Law School Survival Guide

Evidence

Outlines and Case Summaries

2010
Edition

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Outlines and Case Summaries
Law School Survival Guide

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TABLE OF CONTENTS

ABBREVIATIONS

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

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

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

> These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

1. The Federal Rules of Evidence (FRE) govern both criminal and civil proceedings in the federal courts.
2. Federal bankruptcy and magistrate judges are bound by the rules (see FRE 1101 for exceptions).

Rule 102. Purpose and Construction

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

1. This rule purports to support fairness and justice in the interpretation of the rules of evidence. In reality, however, it has little or no relevance.
2. First, this rule *only* applies when there is reasonable ambiguity in the meaning of a rule—it *never* allows the judge to replace the clear meaning of a rule with his own notions of justice and fairness.
3. Furthermore, even if a rule is slightly ambiguous, it is naturally presumed that judges will interpret such rules fairly and justly.

Rule 103. Rulings on Evidence

> (a) Effect of erroneous ruling.
>
> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. - In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. - In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

1. In order for an appeals court to reverse a trial court, the following three elements *must* be met:

a. There must be an ***error;***

b. The error must be prejudicial by ***altering the case's outcome***.

i. A "substantial right of the party" must be affected.

ii. Factors for determining whether an error was prejudicial include: how long the jury took to return a verdict; how many counts of guilt the defendant received; and how many other exhibits were offered.

c. The error was ***preserved*** through either an *objection* or an *offer of proof*. Rule 103(a). An error will not be preserved when it is:

i. *Forfeited* – the attorney does nothing;

ii. *Waived* – the attorney affirmatively gives up the right (*e.g.*, "let it in, your honor."); or

iii. *Invited* – the error is admitted due to the attorney's own conduct.

2. Objections

a. Objections are made when the opposing counsel is trying to admit evidence and a ruling admits that evidence.

b. They may be either:

i. *Objections* that are made when the opposing counsel asks a question or seeks to admit evidence; or

ii. *Motions to strike* that are made *after* the opposing counsel asks a question and the respondent already responded.[1]

1) Every motion to strike is a late objection.

2) Sometimes, an attorney is forced to offer a motion to strike, such as when he has no notice of the content of unresponsive answers.

c. Objections must be:

i. Timely;

ii. Appearing of record with notice to the court and recorded by the court reporter; and

iii. Specific with the grounds for the objection, unless the specific grounds are "apparent from the context." Rule 103(a)(1).

3. Offers of Proof

a. Offers of proof are made by the attorney trying to introduce evidence when a ruling excludes that evidence.

b. Offers of proof must be:

i. Made with *notice to the court* and court reporter. Rule 103(a)(2);

[1] These are also referred to as "motions to strike from the record."

ii. *Specific*, with the "substance of the evidence" made known to the court by offer (unless apparent from the context).[2] Rule 103(a)(2);

iii. Made *outside of the hearing* of the jury. Rule 103(c).

1) *Note*: offers of proof do not need to be timely, since evidence omitted is not prejudicial (as opposed to when the evidence has already been admitted and no objection was made).

4. Motions *in Limine*

a. A motion *in limine* ("on the threshold"; "in the beginning") is one done outside of the hearing of the jury before the judge. They generally take place before trial.

b. The states are divided as to whether an attorney whose motion *in limine* was denied must renew his objection or offer of proof to preserve his claim of error when the court ruled against him in a motion *in limine*.

c. In federal court, however, a renewed objection or offer of proof is unnecessary. Rule 103(a) states that "a party need not renew an objection or offer of proof to preserve a claim of error for appeal" once the court has made a definitive ruling on the evidence.

(b) Record of offer and ruling.

The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

5. Methods of offering proof:

a. *Attorney narrative*. This is an efficient way of offering proof, but it is less reliable, since it allows the attorney to put a "spin" on the narrative.

b. *Question and answer form*. The court calls the witness to the stand to verify for itself the proof being offered. This method is both more reliable and more time-consuming than an attorney narrative.

c. *In writing with an affidavit*. The writing could show, for example, what a witness would have testified if he were permitted.

(c) Hearing of jury.

