Cancellation of Social Security Number

by

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caveat lector

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Contracts and Extortion

So far as I'm aware, when two or more participants engage in a transaction that involves an exchange of obligations, promises, performance, consideration, forbearance or restraint, goods or services, and so forth, then the transaction must be one of only two possible things. The transaction must be either a contract or extortion.[1] Either of those two things, and nothing else, satisfies the characteristics that I've suggested for such a transaction.

The only difference between a contract and extortion is the nature of the participation in the transaction. If participation is voluntary by everybody involved, then the transaction is a contract. If any participant is forced or coerced into the transaction, then the transaction is extortion.

While I was voluntarily participating in the Social Security program, the situation was a contract. That, however, invokes the principles of the contract. One of those principles is that a breach of contract committed by any one of the parties to the contract provides a cause of action for the other parties to the contract, to seek a remedy. One available remedy is avoidance of the contract.

> **AVOIDANCE.** A making void, useless, or empty....
>
> —*Bouvier's Law Dictionary*, 1889

> **Avoidance.** A making void, useless, empty, or of no effect; annulling, cancelling; escaping or evading....
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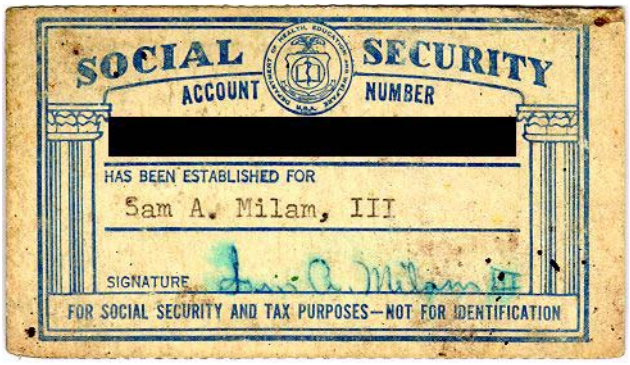
> —*Black's Law Dictionary*, 1979

> **avoidance** .... *n.* **1.** The act of shunning or avoiding. **2.** *Law* [*sic*]. An annulment.
>
> —*American Heritage Dictionary of the English Language*, 1992

Breach and Avoidance



My original Social Security card bore upon its face, clearly printed in English, the inscription, "FOR SOCIAL SECURITY AND TAX PURPOSES — NOT FOR IDENTIFICATION".

When the Social Security number became a mandatory form of identification, against my will and without my consent, I was compelled to either accept the situation or to avoid the contract. I wasn't permitted any other options. My many efforts to refuse such use of the number were rejected. If I had the number, then I was required to use it as identification.[2]

Whether or not I was injured by the breach of contract is irrelevant. Whatever the case, a clearly stated provision of the contract was violated, against my will and without my consent. Injuries that I believe to have resulted from the mandatory use of the Social Security number as identification included but are not necessarily limited to: a loss of my

1 I haven't found a word the general meaning of which inarguably includes both extortion and contract and inarguably excludes any other kind of interaction. *Transaction* is the closest that I've been able to come. If somebody wants to suggest a better word, then I'm willing to consider it.

2 See the section on Advanced Micro Devices in my memoir *Outward Bound*, for some typical examples.

privacy; compromise of any of my personal information that was associated with the number; imposition upon me of a documentation requirement as a prerequisite for activities that should not require such a prerequisite; and loss of my access to the fundamental principles of liberty, such as the presumption of innocence.[3]

Avoidance of the Contract

If I had voluntarily accepted the use of the Social Security number as mandatory identification, then that would have legitimized its use for that purpose, in my case. It would have condoned the injuries that accrued to me from such use. That wasn't an acceptable option. So, on June 13, 1984, I canceled the Social Security number. For people who don't believe that it's possible to cancel a Social Security number, I'll elaborate. I wrote a letter to the Regional Commissioner of the Social Security Administration in San Francisco and informed him of my decision to end my participation in the Social Security program. I instructed him to discontinue my number. I've included a copy of my letter in the Appendix. The Commissioner's reply included the expected lies and misinformation. However, his reply is irrelevant.[4] The Social Security Administration was in breach of contract or, at least, complicit in a breach of contract. All of my previous efforts to correct the situation had failed. Therefore, I secured remedy in the only way that remained available to me. Since I legitimately avoided the contract, any opinion to the contrary by anybody in the Social Security Administration is irrelevant. Nevertheless, I've included in the Appendix a copy of the Regional Commissioner's reply, for the record.

Validity of the Avoidance

If the Social Security program is to be regarded as a contract, then participation must be voluntary. In that case, they can assign numbers to me every day for the rest of my life and, if I don't agree to participate, then there isn't any contract. The numbers don't apply to me. On the other hand, if they can use force or coercion to compel my participation in the program, against my will, then the Social Security program isn't a contract. It's extortion. Since there isn't any obligation under duress, I don't have any obligation to an extortionate Social Security program. Any number that's allegedly assigned to me in connection with such a program doesn't apply to me. Either way, I don't have a Social Security number. Opinion to the contrary within the Social Security Administration is irrelevant. Period. End of Discussion.

3 See my essay, *The Principles of Liberty*.

4 See the reprint, in *Pharos*, of the article *Those Chains That Bind You!,* author unknown. The text of the article is also available in the appendix of this essay, on the next two pages.

Appendix

Article: Those Chains That Bind You!

Original Source Unknown

Evidence of the contract between the state and the natural person is the marriage license, birth certificate, driver's license, social "insecurity" number, and the like. Of course, the nature of these licenses does not meet the specific requirements of a contract; however, they do have the effect of being acted upon like a contract. In past issues we have addressed the constructive or quasi-contract, and we have a position paper available on that subject.

We are often asked how important it is to rescind these contracts, how do you get rid of them, and what do I do when they send my rescission back without an answer?

The answer to the first question is one of individual preference. Obviously, if a person doesn't want to subscribe to a daily newspaper any longer, the contract must be terminated; likewise with rescissions of quasi-governmental contracts created by legislative fiat. If a person likes the terms and conditions of the contract, they should keep the license. However, if the terms of the contract are no longer acceptable, the contract must be rescinded.

Our position has always been, if you have the driver's license, obey all traffic regulations. If you have the social security number, pay your income and social security taxes. However, if you do not want these obligations, you must rescind the quasi-contract.

A person must immediately rescind any contract that has been entered into by fraud and false representation when he learns of the fraud, or the contract will remain in effect. The courts have said:

> "... but in the view we take of the question of waiver of the fraud by failure to exercise due diligence to rescind,...
>
> "... If they proposed to rescind, their duty was to assert that right promptly, unconditionally, and unevasively," otherwise the affirmation of the contract, notwithstanding the fraud, would follow. Richardson v. Lowe, 149 Fed Rep 625, 627-8.
>
> "Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority.... And this is so even though, as here, the agent himself may have been unaware of the limitations of his authority. See e.g., Utah Power & Light Co. v. United States, 243 U.S. 389, 409, United States v. Stewart, 311 U.S. 60, 70; and see generally, The Floyd Acceptance, 7 Wall 666." Federal Corp Ins. Corp. v. Merrill, 332 U.S. 380, 384.
>
> "Where a party desires to rescind upon the grounds of mistake or fraud he must upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, ... he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had been subsisted." Grymes v. Saunders, 93 U.S. 55, 62. Also see Shappiro v. Goldberg, 192 U.S. 232.

Rescission of a contract on the ground of fraud is not a mental process undisclosed and unacted upon. It requires affirmative action immediately on its discovery; some overt act and outward manifestation of the intention to clearly apprise the other party to the

contract of the right asserted. Melton v. Smith, 65 Mo. 325; Walters v. Miller, 10 Iowa 427.

The duty of rescinding arises immediately upon acquiring knowledge of the substantial and material facts constituting the fraud. It is not requisite that the defrauded party shall be acquainted with all the evidence constituting the fraud before the duty to act by way of rescission arises. When he has evidence sufficient to reasonably actuate him to rescind the contract, and once he has acted, no subsequent discovery of cumulative evidence can operate to excuse waiver of the fraud, if such evidence has in the meantime occurred, or to revive a once lost right of rescission. The election to waive the fraud once deliberately made is irrevocable. Vacillation or speculation cannot be tolerated. Campbell v. Flemming, 1 A. & E. 40; Fry on Specific Performance on Contracts (2nd ed) Sections 703 & 704; Bach V. Tuch, 26 N.E. 1019; Taylor v. Short, 17 S.W. 970.

> "If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, the loss happens from such voluntary execution, and he cannot recover for loss which he deliberately elected to incur." Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed 573, 579.

Instruments may be rescinded and canceled when they have been obtained from persons who were at the time under duress or incapacity. French's heirs v. French, 8 Ohio 214; Cook v. Toumbs, 36 Miss 685.

Apart from judicial proceedings the communication of the desire to rescind need not be formal, but it must be a distinct and positive rejection of the contract. L.R. 9, Eq. 263.

From the above, it can be concluded that in order to rescind a contract a person must allege fraud, ignorance of law, mistake of facts, have been under duress, or incapacity (minor) at the time the contract was entered into.

The answer to the second question has a non-specific answer. All rescissions must be tailored to the individual situation. There should be no fill-in-the-blank rescissions, as the circumstances surrounding each quasi-contract are different.

The final question is what to do when the agency involved sends the rescission back. There are basically two alternatives.

1. Do nothing: Once the contract is rescinded, it is rescinded. The argument that you do not have the contract is still valid. Your argument is that you do not have the contract. If the opposition says you do, the burden of proof is on them.

2. Fight: If you want to push the issue, the rescission may be sent back with an explanation of why you have rescinded the contract. Arguments can be taken from our position paper on Constructive contracts. When that fails, an action lies in the judiciary.

Like everything else, what you do is up to you.

Cancellation of Social Security Number

June 13, 1984

Phil DiBenedetto
Regional Commissioner
Social Security Administration
28th Floor, 100 Van Ness Avenue
San Francisco, California 94102

Mr DiBenedetto

This is to inform you of my decision to end my participation in the Social Security system. In accordance with this decision, do the following:

1. Discontinue my Social Security Number ([redacted])
2. Send me a letter of acknowledgement.
3. Disburse to me my accumulated interest in the various Social Security funds.

Sincerely,

Sam A. Milam III

Sam A. Milam III
Box 21633
San Jose, California 95151

Letter from the Regional Commissioner

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer To: SD9B1

Region IX
100 Van Ness Avenue
San Francisco CA 94102

JUN 25 1984

Mr. Sam A. Milam III
Box 21633
San Jose, California 95151

Dear Mr. Milam:

This will acknowledge our receipt of your letter dated June 13, 1984, which stated your desire to end your participation in the Social Security system. We must inform you, however, that your letter in no way serves to invalidate your Social Security number, exempt your work from coverage under the Social Security Act or exempt you from taxation under the Federal Insurance Contributions Act.

