

THE LAW AND THE REASONABLY EXHAUSTIVE (RE)SEARCH

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INTRODUCTION: They are the essential building blocks of any solid genealogy: the wills, the deeds, the vital records, the pension applications, the immigration files. Once we have gathered up a wide variety of records of our families from all of the geographic areas where they lived, we silently tick off that oh-so-important step of the Genealogical Proof Standard—what once was called the “reasonably exhaustive search.” We have, we believed, examined “a wide range of high quality sources” and therefore minimized “the probability that undiscovered evidence will overturn a too-hasty conclusion.” *Or have we?*

THE IMPORTANCE OF LAW TO GENEALOGY

A. Our ancestors and the law

The actions of our ancestors and the records they left behind were greatly affected by the laws and the legal systems in effect at the time and in the place when the records were created. Genealogists use the law to help document and explain not just what our ancestors did but, often, why they did it and even why it was done at one time and not another.

The jurisdictions in which our ancestors lived were created by law—state, county and local boundaries were fixed by law. What taxes they paid, what land they owned and how they obtained that land, when they took up arms and against whom, how their estates passed from generation to generation, who they could and could not marry— these aspects of their lives and so many more were governed by law.

B. The records and the law

The records we rely on were often dictated by law. Whether a birth, marriage or death had to be recorded and with what detail, what specifically had to be done to sell land or a horse or a slave, what had to be shown to get a pension or a land grant—it was the law that set out the details.

A clear understanding of the law when and where the records were created is the only way to understand the records and to use them in accordance with the Genealogical Proof Standard.

THE GENEALOGICAL PROCESS AND THE LAW

A. The Genealogical Proof Process

Elizabeth Shown Mills teaches us: “**Sources** give us **information** from which we select **evidence** for analysis. A sound conclusion may be considered **proof**.” Sources can be original, derivative or authored. Information can be primary, secondary or undetermined. Evidence can be direct, indirect or negative. Proof requires thorough research and documentation, reliable evidence correctly interpreted and carefully correlated, and a well-reasoned analysis.

B. The Proof Process and the Law

The Genealogical Proof Process and the guidance it gives us in meeting the Genealogical Proof Standard works hand-in-hand with the law. The GPS requires more than merely finding records with a wide cast of a geographic and topical net. Often overlooked in our joy at collecting a good range of documentary evidence is the requirement that we consider “what an information item says and what it means in the context of each source’s place and time” including concepts of “economics, ethnic studies, genetics, geography, government, history, law, religion, sociology, and other fields.”

The laws of each source’s place and time are key to understanding the records and using them in accordance with the Genealogical Proof Standard. In so many cases, it will be the laws of the time and place that

- dictate whether a record will be created at all, to provide us with the **sources** so critical to our research;
- control the content of the record, to require the recording of the **information** we extract from it; and
- set out the reasons why the information was required, to explain what portions we may rely on as **evidence**.

And only with a correct interpretation of that evidence can we have the **proof** of relationships central to our genealogy.

GENEALOGICAL PROBLEMS AND THE LAW

A. There are four major legal systems that affect genealogical records in the United States and elsewhere: the common law; the civil law; statutory law; and canon or church law.

1. **Common law** was developed in England, generally followed in its colonies, largely incorporated into American law after the Revolution, and remains applicable to some degree even today. Common law is judge-made law, originating in the commonly-held and commonly-followed judicial decisions of the English law courts starting in the Middle ages. The underlying premises of the common law were collected and published;

Blackstone's *Commentaries on the Laws of England* were the most influential for American jurisprudence as it developed after the Revolution. The scope of the common law was very broad, ranging from property rights to personal relations to the law of contracts and of torts (civil wrongs such as creating a nuisance or slander).

2. **Civil law** was derived from Roman law and, modernized largely through the Napoleonic Code, continues to influence law and records in Quebec, Latin America, and Continental Europe, as well as former French and Spanish Louisiana, California, the American Southwest and Puerto Rico. It also remains the dominant legal system in most countries of the world. Civil law is heavily code-based, with legal concepts set out in structured written form, and examples include the 1804 Napoleonic Code, the modern French *Code Civil* and the Civil Code of Louisiana.

3. **Statutory law** is the law adopted by the legislature. In the United States, statutes may be federal (public or private) or state (public or private).

4. **Canon or church law** may affect any record created or kept by any church and is particularly significant for Roman Catholic records and in areas or at times when government recognized an established church. Internal laws or customs of any religion can influence the conduct of church members and their interaction with society. Examples would include military service exemptions for the Amish during the Civil War and polygamy among Mormons prior to Utah statehood.

B. To understand the law as it applies to a record, we need to be sure:

1. We can read the record.
 - a. Early American handwriting may be difficult to read. Spelling was non-standard and often depended on the whims of the recording clerk.
 - b. Church records may present additional difficulties where the denomination drew its clergy from foreign countries with their own paleographic issues.
2. We understand the terminology used in the record.
 - a. Dictionaries of legal or other relevant terms can be consulted to explain terms, but misspelled words and abbreviations often will require additional effort.
 - b. Dictionaries should be chosen insofar as possible to reflect the terminology in use at the time the record was created.
3. We can find the law that applied when the record was created.
 - a. Any event may have been controlled by federal law, state law or both, and canon or church law may be relevant as well as (or instead of) secular law.
 - b. Laws were amended frequently. A statute enacted in 1816 may have been amended, repealed or replaced in its entirety in 1817. However, later statutes often had marginal notes referencing source enactments.

C. Case examples: how finding, understanding and applying the law can help solve genealogical problems.

For Further Study

The Law and Genealogy

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Finding Historical Laws

16. *Google Books*. <https://books.google.com/>
17. *HathiTrust Digital Library*. <https://www.hathitrust.org/>
18. *Internet Archive*. <https://www.archive.org/>

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21. Graham, Paul K. "A Love Story Proved: The Life and Family of Laura Lavinia (Kelly) Combs of Atlanta and Augusta, Georgia." *NGSQ* 101 (December 2013): 245-266.
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All links verified as of 5 December 2017.