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.

[2] This element is different from that required of objections: the evidence offered must be factually, not legally specific.

> Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

6. Plain Error
    a. An exception to the requirement of preserving error is in circumstances where the error was ***plain***.
    b. Nothing precludes a trial court from excluding evidence on its own, *even absent any objections from the attorneys*, when an error is so serious that its inadmissibility is clear.
    c. Similarly, appeals courts may take notice when the error of a trial court is ***plain.***
    d. This rule is meant to be a middle ground between *inflexible rules* and the *abandonment* of the preservation of error doctrine.
    e. This narrow exception is usually granted in criminal cases when the defendant is trying to exclude admitted evidence.
    f. The rule states that nothing in it "precludes" taking notice of plain errors. Thus, the court is not required to take notice of errors; it is within the ***discretionary power*** of the judge.
    g. Thus, in order to guarantee that an *error* that *affects* a party's substantial rights is not given up to the whims of the court, it ***must be preserved*** (through making an objection or offer of proof) in order for the trial court's decision to be reversed.
7. The Rationale of Rule 103: because Rule 103 requires any error on trial to be preserved, many appeals are automatically dismissed. This in turn keeps the court dockets moving and avoids expense and delay (see Rule 102).

Rule 104. Preliminary Questions

> (a) Questions of admissibility generally.
>
> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact.
>
> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

1. Generally, the facts are decided by the jury and the law is decided by the judge.
2. However, the jury decides only ***ultimate factual questions*** (the charges in the indictment; the claims in the complaint; the defenses in the answer).

Judicial notice may be taken at any stage of the proceeding.

5. The judge may take judicial notice *at any stage.*

(g) Instructing jury.
In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

6. Jury instructions:
   a. In civil cases, the judge may tell the jury to accept a judicially noticed fact as conclusive.
   b. In criminal cases, the judge may *not* tell the jury to accept a judicially noticed fact as conclusive. The judge must instruct the jury that it "may, but is not required" to accept a judicially noticed fact as conclusive.
7. Judicial notice is frequently a source of dispute, since when the parties already agree ona particular fact, they will stipulate it.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

1. In civil actions, presumptions are ***definitive legal inferences*** based on the rule of law.
2. They are different from ***permissive inferences***, which *may* be drawn by a jury.
3. Juries *must* accept presumptions as decided in civil cases if the opposing party fails to *produce evidence to the contrary*.
4. Base facts give way to presumptions. Typical examples include:

Base Fact	Legal Presumption
A has not been seen in seven years.	A is dead.
The package was properly mailed.	The package was received.
B's parents were married at his birth.	B is legitimate.
The letter had a date on the corner.	The date is correct.

5. The ***burden of persuasion*** refers to the obligation to provide sufficient evidence to establish a belief in the mind of the trier of fact.

    a. Examples of burdens of persuasion: the preponderance of the evidence; guilt beyond a reasonable doubt.

    b. The plaintiff carries the burden of persuasion for every element of his case. If he produces evidence to prove an affirmative element of his case, the defendant may attack the credibility of that evidence.

6. The ***burden of production*** refers to a party's obligation to provide sufficient evidence so that a reasonable jury can infer the fact alleged.

    a. The party against whom a presumption is made bears the burden of production. Thus, if a legal presumption is drawn against a party, the ***burden of production*** to rebut the presumption shifts to that party.

    b. The party may not attack the original party's evidence as he would be permitted to do if it were merely a permissive inference.

    c. Rather, he must meet his burden of production by offering evidence against the presumption.

    d. However, the burden of persuasion does not shift because of the presumption. Rule 301 does nothing to shift burdens of persuasion, which rests with the original party.

    e. If the party against whom the presumption is drawn meets his burden of production and if the jury remains unconvinced by either party, it must find against the original party because *he failed to meet the burden of persuasion.*

7. Example:

    a. Suppose that the plaintiff claims that her husband is dead because he has not been seen or heard in ***seven months***. The defendant insurance company may defend itself by doing any of the following:

        i. Undermining the credibility of the testimony of the plaintiff or of any of the plaintiff's witnesses.

