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The Law Restated

THE ROOTS OF THE LAW
Where they are found and best illustrated in both the old and the latest cases

The Great Maxims, General Principles and Leading Cases

The SIX LEADING SUBJECTS in MINIATURE

Equity, Procedure, Contract, Crime, Tort and Construction. The elements of these aligned and reflected from a Text-Index constituting ready reference and a MASTER KEY to the library

The interactions of the six leading subjects

The Fundamentals of Procedure: These followed into the Code (See Qvis, quid:)

These illustrated by the ablest New York cases, also Federal

An Epitome of Great Legal Classics
The student's guide to these

By WILLIAM T. HUGHES

Author of "Procedure," "Grounds and Rudiments of Law," and "Equity In Procedure"

With an Introductory Chapter by WENDELL PHILLIPS STAFFORD
Judge of the Supreme Court of the District of Columbia,
formerly a Justice of the Supreme Court of Vermont

The Roman still holds dominion over this world by the silent empire of his law
Melius est petere fontes quam sectari rivulos. (See Alterum non ladeo.)

PUBLISHED BY THE AUTHOR
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PREFACE

A restatement of the law from its maxims, general principles and leading cases has been long awaited. Many think it will come in the next half century. Anent this great question enough has been said in a general way; the time has come to get down to bed rock facts and see if there are not now some "Datum Posta" that can be agreed upon, fixed, and therefrom a preliminary survey made. These pages are burdened with that demonstration. For this we choose the six leading subjects of the law, Equity, Procedure, Contract, Crime, Tort, and Construction, and for each pick out and gather from overtoppling bulks of matter the data above referred to. For each of these subjects we pick and gather and set the leading matters of substance that has not been changed and which cannot be changed (page xvii, Equity In Procedure) and introduce these with the least amount of formal or adjective law as it has come to be called. Each of these subjects has a law of substance that is protected by a higher law—the law of all ages—the Prescriptive Constitution; also that each has interactions with the other. To demonstrate this latter fact we pick and discuss the greatest maxim of jurisprudence (Alterum non lader, as we call it for brevity) and from it show Equity In Procedure; also the other subjects. Anent Crime we indicate a close relationship to tort and to contract (See R. v. Cases). The opening pages are prefatory and therefore we can be brief here.

This restatement will present all of the major-organic maxims in which the law is embedded, and general principles and leading cases, We offer it as the best and most portable condensed history of the great cases. The elaboration will be attended with a bibliographical effort to point to the ablest and fullest résumé of all of these essentials as they can be found in all libraries, English and American. The effort is not for local or provincial use but for all countries. To illustrate: We shall point out that the best statement of Pasley v. Freeman which has been reprinted so often in England and in America is most ably represented in Davis v. Trent, — 1a. —, 49 L.R.A.(N.S.) 1219, 1224; also that the ablest statement of the matter to be presented by the mandatory record in the criminal case is in Gray v. P., 261 Ill. 140, 49 L.R.A.
(N.S.) 1215. For the presentation we shall pick from the old—the archaic, also the latest. (See Garland v. S; Garrett; Morningstar.)

Under Alterum we indicate that the law can be articulated from a few principles. As we look at the map and see the Rhine and its twelve thousand tributaries, so in a few sections we present the main stream and by means of the Text-Index sprangle out until we touch and integrate the entire body of the law. We might also illustrate with the tree, its roots, trunk, limbs on into the stem, leaf, and bud. We shall present all, at least Broom’s Maxims, Smith’s and White and Tudor’s leading cases, the principal annotated cases, the leading rules of Story, of Greenleaf, of Bishop, of Mechem and of other of the best efforts ever made for the uplifting of the profession. The manifest efforts to stamp out the text-books in the last generation are now followed by addresses in Bar Associations of which every student should take notice. After informing himself, then he can see if this generation of lawyers have not something to ponder over. (See Story; Rushton; Alterum; Literature, and the matters referred to under these titles.)

In reference to the above titles facts are stated and matters are referred to which allow us to ask if there is one good work on Pleading, or the Code, and if there be one, which is it? (See Pomeroy; Feudal Lawyer.)

Procedure lies at the base of a logical and philosophical administration of the laws. Therefore the importance of Pleading. From these facts the above questions are of great significance and of far-reaching consequences. (See Story; Rushton; Gulling.)

The practitioner will be introduced to the genius, the logic and the philosophy of the mandatory record; how it arises from necessity in a constitutionalism; how it is dictated by the logic and the philosophy of the Trilogy of Procedure (see §§ 1–13, Restatement); how these major maxims of the law demand and safeguard this record, which if obscured and silted over by statutes and decisions destroys all symmetry and harmony in Procedure and hereby spreads chaos throughout the whole law. This view necessarily includes questions that are not one Babel alone, but a hundred more; and such as the distinctions between this record and the statutory record which very able courts declare cannot be taught their practitioners. (Pennoufsky v. Coerver, Mo.) It cannot be said that the leading courts in American states have so defined and explained the respective functions and operations of these two records that their logic and philosophy have been understood. Nor
has one Feudal or blackletter author. (The failure of Blackstone is referred to § 15, 1 Gr. & Rud.) The mistakes of practitioners over the uses of these two records are the most prolific sources of fatal error and of delay in Appellate Procedure. Light over these records and their respective uses is needed in all American courts. With a clear understanding of the latter fact we have sought to give the required elucidation. We think that many will accept this effort alone as a Restatement of the Law.

Grasping and defining the organic principles of Procedure and demonstrating these to be Universal, Constitutional principles underlying all systems, including Codes and Practice Acts, yields the mastery so long sought. These principles are shown to be the trunk wherefrom the various kinds or systems issue and are extended by local and fiat laws. The roots and the trunk are the same, but the grafts may be somewhat different in detail or regulation.

Especial attention is given the Code. For it we pick from the mass of confusion in New York three of the best considered cases namely: Campbell v. Consalus, Clark v. Dillon, and Tooker v. Arnoux and point out that these cases and their cognates reaffirmed the roots-organic maxims referred to, and that to these most worthy cases have lately come Palmer v. Humiston, 45 L.R.A.(N.S.), and Milbra, 46 Id.; and that these cases simply reaffirm the old principles and best cases (Rushton, Bristow, and Dovaston). Also that the Municipal Court Act of Chicago has finally come to be construed by the same tests (Walter, 250 Ill. 420). Also that late Federal cases sustain the same views. (See Nalle v. Oyster; Vicksburg v. Henson.) These show that the old law of substance is still with us, also that the modern law is the old law.

By the above plan we weave the Codes and Practice Acts into or deduce them from the trunk referred to. (See title, Code.)

And accordingly we demonstrate the unity, the logic and the philosophy of all systems and elaborate a work for all jurisdictions. It is cosmopolitan. It is Roman, English and American. It cites a multitude of Federal cases. It reduces as far as possible the old matter to the late and current series of annotated cases. The popular and widely found L.R.A. has been much sought and cited. Thus we have presented much in a bibliographical way for the student.

The author's Key-Number plan embraces all books—the Roman,
the English and the American. (See Hughes' Procedure Vol. 1, pages 44–46; Callaghan & Co. 1905.) Afterward a part of this idea was appropriated as an accessory of utility to a vast digest system. It is submitted if this was not a detraction from the broader plan. (See the title "Finding the Law" in the Text-Index.)

Attention is called to the value of the author's Text-Index as a necessary means for this Restatement of the Law. It is a concentrate of maxims, principles and cases all set under an alphabetical plan.

Believing that this effort would appear pretentious and even Utopian, to some minds, assurances were sought; for this distinguished members of the Washington City Bar were consulted. Among these were Mr. Joseph W. Cox, E. Hilton Jackson (see his ante publication letter); also one who is a lawyer, jurist, author, orator and poet. His introductory chapter will speak for itself. We know that it will be accepted as a crowning charm of the offering.

We have reason to believe that a generous profession will give this *Maximus in minimis* deserving attention. We can assure them that we have sought to serve them faithfully and well, as we always shall.

W. T. HUGHES.

Washington City, D. C., February 2, 1915.
RESTATING THE LAW
FROM ITS FUNDAMENTALS

The Universal, Constitutional principles in the language of all nations picked and aligned.
These are the "Datum Posts."
See Maxima ita dicta, etc.

The leading subjects of the law rest upon a few principles: These picked, enumerated and defined.
See Multi utilitus est pauca, etc.

CODES AND PRACTICE ACTS ARE FOUNDED ON THE OLD LAW

The mystery of the Code laid bare.
Its great cases introduced.

THE TRILOGY OF PROCEDURE ENUMERATED AND DEFINED

The cases that illustrate its application.
The great principles and their literature.
The great cases and their literature.
The principles in leading cases indicated.

A TEXT--INDEX of the maxims, general principles and leading and annotated cases. Herein the few fundamentals are worked out.
"The law is founded upon a few fundamental principles well comprehended and worked out."—Adelbert Moot.

"These should be clearly expressed and defined; they are the law of all ages. They are the law of substance which control local and flat law."—James C. Carter.

Melius est petere fontes quam sectari rivulos.
THE LAW RESTATED

By William T. Hughes.

INTRODUCTORY CHAPTER

By Wendell Phillips Stafford, Associate Justice of the Supreme Court of the District of Columbia, formerly a Justice of the Supreme Court of Vermont.