There are no provisions for the Social Security Administration to discontinue the record of a Social Security number after it has been issued to an individual on the basis of a valid application. You are, of course, free to provide or withhold your Social Security number in your personal business transactions. You are similarly free to refrain from engaging in employment covered under the Social Security Act. However, if you do elect to become so employed, there is no legal way to avoid the Social Security tax. In a recent decision (U.S. v. Lee, 102 S Ct. 1051), the United States Supreme Court held that a worker does not have any constitutional right to opt out of Social Security coverage for personal reasons.

The legal authority for collecting Federal Insurance Contributions Act taxes (FICA, or "Social Security taxes") is contained in the Internal Revenue Code and the process is administered by the Internal Revenue Service. If you wish an authoritative response to your request for a return of accumulated taxes, you should direct that request to the Internal Revenue Service. We can informally advise you, however, that we are aware of no provision for the return of taxes which the Internal Revenue Service has properly collected.

Whether or not you request Social Security benefits in the future will be your personal decision. To receive Social Security benefits, an individual must file a valid application. If you choose not to file an application, Social Security benefits will not be paid to you.

Sincerely,

Philip J. DiBenedetto
Regional Commissioner

Glossary

Avoid. To annul; cancel; make void; to destroy the efficacy of anything. To evade; escape. —*Black's Law Dictionary*, 1979

AVOIDANCE. A making void, useless, or empty.

In Ecclesiastical Law. It exists when benefice becomes vacant for want of an incumbent.

In Pleading. Repelling or excluding the conclusions or implications arising from the admission of the truth of the allegations of the opposite party. See CONFESSION and AVOIDANCE.

—*Bouvier's Law Dictionary*, 1889

Avoidance. A making void, useless, empty, or of no effect; annulling, cancelling; escaping or evading. See also **Evasion.**

In pleading, the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect. Fed.R. Civil P. 8(c). See also **Affirmative defense; Confession and avoidance.**

—*Black's Law Dictionary*, 1979

avoidance .... *n.* **1.** The act of shunning or avoiding. **2.** *Law*. An annulment.

—*American Heritage Dictionary of the English Language*, 1992

BREACH. In Contracts. The violation of an obligation, engagement, or duty.

A *continuing* breach is one where the condition of things constituting a breach continues during a period of time, or where the acts constituting a. breach are repeated at brief intervals; F. Moore, 242; 1 Leon. 62; 1 Salk. 141; Holt, 178; 2 Ld. Raym. 1125.

In Pleading. That part of the declaration in which the violation of the defendant's contract is stated.

It is usual in assumpit to introduce the statement of the particular breach, with the allegation that the defendant, contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff, neglected and refused to perform, or performed, the particular act, contrary to the previous stipulation.

In debt, the breach or cause of action complained of must proceed only for the non-payment of money previously alleged to be payable; and such breach is very similar whether the action be in debt on simple contract, specialty, record, or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of _____ dollars, above demanded, nor any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to the damage of the said plaintiff _____ dollars, and therefore he brings suit," etc.

The breach must obviously be governed by the nature of the stipulation; it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect; Comyns, Dig. *Pleader*, C, 45-49; 2 Wms. Saund. 181 *b*, c; 6 Cranch, 127. And see 5 Johns, 168; 8 *id*. 111; 7 *id*. 376; 4 Dali. 436; 2 Hen. & M. 446; Steph. P1. 307.

When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other; 1 Sid. 440; Hardr. 320; Comyns, Dig. *Pleader*, C.

—*Bouvier's Law Dictionary*, 1889

Breach. The breaking or violating of a law, right, obligation, engagement, or duty, either by commission or omission. Exists where one party to contract fails to carry out term, promise, or condition of the contract.

—*Black's Law Dictionary*, 1979

breach .... *n.* **1.a.** An opening, a tear, or a rupture. **b.** A gap or rift, especially in or as if in a solid structure such as a dike or fortification. **2.** A violation or infraction, as of a law, a legal obligation, or a promise. **3.** A breaking up or disruption of friendly relations; an estrangement. **4.** A leap of a whale from the water. **5.** The breaking of waves or surf. **—breach** *v*.... —*tr*. **1.** To make a hole or gap in; break through. **2.** To break or violate (an agreement, for example). —*intr*. To leap from the water: *waiting for the whale to breach*....

SYNONYMS: *breach, infraction, violation, transgression, trespass, infringement.* These nouns denote an act or instance of breaking a

law or regulation or failing to fulfill a duty, obligation, or promise. *Breach* and *infraction* are the least specific: *Revealing the secret would be a breach of trust. Infractions of the rules will not be tolerated.* A *violation* is an infraction committed willfully and with complete lack of regard for legal, moral, or ethical considerations: *She failed to appear for the rehearsal, in flagrant violation of her contract. Transgression* refers most often to a violation of divine or moral law: *"The children shall not be punished for the father's transgression."* (Daniel Defoe). As it refers to the breaking of a statute, *trespass* implies willful intrusion on another's rights, possessions, or person: *"In the limited and confined sense* [trespass] *signifies no more than an entry on another man's ground without a lawful authority"* (William Blackstone). *Infringement* is most frequently used specifically to denote encroachment on another's rights, such as those granted by a copyright: *"Necessity is the plea for every infringement of human freedom"* (William Pitt the Younger).

—*American Heritage Dictionary of the English Language*, 1992

Breach of contract. Failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Prevention or hindrance by party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement....

—*Black's Law Dictionary*, 1979

CAUSE OF ACTION... When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it; 3 B. & Ald. 288, 626; 5 B. & C. 259; 4 C. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; 5 B. & C. 360; 4 D. & R. 346; 4 Bingh. 686.

—*Bouvier's Law Dictionary*, 1889

Cause of action. The fact or facts which give a person a right to judicial relief. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf. Thompson v. Zurich Ins. Co., D.C.Minn., 309 F.Supp. 1178, 1181. Fact, or a state of facts, to which law sought to be enforced against a person or thing applies. Facts which give rise to one or more relations of right-duty between two or more persons. Failure to perform legal obligations to do, or refrain from performance of, some act. Matter for which action may be maintained. Unlawful violation or invasion of right. The right which a party has to institute a judicial proceeding. See also Case; Claim; Failure to state cause of action; Justiciable controversy; Severance of actions; Splitting cause of action; Suit.

—*Black's Law Dictionary*, 1979

CONSIDERATION .... The material cause which moves a contracting party to enter into a contract. 2. Bla. Com. 443.

The price, motive, or matter of inducement to a contract, -whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

It is defined as "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant;" Tindal, C. J., in 3 Scott, 250. See a full definition in L. R. 10 Ex. 162, and see 5 Pick. 380 ....

Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made; Chitty, Contr. 7; Doct. & Stud. 179; 1 Selw. N. P. 39, 40; 2 Pet. 182; 5 Cra. 142, 150; 1 Litt. 183; 3 Johns. 100; 14 *id*. 466; 4 N.Y. 207; 6 Mass. 58; 2 Bibb, 30; 2 J. J. Marsh. 222; 2 N.H. 97; Wright, Ohio, 660, 5 W. & S. 427; 13 S. & R. 29; 12 Ga. 52; 24 Miss. 9; 4 Ill. 33; 5 Humphr. 19; 4 Blackf. 388; 3 C. B. 321; 4 East, 55.

"A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other;" L. R. 10 Ex. 162. See 5 Pick. 380.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract; 2 How. 426; 1 Metc. Mass. 84; 12 Mass. 365; 12 Vt. 259; 23 *id*. 532; 29 Ala. N.S. 188; 20 Penn. 303; 22 N.H. 246; 11 Ad. & E. 983; 6 *id*. 438, 456; 16 East, 372; 9 Ves. Ch. 246; 2 Cr. & M. 623; Ambl. 18; 2 Sch. & L. 395, n. *a*. These valuable considerations are divided by the civilians into four classes, which are given, with literal translations; *Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do)....

—*Bouvier's Law Dictionary*, 1889

Consideration. The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Richman v. Brookhaven Servicing Corp., 80 Misc.2d 563, 363 N.Y.S.2d 731, 733.

See also Adequate consideration; Failure of consideration; Fair and valuable consideration; Fair consideration; Good consideration; Inadequate consideration; Love and affection; Past consideration; Valuable consideration; Want of consideration.

Considerations are either *executed* or *executory; express* or *implied; good* or *valuable*. See definitions *infra*.

Concurrent consideration. One which arises at the same time or where the promises are simultaneous.

Continuing consideration. One consisting in acts or performances which must necessarily extend over a considerable period of time.

Equitable or moral considerations. Considerations which are devoid of efficacy in point of strict law, but are founded upon a moral duty, and may be made the basis of an express promise.

Executed or executory considerations. The former are acts done or values given before or at the time of making the contract; the latter are promises to give or do something in future.

Express or implied considerations. The former are those which are specifically stated in a deed, contract, or other instrument; the latter are those inferred or supposed by the law from the acts or situation of the parties. Express consideration is a consideration which is distinctly and specifically named in the written contract or in the oral agreement of the parties.

Good consideration. Such as is founded on natural duty and affection, or on a strong moral obligation. A consideration for love and affection entertained by and for one within degree recognized by law. Motives of natural duty, generosity, and prudence come under this class. The term is sometimes used in the sense of a consideration valid in point of law, and it then includes a valuable or sufficient as well as a meritorious consideration. Generally, however, *good* is used in antithesis to *valuable consideration (q.v.)*.

Gratuitous consideration. One which is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid in law.

Illegal consideration. An act which if done, or a promise which if enforced, would be prejudicial to the public interest or contrary to law.

Implied considerations. See *Express or implied considerations, supra*.

Impossible consideration. One which cannot be performed.

Legal consideration. One recognized or permitted by the law as valid and lawful; as distinguished from such as are illegal or immoral. The term is also sometimes used as equivalent to "good" or "sufficient" consideration.

Meritorious consideration. See *Good consideration, supra*.

Moral considerations. See *Equitable or moral considerations, supra*.

Nominal consideration. One bearing no relation to the real value of the contract or article, as where a parcel of land is described in a deed

as being sold for "one dollar," no actual consideration passing, or the real consideration being concealed. This term is also sometimes used as descriptive of an inflated or exaggerated value placed upon property for the purpose of an exchange.

Past consideration. An act done before the contract is made, which is ordinarily by itself no consideration for a promise. As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons.

Pecuniary consideration. A consideration for an act of forbearance which consists either in money presently passing or in money to be paid in the future, including a promise to pay a debt in full which otherwise would be released or diminished by bankruptcy or insolvency proceedings.

Sufficient consideration. One deemed by the law of sufficient value to support an ordinary contract between parties, or one sufficient to support the particular transaction.