        ii. Introducing evidence showing that the husband has been seen or heard in seven months; or

        iii. Doing nothing in the hope that the jury will not find that the plaintiff has met her burden of persuasion.

    b. Now suppose that the plaintiff claims that her husband is dead because he has not been seen or heard from in ***seven years.*** This creates a *legal presumption* that the plaintiff's husband is dead.

        i. If the defendant ***does not meet its burden of production***, the court will instruct the jury that if it believes the base fact (the plaintiff's husband has not been seen or heard from for seven years), it must accept the presumption that he is dead.

ii. If the defendant ***does meet its burden of production***, the presumption that the plaintiff's husband is dead "bursts," or is rebutted. The plaintiff must now meet the burden of persuasion on the question of her husband's death by either proving that he has not in fact been seen for seven years or by directly trying to prove that he is dead.

1) If the jury believes her, she wins.

2) If the jury does not believe her, she loses.

3) If it is a close call, she loses, because she has failed to meet her burden of persuasion.

c. Thus, when there is a presumption, the defendant may not defend the case by doing nothing, as he can when there is no presumption and he can simply hope that the jury will find that the plaintiff has not met her burden of persuasion.

d. If he does nothing, the jury must find for the plaintiff. Thus, he must first rebut ("burst") the presumption by meeting his burden of production ***by producing any evidence*** (including his own testimony) to the contrary.

e. His victory then becomes possible by his (i) attacking the plaintiff's evidence; (ii) introducing new, contrary evidence; or (iii) doing nothing and hoping that the jury will not be convinced that the plaintiff has met her burden of persuasion.

8. Legal presumptions apply only in civil cases. In criminal cases, while base facts may be introduced, the Constitution requires that the jury be free to reject the presumptions that follow from them. *Sandstrom v. Montana* (U.S. 1979).

Rule 302. Applicability of State Law in Civil Actions and Proceedings

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

1. In cases where the rules of decision are supplied by state law (*i.e.*, diversity cases), the effect of presumptions is governed by state law.

2. The effect of presumptions is one of *three areas* of evidence law where state common law, not the FRE and the FRCP, applies when state law supplies the rule of decision. The other two areas are privileges (Rule 501) and witness competency (Rule 601).

3. Rationale: these exceptions are based on the logic that where procedural laws are based on substantive social policies, such laws should be based on the state's laws being applied. Presumptions involve the policies and weighty matters of human relationships. These are best left to the states to decide.

ARTICLE V. PRIVILEGES

Rule 501. General Rule

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

1. Under Rule 501, federal judges may develop the privilege law as they decide cases and ***interpret the common law "in the light of reason and experience"*** in criminal and federal question civil cases.
2. However, in cases where the rules of decision are supplied by state law (*i.e.*, diversity cases), the rule of privileges is ***governed by state law***.
3. Rule 501 is therefore one of the three Rules of the FRE that defers to state law (the other two being presumptions (Rule 302) and competency of witnesses (Rule 601)).
4. In criminal cases, due to the Fifth Amendment right against self-incrimination, prosecutors often are unable to directly examine defendants.
    a. They often therefore rely on family and close friends of the defendant and offer evidence of what they say the defendant told them.
    b. Privilege issues are likely to come up, since the content of these conversations may be within the scope of some privilege.
    c. Since the Fifth Amendment right against self-incrimination applies only "in any criminal case,"[3] privilege issues are more likely to be litigated in criminal cases.
5. Examples of privileges include the attorney-client privilege, the spousal privileges, the priest-parishioner privilege, the physician-patient privilege.
6. To be privileged, an exchange must be:
    a. A Communication
        i. A communication is an exchange of information.
        ii. Example: a patient's explaining to his doctor the circumstances behind a stab wound, *not* the doctor's finding a knife-stab in his patient.
    b. That is Confidential

[3] U.S. Const. amend. V.

i. The privileged parties must have been alone when the communication was made, with no third party present, unless the third party was:

1) Present to further the purpose behind the communication (*e.g.*, an interpreter facilitating communication between an attorney and a non-English speaking client);

2) Unable to appreciate the content of the communication (*e.g.*, he or she was mentally insane, asleep, etc.); or

3) Present within the scope of the same or another privilege (*e.g.*, the privilege holder speaks to his doctor within the presence of his spouse. Since the spouse holds an independent privilege, the confidentiality of the statement is not affected).

ii. A communication cannot be confidential when made in a public place where it is possible that third parties will overhear.

iii. A document may be confidential in certain circumstances, but if it is shown or prepared for the purpose of sharing with third parties, it cannot be privileged.