The author of The Law Restated is not to be measured with the law-book makers of to-day. His intellectual descent is to be traced from the greatest in the past. He is a disciple of Bacon, maintaining with him that the body of English law came from past ages, largely through Roman channels; that it is capable of concise statement, and has been thus stated in the Latin maxims, constituting on the whole the most comprehensive and clear-edged summary of fundamental law ever given to the world; that by such a summary the law is best taught and to it all questions are finally to be referred, no matter how remote the deductions at first sight may appear; and above all, that Equity, which is the very life principle of the maxims, is not a mere incident or department of the law, but a moral force pervading all its parts,—not a separate stream, but "a river without a main" finding its way, underneath the surface, through the whole field of law, and certain in the end to supersede all narrow and conflicting rules by virtue of its own intrinsic superiority. He also believes with Bacon that the main body of the law when thus stated and taught should be accompanied by the leading cases which best illustrate the application of the principles, and which may be made to carry any subject of the law into the most distant and minute divisions, exactly as a tree spreads out into innumerable branches, twigs, and leaves. One who will dwell patiently upon this
view of the law as an entirety, and allow himself to be shown how closely its leading principles are related, one to another, and how rules and decisions which he had been accustomed to regard as standing by themselves are really only different expressions of the same general truth, will not be inclined to blame the author for glorifying the maxims as he does, nor for repeating them with a fervor and frequency which must be tiresome indeed to one who fails to perceive their philosophical connection. To the author himself they are stars that shine by their own light,—couriers who carry in their messages their best credentials, and which nobly illustrate the motto, "Not authority for truth, but truth for authority." To him it is no objection that they are hoary with age. As Pater wrote of certain portions of the Roman liturgy, "'We are so old and you are so young,' they seem to say to those who fail to understand them." They are venerable not with years only, but with world-long usefulness as well. Far more modern in their spirit than those doctrines of the common law with which they came in conflict, they have overcome these by their own primal and still youthful vigor,—in England through the slow but complete triumph of equity over law, and in America by express statutory declaration that when the legal and the equitable principles are opposed, the equitable must be followed. Equity is to the law what the New Testament is to the Old. That there should be any active conflict between them is only due to the failure of legal minds to accept the broader and better rule,—the too-common in- ability to keep step with human progress. Maxim-law—Equity—is thus at the same time very old and very new. It is new, as all truth is fresh and perennial; it is old, as having approved itself to men of old time, and as having found clear and masterful expression on their tongues. We cannot hope, we do not need, to state the old truths bet- ter. There are some things—the Golden Rule, for example—that are not capable of improvement. The same is true of the golden rules of equity. How shall one ever find intellectual happiness in the study of the law, unless he can find there some principle of harmony that can bring order out of chaos? Never till then can the morning stars
sing together and all the sons of wisdom shout for joy. If there be such a harmony, and there must be if the soul of law is justice, then it is only reasonable to suppose that the main body of truths that compose it is capable of luminous expression and has found such expression in the past. When, therefore, we find sentences that have survived the deaths of empires and retain their power to mold men's thought and action under every sky, sentences that are scattered through every volume of the law, is it a Quixotic effort to attempt to bring them all together, to arrange them in their natural order and relations under the leading divisions of the law, and to offer them as a compendious statement showing the "truth, unity and concord" of jurisprudence? If such a restatement of the law in its entirety, occupying less than fifty pages, be supplemented by a text index for ready reference, wherein the searcher may find his way at once to the principle which directly controls or is most nearly related to his question, and to those cases where the ablest courts have been engaged upon it,—cases around which annotators have amassed the wealth of decisions that enrich the subject,—shall we not have been offered the best handbook, the best starting-point and guide, the best key to the library, and the best solution thus far found to the problem that confronts the lawyer of to-day? The mass of case law is crumbling under its own weight. Not only is it impossible to master it, it is not desirable even if it were possible. What we do want and must have is a text of universal principles from which we may start and to which we may return, with plain and reliable guideposts to those great historical decisions from which, by the help of annotations, we may extend our exploration as far as we may need. The author for us is the one who places in our hands the silken thread that will lead us back from any winding of the labyrinth to the central principle, and show the connection between that universal truth and the dimmest corner or recess our search has found.

I wish to speak briefly of the author's presentation of the great subject of procedure. Here, too, his view is deep, searching, and clarifying. Procedure, he rightly insists, is the backbone of the law. The
study of procedure is nothing less than the study of government. Due process of law includes a constitutional method of procedure. Not all requirements of such a procedure are expressed in the written constitution. Many of them are implied, but not less sacred and mandatory. A court must have a record and be bound by it, or else there is no protection against the exercise of illegal and arbitrary power. The clerk is a constitutional officer, because contemplated by the constitution as the proper officer to make up and keep such a record. The record shows the authority or want of authority in the court to proceed to judgment. If the authority can be presumed from the mere fact of its exercise by the judge, or gathered merely from the judge's own recitals in his judgment, his authority is beyond attack, and the party's rights are entirely at his mercy. Such is not the law. His jurisdiction is limited and defined by the pleadings. It must appear from the record that there was an issue before him, proper to be tried and within his authority to determine. He cannot act in court as an arbitrator. The consent of the parties cannot confer jurisdiction as to the subject-matter. His authority is derived from the law. Therefore the parties cannot dispense with pleadings altogether, nor waive them to any such extent that the foregoing requisites need not be observed. The record exists not for the parties only, nor indeed primarily, but first of all for the State and the public. The same considerations require that the complaint shall disclose a cause of action. Courts are established to right wrongs, and the complaint must show that a wrong has been committed. It must also disclose who is the party wronged and who is the wrongdoer. To say that such a complaint may be waived by the defendant is to say that a party may confer upon the court jurisdiction over a subject not committed to the magistrate by law, or dispense with a record which the State requires for its own purposes. The rights of the public are concerned because they are bound by constructive notice of the proceedings, and are entitled to a record whereby they can ascertain the facts of which they must take notice. The State and the public are entitled to a substantial record for the further purpose that it may always be known what was decided
in a former case, when it is claimed that the same matter is being drawn in question a second time between those who should be bound by the first decision. The State is interested that there be an end of litigation, and that the judicial machinery shall not be used over and over again for the same question.

It is also known as the common-law record, or record proper. In this record are preserved such facts, and such facts only, as are necessary to show jurisdiction of the court over the parties, and over the subject-matter described in the pleadings; also a verdict, judgment, or decree within and founded upon the issues raised by the pleadings.

Anything beyond this may be waived by the parties.

This nonjurisdictional, or waivable, or error matter must be preserved in and be shown by a separate record, the statutory, or bill of exceptions, record. This record is for an appellant, and for appeal purposes only. It was unknown at common law. Jurisdiction once being established and shown by the common-law record, and not until then, the maxim, Omnia præsumuntur rite, etc., comes into play, and under it all error committed by the court in the progress of the case is cured unless preserved by the statutory record, and error duly assigned thereon with precision and certainty.

The author has brought to light the reason for the necessity of these two records, that is, that each is governed by a maxim peculiar to itself. To the mandatory record applies the maxim, Debite fundamentum fallit opus. There is no presumption in favor of this record. It must affirmatively show its validity upon its face.

But, jurisdiction once being thus established, the maxim Omnia præsumuntur then applies, under which all further proceedings are presumed to be correct, unless error therein is affirmatively shown and duly excepted to. It is to this record that the doctrine of waiver applies, not to the common-law record, where the interests of the State must be met, and cannot be waived by the parties nor be overlooked by the court.

Perhaps the highest single service the author has rendered has been by making plain the "great gulf fixed" by reason and the needs
of government between the mandatory and the statutory records. So far as I am aware, he has been the first to adequately state and defend the grounds upon which that distinction rests, and to show that free constitutional government itself is bound up with the essentials of procedure; that as the law arises out of the facts, the facts must always appear that justify the judgment; that the interests of the State require it, and that the parties cannot bargain it away. This is the great forgotten truth which he has brought to light, and has illustrated with a clearness of comprehension and a wealth of learning that place him among the greatest legal authors. The alarming extent to which this distinction has been lost sight of is shown by the long array of cases criticized in these works, some of them emanating from tribunals of the greatest importance. Neither are the recognized writers upon pleading free from confusion and inconsistency upon this point, a fact to which much of the contrariety of decisions must be traced. Let him who is not to be awed by reputations read the author's criticism of Chitty, Stephen, and Gould at § 113 and following of his work entitled Equity in Procedure, and ask himself if the criticism is not sound and just, and whether the author has not pointed out in Sergeant Williams's misleading note the little rift in the lute which has led to all the discord that has become so painful.

If any matter of substance can be waived, why cannot all be waived? Where is the dividing line, if not between form and substance? The courts of many states have followed the false premise to its logical and violent conclusion, and have held that all pleadings may be waived. Such is the condition to which we have been brought upon a subject which involves life, liberty, property, the rights of the citizen against the exercise of arbitrary power,—even the existence of constitutional government itself.

Another mark of this man’s writing, and one which cannot be too highly praised, is the morality which runs all through it like a thread of gold, giving richness and luster to the whole web. He never fails to show that the law is, in its controlling purpose, ethical, and not formal merely. Again and again, and not seldom where we should least
expect it, we are taught that the minor maxim or the familiar rule is only a phase of a broader rule, expressed in terms that leave no doubt of its relation to fundamental truth and justice. He himself has lived so long in the companionship of the great maxims that he instinctively judges of all questions by them; and the result is that his view has a soundness and wholesomeness not otherwise to be obtained. This I say not only from a study of his works, but from hours of conversation in which I have watched his mind as it grappled with practical questions then first propounded to him, and observed the celerity and certainty with which he handled them, always finding their solution in the proper application of fundamental principles, and at the same time pointing to the leading illustrative cases. His ethical quality is shown not merely by his intrepid attitude towards decisions and texts that are responsible for the chaos into which the law has been thrown, but by the fairness and candor with which he treats those to whom he is most strongly and consistently opposed. He has a passion for accuracy, realizing that, no less in law than in religion, it is the truth that makes us free. His life has been a singular example of the power of a great idea, which can subdue unto itself all personal interests, and make the whole man its herald and protagonist, willing to spend and be spent for the truth which it has been given him to see more clearly than his fellows. He "sees law steadily, and sees it whole." He is the apostle of the unity of law and the sanctity of constitutional procedure,—a doctrine which is to some a stumbling-block and to others foolishness, but to those who are able to comprehend it, both the power of law and the wisdom of law.

