view, emphasis, and formulations can make the determination of the ratio decidendi very difficult. In some cases it must be recognized that no ratio decidendi can be derived from the decision, which might even possibly be the intention of the court.

A dissenting opinion is given when a judge does not approve of the decision itself. The

dissenting opinion has no direct binding effect but might win significance as **persuasive authority** when it is written by a distinguished judge. Such dissents sometime map the course of future development of the law, since a shift in caselaw is often introduced through superior dissenting opinions. With hindsight one speaks of the **great dissenters**.

Law Reporting

The doctrine of stare decisis stands or falls with dependable reporting on court decisions. Law Reports or Court Reports are thus at the same time the heart of the whole legal system. In the United States, there are over 3.5 million published court decisions in full text and approximately 55,000 are added to that number each year.

There are official as well as private law reports, whereby in practice most lawyers use the more accessible private reports. All decisions of the highest state and federal courts are published. Almost no decisions of the trial courts are published because the lower-court decisions contain few conclusions of law, but rather concentrate on the finding of the facts in the case. Problematical can be the selection of decisions for publication at the middle level of courts of appeals.

The decisions of the Supreme Court have been published since 1875 in the official **United States Reports**. In the first 90 volumes of this series, decisions of the Supreme Court from 1790 through 1874 are reprinted. The decisions before 1875 were originally reported in series, which were named after the individual reporter.

The largest private publisher of reports is West Publishing Co. in St. Paul, Minnesota, which has reported the decisions of the Supreme Court in its **Supreme Court Reporter (S.C.)** since 1882. The Supreme Court Reporter is a part of the comprehensive **National Reporter System**, which is renowned for its quick and dependable reporting. It is usually preferred by practitioners because of the uniform structure of all of the series in the system, as well as its excellent indexing of related topics by the use of *key numbers*.

The Lawyer Cooperative Publishing Co. publishes the Lawyers Edition of United States Supreme Court Reports (LED.), which includes all Supreme Court decisions. Because in citation of Supreme Court decisions, the official report must be cited first, but most practitioners work with one of the other reporters, usually all three reports are cited for each case.

Before the reports are published, the most recent caselaw is reported by "advance sheets." Such **advance sheets** include several decisions and usually with the page numbering which corresponds to the numbering of the later published volume. The very first publication of a decision is distributed by the deciding court and is called a "**slip sheet**." Each slip sheet consists of only one decision. Lawyers do not usually receive slip sheets because they are very expensive, impractical for future use and distributed only very slowly by the court.

Decisions of the other federal courts dating from 1789 to 1879 have been published in a large number of smaller series, and recently collected and ordered alphabetically, with commentary, in the 31-volume Federal Cases, as part of West's National Reporter System.

Each individual state also publishes its own series of court decisions. But again, West's National Reporter System includes the decisions of the highest courts in all states in a seven-part series, so that the lawyer researching all of the higher caselaw on a specific issues does not need to consult 50 different series of reports.

Reports on selected decisions taken from all jurisdictions and areas of law are numerous. A widely-used series for general practice and research is the American Law Reports (ALR) published by the Lawyers Cooperative Publishing Company.

Secondary Literature and Aids

Numerous aids are available to assist the lawyer in finding her way quickly through these extensive publications to find the caselaw relevant to the issue she is researching. Such aids include (i) citations systems, such as Shepard's Citations, (ii) supplements to the American Law Reports, (iii) parallel references, such as the National Reporter Blue Book, (v) Digest systems, (vi) key number systems, (vii) descriptive word indexes (viii) case books, (ix) law journals, and (x) computer retrieval systems.

Needless to say, today the computer is the most valuable tool in finding relevant caselaw. From the starting point of an already finely-tuned system of reporting, together with citation systems, parallel references, digest, key number systems, and descriptive word indexes, computer retrieval systems came early and swift to the legal scene in the United States. The two most important competitive systems are Lexis and West law.