1) Example: even if a party shares his income tax returns with his attorney, the attorney-client privilege does not apply, since these documents were prepared for the purpose of sharing with a third party (the government).

c. Made within the Privilege Holder's Official Capacity

i. Example: a communication to one's physician relating to marital problems does not fall within the privilege holder's capacity, sinceit is not related to medical treatment.

ii. between a client and his attorney must be made while the latter is serving as his attorney, not as his golf partner.

iii. *N.B.*: one's spouse is always acting within his or her capacity as a spouse.

7. The privileges rule "applies at all stages of all actions, cases, and proceedings." Rule 1101(c). As a corollary, parties may only obtain discovery that is *not privileged*. Under FRCP 26(b)(1).

8. Attorney-Client Privilege

a. The attorney-client privilege applies when confidential communications are made to an attorney for the purpose of obtaining legal services.

b. Preexisting documents (*e.g.*, income tax records) are not confidential between a client and his attorney and do *not* become privileged when they are turned over to an attorney.

c. The privilege attaches when the party making the statements ***reasonably believes*** that the party in whom he confides is an attorney, even if he is mistaken.

d. The privilege does not, however, apply to communications related to the commission or planning of a future illegal act.

9. Spousal Privileges

a. The federal courts recognize two spousal privileges: the adverse spousal testimony privilege and the confidential marital communications privilege.

b. Adverse Spousal Testimony Privilege

i. The adverse spousal testimony privilege permits one spouse to refuse to testify against the other when the other is the defendant in a criminal proceeding.

ii. The privilege is thus inapplicable when the parties divorce, since it is intended to allow the refusal to testify against one's ***spouse.***

iii. The adverse spousal testimony privilege allows the witness spouse to refuse to testify not only as to communications made during the course of the marriage, but also as to *any communications or occurrences* from *before and during the marriage*.

iv. The privilege is carried by the ***witness spouse***, not by the ***defendant***. The privilege can thus only be invoked or waived by the witness; if she chooses to waive it, the defendant can do nothing to stop her.

c. Confidential Marital Communications Privilege

i. The confidential marital communications privilege is carried by *both spouses*.

ii. According to the majority view, one spouse may testify *only with the consent of the other*.

iii. The privilege applies both during and after the marriage, in both civil and criminal proceedings, to confidential communications ***made during the marriage,*** not communications from before the marriage or after a divorce.

d. These privileges do *not* apply to communications made for the purpose of committing or planning a criminal or fraudulent act.

Summary Chart of the Spousal Privileges

	Adverse Spousal Testimony Privilege	***Confidential Marital Communications Privilege***
Who Carries It	The witness spouse.	Both spouses.
When It Applies	In a criminal proceeding against one of the spouses *while the parties are married*.	In any civil or criminal proceeding, both during and after the marriage, whether or not one of the spouses is a party.
What Is Covered	*Testimony* as to *communications* and *occurrences* from before and during the marriage.	Testimony as to confidential communications made during the marriage.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

1. The law regarding the compency of a witness is one of the three areas of the federal evidence law that is determined by state law when the state law supplies the rule of decision (the other two being the law of presumptions (Rule 302) and the law of privilege (Rule 501)).
2. In cases where the rules of decision are *not* supplied by state law, the FRE establish who is competent to be a witness.
3. Under the common law, the following three groups may not testify:
   a. Those whose ***trustworthiness*** is questionable (this is reflected in Rules 602-03);
   b. Those rendered incompetent because of their ***roles*** in the trial (this is reflected in Rules 605-606(a)); and
   c. Those made incompetent due to "***secret***" reasons: jurors testifying as to the validity of a verdict or indictment (reflected in Rule 606(b)).
4. The FRE in large part reflect the common law rules, but have adapted them substantially.
5. Example: Questionable Trustworthiness

fact that the court appointed the expert witness.