—*Black's Law Dictionary*, 1979

CONTRACT.... An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., 11 Pet. 420, 572. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., 4 Wheat. 197. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been variously defined, as follows: A compact between two or more parties. 6 Cranch, 87, 136. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph. Com. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent, 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol, Lib. 1, § 10; Cowel: Blount.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. 2 Hill, N. Y. 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. 9 Cal. 83.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION. 1 Pars. Contr. 7. Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First*, that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Steph. Com. 109.

The use of the word *agreement* (*aggregatio mentium*) seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil-law *conventio* (*con* and *venio*), a coming together, to which (being derived from *ad* and *grex*) it seems nearly equivalent. We do not think the objection that it is a synonym (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea. But to one who under-

stands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is always presumed by law, - the form of the instrument being held to import a consideration. 2 Kent, 450, note.

A contract without consideration is called a *nudum pactum* (nude pact), but it is still a *pactum;* and this implies that consideration is not an essential. The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open.

There is an idea of mutuality in *con* and *traho*, to draw together, but we think that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Bla. Com. 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "between two or more parties" following agreement.

In its widest sense, "contract" includes records and specialties; but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement," which is never applied to specialties. Mutuality is of the very essence of both, - not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum;* 2 Co. 15; 7 M. & G. 998, argum. and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage; and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality, - no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent. It is *judicium redditum in invitum*. It may properly be denied to be a contract, though Blackstone insists that one is implied. *Per Mansfield*, 3 Burr. 1545; 1 Cow. 316; *per Story*, J., 1 Mas. 288. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chit. Con. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes. 5 Ohio St. 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art. 1, § 10, clause 1. 27 Miss. 417. See IMPAIRING THE OBLIGATION OF CONTRACTS.

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken * * * ; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louis. Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louis. Code, art. 1767.

Certain Contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louis. Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties, without other formalities; Maine, Anc. Law, 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefore is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time; 6 Cranch, 87, 136.

A contract *executed* (which differs in nothing from a grant) conveys a chose in possession; a contract *executory* conveys a chose in action. 2 Bla. Com. 443. As to the importance of grants considered as contracts, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louis. Code, 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, vis., by execution under seal.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louis. Code, art. 1769.

Implied contracts may be either implied *in law* or *in fact*. A contract implied *in law* arises where some pecuniary inequality exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied *in fact* arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the real value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louis. Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral Contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These are the highest class of contracts. Statutes merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record. 4 Bla. Com. 465.

Severable (or separable) contracts are those the considerations of which are by their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure - *i.e.* so much per pound or bushel - does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written*; for contracts are equally *verbal* whether the words are *written* or spoken, - the meaning of verbal being - *expressed in words*. See 3 Burr. 1670; 7 Term, 350, note; 11 Mass. 27, 30; 5 *id* . 299, 301; 7 Conn. 57; 1 Caines, 386.

Specialties are those which are under seal: as, deeds and bonds.

Specialties are sometimes said to include also contracts of record, 1 Pars. Con. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed*, *sealed*, and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity. Plowd. 305; 7 Term, 477; 4 B. & Ad. 652; 3 Bingh. 111; 1 Fonb. Eq. 342, note. Though little of real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute. In 13 Cal. 33, it is said that the distinction is now unmeaning and not sustained by reason. See CONSIDERATION.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol. 2 Watts, 451; 9 Pick. 298; 13 Wend. 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louis. Code, art. 1758. A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1. c. 1, s. 1. art. 2, makes the five following classes: *reciprocal* and *unilateral*; *consensual* and *real*; *those of mutual interest, of beneficence* and *mixed*; *principal* and *accessory*; *those which* are subjected by the civil law to

certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which is the method taken by the civil law; it has referred the greatest part of the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu*. Inst. 3. 14. 2; 2 Bla. Com. 443.

Qualities of. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; Peak. 227; 3 Term, 653; 1 B. & Ald. 681; 1 Pick. 278. To the rule that the contract must be obligatory on both parties there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Stra. 937. See other instances, 6 East, 307; 3 Taunt. 169; 5 *id*. 788; 3 B. & C. 232. There must be a good and valid consideration (*q.v.*), which must be proved though the contract be in writing; 7 Term, 350, note (a); 2 Bla. Com. 444; Fonb. Eq. 335, n. (a); Chitty, Bills, 68. There is an exception to this rule in the case of bills and notes, which are of themselves *primâ facie* evidence of consideration. And in other contracts (written) when consideration is acknowledged, it is *primâ facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be omitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty. Chitty, Com. L. 215, 217, 222, 228, 250; 1 Binn. 110, 118; 4 Dall. 269, 298; 4 Yeates, 24, 84; 28 Ala. 514; 7 Ind. 132; 4 Minn. 278; 30 N.H. 540; 2 Sandf. 146. But see 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their comprehensive and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat*.

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor - *contra proferentem* - except in the case of the sovereign.

This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither false English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"). 2 Bla. Com. 379; 6 Co. 59.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for any thing else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real

estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

See, generally, as to contracts, Bouv. Inst. Index; Parson, Chitty, Comyns, Leake, Anson, and Story, on Contracts; Com. Dig. *Abatement* (E, 12) (F, 8), *Admiralty* (E, 10, 11), *Action on Case on Assumpsit, Agreement, Bargain and Sale, Baron et Feme* (2), *Condition, Debt* (A, 8, 9), *Enfant* (B, 5), *Idiot* (D, 1), *Merchant* (E, 1), *Pleader* (2 W, 11, 43), *Trade* (D, 3), *War* (B, 2); Bac. Abr. *Agreement, Assumpsit, Condition, Obligation;* Vin. Abr. *Condition, Contract and Agreements, Covenant, Vendor, Vendee;* 2 Belt, Sup. Ves. 260, 295, 376, 441; Yelv. 47; 4 Ves. 497, 671; Arch. Civ. Pl. 22; La. Civ. Code, 3, tit. 3-18; Poth. Obl.; Maine, Anc. Law; Austin, Jurisp.; Sugd. Ven. & P.; Long, Sales (Rand. ed.), and Benj. Sales; Jones, Story, and Edwards, on Bailment; Toull. *Dr. Civ*. tom. 6, 7; Hamm. Part. c. 1; Calv. Par.; Chitty, Prac, Index.

Each subject included in the law of contracts will be found discussed in the separate articles of this Dictionary. See AGREEMENT; APPORTIONMENT; APPROPRIATION; ASSENT; ASSIGNMENT; ASSUMPSIT; ATTESTATION; BAILMENT; BARGAIN AND SALE; BIDDER; BILATERAL CONTRACT; BILL OF EXCHANGE; BUYER; COMMODATE; CONDITION; CONSENSUAL; CONJUNCTIVE; CONSUMMATION; CONSTRUCTION; COVENANT; DEBT; DEED; DELEGATION; DELIVERY; DISCHARGE OF A CONTRACT; DISJUNCTIVE; EQUITY OF REDEMPTION; EXCHANGE; GUARANTY; IMPAIRING THE OBLIGATION OF CONTRACTS; INSURANCE; INTEREST; INTERESTED CONTRACTS; ITEM; MISREPRESENTATION; MORTGAGE; NEGOCIORUM GESTOR; NOVATION; OBLIGATION; PACTUM CONSTITUTÆ PECUNIÆ; PARTIES; PARTNERS; PARTNERSHIP; PAYMENT; PLEDGE; PROMISE; PURCHASER; QUASI CONTRACTUS; REPRESENTATION; SALE; SELLER; SETTLEMENT; SUBROGATION; TITLE.

—*Bouvier's Law Dictionary*, 1889

Contract. An agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation. Lamoureux v. Burrillville Racing Ass'n, 91 R.I. 94, 161 A.2d 213, 215. Under U.C.C., term refers to total legal obligation which results from parties' agreement as affected by the Code. Section 1-201(11). As to sales, "contract" and "agreement" are limited to those relating to present or future sales of goods, and "contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. U.C.C. § 2-106(1).
The writing which contains the agreement of parties, with the terms and conditions, and which serves as a proof of the obligation.

Contracts may be classified on several different methods, according to the element in them which is brought into prominence. The usual classifications are as follows:

Certain and hazardous. Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated. Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event.

Commutative and independent. Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Independent contracts are those in which the mutual acts or promises have no relation to each other, either as equivalents or as considerations.

Conditional contract. An executory contract the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do or not to do something, but it is a contract whose very existence and performance depend upon a contingency.

Consensual and real. Consensual contracts are such as are founded upon and completed by the mere agreement of the contracting parties, without any external formality or symbolic act to fix the obligation. Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit or pledge, which, from

their nature, require a delivery of the thing *(res)*. In the common law a contract respecting real property (such as a lease of land for years) is called a "real" contract.

Constructive contract. See **Constructive contract;** also *Express and implied; Quasi contract, infra*.

Cost-plus contract. See **Costs.**

Divisible and indivisible. The effect of the breach of a contract depends in a large degree upon whether it is to be regarded as indivisible or divisible; *i.e.* whether it forms a whole, the performance of every part of which is a condition precedent to bind the other party, or is composed of several independent parts, the performance of any one of which will bind the other party *pro tanto*. The only test is whether the whole quantity of the things concerned, or the sum of the acts to be done, is of the essence of the contract. It depends, therefore, in the last resort, simply upon the intention of the parties. Integrity Flooring v. Zandon Corporation, 130 N.J.L. 244, 32 A.2d 507, 509.

When a consideration is entire and indivisible, and it is against law, the contract is void *in toto*. When the consideration is divisible, and part of it is illegal, the contract is void only *pro tanto*. Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 220, 17 L.Ed. 530.

Entire and severable. An *entire* contract is one the consideration of which is entire on both sides. The entire fulfillment of the promise by either is a condition precedent to the fulfillment of any part of the promise by the other. Whenever, therefore, there is a contract to pay the gross sum for a certain and definite consideration, the contract is entire. A *severable* contract is one the consideration of which is, by its terms, susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side, as a contract to pay a person the worth of his services so long as he will do certain work; or to give a certain price for every bushel of so much corn as corresponds to a sample.

Where a contract consists of many parts, which may be considered as parts of one whole, the contract is entire. When the parts may be considered as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract, the contract is a separable contract. But, if the consideration of the contract is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.

Entire contract clause. A provision in the insurance contract stating that the entire agreement between the insured and insurer is contained in the contract, including the application (if attached), declarations, insuring agreement, exclusions, conditions, and endorsements.

Exclusive contract. See *Requirements contract; Tying contract, infra*.

Executed and executory. Contracts are also divided into executed and executory; *executed,* where nothing remains to be done by either party, and where the transaction is completed at the moment that the arrangement is made, as where an article is sold and delivered, and payment therefor is made on the spot; *executory,* where some future act is to be done, as where an agreement is made to build a house in six months, or to do an act on or before some future day, or to lend money upon a certain interest, payable at a future time.

Express and implied. An express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing.

An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding.