Now a few words by way of illustration. The author's whole view of the law is related to that maxim which has been aptly called the Golden Rule of Jurisprudence: *Juris praecepta sunt hac, honeste vivere, alterum non laedere, suum cuique tribuere:* The precepts of the law are these,—to live honorably, to hurt nobody, to render to everyone his due. "To hurt nobody,"—*alterum non laedere,*—that is the precept which must appear to have been broken before any court has a right to call upon one individual to answer to another. Conse-
sequently the plaintiff must state in his complaint facts, which, on their face, show that a wrong has been done to him, and done by the defendant. If he fails to do so, the court has no authority to proceed. Its jurisdiction does not attach; it cannot be invoked by anything less; there is nothing for the court to act upon. The test of the complaint is the general demurrer. That is only a means of calling the attention of the court to the fact that there is nothing for the court to act upon. The court of its own motion may take cognizance of the situation, and refuse to proceed. It ought to do so if it observes the plight in which the case stands. No lapse of time, no failure to raise the question, can mend the matter. Even by express consent the parties cannot give the court jurisdiction over a subject-matter which the law does not recognize as sufficient to call upon the court for action. Hence it follows that the general demurrer cannot be waived. Our author leads us at once to this fundamental truth, and shows us where runs the dividing line between matter that may be waived and matter that cannot be waived. His teaching is fundamental, logical, sound; and if it had been followed by decisions everywhere we should have had a sane and consistent procedure, instead of the wilderness of contradictions that has taken its place. Therefore if you have a question of pleading, turn to his pages upon this subject, and get your bearings by the fixed stars. By these you can determine how far any particular court in any particular decision has gone astray, and even if you cannot hope to overrule the decision you can at least have the satisfaction of discerning the truth and of stating it, as a lawyer is bound to do. Better still, you may be able to prevent any further departure from reason, and to arouse a just appreciation of the subject. You will find the matter of pleading dealt with as an expression of substantive law. You will learn the relation of the general demurrer to appellate procedure, collateral attack, *res adjudicata*, and due process of law, and be shown the interest the State has in matters of procedure, independently of the interest of the parties to the proceeding, and that the interest of the State is beyond the control of the parties,—cannot be conceded away by either, nor by both. You will find a demonstration
that all the above subjects have interactions, and that they all run back to the fundamental maxim, *Alterum non lædere*. This illustrates my meaning when I say that the author's works are not only logical and philosophical but also profoundly moral. The truth he teaches upon this subject, although it is as old as jurisprudence, will be to many lawyers a new discovery,—an element as rare as radium, and one that will be found as precious and as powerful.

Or suppose your question relates to Fraud or Illegality. You turn to those titles in the Index, and are pointed to the maxims and cases that will serve you as keys and guides. You find, *In pari delicto potior est conditio defendantis*, and *Ex dolo malo non oritur actio*, with their cognate maxims and their illustrative cases, and are referred to the appropriate sections of the Restatement itself. Here you will have in hand the clues to the whole library. If your case involves the principle that no one can act where his integrity and his interest are in conflict, before wasting your time over a search for cases as nearly like yours as possible, in their accidental circumstances, you will look at *Agency*, *Trustees*, or *Equity*, and be pointed to the major maxim, *Idem agens et patiens esse non potest*. Therefrom you will be led to the most important cases and the best discussions of the principle in opinions, text-books, and annotations. The same course is to be pursued if you are interested in the law of *Assent* as applied to a contract, or in the Liability of *Infants*, or the liability of a husband for the debts of the wife. If you are concerned with *Remoteness* or *Privity of Causation*, these topics will conduct you to *In jure non remota*, to the *Squib Case* and exhaustive résumés of this important principle. The law of Intent in Crime will be looked for under the title *Intent*, and you will find your point of departure in *Actus non facit nisi mens sit rea*. And so on in other cases. It would seem to require no argument to demonstrate the advantage of examining every question in the light of such principles, and of getting one's bearings, to begin with, from the fixed and unalterable landmarks of the law. The value of any book depends largely upon the reader's familiarity with it and his habit of keeping it at his elbow, and of consulting it on every question that arises. Such a use of the present book will, I am confident, make good all that I have said.
A Restatement of The Law
From Alterum Non Laedere

Embracing the great star and the rivulets below.

From the fundamental immutable principles of liberty and freedom, ignored by Imperialism and Feudalism (§ 21) and their offshoots, Commercialism and its ally Empiricism. (See Feudal Lawyer.)

Why the general demurrer cannot be waived; the attitude of the state safeguarded and vindicated by the Prescriptive Constitution. The sources of attacks upon these pointed out and explained (see Literature; also §§ 17, 21, 25, 26). The failure of the Feudal authors and their followers (§ 21); "Parliament is omnipotent," a misleading motto of Feudalism which has wrecked the Codes and Practice Acts; also the logic and philosophy of the law.

The six leading subjects of the law—Procedure, Equity, Contract, Crime, Tort, and Construction—are embedded in the maxims of the Prescriptive Constitution. These named and explained.

A CHAPTER OF MAXIMS, GENERAL PRINCIPLES, AND LEADING CASES

Codes and Practice Acts discussed in the light of these and the best Federal Cases that can be picked and cited.

The Rules of Res Adjudicata, Collateral Attack, "Due Process of Law," and Appellate Procedure, are shown to be paraphrases of the maxims.


THE MYSTERY OF THE CODE REVEALED

The universal, constitutional principles of all ages stated and discussed.

Meaning of the rule that "What ought to be of record must be proved by record and by the right record." This illustrated in the light of Mondel v. Steel, L. C. 77 et seq., 3 Gr. & Rud.; also Milbra, 46 L.R.A.(N.S.) 274, 277, 278; Palmer v. Humiston, 45 L.R.A.(N.S.) 640; also Kewaune County v. Decker, L. C. 30, 3 Gr. & Rud.

A TRUE DEFINITION OF PLEADING

ALSO of the MANDATORY and of the STATUTORY RECORDS

Herefrom Important Rules of Appellate Procedure.

Pleadings are shown to be a jurisdictional element, and cannot be bargained away (Campbell v. Consalus), nor waived, nor legislated out of procedure. They are to limit issues and to narrow proofs

THE MUNICIPAL COURT ACT FOR CHICAGO

The errors of Sergeant Williams, Blackstone, Todd, Chitty, Stephen, Pomeroy, and the Code authors that have followed the Feudal authors. How these have led into a Babel,—a legacy of bewildering literature that is beyond human capacity.

Melius est petere fontes quam sectari rivulos
CHAPTER II.

§ 1. Organic Law Is Embedded in the Major Maxims. Major maxims are the fundamentals of the leading subjects of the law, which are Procedure, Equity, Contract, Crime, Tort, and Construction. Thus the fundamentals of the law are in Latin, the language of all nations, and, of course, of the great lawgivers, who organized the law and perceived its logic and philosophy. They are for all climes and all ages. (See Logic.) The few fundamentals from which the law is deduced are best expressed in the Latin. This may be perceived from what we shall demonstrate of Procedure, which rests on three major maxims that should be taught and well impressed. These we shall pick and set, and for brevity call the Trilogy of Procedure. They are:

1. De non apparentibus et non existentibus eadem est ratio: What is not juridically presented cannot be judicially considered, decided, or adjudged.

2. Frustra probatur quod probatum non relocaet: It is vain to prove what is not alleged.

3. Verba fortius accipiuntur contra proferentem: Every presumption is against a composer, or pleader.

These are the major maxims of the subject; in other words they are the dominant initials from which the subject is deduced. They are the central ideas—the organic principles. They have mutual interactions, and from various standpoints they present phases of many minor maxims. To illustrate: When we say that what one does not allege he cannot prove, we apply to him Verba fortius, the third maxim above. When we say that the actor must prove his allegations (Actore non probante reus absolvitur, or Semper presumire pro negante), we also present phases of Verba fortius. Thus we see Verba fortius lying at the base of the burden of proof, one of the cardinal rules of evidence, which has vast ramifications. It is related to many rules of great importance to the practitioner.