(d) Parties' experts of own selection.

Nothing in this rule limits the parties in calling expert witnesses of their own selection.

1. Rule 706 gives judges the power to resolve many of the issues that often arise with respect to experts, such as jury confusion.
2. Rarely, however, do judges exercise this power.

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

1. For the purposes of hearsay, a ***"statement"*** may be either one of the following:
    a. An oral or written assertion;
        i. An assertion is generally a declaratory statement.
        ii. Commands, requests, instructions, and questions are generally not considered to be hearsay.
        iii. Example:
            1) A testifies that he heard the defendant say to the victim, "give me all of your money!"
            2) This would not be considered hearsay, since there is *no assertion*. Rather, it is a *command*.
    b. *Conduct* intended to be an assertion (*e.g.*, nodding, gesturing, etc.).
        i. Examples of conduct intended to be an assertion:
            1) Nodding in response to a question; and
            2) Pointing when asked where an object is located.
        ii. Examples of conduct *not* intended to be an assertion:
            1) Taking one's foot off the brake as an indication of whether a light turned green (although this indicates that the light turned green, it is not *intented* as such).
            2) Walking into a room with a wet raincoat and umbrella (although this indicates that it was raining, it is not *intended* as such).

iii. Only conduct intended to be an assertion is included under the hearsay rule because there is generally no ***potential for deception*** when there is no intent to communicate.

(b) Declarant. A "declarant" is a person who makes a statement.

2. Only a person can make a statement, whether the statement is an oral or written assertion or conduct intended to be an assertion.

a. Thus, if B testifies that he look at the thermometer, and it indicated 99°, the indication of the temperature would *not* be hearsay, since the declarant must be a person, not a machine.

b. Similarly, if a police officer testifies that a canine detected drugs in C's luggage, the statement would not fall into hearsay, since the declarant must be a person, not an animal.

i. *N.B.*: Rule 801(a) parallels this rule when it defines conduct that comprises a statement as "nonverbal conduct *of a person*."

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

3. There are three elements required for evidence to be hearsay:

a. There must be a ***statement*** (see *supra.*, for details);

b. That is ***out of court*** (made by someone other than the declarant while testifying);

i. For the purposes of hearsay, a declarant is the person making an out of court statement that is later offered into evidence.

ii. To be hearsay, a statement must be "out of court," which simply means that it was *not made by the declarant* while testifying.

iii. Thus, even some in-court statements can be considered to be "out of court" for the purpose of hearsay.

c. Offered "***to prove the truth*** of the matter asserted."

i. A statement is hearsay when its relevance to the case is conditioned on *whether the statement is true.*

ii. However, when the a statement is offered not to prove that it is true, but rather, to prove motive, notice, effect on a listener, perception of danger, or *merely that it was said*, or when it is offered to show the feelings or state of mind of the person who made it, is not hearsay.

iii. Verbal Acts

1) "Verbal acts" (*i.e.*, "operative facts" or "legally operative" words) are not hearsay because the words have *legal consequences regardless of their truth.*

2) Examples of verbal acts include statements offered not to prove the truth of the matter asserted, but rather, the existence of:

i) Gifts, acceptance to a contract, consent, wills;

ii) Apologies, warnings, slander.

3) Example:

i) The plaintiff sues for slander and calls witness A, who testifies that he heard the defendant say that the plaintiff was a liar and a thief. Is this testimony prohibited by the hearsay rule?

ii) No: the statements are not offered to prove *the truth of the matter asserted* (that the plaintiff is a liar and a thief), but rather, to prove that the *statements were made*.

(d) Statements which are not hearsay.

A statement is not hearsay if--

(1) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

4. Rule 801(d)(1) removes the prior statement of a witness[8] from the definition of hearsay and thus permits a party to introduce such a statement to impeach the witness or to be used as substantive evidence,[9] when both of the following elements are met:

a. The declarant testifies at the trial or hearing and is subject to cross-examination regarding the prior statement[10]; and

b. The prior statement is one of the following:

i. An *inconsistent statement* given *under oath* in a prior trial, hearing, or other proceeding, or in a deposition and subject to perjury;

1) *N.B.*: note that a prior inconsistent statement could be used for impeachment purposes *regardless of whether it was made under oath*.