Implied contracts are sometimes subdivided into those "implied in fact" and those "implied in law," the former being covered by the definition just given, while the latter are obligations imposed upon a person by the law, not in pursuance of his intention and agreement, either expressed or implied, but even against his will and design, because the circumstances between the parties are such as to render it just that the one should have a right, and the other a corre-

sponding liability, similar to those which would arise from a contract between them. This kind of obligation therefore rests on the principle that whatsoever it is certain a man ought to do that the law will suppose him to have promised to do. And hence it is said that, while the liability of a party to an express contract arises directly from the contract, it is just the reverse in the case of a contract "implied in law," the contract there being implied or arising from the liability. Bliss v. Hoyt, 70 Vt. 534, 41 A. 1026; Kellum v. Browning's Adm'r, 231 Ky. 308, 21 S.W.2d 459, 465. But obligations of this kind are not properly contracts at all, and should not be so denominated. There can be no true contract without a mutual and concurrent intention of the parties. Such obligations are more properly described as "quasi contracts." See **Constructive contract;** also *Quasi contract, infra.*

Gratuitous and onerous. Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one thereafter, although such benefit be of a pecuniary nature. Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value. A gratuitous contract is sometimes called a contract of beneficence.

Investment contract. A contract in which one party invests money or property expecting a return on his investment. See also **Investment contract; Security.**

Joint and several. A joint contract is one made by two or more promisors, who are jointly bound to fulfill its obligations, or made to two or more promisees, who are jointly entitled to require performance of the same. A contract may be "several" as to any one of several promisors or promisees, if he has a legal right (either from the terms of the agreement or the nature of the undertaking) to enforce his individual interest separately from the other parties. Generally all contracts are joint where the interest of the parties for whose benefit they are created is joint, and separate where that interest is separate.

Mutual interest, mixed, etc. Contracts of "mutual interest" are such as are entered into for the reciprocal interest and utility of each of the parties; as sales, exchange, partnership, and the like. "Mixed" contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge. Contracts "of beneficence" are those by which only one of the contracting parties is benefited; as loans, deposit and mandate.

Open end contract. Contract (normally sales contract) in which certain terms (*e.g.* order amount) are deliberately left open.

Output contract. A contract in which one party agrees to sell his entire output and the other agrees to buy it; it is not illusory, though it may be indefinite. See also *Requirements contract, infra.*

Parol contract. A contract not in writing, or partially in writing. At common law, a contract, though it may be in writing, not under seal. See **Parol evidence rule.**

Personal contract. A contract relating to personal property, or one which so far involves the element of personal knowledge or skill or personal confidence that it can be performed only by the person with whom made, and therefore is not binding on his executor.

Pre-contract. An obligation growing out of a contract or contractual relation, of such a nature that it debars the party from legally entering into a similar contract at a later time with any other person.

Principal and accessory. A principal contract is one entered into by both parties on their own account or in the several qualities they assume. It is one which stands by itself, justifies its own existence, and is not subordinate or auxiliary to any other. Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledge. Civ.Code La. art. 1771.

Quasi contract. Legal fiction invented by common law courts to permit recovery by contractual remedy in cases where, in fact, there is no

contract, but where circumstances are such that justice warrants a recovery as though there had been a promise. It is not based on intention or consent of the parties, but is founded on considerations of justice and equity, and on doctrine of unjust enrichment. It is not in fact a contract, but an obligation which the law creates in absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it. It is what was formerly known as the contract implied in law; it has no reference to the intentions or expressions of the parties. The obligation is imposed despite, and frequently in frustration of their intention. See also **Constructive contract.**

In the civil law, a contractual relation arising out of transactions between the parties which give them mutual rights and obligations, but do not involve a specific and express convention or agreement between them. The lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties. Civ.Code La. art. 2293.

Record, specialty, simple. Contracts of record are such as are declared and adjudicated by courts of competent jurisdiction, or entered on their records, including judgments, recognizances, and statutes staple. These are not properly speaking contracts at all, though they may be enforced by action like contracts. Specialties, or special contracts, are contracts under seal, such as deeds and bonds. All others are included in the description "simple" contracts; that is, a simple contract is one that is not a contract of record and not under seal; it may be either written or oral, in either case, it is called a "parol" contract, the distinguishing feature being the lack of a seal.

Requirements contract. A contract in which one party agrees to purchase his total requirements from the other party and hence it is binding and not illusory. See also *Output contract, supra.*

Shipment contract. A contract calling for shipment of goods and in which shipment is excused if ship is lost. Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 41 S.Ct. 612, 65 L.Ed. 1123.

Special contract. A contract under seal; a specialty; as distinguished from one merely oral or in writing not sealed. But in common usage this term is often used to denote an express or explicit contract, one which clearly defines and settles the reciprocal rights and obligations of the parties, as distinguished from one which must be made out, and its terms ascertained, by the inference of the law from the nature and circumstances of the transaction. A special contract may rest in parol, and does not mean a contract by specialty; it is defined as one with peculiar provisions not found in the ordinary contracts relating to the same subject-matter.

Subcontract. A contract subordinate to another contract, made or intended to be made between the contracting parties, on one part, or some of them, and a third party (*i.e.* subcontractor). One made under a prior contract.

Where a person has contracted for the performance of certain work (*e.g.*, to build a house), and he in turn engages a third party to perform the whole or a part of that which is included in the original contract (*e.g.*, to do the carpenter work), his agreement with such third person is called a "subcontract," and such person is called a "subcontractor." The term "subcontractor" means one who has contracted with the original contractor for the performance of all or a part of the work or services which such contractor has himself contracted to perform.

Tying contract. See **Tying arrangement.**

Unconscionable contract. One which no sensible man not under delusion, duress, or in distress would make, and such as no honest and fair man would accept. Franklin Fire Ins. Co. v. Noll, 115 Ind.App. 289, 58 N.E.2d 947, 949, 950. A contract the terms of which are excessively unreasonable, overreaching and one-sided. See **Unconscionability.**

Unilateral and bilateral. A unilateral contract is one in which one party makes an express engagement or undertakes a performance, without receiving in return any express engagement or promise of performance from the other. Bilateral (or reciprocal) contracts are those by which the parties expressly enter into mutual engagements, such as sale or hire. Kling Bros.

Engineering Works v. Whiting Corporation, 320 Ill.App. 630, 51 N.E.2d 1004, 1007. When the party to whom an engagement is made makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. A contract is also said to be "unilateral" when there is a promise on one side only, the consideration on the other side being executed.

Usurious contract. See **Usurious contract.**

Voidable contract. See **Voidable contract.**

Void contract. See **Void contract.**

Written contract. A "written contract" is one which in all its terms is in writing. Commonly referred to as a formal contract.

See also Adhesion contract; Agreement; Aleatory contract; Alteration of contract; Bilateral contract; Bottom hole contract; Breach of contract; Collateral contract; Compact; Constructive contract; Contingency contract; Entire output contract; Executory contract; Formal contract; Futures contract; Indemnity contract; Innominate contracts; Installment contract; Integrated contract; Investment contract; Letter contract; Letter of intent; Literal contract; Marketing contract; Novation; Oral contract; Parol evidence rule; **Privity** (Privity of contract); Procurement contract; Severable contract; Simulated contract; Specialty. For "liberty of contract", see **Liberty.**

—*Black's Law Dictionary*, 1979

contract .... *n*.... **1.a.** An agreement between two or more parties, especially one that is written and enforceable by law. **b.** The writing or document containing such an agreement. **2.** The branch of law dealing with formal agreements between parties. **3.** Marriage as a formal agreement; betrothal. **4.** *Games*. **a.** The last and highest bid of one hand in bridge. **b.** The number of tricks thus bid. **c.** Contract bridge. **5.** A paid assignment to murder someone: *put out a contract on the mobster's life*.... —*tr*. **1.** To enter into by contract; establish or settle by formal agreement: *contract a marriage*. **2.** To acquire or incur: *contract obligations; contract a serious illness*. **3.a.** To reduce in size by drawing together; shrink. **b.** To pull together; wrinkle. **4.** *Grammar*. To shorten (a word or words) by omitting or combining some of the letters or sounds. —*intr*. **1.** To enter into or make an agreement: *contract for garbage collection*. **2.** To become reduced in size by or as if by being drawn together: *The pupils of the patient's eyes contracted*....

SYNONYMS; contract, condense, compress, constrict, shrink. These verbs mean to decrease in size or content. To *contract* is to draw together, especially by an internal force, with a resultant reduction in size, extent, or volume: *The bodybuilders contracted their biceps in unison. The pupil of the eye dilates and contracts in response to light. Condense* refers to a reduction in volume and in increase in compactness: *"To produce snow requires both heat and cold; the first to evaporate, the second to condense"* (John Lubbock). *The chairman condensed all the suggestions put forward into a single plan of action. Compress* applies to increased compactness brought about by pressing or squeezing; the term implies reduction in volume and change of form or shape: *compress dough into a circle with a rolling pin; sat on the lid of the suitcase to compress the clothes; trying to compress my thoughts into a few words*. To *constrict* is to make smaller or narrower, usually by binding or compression: *An accumulation of silt constricted the entrance to the harbor. Tight shoes constrict the feet. Shrink* refers to contraction that produces reduction in length, size, volume, or extent: *Wool jersey should be shrunk before being cut and stitched. Many once prosperous northern mill towns have shrunk as industry has moved to the South. His capital shrunk as his business foundered*. See also Synonyms at **bargain**.

—*American Heritage Dictionary of the English Language*, 1992

EXTORTION. The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Bla. Com. 141; 1 Hawk. Pl. Cr. c. 68, s. 1; 1 Russ. Cr. *144.

In a large sense the term includes any oppression under color of right; but it is generally and constantly used in the more limited technical sense above given.

To constitute extortion, there must be the receipt of money or something of value; the tak-

ing a promissory note which is void is not sufficient to make an extortion; 2 Mass. 523; 16 *id*. 93, 94. See Bacon, Abr; Co. Litt. 168. It is extortion and oppression for an officer to take money for the performance of his duty, even though it be in the exercise of a discretionary power; 2 Burr. 927. See 6 Cow. 661; 1 Caines, 130; 13 S. & R. 426; 3 Penn. R. 183; 1 Yeates, 71; 1 South. 324; 1 Pick. 171; 7 *id*. 279; 4 Cox, Cr. Cas. 387.

—*Bouvier's Law Dictionary*, 1889

Extortion. The obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C.A. § 871 et seq.; § 1951.

A person is guilty of theft by extortion if he purposely obtains property of another by threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor. Model Penal code, § 223.4.

See also **Blackmail; Hobbs Act**; **Loan Sharking**; **Shakedown**. With respect to "Larceny by extortion", see **Larceny**.

—*Black's Law Dictionary*, 1979

FORBEARANCE. A delay in enforcing rights. The act by which a creditor waits for the payment of a debt due him by the debtor after it has become due. It is sufficient consideration to support assumpsit. See ASSUMPSIT; CONSIDERATION.