B. Structure of American Cases:

Published cases in official and private law reports usually include the following items:

1. Name of the case;

2. Name of the court;

3. Date of the judgment;

4. **Citation** of the report; The citation is the written reference to the case report.

5. **Headnote or syllabus**; This is a summary prepared by the publisher of the report and usually includes facts of the case and legal issues handled by the court. The purpose of the headnote is to give the reader an orientation on the issues discussed in the case and is not properly a part of the case. The headnote may never be cited as legal authority.

6. Names of judges hearing the case;

7. Statement of Facts; The statement of disputed and undisputed facts in the reported case of an appellate court is usually not complete. However, briefs submitted by the parties and the complete court record can be requested from the local bar library.

8. **Opinion**; The opinion is the heart of the decision. It contains the discussion of relevant precedents and the actual conclusions of the court on the law.

9. **Decision**; The decision is the final result of the finding of facts and the conclusions of law.

10. **Judgment**; The judgment is the final pronouncement of court on the rights of the parties.

11. **Concurring and Dissenting Opinions**.

In reading the case below, try to identify the above items.

Fuentes v. Tucker

Supreme Court of California, 1947

31 Cal 2d. 1, 187 P.2d 752

PABLO FUENTES et al., Respondents, v. CLARENCE L. TUCKER, Appellant.
ANDRES L. NEGRETTE et al., Respondents, v. CLARENCE L. TUCKER, Appellant.

GIBSON, CHIEF JUSTICE. The minor sons of the respective plaintiffs were killed by an automobile operated by defendant**.** The two actions were **consolidated** for trial, and in each case the verdict of the jury **awarded** the plaintiffs $7,500. Defendant appealed from the judgments claiming the trial court **erred** in permitting plaintiffs to **present evidence** of facts outside the **issues framed by the pleadings**.

On the day of the trial defendant filed an **amended answer** in each case which admitted "that he was and is **liable** for the death of the deceased ... and the damages directly and proximately caused thereby." Plaintiffs were nevertheless permitted to prove the circumstances of the accident, including the facts that defendant was intoxicated and that the children were thrown eighty feet by the force of the impact.

It is defendant's position that the **introduction of evidence** as to the circumstances of the accident was error because it was not **relevant** or **material** to the amount of the **damages**, which was the only issue to be determined by the jury. Plaintiffs **contend** that defendant could not, by acknowledging legal responsibility for the deaths of the children, deprive them of the right to show the circumstances surrounding the accident, and that therefore it was not error to **admit evidence** of such facts. They do not claim, however, that the evidence was material to any of the **facts in dispute** under the pleadings as they stood at the commencement of the trial.

It is a doctrine too long established to be open to dispute that the proof must be confined to the issues in the case and that the time of the court should not be wasted, and the jury should not be confused, by the introduction of evidence which is not relevant or material to the matters to be **adjudicated**. This is merely one aspect of the larger problem of delay in the conduct of litigation. Every court has a responsibility to the public to see that **justice is administered** efficiently and **expeditiously** and that the facilities of the court are made available at the first possible moment to those whose cases are awaiting trial. It would be an unwarranted waste of public funds, and a manifest injustice to the many **litigants** seeking an early trial date, to allow **counsel** in a particular case to occupy substantial periods of time in the useless **presentation of evidence** on matters not **in controversy**; and we know of no **well considered opinion** which asserts such a right.

One of the functions of pleadings is to limit the issues and narrow the proofs. If facts **alleged** in the complaint are not **controverted** by the answer, they are not **in issue**, and no evidence need be offered

to prove their existence. Travelers Ins. Co. V. Byers, 123 Cal. App. 473, 482, 11 P.2d 444; Code Civ. Proc. §§ 462, 588, 1868, 1870, subds. (1), (15); see 1 Wigmore on Evidence, 3d Ed. 1940, p. 9, § 2. Evidence which is not pertinent to the issues raised by the pleadings is **immaterial**, and it is **error** to allow the introduction of such evidence. [Citations omitted.]