[8] The reference to "witnesses" in this rule refers only to those who testify at a trial. It does not include all who "witness" some occurrence with his eyes.

[9] The majority of states do not follow this federal practice and admit prior statements of a witness for the limited purpose of impeaching the witness.

[10] This element obviously can only be met when the witness is *available*.

i) In such a case, Pattern Criminal Jury Instruction[11] (PJI) 32 applies, where the judge tells the jury to use such statements *for impeachment only*, not as evidence in the case (unless it was under oath).

2) However, if it was under oath, it will be admissible for its truth as well. *See* PJI 33.

ii. A *prior consistent statement* offered to rebut a charge against the declarant of recent fabrication, bias, or improper motive;

1) Example: the defendant argues that the alleged victim of sexual abuse is lying about the defendant's molesting her. He states that the motive of her fabrication is a fight that she got into with him last summer.

2) The prosecutor may offer a prior consistent statement made by the victim from before last summer in order to show that the fight last summer did not motivate a fabrication.

iii. A *prior identification* of a person that is made after perceiving the person.

1) Example: the victim picked out the accused in a lineup. This is an out of court "statement" (in this case, non-verbal conduct) offered for its truth.

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

5. Rule 801(d)(2) removes ***admissions by party-opponents*** from hearsay.

a. To qualify as non hearsay under this section, statements must be offered against a party and must be one of the following:

i. The party's ***own statement.*** Rule 801(d)(2)(A).

1) This is perhaps the most important category of statements that seem like hearsay but that are excluded from the hearsay rule:

[11] The Pattern Criminal Jury Instructions are put out by the Federal Judicial Center to federal judges as patterns to follow in criminal trials. Most of the details of the Pattern Criminal Jury Instructions also apply in civil cases.

THEMATIC INDEX

GLOSSARY

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

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

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

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

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

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

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

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

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

Claim preclusion *See RES JUDICATA*.

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

Closing of escrow *See* CLOSING.

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

Constructive notice Legal notice derived from the circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

if she recognizes the perpetrator of a crime in court.

Indictment Since a defendant may not cross-examine witnesses presented against him in a grand jury indictment, the Confrontation Clause does no apply. Compare PRELIMINARY HEARING.

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

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

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

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

Issue preclusion *See* COLLATERAL ESTOPPEL.

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

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

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

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

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

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

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

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

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

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

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

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

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

power by either the Legislative or the Executive Branch; it does not involve a *judicial* question to be decided by the judiciary.

Nuisance A condition or activity on another's land that unreasonably affects the other's right to enjoy and use his land. The standard is one of a person of *ordinary sensibility*.

Parol evidence Oral or written evidence of a bargain that occurred before the final terms of the contract were laid down and that was not made part of the final contract.

Parol evidence rule Rule of substantive law that states that supplementary oral or written evidence of any agreement prior to or contemporaneous with the laying down of the final terms of the contract cannot be used to contradict or vary the final agreement.

Pendent parties jurisdiction The jurisdiction to adjudicate a claim against a party who is not otherwise within court's jurisdiction, because the claim by or against that party arises from the same core facts of another claim that is properly before the court.

Personalty Personal property, which is moveable, as contrasted with REALTY (real property).

Photographic lineup Modality of identification where a witness identifies one suspect among others in a spread of photographs.

Pleading Documents filed by a litigant that set forth the material facts and legal arguments of his claims or defenses.

Police lineup Modality of identification in which suspects are lined up at a police station and a witness is asked if he recognizes the perpetrator among them.

Preliminary hearing Permits a defendant to cross-examine witnesses presented against him. Compare INDICTMENT.

Prima facie case A case in which the plaintiff presents sufficient evidence "on its first appearance" (Lat.) supporting the cause of action. If no contrary or rebutting evidence is presented, the plaintiff is entitled to a decision in his favor.