—*Bouvier's Law Dictionary*, 1889

Forbearance. Act by which creditor waits for payment of debt due him by debtor after it becomes due. Upton v. Gould, 64 Cal.App.2d 814, 149 P.2d 731, 733. A delay in enforcing rights. Indulgence granted to a debtor. Refraining from action. The term is used in this sense in general jurisprudence, in contradistinction to "act."

Within usury law, term signifies contractual obligation of lender or creditor to refrain, during given period of time, from requiring borrower or debtor to repay loan or debt then due and payable. Hafer v. Spaeth, 22 Wash.2d 378, 156 P.2d 408, 411.

As regards forbearance as a form of consideration, see **Consideration.**

—*Black's Law Dictionary*, 1979

forbearance .... *n.* **1.** The act of forbearing. **2.** Tolerance and restraint in the face of provocation; patience. See Synonyms at **patience.** **3.** The quality of being forbearing. **4.** *Law.* The act of a creditor who refrains from enforcing a debt when it falls due.

—*American Heritage Dictionary of the English Language*, 1992

GOODS. In Contracts. The term goods is not so wide as chattels, for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which chattels does include; Co. Litt. 118; 1 Russ. 376.

Goods will not include fixtures; 2 Mass. 495; 4 J. B. Moore, 73. In a more limited sense, goods is used for articles of merchandise; 2 Bla. Com. 389. It has been held in Massachusetts that promissory notes were within the term goods in the Statute of Frauds; 3 Metc. Mass. 365; but see 24 N. H. 484; 4 Dudl. 28; so stock or shares of an incorporated company; 20 Pick. 9; 3 H. & J. 38; 15 Conn. 400; so, in some cases, bank notes and coin; 2 Stor. 52; 5 Mas. 537.

In Wills. In wills goods is *nomen generalissiniun*, and, if there is nothing to limit it, will comprehend all the personal estate of the testator, as stocks, bonds, notes, money, plate, furniture, etc.; 1 Atk. 180-182; 2 *id*. 62; 1 P. Wms. 267; 1 Brown, Ch. 128; 4 Russ. 370; Will. Ex. 1014; 1 Rop. Leg. 250; but in general it will be limited by the context of the will; see 2 Belt, Suppl. Ves. 287; 1 Chitty, Pr. 89, 90; 1 Ves. 63; 3 *id*. 212; Hamm. Parties, 182; 1 Yeates, 101; 2 Dall. 142; Ayliffe, Pand. 296; Weskett, Ins. 260; Sugd. Vend. 493, 497; see 1 Jarman, Wills, 751; and the articles BIENS, CHAT-

TELS, FURNITURE.

—*Bouvier's Law Dictionary*, 1889

Goods. A term of variable content and meaning. It may include every species of personal property or it may be given a very restricted meaning.

Items of merchandise, supplies, raw materials, or finished goods. Sometimes the meaning of "goods" is extended to include all tangible items, as in the phrase "goods and services."

All things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. Also includes the unborn of animals and growing crops and other identified things attached to realty as fixtures. U.C.C. § 2-105(1). All things treated as movable for the purposes of a contract of storage or transportation. U.C.C. § 7-102(1)(f).

As used with reference to collateral for security interest, goods include all things which are movable at the time the security interest attaches or which are fixtures. Section 9-105(1)(h) of the 1972 U.C.C.; § 9-105(1)(f) of the 1962 U.C.C.

See also **Confusion of goods; Future goods; Identification of goods.**

Capital goods. The equipment and machinery used in production of other goods or services.

Consumer goods. Goods which are used or bought for use primarily for personal, family or household purposes. U.C.C. § 9-109(1). See also **Consumer goods.**

Durable goods. Goods which have a reasonably long life and which are not generally consumed in use; *e.g.* refrigerator.

Fungible goods. Goods, every unit of which is similar to every other unit in the mass; *e.g.* uniform goods such as coffee, grain, etc. U.C.C. § 1-201.

Hard goods. Consumer durable goods. See *Durable goods, supra.*

Soft goods. Generally consumer goods such as wearing apparel, curtains, etc., in contrast to hard goods. —*Black's Law Dictionary*, 1979

IRRELEVANT. No entry.

—*Bouvier's Law Dictionary*, 1889

Irrelevant. Not relevant; immaterial; not relating or applicable to the matter in issue; not supporting the issue or fact to be proved. Evidence is irrelevant where it has no tendency to prove or disprove any issue of fact involved. Irrelevant evidence is commonly objected to and disallowed at trial. Fed.Evid.R. 402. See also **Immaterial; Impertinence; Irrelevancy.** —*Black's Law Dictionary*, 1979

irrelevant ..... *adj*. Unrelated to the matter at hand....

SYNONYMS: *irrelevant, extraneous, immaterial, impertinent*. The central meaning shared by these adjectives is "not pertinent to the subject under consideration": *an irrelevant comment; a question extraneous to the discussion; an objection that is immaterial after the fact; mentioned several impertinent facts before finally coming to the point.*

ANTONYM: *relevant.*

—*American Heritage Dictionary of the English Language*, 1992

OBLIGATION (from Lat. *obligo, ligo,* to bind). A duty.

A tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made. Inst. 3. 14.

A bond containing a penalty, with a condition annexed, for the payment of money, performance of covenants, or the like, and which differs from a bill, which is generally without a penalty or condition, though it may be obligatory. Co. Litt. 172.

A deed whereby a man binds himself under a penalty to do a thing. Comyns, Dig. *Obligation* (A); 2 S. & R. 502; 6 Vt. 40; 1 Blackf. 241; Harp. 434; Baldw. 129.

An *absolute* obligation is one which gives no alternative to the obligor, but requires fulfilment (sic) according to the engagement.

An *accessory* obligation is one which is dependent on the principal obligation; for example, if I sell you a house and lot of ground, the principal obligation on my part is to make you a title for it; the accessory obligation is to deliver you all the title-papers which I have relating to it, to take care of the estate till it is delivered to you, and the like.

An *alternative* obligation is where a person engages to do or to give several things in such a manner that the payment of one will acquit him of all.

Thus, if A agrees to give B, upon a sufficient consideration, a horse, or one hundred dollars, it is an *alternative* obligation. Pothier, Obl. pt. 2, c. 3, art. 6, no. 245.

In order to constitute an alternative obligation, it is necessary that two or more things should be promised disjunctively: where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any of them.

The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor; Dougl. 14; 1 Ld.Raym. 279; 4 Mart. La. N.S. 167. If one of the acts is prevented by the obligee or the act of God, the obligor is discharged from both. See 2 Evans, Pothier, Obl. 52-54; Viner, Abr. *Condition* (S b); CONJUNCTIVE; DISJUNCTIVE; ELECTION.

A *civil* obligation is one which has a binding operation in law, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. 4 Wheat. 197; 12 *id.* 318, 337.

Civil obligations are divided into express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, or mixed.

A *conditional* obligation is one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

A *determinate* obligation is one which, has for its object a certain thing: as, an obligation to deliver a certain horse named Bucephalus. In this case the obligation can only be discharged by delivering the identical horse.

A *divisible* obligation is one which, being a unit, may nevertheless be lawfully divided with or without the consent of the parties. It is clear that it may be divided by consent, as those who made it may modify or change it as they please. But some obligations may be divided without the consent of the obligor: as, where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire; yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars and the seller the other hundred. See APPORTIONMENT.

Express or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation.

Imperfect obligations are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only: such as charity or gratitude. In this sense an obligation is it mere duty. Pothier, Obl. art. prél. n. 1.

An *implied* obligation is one which arises by operation of law: as for example, if I send you daily a loaf of bread, without any express authority, and you make use of it in your family, the law raises an obligation on your part to pay me the value of the bread.

An *indeterminate* obligation is one where the obligor binds himself to deliver one of a certain species: as, to deliver a horse, where the delivery of any horse will discharge the obligation.

An *indivisible* obligation is one which is not susceptible of division: as, for example if I promise to pay you one hundred dollars, you cannot assign one-half of this to another, so as to give him a right of action against me for his share. See DIVISIBLE.

A *joint* obligation is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint, and the obligors do not promise separately to fulfil (sic) their engagement, they must be all sued, if living, to compel the performance: or, if any be dead, the survivors must all be sued. See PARTIES TO ACTIONS.

A *natural* or *moral* obligation is one which cannot be enforced by action, but which is binding on the party who makes it in conscience and according to natural justice.

As, for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished; 5 Binn. 573. Although natural obligations cannot be enforced by action, they have the following effect; *first,* no suit will lie to recover back what has been paid or given in compliance with a natural obligation: 1 Term, 285; 1 Dall. 184; *second*, a natural obligation has been held to be a sufficient consideration for a new contract; 2 Binn. 591; 5 *id*. 33; Yelv. 41 *a*, n. 1; Cowp. 290; 2 Bla. Com. 445; 3 Bos. & P. 249, n.; 2 East, 506; 3 Taunt. 311; 5 *id*. 36; 3 Pick. 207; Chitty, Contr. 10; but see MORAL OBLIGATION; CONSIDERATION.

A *penal* obligation is one to which is attached a penal clause, which is to be enforced if the principal obligation be not performed. See LIQUIDATED DAMAGES.

A *perfect* obligation is one which gives a right to another to require us to give him something or not to do something. These obligations are either natural or moral, or they are civil.

A *personal* obligation is one by which the obligor binds himself to perform an act, without directly binding his property for its performance.

It also denotes an obligation in which the obligor binds himself only, not including his heirs or representatives.

A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should itself be the first fulfilled.

A *principal* obligation is one which is the most important object of the engagement of the contracting parties.

A *pure* or simple obligation is one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, it has been fulfilled.

A *real* obligation is one by which real estate, and not the person, is liable to the obligee for the performance.

A familiar example will explain this. When an estate owes an easement as a right of way, it is the thing, and not the owner, who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage: he is not liable for the debt, though the estate is. In these cases the owner has an interest only because he is seised of the servient estate or the mortgaged premises, and he may discharge himself by abandoning or parting with the property. The obligation is both personal and real when the obligor has bound himself and pledged his estate for the fulfilment of his obligations.

A *secondary* obligation is one which is contracted and is to be performed in case the *primitive* cannot be. For example, if I sell you my house, I bind myself to give a title: but I find I cannot, as the title is in another: then my *secondary* obligation is to pay you damages for my non-performance of my obligation.

A *several* obligation is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement. In this case each obligor may be sued separately; and if one or more be dead, their respective executors may be sued. See PARTIES TO ACTIONS.

A *single* obligation is one without any penalty: as where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal.