§ 2. Ramifications of Verba Fortius; Observation upon Authors. Likewise we may trace Verba fortius, indeed the Trilogy of Procedure itself, into Res Adjudicata and all of its ramifications, as where Verba fortius is paraphrased thus: "Estoppels are odious and
are strictly taken" (see Vicksburg v. Henson); or thus: “Every intendment is against the estoppel.” These are the State’s rules of construction in vindication of its attitude as viewed from Interest reipublicae ut sit finis litium. Herefrom it is disclosed that the general demurrer cannot be waived; that it searches the substantial pleadings, and attaches to the first fault even at the stage of collateral attack, as well as in Res Adjudicata and in tests for “due process of law.” The Trilogy of Procedure are the tests of a pleading at all stages of the general demurrer, at all of its correlatives, without varibleness or shadow of turning. (See Bouv. Dic. Rawle’s 3rd Revised ed. Title “Pleading”.) A judgment is a contract, and as such its foundations are always tested by the general demurrer and its correlatives. Herefrom we see the Trilogy of Procedure bottoming the highest form of contract, to evince which the State demands a record which we call the mandatory record, which was never cleared and defined by Feudalism and its followers. This their works on pleading and cognate subjects will show. They have led away from the above logic and philosophy, and not to it. See Logic. The two records, the mandatory and the statutory, are a mere of bewilderment, from the Federal Supreme Court on down, notwithstanding some truly excellent cases like Nalle v. Oyster and Vicksburg v. Henson. The same is true in every court where it is held that allegations, admissions, denials, and issues may be waived. (See Garland v. S. 232 U. S. 642.) Such waiver assails the bulwarks of protection perceivable in the Trilogy of Procedure, and of course ignores the State’s attitude and interest above referred to. Such waiver makes way for usurpation, judicial arrogance, and oppression, as is clearly set forth in the dissenting opinion of Judge Talbot in Gulling v. Bank, 29 Nev. 266–280. Upon this question Story is on one side and Thompson on the other. (See Literature.) The latter is generally preferred by American courts; for a full generation he was the most prominent and popular author, although neither understanding nor caring for fundamental law.

§ 3. Observations upon Authors Continued. The latter author denied that pleadings in a civil case were jurisdictional. He did, however, recognize the indictment as essential, and by this he showed that he did not understand the logic and philosophy of procedure. In the civil case his theory was that the pleadings were functus officio when the judgment was entered. He simply denied the Trilogy of Procedure and all its cognates. Nowhere did he mention Res Adjudicata, or col-
lateral attack, or jurisdiction and say how the pleadings were involved in these subjects. He never cited a maxim nor explained one. He claimed in the broadest way that every presumption is in favor of a pleader, that if irrelevant evidence were admitted, this became a juridical element and would stand for pleadings; that a case did not depend upon *allegata* but on *probata* alone. See his 2 Trials, §§ 2310–2314, quoted under the title "Variance," 4 Gr. & Rud. To him procedure was a local and flat question, a question of statutes and cases, without regard to fundamental law (see Literature) which he denied in a broad, sweeping, and most extended way. Cases like *Gulling v. Bank* and *S. v. Fasse* (Mo.) would pass as *coram judice* with him. His work last cited was regarded as high authority for a full generation, and earned for him a foremost place with the American profession. His career was that of a writer and not of a practitioner. His works in general have been very popular with the Cyc editors, as well as in many schools. The 31 Cyc is largely prepared along the lines he contended for as a "new dispensation." And the same views are indorsed in Smith's (since labeled Clark’s) Elementary Law, in attempting to elucidate the maxim, "Equity regards as done that which ought to be done."

Neither of these authors understood the above Trilogy. They can be cited to deny it, and the whole of it. (See Story, Jurisdiction.)

§ 4. A Great Maxim: A Test of Jurisdiction. *Quod ab initio non valet intractu temporis non convalescit:* That which is void in the beginning cannot be cured by waiver, acquiescence or lapse of time. This may be classed as one of the major maxims, although it is a logical deduction from the Trilogy of Procedure. It may be viewed as a shield against usurpation or abuse of power. If no crime is charged, or no "cause of action" is stated, the court has nothing before it, and it cannot consider or adjudicate anything. Its attempt to do so is barred by the application of *Quod ab initio*. A court cannot start without jurisdiction, and pick it up in the course of the proceedings, as by a stipulation that it may proceed, or by the introduction of irrelevant evidence. (See *Campbell v. Consalus*, N. Y.) Nor can jurisdiction be acquired by an amendment after the trial. (See Amendments.) In an action of specific performance, if the description of the land sought were omitted, this description could not be inserted after the trial. So, too, if neither party is named such an omission could not be supplied after the trial. Nor could any of the essentials called for by *Quis*, *quid*,
coram quo be then supplied. Such procedure would offend the require-
ments of the State, and these cannot be waived. The State is a silent
third party to the record, and its interests cannot be waived. *Res inter
alios acta. Alterum non lædere.* These conclusions are deducible from
the Trilogy of Procedure. And so we may view this maxim as a minor
one. However, it is very useful and instructive, and elsewhere we con-
sider it at length. It well illustrates the rule that the general demurrer
searches the entire record (substantial pleadings), and attaches to the
first fault. In the light of the Trilogy and of this maxim, the rule of
the demurrer may be clearly seen and thoroughly impressed. Accord-
ingly we see this maxim opposed to the theory of the case as advocated
by Judge Thompson. It is comprehended in § 10, Story’s Eq. Pl., § 47,
Hughes’ Equity In Procedure.

§ 5. The Most Instructive Maxim of Pleading.

*Quis, quid, coram quo, quo jure petatur et a quo;*

*Recte compositus quisque libellus habet:*

Every statement correctly drawn must state with certainty to what court
application is made (see Terms of court), who complains, of whom he
complains, what wrong he did, and the amount of damage done (see *Ad
Damnum*). *Garrett.*

The names of the plaintiff and of the defendant must be stated with
certainty. (See Names, also *Wiebold v. Herman*, L. C. 98, 3 Gr. &
Rud.)

All of the above five requirements are jurisdictional requirements in
all courts. There may be more, but in no cases are there less. They
may be called the “irreducible minimum.” The general demurrer and
all of its correlates would be stages whereat objections could be made
to a statement wherein any of the above essentials was omitted (see
*Quod ab initio*). At all of these stages the general demurrer would
search the entire record and attach to the first fault.

This maxim may be viewed as one enumerating the essentials re-
quired by the Trilogy of Procedure; for this it is very useful and most
instructive. It should be read connectedly with §§ 10, 25–28, Story’s
Equity Pleading, also 47 Hughes’ Equity.

§ 6. The Five Maxims of Substantial Procedure. The above
five maxims—*De non, Frustra, Verba fortius, Quod ab initio,* and *Quis,
quid, coram quo*—are the Roman fundamentals of substantial procedure.
These are the roots of procedure in the countries of the Continent of
Europe and of Latin America and generally of all countries into which
the Roman arms were carried and wherever the Roman held court. (See
FROM ITS LOGIC AND PHILOSOPHY

chapter I. Fountains of the law, 1 Gr. & Rud.) Because of their universality and organic character they ought to be presented in all works on pleading and cognate subjects. (See Maxims.) These maxims have a profoundly constitutional character. Indeed they are maxims of the Prescriptive Constitution. They are the higher law. Local and flat laws cannot abolish them in a constitutionalism. No constitution has greater principles. The attempt to abolish them by statutes of amendments and jeofails has failed.

§ 7. An Instructive Maxim Continued. Quis, quid, coram quo, calls for parties. Essential parties are jurisdictional. (Williams v. Bankhead, L. C. 93 et seq., 3 Gr. & Rud.) It is jurisdictional that only a wronged party can complain, and he must state his wrong by setting forth the descriptive facts; this rule is dictated by the necessities of Res Adjudicata, in other words the interests of the State; therefore it cannot be waived. Consent cannot confer jurisdiction of subject-matter; this must appear from the facts stated. For this, conclusions of law will not do. One who is not injured cannot sue. Fabula non judicium. The injured party must appear, and describe himself with certainty, and describe a wrong known to the laws of the land. He must describe something that the court is authorized to act upon, otherwise the proceeding is coram non judice, i. e., beyond the authority conferred by the State. § 10, Story's Equity Pleading.

Quis, quid, is reaffirmed by all Codes. What we observe of Campbell v. Consalus, Clark v. Dillon, and Tooker v. Arnoux, all N. Y. Code cases, will prove instructive in all jurisdictions. These cases present many phases of the major maxims above discussed. Codes require the statement of a "cause of action." They also provide for the general demurrer, and that the recovery must be within the facts stated. Monday v. Vail, L. C. 79 et seq.; Vicksburg v. Henson. Story.

Authors who omit, exclude, and deny the fundamentals, and lead furthest away from them, have been most prominent, and most sought by the legal profession, for the last two generations. How much they aided in the construction of the Code is indicated by cases like Gulling v. Bank and Weber v. Lewis (N. D.). The student should seek the work on pleading that presents the fundamentals with congruity and in the light of logic and philosophy.

§ 8. The Substantial Maxims Construed Away. Lord Mansfield, in Robinson v. Raley, L. C. 45, 3 Gr. & Rud. stated that the rules of substantial pleadings were founded in "strong sense and the closest
logic,” in other words, in reason and philosophy. And he is borne out in that statement by an understanding of the Trilogy of Procedure and its cognate maxims. These are canons of sense and of logic to be studied and followed by the courts in a constitutional government. Herefrom the Code appears as a grand piece of declaratory legislation. If in the first Code case, *Biddle v. Boyce* (Mo.), and in *Eno v. Woodworth* and *Allen v. Patterson* (N. Y.), the courts had quoted the Trilogy and had stated in clear-cut language that these canons of sense and of logic would be respected more than the motto that “Parliament is omnipotent,” or the letter of the statute (*Ita lex scripta est*), the history of the Code would have been far different. The courts and authors should have said in plain language that there are but a few principles or elements of procedure, and that these were well gathered and expressed by antiquity. But, instead, the courts stumbled, and the authors followed, crying for more cases and more legislation. The prefaces of Professor Pomeroy and of Judge Nash, elsewhere set forth, show this. All, courts and authors alike, avoided the elements expressed in the maxims of old; they turned away from these, and gave heed to the “late case,” and the letter of the Code. They never cited or paid respect to *Verba fortius* as a great universal, constitutional principle, for they sought to extirpate it, to destroy this canon of sense, of logic, of construction, of evidence and of pleading. And the result is that the profession is bewildered with discussions of cases like *Clark v. Dillon* in New York and *C. & A. R. R. v. Clausen* (Illinois). Clark is discussed by New York authors, as appears from Bradbury’s Rules of Pleading, pp. 9–16; 1564–1570; also Baylies’ Code Pleading and Practice, 1–4. Such pages show the attempts to renounce and depart from the maxims of sense and logic. Elsewhere we cite the sections of Thompson and the elementary works extensively used in schools.