Profit à prendre An easement that grants the right to enter and remove timber, minerals, oil, gas, game, and other substances from another's land.

Proximate cause is legal causation that serves as a limitation on actual cause. The law limits those acts that are said to be "causes" of some consequence, requiring the acts to be related to the consequence through some foreseeable sequence of events. If an act is foreseeably related, it is said to be the proximate. Compare CAUSATION IN FACT.

Quantum meruit A Latin expression meaning "as much as he deserves." This is a doctrine at equity that allows a party to recover for the value of the labor or materials delivered to another, even if there was no actual contract or if there was a contract and the party breached it, in order to prevent the other party will not be unjustly enriched.

Rape Under the common law, rape was defined as "the carnal knowledge of a woman forcibly and against her will." The modern law has departed from this view by defining rape in gender-neutral terms.

***Ratione soli* doctrine** Under this doctrine, also known as the "*ad coelum* minor doctrine," the owner of the soil *is the first occupant* and owner of whatever is found on the soil, including minerals and *ferae naturae*, regardless of who the finder is.

Real covenant A promise relating to land use that runs with the land at law and is enforceable at law (offering monetary damages as remedies) between the original covenanting parties as a contract. Compare EQUITABLE SERVITUDE.

Realty Real property, which is immovable and fixed to the ground (*e.g.*, buildings, land), as contrasted with PERSONALTY.

Recklessness (torts) The purposeful disregard of a high probability of a resulting consequence (*e.g.*, of resulting emotional distress, in the case of the intentional infliction of emotional distress).

Replevin An action at common law to recover *the possession* of personalty wrongfully taken from the plaintiff. Compare TROVER.

Replevy To exercise the common law action of REPLEVIN.

Res ipsa loquitur A negligence circumstantial evidence doctrine that is invoked when the facts create such a strong presumption of negligence that "the thing speaks for itself" (*Lat.*). The plaintiff is not required to introduce direct evidence.

Res judicata Under the doctrine of *res judicata* (Lat., the "the thing already adjudicated"), a party *may not litigate* ***claims*** that he raised or could have raised in a previous suit that reached a final judgment. Also referred to as CLAIM PRECLUSION.

Respondeat superior (*Lat.*, "let the superior answer") The doctrine that a master or principal is *vicariously liable* for the negligence of his servants or agents, even when he was not himself negligent. This doctrine usually refers to the liability of employers for their employees.

Robbery The specific intent crime that consists of the unlawful taking of property from another person or in the person's presence by the use of force or by threatening the imminent use of force.

Second degree murder Under the modern statutory approach to murder, second degree murder is generally defined as all forms of murder having malice aforethought, but, unlike FIRST DEGREE MURDER, lacks premeditation and deliberation (*e.g.*, depraved heart murder, felony murder committed in tandem with a non-inherently dangerous felony, etc.).

Shelter principle Under this principle, if a possessor of some chattel or other property became the legitimate owner of the property under some theory of ownership (*e.g.*, adverse possession, accession, etc.), then all subsequent possessors may claim that good title was also passed to them if they legitimately acquired the good.

Showup Modality of identification in which police seize a suspect, bring him to the victim of a crime, and ask the witness if the suspect is the perpetrator. A showup usually occurs before an indictment, when time is of the essence.

Solicitation The act of entreating, imploring, inducing, or encouraging another person to engage in some unlawful behavior.

Sua sponte By order of the court, "of its own will" (Lat.), without motions by either party.

Sublease A transfer of property that grants possession of the land to a new tenant for *part of the duration of a lease period*, even if it is as little as one minute. Compare ASSIGNMENT.

Suicide pact An agreement whereby two or more people agree to kill one another.

Superseding cause An INTERVENING CAUSE that is strong enough to relieve a wrongdoer of liability.

Supplemental jurisdiction The jurisdiction that a court has over a claim that is *part of the same case or controversy* as another claim over which the court has *original jurisdiction*.

Tort A civil wrong, other than a breach of contract, for which the law provides a remedy.

Tortfeasor A person who has committed a tort.

Trover A remedy that allows the rightful owner of property to recover possession or to recover damages for the wrongful taking of his property. Compare REPLEVIN.