—*Bouvier's Law Dictionary*, 1889

Obligation. A generic word, derived from the Latin substantive "obligatio," having many, wide, and varied meanings, according to the context in which it is used. That which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc. Rucks-Brandt Const. Co. v. Price, 165 Okl. 178, 23 P.2d 690; Helvering v. British-American Tobacco Co., C.C.A., 69 F.2d 528, 530. Law or duty binding parties to perform their agreement. An undertaking to perform. That which constitutes a legal or moral duty and which renders a person liable to coercion and punishment for neglecting it; a word of broad meaning, and the particular meaning intended is to be gained by consideration of its context. An obligation or debt may exist by reason of a judgement as well as an express contract, in either case there being a legal duty on the part of the one bound to comply with the promise. Schwartz, v. California Claim Service, 52 Cal.App.2d 47, 125 P.2d 883, 888. Liabilities created by contract

or law (*i.e.* judgements). Rose v. W. B. Worthen Co., 186 Ark. 205, 53 S.W.2d 15, 16. As legal term word originally meant a sealed bond, but it now extends to any certain written promise to pay money or do a specific thing. Lee v. Kenan, C.C.A.Fla., 78 F.2d 425. A formal and binding agreement or acknowledgment of a liability to pay a certain sum or do a certain thing. United States v. One Zumstein Briefmarken Katalog 1938, D.C.Pa., 24 F.Supp. 516, 519. The binding power of a vow, promise, oath, or contract, or of law, civil, political, or moral, independent of a promise; that which constitutes legal or moral duty.

See also **Contract**; **Duty**; **Liability**.

Absolute obligation. One which gives no alternative to the obligor, but requires fulfillment according to the engagement.

Conjunctive or alternative obligation. The former is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately. But where the things which form the object of the contract are separated by a disjunctive, then the obligation is alternative, and the performance of either of such things will discharge the obligor. The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor. A promise to deliver a certain thing or to pay a specified sum of money is an example of an alternative obligation. Civ.Code La. arts. 2063, 2066, 2067.

Contractual obligation. One which arises from a contract or agreement. See **Contract.**

Current obligation. See **Current obligations.**

Determinate or indeterminate obligation. A determinate obligation is one which has for its object a certain thing; as, an obligation to deliver a certain horse named Bucephalus, in which case the obligation can be discharged only by delivering the identical horse. An indeterminate obligation is one where the obligor binds himself to deliver one of a certain species: as, to deliver a horse, where the delivery of any horse will discharge the obligation.

Divisible or indivisible obligation. A divisible obligation is one which, being a unit, may nevertheless be lawfully divided, with or without the consent of the parties. An indivisible obligation is one which is not susceptible of division; As, for example, if I promise to pay you one hundred dollars, you cannot assign one-half of this to another, so as to give him a right of action against me for his share.

Express or implied obligation. Express or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation, while implied obligations are such as are raised by the implication or inference of the law from the nature of the transaction.

Failure to meet obligations. See **Failure to meet obligations.**

Joint or several obligation. A joint obligation is one by which two or more obligors bind themselves jointly for the performance of the obligation. A several obligation is one where the obligors promise, each for himself, to fulfill the engagement.

Moral obligation. A duty which is valid and binding in conscience and according to natural justice, but is not recognized by the law as adequate to set in motion the machinery of justice; that is, one which rests upon ethical considerations alone, and is not imposed or enforced by positive law. A duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. See also **Love and affection.**

Natural or civil obligation. A natural obligation is one which cannot be enforced by action, but which is binding on the party who makes it in conscience and according to natural justice. As, for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished. Ogden v. Saunders, 25 U.S. 213, 337, (12 Wheat.) 6 L.Ed. 606. A civil obligation is a legal tie, which gives the party with whom it is contracted the right of enforcing its performance by law.

Obediential obligation. One incumbent on parties in consequence of the situation or relationship in which they are placed.

Perfect or imperfect obligation. A perfect obligation is one recognized and sanctioned by positive law; one of which the fulfillment can be enforced by the aid of the law. But if the duty created by the obligation operates only on the moral sense, without being enforced by any positive law, it is called an "imperfect obligation," and creates no right of action, nor has it any legal operation. The duty of exercising gratitude, charity, and the other merely moral duties are examples of this kind of obligation. Edwards v Kearzey, 96 U.S. 595, 600, 24 L.Ed. 793.

Personal or heritable obligation. An obligation is heritable when the heirs and assigns of one party may enforce the performance against the heirs of the other. It is personal when the obligor binds himself only, not his heirs or representatives. An obligation is strictly personal when none but the obligee can enforce the performance, or when it can be enforced only against the obligor. An obligation may be personal as to the obligee, and heritable as to the obligor, and it may in like manner be heritable as to the obligee, and personal as to the obligor. For the term *Personal obligation,* as used in a different sense, see the next paragraph.

Personal or real obligation. A personal obligation is one by which the obligor binds himself to perform an act, without directly binding his property for its performance. A real obligation is one by which real estate, and not the person, is liable to the obligee for the performance.

Primary or secondary obligation. An obligation which is the principal object of the contract. For example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. The words "primary" and "direct," contrasted with "secondary," when spoken with reference to an obligation, refer to the remedy provided by law for enforcing the obligation, rather than to the character and limits of the obligation itself.

A primary obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should itself be the first fulfilled. A secondary obligation is one which is contracted and is to be performed in case the primitive cannot be. For example, if one sells his house, he binds himself to give a title; but if he finds he cannot as when the title is in another, then his secondary obligation is to pay damages for nonperformance of the obligation.

Principal or accessory obligation. A principal obligation is one which arises from the principal object of the engagement of the contracting parties; while an accessory obligation depends upon or is collateral to the principal. For example, in the case of the sale of a house and lot of ground, the principal obligation on the part of the vendor is to make title for it; the accessory obligation is to deliver all the title-papers which the vendor has relating to it, to take care of the estate until it is delivered, and the like. See, further, the title **Accessory obligation.**

Pure obligation. One which is not suspended by any condition, whether it has been contracted without any condition, or, when thus contracted, the condition has been accomplished. See *Simple or conditional obligation.*

Simple or conditional obligation. Simple obligations are such as are not dependent for their execution on any event provided for by the parties, and which are not agreed to become void on the happening of any such event. Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition. A simple obligation is also defined as one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, the condition has been fulfilled; and a conditional obligation is also defined as one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

Single or penal obligation. A penal obligation is one to which is attached a penal clause, which is to be enforced if the principal obligation be not performed. A single obligation is one without any penalty, as where one simply promises to pay another one hundred dollars.

This is called a single bill, when it is under seal.

Solidary obligation. In the law of Louisiana, one which binds each of the obligors for the whole debt, as distinguished from a "joint" obligation, which binds the parties each for his separate proportion of the debt. Groves v. Sentell, 153 U.S. 465, 14 S.Ct. 898, 38 L.Ed. 785. See **Solidary.** —*Black's Law Dictionary*, 1979

obligation .... *n.* **1.** The act of binding oneself by a social, legal, or moral tie. **2.a.** A social, legal, or moral requirement, such as a duty, contract, or promise that compels one to follow or avoid a particular course of action. **b.** A course of action imposed by society, law, or conscience by which one is bound or restricted. **3.** The constraining power of a promise, contract, law, or sense of duty. **4.** *Law.* **a.** A legal agreement stipulating a specified payment or action, especially if the agreement also specifies a penalty for failure to comply. **b.** The document containing the terms of such an agreement. **5.a.** Something owed as payment or in return for a special service or favor. **b.** The service or favor for which one is indebted to another. **6.** The state, fact, or feeling of being indebted to another for a special service or favor received....

SYNONYMS: *obligation, responsibility, duty.* These nouns refer to a course of action that is demanded of a person, as by law or conscience. *Obligation* usually applies to a specific constraint arising from a particular cause: *"Then in the marriage union, the independence of the husband and wife will be equal, their dependence mutual, and their obligations reciprocal"* (Lucretia Mott). *Responsibility* stresses accountability for the fulfillment of an obligation: *"I believe that every right implies a responsibility; every opportunity, an obligation; every possession, a duty"* (John D. Rockefeller, Jr.). *Duty* applies especially to constraint deriving from moral or ethical considerations: *"I therefore believe it is my duty to my country to love it, to support its Constitution, to obey its laws, to respect its flag, and to defend it against all enemies"* (William Tyler Page).

—*American Heritage Dictionary of the English Language*, 1992

PERFORMANCE. The act of doing something. The thing done is also called a performance: as, Paul is exonerated from the obligation of his contract by its performance.

When a contract has been made by parol, which under the Statute of Frauds and Perjuries could not be enforced, because it was not in writing, and the party seeking to avoid it has received the whole or a part performance of such agreement, he cannot afterwards avoid it; 14 Johns. 15; 1 Johns. Ch. 273; and such part performance will enable the other party to prove it *aliunde;* 1 Pet. C. C. 380; 1 Rand. 165; 1 Blackf. 58; 2 Day, 255; 5 *id.* 67; 1 Des. 350; 1 Binn. 218; 1 Johns. Ch. 131, 146; 3. Paige, Ch. 545. —*Bouvier's Law Dictionary*, 1889

Performance. The fulfillment or accomplishment of a promise, contract, or other obligation according to its terms. See also **Execute; Execution; Part performance; Payment; Substantial performance.**

Non performance. See **Commercial frustration; Default; Impossibility.**

Part performance. The doing some portion, yet not the whole, of what either party to a contract has agreed to do.

Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.

As regards the sale of goods, the statute of frauds requirement is dispensed with by partial performance for the goods which have been accepted or for which payment has been made and accepted. U.C.C. § 2-201(3). See also Part performance.

Specific performance. The remedy of performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon. The actual accomplishment of a contract by a party bound to fulfill it. The doctrine of specific performance is that, where damages would be an inadequate compensation for the breach of an agreement, the contractor or vendor will be compelled to perform specifically what he has agreed to do; *e.g.* ordered to execute a specific conveyance of land. See Fed.R.Civil P. 70.

With respect to sale of goods, specific performance may be decreed where the goods are unique or in other proper circumstances. The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just. U.C.C. §§ 2-711(2)(b), 2-716.

As the exact fulfillment of an agreement is not always practicable, the phrase may mean, in a given case, not literal, but substantial performance. —*Black's Law Dictionary*, 1979

performance .... *n.* **1.** The act of performing or the state of being performed. **2.** The act or style of performing a work or role before an audience. **3.** The ways in which someone or something functions: *The pilot rated the airplane's performance in high winds.* **4.** A presentation, especially a theatrical one, before an audience. **5.** Something performed; an accomplishment. —*American Heritage Dictionary of the English Language*, 1992

PROMISE (Lat. *promitto*, to put forward). An engagement by which the promisor contracts with another to perform or do something to the advantage of the latter.

When a promise is made, all that is said at the time in relation to it must be considered: if, therefore, a man promises to pay all he owes, accompanied by a denial that he owes any thing, no action will lie to enforce such a promise; 15 Wend. 187.