The law has no greater principle than *Verba fortius*. It is a Datum Post in construction, evidence, and pleading. But what has the Feudal lawyer and his followers done for it? Look at the above authors, at Tidd, Chitty, and Stephen, and see if each did not ride astraddle when they mentioned it. They cited it in relation to *Jackson v. Pesked* and sometimes *Dowaston v. Payne*, L. C. 217, 3 Gr. & Rud. For it each decade, each province and school, has selected its own group of cases. The Federal court has generally vindicated it; but in *Baker v. Warner* it gives notice that the old rules, so long respected and adhered to, must give way to the “new” and “modern” views. That case can be cited
against *Verba fortius*; etc., also the Code cases *Campbell v. Consalus, Clark v. Dillon* and *Tookey v. Arnow*. It is a case that is likely to give the profession endless trouble, unless that court declares itself for the ancient rules of sense and logic. These have never been cited and explained by the court. (*McFaul v. Ramsey.*) Its decisions, like those of state courts, have been Feudal in character. All courts have at times applied and upheld those principles, but the trouble is they do not adhere to their decisions nor put them on the true grounds. As to these rules of sense and logic there is no *stare decisis*. Everything is decided every way, as will appear from the authors above cited.

Had some American court picked and stated the Trilogy of Procedure, and explained its maxims, the history of procedure would have been different. (See Logic.)

To a profession that did not understand the rules of sense and logic upon which pleadings depend, the Code was given, only to be destroyed by construction.

*Benedicta expositio quando res redimitur a destructione.*

§ 9. The Trilogy of Procedure: The "Manner of the Romans." *Actore non probante reus absolvitur:* The plaintiff must prove his case or the defendant is absolved. Whoever alleges must prove. *Semper præsumire pro negante:* The presumption is with him who denies. One must allege a case (*De non apparentibus*), and if it is denied, the plaintiff must prove the allegations that are denied. This maxim is not a major one, but it is a corollary of *De non apparentibus*, already introduced.

In Paul's Trial (see Acts, xxv.) the Trilogy of Procedure was up for discussion, and Festus instructed the Scribes and Pharisees touching the "manner of the Romans." Therefrom it appeared that the manner of the Romans involved sufficient allegations in distinction from a conclusion of law, that it recognized that the burden of proof devolved upon the prosecution, and that the accuser "must prove the crime as laid;" that the evidence must correspond with the allegations and be confined to the points in issue (1 Gr. Ev. 51).

This maxim ought to be studied in connection with the Trilogy of Procedure, the primary organic maxims. *Actore* calls for the issue in all cases, both civil and criminal; there is no difference. It calls for the allegation, the denial (see *Dickson v. Cole et seq.*, 3 Gr. & Rud.), and the issue (see Issue). Where there is no issue there is nothing to try. (*Munday v. Vail*, L. C. 79, 3 Gr. & Rud.; *Garland v. S.* 232 U. S. 642.)
The issue must appear from the mandatory record. (See Id.) But this is denied by the "theory-of-the-case" advocates. (See Id.) Also C. J. Cyc 66, 100—bills of particulars, evidence, and opinions admissible to prove. The burden of proof is a rule of great consequence to the practitioner. It is a rule of substantial right. (See Bonnell v. Wilder, L. C. 185, 3 Gr. & Rud.) It often presents a phase of Verba fortius. There is a presumption against him who alleges or claims. (See Tinker, 231 U. S. 681; the rule is not one of fixed right.)

§ 10. Rules of Res Adjudicata; The Rules of Pleading and Certainty. Juridically presenting and proving a plea of Res Adjudicata is a fine illustration of the Trilogy of Procedure, also of Actore. This plea has no presumptions in its favor, but, on the contrary, all presumptions are against it. This plea must appear wholly from the mandatory record. The matter of the statutory record is inadmissible to prove it. These views the "theory-of-the-case" advocates have not and cannot meet. They write volume after volume and article after article in Cyes on Pleading, Evidence, Practice, Trials, and Trial Practice, without mentioning the plea of Res Adjudicata,—how it must juridically appear, and how it must be proved. This plea and the practice relating to it is tested by the Trilogy of Procedure. It is the most learned plea of the law, except the pleadings in equitable exceptions to the statute of frauds. (See Lester v. Foxcroft, L. C. 341, 3 Gr. & Rud.) In the criminal law perjury involves the most refined pleadings and proofs. Here there must be an issue, and it must appear from the pleadings,—the right record. (Mondel v. Steel, L. C. 77, 3 Gr. & Rud.) To support the charge of perjury it must appear that there were pleadings, an allegation and a denial, and a material issue, judged by the tests of the Trilogy of Procedure. Thus the claim that a case arises from the evidence, bills of particulars, arguments, instructions and opinions, and not from the pleadings, is answered by the requirements for pleading and proving perjury.

Uno absurdo dato infinita sequuntur.

The rules of Res Adjudicata, the equitable exceptions to the statute of frauds and of perjury, are all in accord with the Trilogy of Procedure. And all of these are at war with the "theory of the case." But they are in harmony with Code provisions. (See Campbell v. Consalus; Clark v. Dillon and Tooker v. Arnoux.)

§ 11. The Trilogy of Procedure Is International Law. The Trilogy of Procedure pervades the highest of laws, not only constitu-
tional law, but the law of nations as well. To illustrate: If England demanded of Mexico an accounting for the slaying of Benson, a British subject, and the defense of Mexico was that he was executed according to "due process of law," then the usual incidents of this defense would be called for. For this, local and flat law and the law of some province in disaccord with fundamental law, would not be thought of for a moment. For this the "manner of the Romans" must be presented. For this a record (the mandatory record) would be called for, which must present a charge of a crime (Quis, quid, coram quo), and this charge would be scanned and tested for a presentment, and for notice of it, and an opportunity to be heard, and for a sentence in accord with the presentment and the notice. (Standard Oil Co. v. Missouri, 222 U. S. 270, 272.)

If no sufficient charge was presented,—if it would not pass the general demurrer,—the investigation would close then and there. The tribunal had no jurisdiction to begin with, and it could not pick and gather it up on the way of a trial. That would be a "theory of the case," which England does not recognize. On the contrary, the maxim Quod ab initio would be applied. The general demurrer searches the substantial pleadings, and attaches to the first fault. With no crime charged, to start with, the investigation would proceed no further (Story). If there was no crime charged, then it matters not what the evidence was. Evidence cannot supply allegata. Jurisdictional averments must appear in the right record. Probata is one thing and allegata is another. Frustra probatur quod probatum non relevat.

Statesmen and diplomats would be governed and would find according to these maxims, and upon these submit the case to the nations of earth to judge from. These maxims would be laid down as the law of nations, and, too, in the language of all nations, not in the language of some province or state which may have declared its law as suited the legislature of that province. The prescriptive constitution would guide in such a case, and not local and flat law, nor the late case in opposition to those maxims.

The principles of "due process of law" that would govern in such a case would be the Trilogy of Procedure,—the "manner of the Romans." There must be some test for such an inquiry, and that test is the maxims referred to.

If it appeared that notorious enemies openly proclaimed and crowded themselves in as judges and triers of the status of the slain party, then the
proceedings would be condemned as coram non judice. And it would be vain to show that Benson did not object or take exceptions. One cannot consent to what offends public policy. Alterum non lade.

In this connection read Oakley v. Aspinwall, 3 N. Y. 547, 549–554, the ablest exposition of Nemo debet esse judex in propria sua causa. This maxim is there declared to be the first principle in the due administration of justice in New York, and to be above statutes and Constitutions. (Lead. C. 222, 3 Gr. & Rud.) In presentia majoris cessat potentia minoris.

In extradition proceedings the character and the nature of the offense charged is determined from the mandatory record, and not from ephemeral and evanescent vestiges and scraps. If one is accused of perjury, then the materiality of the issue is a matter of substance, and this would not be sought from matter in or belonging to the statutory record, nor from oral evidence, nor from stenographer's minutes. But the mandatory record would be opened, and this record would be construed by the rule, "What ought to be of record must be proved by record, and by the right record." (Fiunt enim; Equity In Procedure 218–231.)

The issues would be sought according to the rule in Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Milbra. 45 L.R.A.(N.S.) 274, 277, 278; Palmer v. Humiston, 46 Id. 640. If no material issue appeared from the right record, the charge of perjury would fail. Deble fundamentum fallit opus. Equity In Procedure, 206–217. If no "cause of action" was presented, then there was no material or relevant evidence, and therefore no coram judice proceeding, and therefore there was no wrong. Fabula non judicium. Frustra probatur quod probatum non relevat.

The "theory-of-the-case" advocates cannot have any standing in International Law, from the above viewpoints. (See Story.) The Pleadings cannot be waived. (§§ 83–124, 1 Gr. & Rud.)

