

HOW OLD DID HE HAVE TO BE...?

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Introduction: Is *this* man John the father or John the son? Could *that* man be my ancestor who married in 1802? Knowing a person's age is often the key to distinguishing between two same-name people. But if no record gives a birthdate, how do you know how old he was? The law often gives the answer.

THE BOTTOM LINE ANSWER TO THE QUESTION:

It depends. There's a reason why that has to be the answer, and it's because of the way the legal system works: there are at least three sources of law that might exist at any particular time for any particular place that could provide the answer and sometimes the information those sources provide can be inconsistent.

THE HIERARCHY OF THE LAW

In our legal scheme, laws have rank, and certain types of law outrank others. First, there may be some *fundamental document* like a colonial charter or a state or national constitution with some specific age provision. If there is, it's going to trump any other source of law. Second, there may be a *statute* that sets a specific age. If there is, and it isn't trumped by some fundamental document, then it will control. Finally, if there's nothing in any fundamental document and nothing in any statute, then in most of what's now the United States, the *common law* rule will control.

A. FUNDAMENTAL DOCUMENTS

Colonial charters and ordinances and their replacements, the various Constitutions the States have adopted since the Revolutionary War, control whenever there is a conflict between the fundamental document and a statute or common law principle. Many of these documents contain express provisions about age:

- The 1669 Fundamental Constitutions of Carolina required every man aged 17 and above to be recorded once, and only once, as a church member (paragraph 101), "inhabitants and freemen of Carolina above seventeen years of age, and under sixty, ... to bear arms and serve as soldiers" in the

militia (paragraph 116); and every inhabitant aged 17 and older to take a loyalty oath (paragraph 117).

- The 1683 Fundamental Constitutions of the Colony of East Jersey required the ruling Proprietors to be 21 years old in order to vote (section XIII), jurors to be age 25 (section XIX), and, whenever any names were to be drawn by lot for elections or jury service, the drawing was done by a boy under the age of 10 (sections III and XIX).
- The 1818 Constitution of Illinois provided that members of the militia included all free white males between the ages of 18 and 45 (Article V, §1); and officers could continue to serve until age 60 (*ibid.*, §5).
- Under the California Constitution of 1849, the Legislature was to levy and collect a poll tax on every male over the age of 21 and under 60, with few exceptions (Article XIII, §12).

B. STATUTORY LAW

In most cases, the colonial charter or similar document won't set out the answer we need. So the next step in finding out how old folks had to be is to go to the specific statutory laws in effect *at that time* and *in that place*. They're called *acts* or *laws* or *statutes*, and sometimes even *resolves*, and if they contained specific age provisions, then those provisions would outrank any common law rule setting an age requirement. A few examples are:

- Maryland law in 1638/9 said free servants over age 18 served four-year indentures. Males under age 18 served until they turned 24; females aged 12 and under were to serve for seven years and those over age 12 for four years. (*Proceedings and Acts of the General Assembly January 1637/8-September 1664, Archives of Maryland Online Vol. I: 80.*)
- Under Virginia law as of 1849, up to 32 young men between the ages of 16 and 25 were eligible to be admitted, free of charge, to the Virginia Military Institute each year. (Chapter XXXIV, §13 (1849), in *The Code of Virginia* (Richmond: State Printer, 1849), 175.)
- Under Colorado law, as of 1868, no child under the age of 10 could be convicted of any crime or misdemeanor. ("An Act concerning Criminal Jurisprudence," §4 (1868), in *The Revised Laws of Colorado ... 1867* (Central City: State Publisher 1868), 196.)

C. THE COMMON LAW

Sometimes even the statutes didn't set out a specific age when a person was considered old enough to act in a particular way. In those cases, in most American jurisdictions (Louisiana being a major exception), the unwritten rules of law collectively known as the common law may very well have the answer we need. And although these rules of law were not written down the way statutes were, they were collected and reported by commentators whose works became accepted as the definitive explanations of the common law. The most important of these commentators was William Blackstone, whose *Commentaries on the Laws of England* were generally used and relied on by early

American lawyers. Throughout the *Commentaries* there are numerous references to the age a person had to be to act (or be acted upon) under the law, such as:

- “[N]o person under twenty-one years of age shall be capable of voting ...”
- “A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may aliene his lands, goods, and chattels. A female also at seven years of age may be betrothed, or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage; and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth.”
- “In criminal cases, an infant of the age of fourteen years may be capitally punished for any capital offence; but under the age of seven he cannot. The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he ... could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion.”

D. THE ROLE OF FEDERALISM

Federalism – the form of government in the United States – divides authority between the federal and state governments. Under Amendment X to the Constitution, “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.”

But Article VI, clause 2, provides that: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” So if there is a direct conflict between federal law and state law in an area not reserved to the states, federal law will prevail.