And when the promise is conditional, the condition must be performed before it becomes of binding force; 7 Johns. 36. See CONDITION; CONTRACTS; 5 East, 17; 2 Leon. 224; 4 B. & Ald. 595. —*Bouvier's Law Dictionary*, 1889

Promise. A declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing. A declaration, verbal or written, made by one person to another for a good or valuable consideration, in the nature of a covenant by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfillment. An express undertaking, or agreement to carry a purpose into effect. E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., C.C.A.Iowa, 64 F.2d 224.

Promise is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future. Plumbing Shop, Inc. v. Pitts, 67 Wash.2d 514, 408 P.2d 382, 384.

A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. Restatement, Second, Contracts § 2.

While a "promise" is sometimes loosely defined as a declaration by any person of his intention to do or forbear from anything at the request or for the use of another, it is to be distinguished, on the one hand, from a mere declaration of intention involving no engagement or assurance as to the future, and, on the other, from "agreement," which is an obligation arising upon reciprocal promises, or upon a promise founded on a consideration.

See also Aleatory promise; Conditional promise; Illusory promise; Implied promise; Offer; Raising a promise.

Commercial law. An undertaking to pay and it must be more than an acknowledgment of an obligation. U.C.C. § 3-102(1)(c).

Fictitious promise. Sometimes called "implied promises," or "promises implied in law," occur in the case of those contracts which were invented to enable persons in certain cases to take advantage of the old rules of pleading peculiar to contracts, and which are not now of practical importance.

Illusory promise. A promise in which the promisor does not bind himself to do anything and hence it furnishes no basis for a contract because of the lack of consideration; *e.g.* a promise to buy whatever goods the promisor chooses to buy.

Mutual promises. Promises simultaneously made by and between two parties; each promise being the consideration for the other.

Naked promise. One given without any consideration, equivalent, or reciprocal obligation, and for that reason not enforceable at law.

New promise. An undertaking or promise, based upon and having relation to a former

promise which, for some reason, can no longer be enforced, whereby the promisor recognizes and revives such former promise and engages to fulfill it.

Parol promise. A simple contract; a verbal promise.

Promise implied in fact. Promise implied in fact is merely tacit promise, one which is inferred in whole or in part from expressions other than words by promisor. Cooke v. Adams, Miss., 183 So.2d 925, 927.

Promise implied in law. Promise implied in law is one in which neither words nor conduct of party involved are promissory in form or justify inference of promise and term is used to indicate that party is under legally enforceable duty as he would have been, if he had in fact made promise. Cooke v. Adams, Miss., 183 So.2d 925, 927.

Promise of marriage. A contract mutually entered into by a man and a woman that they will marry each other.

Promise to pay the debt of another. Within the statute of frauds, a promise to pay the debt of another is an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, continues liable. —*Black's Law Dictionary*, 1979

promise .... *n.* **1.a.** A declaration assuring that one will or will not do something; a vow. **b.** Something promised. **2.** Indication of something favorable to come; expectation: *a promise of spring in the milder air.* **3.** Indication of future excellence or success: *a young player of great promise. v.... —tr.* **1.** To commit oneself by a promise to do or give; pledge: *promised a quick answer; left early but promised to return.* **2.** To afford a basis for expecting: *thunderclouds that promise rain. —intr.* **1.** To make a declaration assuring that something will or will not be done. **2.** To afford a basis for expectation: *an enterprise that promises well....*

SYNONYMS: *promise, covenant, engage, pledge, plight, swear, vow.* The central meaning shared by these verbs is "to declare solemnly that one will perform or refrain from a particular course of action": *promise to write soon; covenanting to exchange their prisoners of war; engaged to reorganize the department; pledged to uphold the law; plighted their loyalty to the king; swore to get revenge; vowed they would never surrender.*

—*American Heritage Dictionary of the English Language*, 1992

REMEDY. The means employed to enforce a right or redress an injury.

Remedies for *non-fulfilment* of contracts are generally by action, see ACTION; ASSUMPSIT; COVENANT; DEBT; DETINUE; or in equity, in some cases, by bill for specific performance. Remedies for the redress of injuries are either public, by indictment, when the injury to the individual or to his property affects the public, or private, when the tort is only injurious to the individual. See INDICTMENT; FELONY; MERGER; TORTS; CIVIL REMEDY.

Remedies are *preventive* which seek *compensation*, or which have for their object *punishment*. The *preventive*, or *removing*, or *abating* remedies may be by acts of the. party aggrieved or by the intervention of legal proceedings: as in the case of injuries to the person or to personal or real property, *defence, resistance, recaption, abatement of nuisance,* and *surety of the peace*, or *injunction* in equity, and perhaps some others. Remedies *for compensation* may be either by the *acts of the party aggrieved*, or *summarily* before justices, or by *arbitration*, or *action*, or *suit* at law or in equity. Remedies which have for their object *punishments* or compensation and punishments are either *summary proceedings* before magistrates, or *indictment*, etc.

Remedies are *specific* and *cumulative:* the former are those which can alone be applied to restore a right or punish a crime: for example, where a statute makes unlawful what was lawful before, and gives it particular remedy, that is specific, and must be pursued, and no other; Cro. Jac. 644; 1 Salk. 45; 2 Burr. 803. But when an offence was antecedently punishable by a common-law proceeding, as by indictment, and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had at common law or under the statute; 1 Saund. 134, n. 4.

The maxim *ubi jus, ibi remedium*, has been considered so valuable that it gave occasion to

the first invention of that form of action called an action on the case; 1 Sm. Lead. Cas. 472. The novelty of the particular complaint alleged in an action on the case, is no objection, provided there appears to have been an injury to the plaintiff cognizable by law; 2 Wils. 146; 3 Term, 63; Willes, 577; 2 M. & W. 519.

—*Bouvier's Law Dictionary*, 1889

Remedy. The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. Long Leaf Lumber, Inc. v. Svolos, La.App., 258 So.2d 121, 124. The means employed to enforce a right or redress an injury, as distinguished from right, which is a well founded or acknowledged claim. Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 38 S.Ct. 501, 503, 62 L.Ed. 1171.

The rights given to a party by law or by contract which that party may exercise upon a default by the other contracting party, or upon the commission of a wrong (a tort) by another party.

Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal. "Rights" includes remedies. U.C.C. § 1-201.

That which relieves or cures a disease, including a medicine or remedial treatment.

See also Adequate remedy; Administrative remedy; Alternative relief; Cause of action; Extraordinary remedies; Inadequate remedy at law; Marshaling remedies; Mutuality of remedy; Provisional remedy.

Civil remedy. The remedy afforded by law to a private person in the civil courts in so far as his private and individual rights have been injured by a delict or crime; as distinguished from the remedy by criminal prosecution for the injury to the rights of the public.

Cumulative remedy. See **Cumulative.**

Equitable remedy. See **Equity; Injunction; Performance** *(Specific performance);* **Reformation.**

Extraordinary remedy. See **Extraordinary.**

Joinder of remedies. See **Joinder.**

Legal remedy. A remedy available, under the particular circumstances of the case, in a court of law, as distinguished from a remedy available only in equity. Procedurally, this distinction is no longer generally relevant, for under Rules of Civil Procedure there is only one form of action known as a "civil action." Rule 2.

Remedy over. A person who is primarily liable or responsible, but who, in turn, can demand indemnification from another, who is responsible to him, is said to have a "remedy over." For example, a city, being compelled to pay for injuries caused by a defect in the highway, has a "remedy over" against the person whose act or negligence caused the defect, and such person is said to be "liable over" to the city. See **Subrogation.**

—*Black's Law Dictionary*, 1979

remedy .... *n.*,... **1.** Something, such as medicine or therapy, that relieves pain, cures disease, or corrects a disorder. **2.** Something that corrects an evil, a fault, or an error. **3.** *Law*. A legal order of preventing or redressing a wrong or enforcing a right. **4.** The allowance by a mint for deviation from the standard weight or quality of coins. —*tr*.... **1.** To relieve or cure (a disease or disorder). **2.** To set right; remove, rectify, or counteract. See Synonyms at **Correct. 3.** See Synonyms at **Cure....**

—*American Heritage Dictionary of the English Language*, 1992

RESTRAINT. Contracts operating for the restraint of trade are presumptively illegal and void on the ground of the policy of the law favoring freedom of trade; but the presumption of illegality may be rebutted by the occasion and circumstances. Thus in agreements for the sale of the good-will of a firm, or the formation or dissolution of a partnership, provisions operating in restraint of trade are frequently inserted. Their validity depends upon whether the restraint is such only as to afford a fair protection to the interests of the party in whose favor it is imposed; Leake Contr. 734-735. Whatever restraint is larger than is necessary for the protection of this party is void: therefore, the restraint must be limited in regard to space; 5 M. & W. 562; L. R. 15 Eq. 59. An agreement reasonably in regard to space may be unlimited in regard to the duration of time provided for; but where the question is whether the limit of space is unlimited, the duration of the restraint in point of time may become an important matter; Leake, Contr. 736; 2 M. & G. 20.

There are cases where an unlimited restraint is justified: *e.g.* the sale of a secret process of manufacture of an article in general demand, which it is agreed shall be communicated for the exclusive benefit of the buyer; see L. R. 9 Eq. 45; so of the sale of a patent right, the restraint may be unlimited while the patent continues; 1 H. & N. 189.

Some cases have required the presence of a sufficient and reasonable consideration to support a contract in restraint of trade; 8 Mass. 223; 21 Wend. 158; see 3 Ohio St. 275; but in England a legally valid consideration only is required; 6 A. & E. 438. See, generally, 1 Sm. L. C. 724; 35 Am. Rep. 269.

Conditions in wills in general restraint of marriage are held void. The subject is encumbered with many refined distinctions; see 2 Jarm. Wills, *44; art. in 2 Law Mag. & Rev. 419, 4th series. —*Bouvier's Law Dictionary*, 1889

Restraint. Confinement, abridgment, or limitation. Prohibition of action; holding or pressing back from action. Hindrance, confinement, or restriction of liberty. Obstruction, hindrance or destruction of trade or commerce. See **Restraint of trade; Stop.**

Unlawful restraint. Unlawful restraint is knowingly and without legal authority restraining another so as to interfere substantially with his liberty.

Person is guilty of "unlawful restraint" if he knowingly: (1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or (2) holds another in a condition of involuntary servitude. 18 Pa.C.S.A. § 2902. See also **Imprisonment.** *(False imprisonment);* **Kidnapping.**

—*Black's Law Dictionary*, 1979

restraint .... *n.* **1.** The act of restraining or the condition of being restrained. **2.** Loss or abridgment of freedom. **3.** An influence that inhibits or restrains; a limitation. **4.** An instrument or a means of restraining. **5.** Control or repression of feelings; constraint....

—*American Heritage Dictionary of the English Language*, 1992

SERVICE. In Contracts. The being employed to serve another.

In cases of seduction, the gist of the action is not the injury which the seducer has inflicted on the parent by destroying his peace of mind and the reputation of his child, but for the consequent inability to perform those services for which she was accountable to her master or her parent, who assumes this character for the purpose. See SEDUCTION; 2 M. & W. 539; 7 C. & P. 528.