§ 12. The Mandatory Record a Constitutional Implication.
The maxims of sense and logic call for tremendous implications for their application and operation. And among these implications is that paramount essential, the mandatory record. This record is indispensable for the due administration of justice. Indeed it is a constitutional implication. By it must be determined what is juridically presented, considered, adjudged, and determined. For this purpose it is the exclusive and the best evidence. To it is strictly applied, Expressio unius est exclusio alterius. As the deed or the note is called for to prove the rights of a claimant under them, so the judgment and its supporting
record is called for when the judgment is relied upon to prove an estoppel of record, a plea of *Res Adjudicata*, or a title founded thereon. And as a deed or a note may have defenses not indicated on its face, so may a judgment. It may be shown to be *coram non judice* by the attending record upon which it depends. (*Windsor v. McVeigh*, L. C. 1, 3 Gr. & Rud.; *Vicksburg v. Henson; Nalle v. Oyster.*) In all courts authority must be shown for the entry of a judgment; it is not presumed.

A judgment does not carry presumptions of regularity on its face. Jurisdictional facts must affirmatively appear. And at all stages this supporting record is tested by the Trilogy of Procedure. The general demurrer is never waived; it searches the entire record, and attaches to the first fault. And this is the rule at the stage of collateral attack, of *Res Adjudicata*, of “due process of law.” (See Collateral Attack.) This record is governed by the rule, “What ought to be of record must be proved by record and by the right record.” (*Fiunt enim de his contractibus.*) It is the state’s record and cannot be waived. *Res inter alios acta; Alterum non laedere.*

Codes and practice acts are governed by the above deductions from the Trilogy of Procedure. *Campbell v. Consalus; Clark v. Dillon; Tooker v. Arnoux; S. v. Muench* (Mo.). (See Mandatory Record.)

§ 13. The Statutory Record Is a Formal Record; Its Office and Functions. The statutory record (bill of exceptions) is entirely different from the mandatory record. It is for entirely different purposes. It is not opened at the stage of collateral attack, nor on questions of *Res Adjudicata*. (*Alterum.*) It is for an appellant in a court of errors, and is for no other purpose. It may be waived in whole or in part, and as may please the appellant. (See statutory record.) Nothing is of more consequence to the practitioner than an accurate technical knowledge of these two records. And, it must be added, nothing is more illly understood. (See *Pennewfsky v. Coerver* [Mo.]; *Planing Mill Co. v. Chicago*, L. C. 2d, 3 Gr. & Rud. and sections in 1 Gr. & Rud. there cited; also L. C. 290a–299, 3 Gr. & Rud.; Abatement.)

At this point let us ask if it is not apparent that the rules of “sense and logic,” upon which pleadings depend, should be introduced and taught as great organic principles of the prescriptive constitution, common to all systems, including the Code? Should the rules not apply as well to courts created for cities, like the Chicago municipal court (see Id.)? Do not these major maxims underlie not only pleading, but its related subjects as well? Should not every work on pleading introduce
and elucidate them? Would not the Trilogy of Procedure be a valuable addition to every work on pleading and to every article in Cyes, on evidence and practice, on trials and trial tactics? Can any greater or more useful rules of procedure be named? Is not the vision greatly widened and cleared after a careful consideration of the Trilogy of Procedure? Why, then, have all the works on pleading and evidence omitted the major maxims? Is it not certain that they must be stated and made prominent in any logical and philosophical restatement of the law?


1. *Juris praecpta sunt hae: Honeste vivere; Alterum non laedere; Suum cuique tribuere:* These are the precepts of the law: We should live honestly; injure no one, and render to every man his due.

This is the greatest maxim of the law. No case can be cited that presents all its phases. *Alterum non laedere* is widely cited in tort, and it may be cited also in crime. We have cited it to sustain the state’s attitude in procedure, and especially to the proposition that the general demurrer cannot be waived. (See *Alterum.*) For brevity we often cite it simply as *Alterum*.


This maxim is very important in construction. It is adopted by the courts of Continental Europe and of Latin America. It indicates the importance of the prescriptive constitution as a body of organic, fundamental law. Constitutions and statutes are governed by the higher law. *Indianapolis R. R. v. Horst,* L. C. 223, 3 Gr. & Rud.; *Church of The Holy Trinity v. U. S.* 2 Gr. & Rud.; *S. ex rel. Henson v. Shepherd,* 4 Gr. & Rud.; *Oakley v. Aspinwall,* L. C. 222, 3 Gr. & Rud. See *Nemo debet esse judex:* Also Hughes’ Equity, §§ 509–522. *In prae-sentia majoris.*

The major maxims of equity were not assigned as the basis for equity jurisdiction and operation in the seventeenth century, when Coke was in power. See chapter I. 1 Vol. Gr. & Rud.; Equity, 2 Gr. & Rud.; also title Equity, post.

§ 15. Contract; Its Trilogy. Having presented the major maxims of procedure and of equity, we will next gather and present those that are the substance of other leading subjects. These shall be only the
familiar maxims that are fundamental in the discussions of those subjects. The American Bar Association recommends that the familiar maxims be taught in the schools. From these we pick a few of the most important, such as should be comprehended by all students. We have already endeavored to show why the organic maxims of procedure should be understood as the basis of all systems of pleading and practice.

Maxims are like a river without a main, percolating under the entire body of the law; and especially the great maxims of sense, logic, and morals. This is illustrated by a consideration of *Idem agens et patientes esse non potest*, in §§ 509–522, Hughes' *Equity In Procedure*. There are maxims of the law that are a necessary part of a good education. Having introduced Procedure and Equity we will next present:

**CONTRACT:**

1. *Non hoc in fœdera veni*: I did not come into this compact. This is equivalent to saying I did not assent to this contract. It involves the law of assent. See Lampleigh v. Brathwait, L. C. 301, 3 Gr. & Rud.

2. *Ex nudo pacto non oritur actio*: No cause of action arises from a bare agreement. In other words a consideration is essential to support a simple contract. See Rann v. Hughes et seq., 3 Gr. & Rud. L. C. 312.

3. *In pari delicto potior est conditionis*; in equal fault the position of the defendant is preferred. In other words, "he who hath done iniquity shall not have equity." A party to an unlawful agreement cannot enforce it. The state interdicts illegality, and therefore its courts will not entertain jurisdiction of contracts made in violation of law. It involves a question of jurisdiction, and this involves questions of pleading and proof; See Holman v. Johnson, L. C. 363 et seq., 3 Gr. & Rud.

Maxims and cases of Contract, see 1 Gr. & Rud. §§ 280–290; also 3 Gr. & Rud. 301–417; also Equity In Procedure, 466–472.

Contract has interactions with equity, procedure, crime, tort, and construction. To demonstrate this, we have only to study *In pari delicto* and its cognate maxims. "These are trite and familiar maxims we all know," Justice Peckham, in McMullen v. Hoffman, 174 U. S. 639, 654–660. He also said these maxims were in all the works. But in this he was mistaken. We have popular elementary works and works on "brief making" that do not present one of these "trite and commonplace" maxims that the justice called the *organic law of Contract from of old*. To-day in schools in New York city are professors who have no more use for maxims than had Judge Seymour D. Thompson. (See
Story.) In McMullen, several paraphrases of In pari are set forth and discussed as jurisdictional maxims; thus as Procedure. Paraphrases are given which relate to equity. He did not cite Crimen omnia ex se nata vitiat: Crime vitiates all into which it enters. But he well impressed Ex dolo malo non oritur actio. This is a most useful maxim in the law of tort, in misrepresentation, deceit, and cognate cases. These maxims interact with crime from many viewpoints (R. v. Wheatley, L. C. 19, 3 Gr. & Rud.) Nor did he observe that the coram non judice proceeding in the field of procedure was an example of In pari in contract. Nor that a judgment is one of the classes of contract, the contract of record, and that the judgment depended upon the coram judice proceeding, without which the judgment is In pari, so to speak. (See Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.; also S. v. Baughman, Wellmer v. Bishop, Beaumont v. Reeve, L. C. 268, 265a, 367, 3 Gr. & Rud.; Fabula non judicium; Scott v. McNeal, 4 Gr. & Rud.; Jurisdiction.)

§ 16. Contract; Pleading of. The statement of a contract which showed it was In pari would not pass the general demurrer, and this is never waived. Alterum non ladere. The welfare of the state cannot be waived. Salus populi suprema lex. Res inter alios. All of these propositions can be picked out of McMullen, 174 U. S. 654–660. Therein is cited Holman v. Johnson, L. C. 363, 3 Gr. & Rud.; Trist v. Child, L. C. 214, 3 Gr. & Rud. et seq. (by construction the welfare is defended). Benedicta expositio quando res redimitur a destructione. McMullen is perhaps the deepest and broadest discussion of In pari. And yet it comes from a judge who can be cited to sustain the view that there is “new” and “modern” law, for he held that jurisdiction of formal matter could be conferred without regard to an assignment of errors. Such decisions speak far and wide.

In McMullen it was conceded that a few maxims founded and formulated the law of contract. Now if this is so, does it not follow that the same elements in other branches of the law are also equally immutable? A study of In pari, will answer this question. (See Equity; Feudal Lawyer.)