It follows, therefore, if an issue has been removed from a case by an admission in the answer, that it is error to receive evidence which is material solely to the excluded matter. This, of course, does not mean that an admission of liability **precludes** a plaintiff from showing how an accident happened if such evidence is material to the issue of damages. In an action for **personal injuries**, where **liability** is admitted and the only issue to be tried is the amount of **damage**, the force of the impact and the surrounding circumstances may be relevant and material to indicate the extent of plaintiff's injuries. Johnson v. McRee, 66 Cal. App.2d 524, 527, 152 P.2d 526; Martin v. Miqueu, 37 Cal.App.2d 133, 137, 98 P.2d 816. Such evidence is admissible because it is relevant and material to an issue remaining in the case.

The defendant here by an unqualified statement in his answer admitted liability for the deaths of the children, and the sole remaining question in issue was the amount of damages suffered by the parents. In an action for wrongful death of a minor child the damages consist of the pecuniary loss to the parents in being deprived of the services, earnings, society, comfort and protection of the child. Bond v. United Railroads, 159 Cal. 270, 285, 113 P. 366, 48 L.R.A., N.S., 687, Ann. Cas.1912C, 50. The manner in which the accident occurred, the force of the impact, or defendant's intoxication could have no bearing on these elements of damage. The evidence, therefore, was not material to any issue before, the jury, and its admission was error.

[The court held that the admission of the evidence concerning the circumstance of the death of the children, though erroneous, was **not prejudicially so**.]

The judgments are affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., **concur**.

C. Terminology

Doctrine of stare decisis

Concurring opinions

Dissenting opinions

Consolidation of actions

“Presentation of evidence,” “introduction of evidence,” “admission of evidence”

"Issue framed by the pleadings”

Amended pleading

Liability

Relevant or material evidence

Facts “disputed,” “in controversy,” or “in issue”

“Damages,” “damage,” and “injuries”

Adjudication of a case

Prejudicial error

D. Review and Discussion

1. Comment on the following passage from Judge Brandeis in his decision in Burnet v. Coronado Oil & Gas (1932):

> “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the federal Constitution, where correction through legislative action is practically impossible, the court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”

2. Comment on the following translation of a passage from Blumenwitz, page 29:

> “The difference between the German (or Continental European) and the Anglo-

American legal systems is often demonstrated by the role of the judge: Here the judge is bound only by the law [*Gesetz*], there he is bound by precedents on the same legal issue. Being bound by relevant precedents in Anglo-American law is however by no means as simple and clear as being bound by the law [*Gesetz*]."

3. ***Compare the German system of law reporting with the American system***. Shouldn't the German public be presented with full case reports, including names of the parties, details of the facts of the dispute, identification of the judges with a specific opinion?

4. ***Find the following information on the case:***

a. In which court was the case *Fuentes v. Tucker* heard?

b. Where was the case published?

c. Who delivered the opinion of the court?

d. Who were the plaintiffs in this case?

e. What was the final judgment?

f. Which judges heard the case? Did they concur or dissent?

g. What is the procedural history of the case?

h. State the facts of the case as concisely as possible.

i. Why did the defendant amend his answer? Why did he wait until shortly before trial?

j. In one sentence, what is the point of law under consideration by the court?

k. What do you consider to be the ratio decidendi of the case and what statements of the court are obiter dicta?

l. Why are U.S. courts so strict on the admissibility of evidence?

m. What evidence does the defendant claim was not relevant and material?

n. When might such evidence be relevant and material even if the defendant admits liability and the only issue to be tried is the amount of damages?

o. Why did the Supreme Court of Texas affirm the judgments of the trial court even though the trial court erred in admitting certain evidence at trial?

q. Do you agree that a jury should never hear evidence on an issue that has been "removed" from the case?