In Feudal Law. That duty which the tenant owed to his lord by reason of his fee or estate.

The services, in respect of their quality, were either free or base, and in respect of their quantity, and the time of exacting them, were either certain or uncertain. 2 Bla. Com. 62.

In Civil Law. A servitude.

In Practice. The execution of a writ or process. Thus, to serve a writ of capias signifies to arrest a defendant under the process; Kirb. 48; 2 Aik. 338; 11 Mass. 181; to serve a summons is to deliver a copy of it at the house of the party, or to deliver it to him personally, or to read it to him: notices and other papers are served by delivering the same at the house of the party, or to him in person.

But where personal service is impossible, through the non-residence or absence of a party, constructive service by *publication* is, in some cases, permitted, and is effected by publishing the paper to be served in a newspaper designated in the order of court and by mailing a copy of the paper to the last known address of the party.

Substituted service is a constructive service made upon some recognized representative, as where a statute requires a foreign insurance company doing business in the State of Massachusetts to appoint the insurance commissioner of the state their attorney, "upon whom all lawful processes in any proceeding against the company may be served with like effect as if the company existed in that commonwealth;" 16 Am. L. Rev. 421. Service by publication is in general held valid only in proceedings *in rem,* where the subject matter is within the jurisdiction of the court, as in suits in partition, attachment, for the foreclosure of mortgages, and the enforcement of mechanics' liens. In many of the states statutes have been passed to meet this class of cases. In purely personal actions, service by publication is invalid, upon the well-settled principle that the person or thing pro-

ceeded against must be within the jurisdiction of the Court entertaining the cause of action. 27 Am. L. Reg. 92; 95 U. S. 704; Story, Contl. L. § 539. Some states, however, have gone so far as to allow suits in chancery to be maintained against non-residents upon constructive service of process by publication; 15 Am. L. Reg, 2. But proceedings in divorce are generally recognized as forming an exception to the rule; Bish. Mar. & D. § 159 *et seq*. See DIVORCE; FOREIGN JUDGMENT; Wall. 329.

When the service of a writ is prevented by the act of the party on whom it is to be served, it will, in general, be sufficient if the officer do everything in his power to serve it; 1 Mann. & G. 238. —*Bouvier's Law Dictionary*, 1889

Service. This term has a variety of meanings, dependent upon the context or the sense in which used. Central Power & Light Co. v. State, Tex.Civ.App., 165 S.W.2d 920, 925.

Contracts. Duty or labor to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter. The act of serving the labor performed or the duties required. Occupation, condition, or status of a servant, etc. Performance of labor for benefit of another, or at another's command; attendance of an inferior, hired helper, etc. Claxton v. Johnson County, 194 Ga. 43, 20 S.E.2d 606, 610. "Service" and "employment" generally imply that the employer, or person to whom the service is due, both selects and compensates the employee, or person rendering the service.

The term is used also for employment in one of the offices, departments, or agencies of the government; as in the phrases "civil service," "public service," "military service," etc.

Domestic relations. The "services" of a wife, for the loss of which occasioned by an injury to the wife, the husband may recover in an action against the tortfeasor include whatever of aid, assistance, comfort, and society the wife would be expected to render to bestow upon her husband in the circumstances in which they were situated. See **Consortium.**

Feudal law. The consideration which the feudal tenants were bound to render to the lord in recompense for the lands they held of him. The services, in respect of their quality, were either free or base services, and, in respect of their quantity and the time of exacting them, were either certain or uncertain. 2 Bl.Comm. 60.

Practice. The exhibition or delivery of a writ, summons and complaint, criminal summons, notice, order, etc., by an authorized person, to a person who is thereby officially notified of some action or proceeding in which he is concerned, and is thereby advised or warned of some action or step which he is commanded to take or to forbear. Fed.R.Civil Proc. 4 and 5; Fed.R.Crim.P. 4 and 49. Pleadings, motions, orders, etc., after the initial summons are normally served on the party's attorney unless otherwise ordered by court. See *Service of process,* below.

General Classification

Civil service. See that title.

Public utilities. The furnishing of water, heat, light and power, etc., by utility. Claxton v. Johnson County, 194 Ga. 43, 20 S.E.2d 606, 610.

Salvage service. See **Salvage.**

Secular service. Worldly employment or service, as contrasted with spiritual or ecclesiastical.

Service of process. The service of writs, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are then said to have been served. Usually a copy only is served and the original is shown. The service must furnish reasonable notice to defendant of proceedings to afford him opportunity to appear and be heard. Chemical Specialties Sales Corp. Industrial Div. v. Basic Inc., D.C.Conn., 296 F.Supp. 1106, 1107. Fed.R.Civil P. 4; Fed.R.Crim.P. 4. The various types of service of process are as follows:

Constructive service of process. Any form of service other than actual personal service. Notification of an action or of some proceeding therein, given to a person affected by sending it to him in the mails or causing it to be published in a newspaper. Fed.R.Civil P. 4(e). See also *Service by publication; Substituted service,* below.

Long arm statutes. Laws enacted in most states which permit courts to acquire personal

jurisdiction of non-residents by virtue of activity within the state. See **Foreign service; Long arm statutes; Minimal contacts.**

Personal service. Actual delivery of process to person to whom it is directed or to someone authorized to receive it in his behalf. Green Mountain College v. Levine, 120 Vt. 332, 139 A.2d 822, 824. Personal service is made by delivering a copy of the summons and complaint to the person named or by leaving copies thereof at his dwelling or usual place of abode with some responsible person or by delivering a copy to an agent authorized to receive such. Special rules are also provided for service on infants, incompetents, corporations, the United States or officers or agencies thereof, etc. Fed.R. Civil P. 4(d); Fed.R.Crim.P. 4(d).

Proof of service. See **Proof.**

Service by publication. Service of a summons or other process upon an absent or nonresident defendant, by publishing the same as an advertisement in a designated newspaper, with such other efforts to give him actual notice as the particular statute may prescribe. See also *Substituted service,* below.

Substituted service. Any form of service of process other than personal service, such as service by mail or by publication in a newspaper; service of a writ or notice on some person other than the one directly concerned, for example, his attorney of record, who has authority to represent him or to accept service for him. See also **Long arm statutes.**

—*Black's Law Dictionary*, 1979

service .... *n*.... **1.a.** Employment in duties or work for another, especially for a government. **b.** A government branch or department and its employees: *the diplomatic service.* **2.a.** The armed forces of a nation. **b.** A branch of the armed forces of a nation. **3.a.** Work or duties performed for a superior. **b.** The occupation or duties of a servant. **4.a.** Work done for others as an occupation or a business: *provides full catering service.* **b.** A department or branch of a hospital staff that provides specified patient care: *the anesthesiology service; the chest service.* **5.** Installation, maintenance, or repairs provided or guaranteed by a dealer or manufacturer. **6.** A facility providing the public with the use of something, such as water or transportation. **7.a.** Acts of devotion to God; witness. **b.** A religious rite. **8.** An act of assistance or benefit to another or others; a favor. **9.a.** The serving of food or the manner in which it is served. **b.** A set of dishes or utensils: *a silver tea service.* **10.** *Sports.* The act, manner, or right of serving in many court games; a serve. **11.** Copulation with a female. **12.** *Law.* The serving of a writ or summons. **13.** The material, such as cord, used in binding or wrapping rope.... *tr.v*.... **1.** To make fit for use; adjust, repair, or maintain: *service a car.* **2.** To provide services to. **3.** To make interest payments on (a debt). **4.** To copulate with..... *adj*.... **1.** Of or relating to the armed forces of a country. **2.** Intended for use in supplying or serving: a *service elevator; the service entrance.* **3.** Offering repairs or maintenance: *a service guarantee; a road service area.* **4.** Offering services to the public in response to need or demand: *a service industry*....

USAGE NOTE. Aside from specialized senses in finance (*service a debt*) and animal breeding (*service a mare*), *service* is used principally in the sense "to repair or maintain": *service the electric dishwasher.* In the sense "to supply goods or services to," *serve* is the most frequent or only choice: *One radio network serves three states.*

—*American Heritage Dictionary of the English Language*, 1992

Transact. To "transact" means to prosecute negotiations; to carry on business; to have dealings; to carry through; bring about; perform; to carry on or conduct; to pass back and forth as in negotiations or trade; to bring into actuality or existence. Knoepfle v. Suko, N.D., 108 N.W.2d 456, 462. The word embraces in its meaning the carrying on or prosecution of business negotiations, but it is a broader term than the word "contract" and may involve business negotiations which have been either wholly or partly brought to a conclusion. Bozied v. Edgerton, 239 Minn. 227, 58 N.W.2d 313, 316. See also **Negotiate; Transaction.**

—*Black's Law Dictionary*, 1979

transact .... —*tr.* to do, carry on, or conduct: *transact business over the phone; transacting trade agreements.* —*intr.* To conduct business: *transacting with foreign leaders*....

—*American Heritage Dictionary of the English Language*, 1992

TRANSACTION (from Lat. *trans* and *ago*, to carry on). **In Civil Law.** An agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their difference, by mutual consent, in the manner which they agree on. In Louisiana this contract must be reduced to writing. La. Civ. Code, art. 3038.

Transactions regulate only the differences which appear to be clearly comprehended in them by the intentions of the parties, whether they be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them. La. Civ. Code, art. 3040.

To transact, a man must have the capacity to dispose of the things included in the transaction. I Domat. Lois Civiles, 1, 13, 1; Dig. 2. 15. 1; Code, 2. 4. 41. In the common law this is called a compromise. See COMPROMISE.

—*Bouvier's Law Dictionary*, 1889

Transaction. Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. It is a broader term than "contract". Hoffman Machinery Corporation v. Ebenstein, 150 Kan. 790, 96 P.2d 661, 663. See also **Transact.**

Civil law. An agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on. This contract must be reduced into writing. Civ.Code La. art. 3071.

Evidence. A "transaction" between a witness and a decedent, within statutory provisions excluding evidence of such transactions, embraces every variety of affairs which can form the subject of negotiations, interviews, or actions between two persons, and includes every method by which one person can derive impressions or information from the conduct, condition, or language of another. An action participated in by witness and decedent and to which decedent could testify of his own personal knowledge, if alive. Nelson v. Janssen, 144 Neb. 811, 14 N.W.2d 662, 665. A personal or mutual transaction wherein deceased and witness actively participate.

—*Black's Law Dictionary*, 1979

transaction .... *n. Abbr.* **trans.** 1. The act of transacting or the fact of being transacted. **2.** Something transacted, especially a business agreement or exchange. **3.** Communication involving two or more people that affects all those involved; personal interaction: *"a rich sense of the transaction between writer and reader"* (William Zinsser). **4. transactions.** A record of business conducted at a meeting; proceedings.... —*American Heritage Dictionary of the English Language*, 1992

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