The attitude of the state must be respected in contract law. McMullen, supra. Alterum non ladere. Must it not be respected in all relations? And if disregarded, are not the proceedings subject to collateral attack (Windsor)?
§ 17. Contract; Outline Considerations. Every legal contract is respected by government, and will be enforced by it as far as possible; this is the duty, the obligation, of government. The law protecting contract from impairment is not local and flat, but arises from organic principles of society. Local law may reaffirm this older law, but this is not making the law. The law of contract, its protection and enforcement, is old and archaic, and not "new" and "modern" law. Every lawful contract must be respected. This idea is well expressed in: *Pacta conventa quae neque contra leges neque dolo malo inita sunt omnimodo observanda sunt*: Contracts which are not illegal and do not originate in fraud must in all respects be observed. What this maxim means is well stated by Judge Peckham in a truly notable and instructive case *McMullen v. Hoffman*, 174 U. S. 639, 654–660, which, with *Oakley v. Aspinwall, Riggs v. Palmer,* and *Clark v. Dillon,* stands for the prescriptive constitution. In these cases the supremacy of the state and its interests are well set forth. With *Campbell v. Consalus* they speak for the higher law. *Salus populi suprema lex.*

A statement that presents an illegal contract will not attract jurisdiction; it is subject to general demurrer, and this cannot be waived. *Lampleigh v. Brathwait,* L. C. 301, 3 Gr. & Rud. Herefrom will appear the depth and importance of the maxim, *In pari.* (See discussions of *McMullen*, supra; also of the expression *Coram non judice* in procedure.) In contract law we call illegality *In pari,* while in the law of procedure we call a defect of the judgment contract, *Coram non judice.* The idea is the same in each case.

The prescriptive constitution dictates the law of the leading subjects. The higher law cannot be changed without eating into the very structure of government, changing its obligations and operations. (See Jurisdiction; *Trist v. Child,* L. C. 214, 3 Gr. & Rud.)

The endless discussions of *Cumber v. Wane,* L. C. 311, 3 Gr. & Rud. are nothing more than phases of *Ex nudo pacto* (Equity In Procedure, p. 467). For the discussion, one professor selects *Cumber v. Wane,* while another selects *Foakes v. Beer* and another *Pinney's Case,* and still another, *Sibree v. Tripp* (Equity In Procedure, 467).

Now, whether the old unchanging statements of the law, in the maxims, or the ever-changing and fluctuating cases, best present fundamental principles, the student must judge for himself. *It is maxims,* not cases, that have stood the tests of time. Only the cases that best illustrate these are worthy. The rest may be recalled or blown away.
Even admitting the excellence of the case system, still its advocates ought to agree on the right and true cases, and explain and impress these, and the fewer the better. (See Case System, 2 Gr. & Rud.)

The discussions of Cutter v. Powell, L. C. 308, 3 Gr. & Rud.; p. 471 (Equity In Procedure), involve phases of Non hac in fædera veni as well as phases of procedure. When one denies that he entered into a contract, he denies that he injured the plaintiff. One who has not injured cannot be held responsible. Courts were not created and given jurisdiction to condemn those who are not guilty or liable. Courts cannot make contracts for parties. Hoare v. Rennie. Parties must make their own contracts; only the contracts parties have made and plainly agreed to can be enforced.

Contracts made for the benefit of a third person and enabling the latter to sue in his own name involve questions of procedure as well as of contract. To present this question, one professor or school chooses Dutton v. Poole; another chooses Hendrick v. Lindsay, L. C. 319, 3 Gr. & Rud., while another will choose Lawrence v. Fox, and gather from the New York reports the nearly 300 citations of this case; and from this mass who shall pick that case which comprehends the true principle of procedure, around which all of these cases revolve? Not one teacher will cite Actio non datur non damnificato: An action is not given to one not injured. 4 Brit. R. C. 425. Not one will clearly state the principle that only an injured person can complain to a court, and that this is a jurisdictional question (see Jurisdiction); that a statement of a “cause of action” must present an injured person (Quis, quid, coram quo), otherwise the statement will not pass the general demurrer (Story; Rushton). The Dutton, Hendrick and Lawrence cases well illustrate the interactions of contracts and procedure, and the fact that pleadings lie at the base of protection and of contract, and show how cases can be made to illustrate the maxims. These cases are further stated in other relations.

From Cutter v. Powell and Dutton v. Poole may be perceived parts of the major-organic maxims of contract above referred to; also how these ramify equity, procedure, contract, crime, tort, and construction. These principles have fared badly in the scholasticism of Feudalism and its overtopping bulks of digests and Cyes filled with myriads of cases that cannot be reconciled. Its hurrah for these various selections as “statements of the law that have stood the tests of time” on the one hand, and, on the other hand, that the “law is the last interpretation of
the law by the last judge,” but such are the ways of commercialism. It claims that more than 5,000 new principles are stated and developed each year, and that this “wonderful development” demands their unending lines of chaff pads and jargon. From these the student must turn and seek the logic and philosophy found in the maxims.

To illustrate the condition, we call attention to the judicial anarchy relating to the pleading of a contract. This will appear from a consideration of Bowen v. Emerson on the one hand, and on the other Weber v. Lewis, 34 L.R.A.(N.S.) 362–374. (See Contract, post; also Lambleigh v. Brathwait, L. C. 301, 3 Gr. & Rud.)

We offer the view that the law of contract is evolved from a few maxims, and not from cases. Cases may, and often do, break the law (see Clark v. West), but breaking the law is not making the law. This was well said by James C. Carter, and very plainly intimated by Judge Peckham. These high authorities spoke for the old and the higher law.

Melius est petere fontes quam sectari rivulos.


CRIME: ITS ORGANIC MAXIMS.

1. Ignorantia legis neminem excusat: Ignorance of fact will excuse; ignorance of law will not excuse. Levett's Case, 4 Gr. & Rud.; R. v. Esop, 4 Gr. & Rud.; McNaghten's Case, L. C. 195, 3 Gr. & Rud.

Legislatures have sought to abolish this maxim of the prescriptive constitution, but in vain. Courts and juries refuse to convict the nurse for administering a noxious drug when ignorant of its nature. In petty crimes and in police regulations the intent may be presumed, but not in felonies. P. v. Roby, 4 Gr. & Rud.


3. Qui primum peccat ille facit rixam: He who is guilty of the first offense is liable for the whole strife. This is an important maxim in the law of self-defense. C. v. Selfridge, 2 Gr. & Rud.; Squib Case, 4 Gr. & Rud.

Note.—Crimes: See 1 Gr. & Rud. §§ 291–297; R. v. Cases, 4 Gr. & Rud.; C. v. Cases, 2 Gr. & Rud.; P. v. Cases, 4 Gr. & Rud.; S. v. Cases, 4 Gr. & Rud.; U. S. v. Cases, 4 Gr. & Rud. See also the respective subjects in the Gr. & Rud. in its alphabetical place.
§ 19. Tort; Its Trilogy.

TORT:

1. Alterum non lacere: Injure not one another. This is a part of Juris praecipea sunt hae: 2 Gr. & Rud. See Sic utere; Fletcher v. Rylands, 2 Gr. & Rud.; Squib Case; §§ 23, 97, Hughes’ Equity In Procedure.

2. Volenti non fit injuria: He who assents or invites his own injury ought not to be heard to complain of it. Davies v. Mann, 2 Gr. & Rud.; Hegarty v. Shine, 2 Gr. & Rud.

The negligence of one ought not to be charged to another. § 97, Hughes’ Equity.

This maxim and Actus non facit reum nisi mens sit rea (see Crime, supra) and Verba fortius accipientur contra proferentem (see Procedure, supra) are three maxims that have been strongly assailed by legislation. They are of the prescriptive constitution and self-vindicating. In the nature of things courts are bound to respect them.

3. In jure non remota causa sed proxima spectatur: The law regards the immediate, and not the remote, cause of any event. See Causation.

This maxim has long been elucidated in the “Squib Case,” 4 Gr. & Rud. Its most extended discussion is found in Gilson v. Delaware Canal Co. 36 Am. St. 802–861, ext. n.; 2 Gr. & Rud.

There are many cases which savor of both crime and tort and also of contract. See R. v. Wheatley, L. C. 19, 3 Gr. & Rud.; Coggs v. Bernard, L. C. 350, 3 Gr. & Rud. (Bailments); Hadley v. Baxendale, 2 Gr. & Rud. (Breach of Contract); Brown v. W. U. Tel. Co. 234 U. S. 542; Pasley v. Freeman, L. C. 375, 3 Gr. & Rud. (Deceit; False Representations that Cause Injury).

§ 20. Construction; Its Importance; Its Leading Maxims, General Principles and Leading Cases. Nothing is of more consequence to the practitioner, or to one examining titles to property, than to know how to construe pleadings and judicial records; and there is nothing that presents a greater barrier to the progress of the student than to confuse the logic and philosophy involved. The law relating to the subject is simply chaos, as will appear by starting from Collateral Attack and examining the conflict. The discussions around the motto, “Parliament is omnipotent” the statute of amendments and jeofails, and the “liberal provisions” of the Code, and the attempts to create courts like the Municipal Court of Chicago to practically dispense altogether with pleadings and all certainty in judicial records, will exhibit a mire of bewilderment. Cases like Crepps v. Durden (records of in-
ferior tribunals) are simply beyond human capacity. Relating to this question, the difficulty will appear by examining the cases of the Federal court concerning the *Green County Bonds*, which arose in Kentucky (108 Ky. 116–135). The maxims we shall next cite are submitted to the consideration of the student, with the suggestion that he can gain more light from these than he can from the jungle of cases that are laid before him for instruction. We ask a consideration of the subject from the old and the high law, and ask that this be compared with the "late" cases and the "new" law that is supposed to have come. See *Baker v. Warner*, 231 U. S. 588–593; *Eighmy v. P.* (N. Y.); *Rice v. Travis* (Ill.)

The principles of construction are embedded in the Prescriptive Constitution. These underlie and pervade the entire body of the law. They are its reason, logic, and philosophy. (See Logic.)