E. WHAT THIS MEANS FOR GENEALOGY

Whenever you need to know what the law was at a particular time and place, look first to see which law applied: federal or state. If state, then look first to the fundamental document in effect at the time – a colonial charter or Constitution, then to the statutes in effect at the time and then, finally, to the common law for the answer. Federal legal research follows the same path: look first to the United States Constitution, then to federal statutes, and last to the common law for an answer to the research question.

RESOURCE LIST

General Resources

1. Blackstone, William. *Commentaries on the Laws of England*. 4 volumes. Oxford, England : Clarendon Press, 1765-1769. Widely available online.
2. Digital Georgetown. (Digital collections of Georgetown University) “Legal Dictionaries.” <https://repository.library.georgetown.edu/handle/10822/559416>
3. Google Books. <https://books.google.com/>
4. HathiTrust Digital Library. <https://www.hathitrust.org/>
5. Internet Archive. <https://archive.org/>
6. Thorpe, F.N. *The Federal and State Constitutions ...*, 7 vols. Washington, D.C. : GPO, 1909. Google Books, <https://bit.ly/legalgen0405> [US, AL-DC], <https://bit.ly/legalgen0406> [FL-KS], <https://bit.ly/legalgen0407> [KY-MA], <https://bit.ly/legalgen0408> [MI-NH], <https://bit.ly/legalgen0409> [NJ-PI], <https://bit.ly/legalgen0410> [PR-VT], <https://bit.ly/legalgen0411> [VA-WY]

Sources for Early Laws

Alabama: <https://archive.org/details/alabama-acts?&sort=date>
Arkansas: <https://advancinggenealogist.com/historic-arkansas-statutory-law/>
Connecticut: <https://cslib.contentdm.oclc.org/digital/collection/p128501coll3/>
Delaware: <https://delaware.contentdm.oclc.org/digital/collection/p15323coll1>
Florida: <https://ufdc.ufl.edu/law> Acts & Resolutions <http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/index.htm>;
Territorial Laws, 1822-1845, <http://edocs.dlis.state.fl.us/fldocs/leg/actterritory/index.htm>
Georgia: https://dlg.usg.edu/collection/dlg_zlg and https://digitalcommons.law.uga.edu/ga_code/
Illinois: http://www.wiu.edu/libraries/govpubs/illinois_laws/
Indiana (1817-1850): <https://bit.ly/legalgen0089> [Indiana Historical Laws]
Iowa: <https://www.legis.iowa.gov/law/statutory/acts> and <https://www.legis.iowa.gov/archives/code>
Louisiana: https://digitalcommons.law.lsu.edu/la_civilcode/
Maine: <https://legislature.maine.gov/legis/lawlib/lldl/open.htm>
Maryland: Codes- <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/codes.html>
Session laws: <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/laws.html>
Massachusetts: <https://bit.ly/legalgen0052> and for historical documents and laws, <https://bit.ly/legalgen0090>
Minnesota: <https://www.revisor.mn.gov/statutes/?view=archive>
Missouri: <https://cdm16795.contentdm.oclc.org/digital/collection/molaws>
Nevada: <https://www.leg.state.nv.us/law1.html>
New Hampshire: <https://scholars.unh.edu/lawsnh/> and <https://bit.ly/legalgen0454>
New Jersey: <https://bit.ly/legalgen0440> (codes) and <https://bit.ly/legalgen0441> (session laws)
New Mexico: <https://www.nmonesource.com/nmos/en/nav.do>
New York: <https://www.nysl.nysed.gov/scandocs/historical.htm>
North Carolina: <https://bit.ly/legalgen0690>
North Dakota: <https://www.ndlegis.gov/legislative-histories/session-laws>
Pennsylvania: <https://www.palrb.gov/Preservation> and see <https://bit.ly/legalgen0502>
South Carolina: https://www.carolana.com/SC/sc_state_government_sources.html
South Dakota: https://sdsdl-montage.auto-graphics.com/#/customizeListView?listId=CustomizeEntityLists_97
Texas: <https://guides.sll.texas.gov/historical-texas-statutes>
Utah: https://collections.lib.utah.edu/search?facet_setname=s=uu_law_uschs
Vermont: <https://libguides.vermontlaw.edu/vermontlawguide/vermonthistoriclegislation>
Virginia (and West Virginia): <https://vagenweb.org/hening/> ; <https://catalog.hathitrust.org/Record/008885427>
Washington: https://leg.wa.gov/CodeReviser/Pages/session_laws.aspx
West Virginia: <https://babel.hathitrust.org/cgi/mb?a=listis&c=862882432>
Wisconsin: <https://docs.legis.wisconsin.gov/archive/law>
Wyoming: <https://wyomingdigitalcollections.ptfs.com/>
For others such as Indian Territory, Kansas, Nebraska, Ohio, Oklahoma, see <http://advancinggenealogist.com/laws-and-statutes-index/>

Web addresses verified as of 8 May 2024