To start with, the Trilogy of Procedure are canons of construction; they are major-organic principles. Construction has no more important principle than that expressed in the maxim of all ages, *Verba fortius accipiuntur contra preferentem*. This maxim and its cognates should have due and full consideration at the very threshold. Herefrom the student may judge of the old as well as of the "new." Looking at the dreadful confusion it is time that the few fundamental principles were picked and set and introduced to the student so that he can see and judge for himself. Accordingly we present him the few principles that lead and light up the way of construction. We introduce him to the Trilogy of Procedure, which are the state's rules, the rules of strict construction, which cannot be waived nor disposed of by the parties. (See *Campbell v. Consalus*.) Wherever the state has an interest these rules apply. These views are dictated by the greatest maxims. *Alterum non lædere; Interest reipublicæ ut sit finis litium; Res inter alios acta.* Parties cannot stipulate away pleadings, nor waive them, directly nor indirectly. (*Campbell v. Consalus.*) There are limitations of *Consensus tollit errorem*. The state's interests are safeguarded by the major—the organic, the universal, constitutional maxims of procedure, already introduced. These rules are dictated by *Res Adjudicata*, which is founded on *Interest reipublicæ*. At the stage of *Res Adjudicata* the rules are strict for and on behalf of the State. And these are just the same at the stage of the general demurrer; there is no difference. It is absurd to say that at the stages of collateral attack or *Res Adjudicata* the State applies rules different from those applied at earlier stages. Logic, reason, and
philosophy require that the tests be uniform. And the tests are uniform on general demurrer and at all of its correlatives. (See Collateral Attack; Res Adjudicata; Due Process of Law.) But this is denied in Rawle's 3rd Revised Edition of Bouvier's Dictionary, volume 3, title "Pleading."

When we demonstrate that the general demurrer and all of its correlatives are all governed by the same tests—by the Trilogy of Procedure, then we make the rules and tests of all these matters rules of construction, and show that all radiate from and around the Trilogy of Procedure, which includes Verba fortius.

§ 21. Feudalism and Imperialism Have Led into Bewilderment. The Feudal author and his followers never perceived and indicated the prescriptive constitution. He could not have done so while defending his motto, "Parliament is omnipotent." This motto barred the idea that there were major-organic maxims above local and flat law. Consequently he either ignored the maxims, or presented them along with cases like Jackson v.Pesked (see Logic), or as Professor Pomeroy did (see Pomeroy's Code, 533, citing Antisdel v. R. R. and the contrary in § 546). We know of no author or case or article that plainly indicates that the attempt to reverse the operation of Verba fortius is a thrust at the vitals, the logic, and the philosophy, of the law, or that the law of procedure has immutable principles which imperial statutes and resolves of government cannot abolish. There are no better cases than Dovaston v. Payne, L. C. 217, 3 Gr. & Rud.; Clark v. Dillon (N. Y.); C. & A. R. R. v. Clausen (Ill.); Rose v. Milne (Va.). See this maxim discussed in Hughes' Equity.

This is the maxim that statutes of amendments and jeofails, the liberal provisions of the Code, and municipal court acts like that of Chicago, are enacted and established to overwhelm. It is over this maxim that a furious conflict has raged, and has dismembered the logic and philosophy of the law, and made of it a mire of statutes and cases. All courts have vindicated it at times, but not continuously nor congruously. (See Theory of the Case.) Every court that holds that a pleader may be allowed what he has not alleged violates this maxim. (See Henry v. Hilliard, — N. C. —, 49 L.R.A. (N.S.) 1-44, cited and discussed in relation to Lester v. Foxcroft.)

§ 22. The Prescriptive Constitution Opposed to "Parliament Is Omnipotent." The maxims require that a cause of action be stated. Bacon, Mansfield, Kent, and Story all reaffirmed the law of antiquity,—the prescriptive constitution. The state in its scheme of
FROM ITS LOGIC AND PHILOSOPHY

protection has reaffirmed that law by its Codes and practice acts. The
supreme law of the land when dealing with the removal of causes de-
mands it. And there are other demands for it. (See Consensus tollit
errorem, also §§ 83–123, 1 Gr. & Rud.) The late Code cases de-
mand it. Palmer v. Humiston (O.); Milbra v. Steel Co. (Ala.) The
latter cites and follows Mondel v. Steel, L. C. 77, 3 Gr. & Rud. Plead-
ings must present the case. It cannot arise from irrelevant evidence
(see 1 C. J. Cyc, 66, 100). "What ought to be of record must be
proved by record and by the right record." Milbra; Campbell v. Con-
salus. At all stages the pleading must be tested by the Trilogy of Pro-
cedure, n Verba fortius accipipuntur contra proferentem, and its cog-
nates. Even in Res Adjudicata the judgment is construed and limited
by the pleadings. Verba generalia restringuntur ad habilitatem rei vel
personam. Vicksburg v. Henson; Munday v. Vail, L. C. 79 et seq., 3
Gr. & Rud. A judgment outside the pleadings is void. Vicksburg v.
Henson (U. S.). It is void for purposes of Res Adjudicata. How, then,
can this void judgment be of more effect at the stage of Collateral Attack,
or at appellate procedure, or the motion in arrest? Should not con-
struction be uniform? It is the State's interest that dictates the con-
struction at all stages. And is not this interest the same at all stages?
Dict. 1914 ed. title Pleading.

But the maxims are denied by the statutes and the late cases referred
to. This the discussions of Clark v. Dillon, in New York, will show.
(See New York.)

At the stage of appellate procedure the pleadings are still jurisdic-
tional and are opened without regard to exceptions or assignments of
error. (Nalle v. Oyster.) At the stage of Res Adjudicata the judgment
is construed by the pleadings. (Munday v. Vail; Vicksburg v. Hen-
son; cases cited; Mondel v. Steel, L. C. 77, 3 Gr. & Rud.) How, then,
can any lawyer deny that pleadings are jurisdictional and cannot be
waived? (See Campbell v. Consalus and cases cited; Federal Pro-
cedure.) Plain as the last proposition may appear, still in almost all of
the American courts it is held that pleadings may be waived (see
"Theory of the Case;" Thompson's Trials, 2310, 2311, quoted under the
title Variance, 4 Gr. & Rud.; Smith's [now Clark's] Elementary Law,
in relation to the maxim "Equity regards as done that which ought to
Also the 1914 edition of Bouvier's Dictionary, title Pleading. The
“theory-of-the-case” sect contend that with the entry of judgment the pleadings become functus officio. They deny that they are jurisdictional; they deny the maxim Quis, quid, coram quo; they deny the Trilogy of Procedure. They never cite nor explain these maxims, nor the necessities of Res Adjudicata, nor its rules and the interactions of these with the rules of evidence, pleading, practice, and construction.

This sect does not recognize the attitude of the state in procedure. They do not cite and explain Interest reipublicae ut sit finis litium, nor recognize that the state demands pleading and the mandatory record (P. v. Gray, 261 Ill. 140, 49 L.R.A.(N.S.) 1215) for reasons of public policy. Alterum non lader. Res inter alios acta. Campbell v. Consalus, et seq.

§ 23. The Prescriptive Constitution Continued. The attempt to write and to teach the law without regard to its fundamentals is before us. (Gulling v. Bank; Henry v. Hilliard, 49 L.R.A.(N.S.) 1-44; Slo-cum v. Ins. Co. and Baker v. Warner [U. S.].) These cases show that the entire juridical field is pervaded with the notion that the law is local and flat, and may arise from statutes and cases. Look at the attempts to establish courts and systems that will abolish pleadings. The claims for this by the journals and forensic orators have now to be measured by the decisions in Illinois which have reaffirmed the Trilogy of Procedure as the fundamental law and applicable to the Municipal Court of Chicago. Walter Cabinet Co. v. Russell, 250 Ill. 420. Affidavits and stipulations will not enlarge or diminish pleadings. Id.; Campbell v. Consalus (N. Y.). “A cause of action” must be stated. Devine, 162 Ill. App. 629. Quis, quid, coram quo. The contentions over the Chicago court indicate the state of the professional training in Illinois (see Feudal Lawyer; Jackson v. Pesked). Elsewhere we refer to New York, Missouri, and other states. The truth is abroad that the law must be restated, exactly as Bacon prophesied. And now that restatement will come to a nation in judicial anarchy, and to a legal profession inviting by its attitude all the consequences of a failure of the due administration of the laws. The lawyer, his judiciary, his literature, and his schools vitally affect the welfare of the country, its commerce, its morals, the titles to property, the education of the people, and all upon which a nation's prosperity can be built.

Multitudinum imperitorem perdit curiam.

This proposition is self-evident. However we will cite Goldham v. Edwards (Eng.).
FROM ITS LOGIC AND PHILOSOPHY

If a "cause of action" must be juridically stated, then there must be some test of the sufficiency of this statement. For such a test, what case or rule gives more light than the Trilogy of Procedure and its Cognates? Bacon, Mansfield, Story, Kent, Cooley and Jackson (Legal Maxims) perceived the logic and the philosophy of the maxims. Blackstone in relation to *Juris præcepta sunt hæc* intimated the fundamental character of the maxims. But no author has taken the time and space to demonstrate the existence of such logic and philosophy. There has long been need for more than hints, intimations, and repetitions of what some great judge or author has said. It is time to make some important facts plain. Therefore we will in this connection attempt one demonstration, and for that we shall choose an old and trite rule, no longer understood, namely, "The general demurrer cannot be waived." This is not understood in the "theory-of-the-case" courts. The reason of the rule has been lost, like the dominating initial from which the Parthenon was drafted.

To begin with, let us note that the unity, symmetry, harmony, and philosophy of the law are a battered and helpless wreck upon the shoals of empiricism and commercialism with their vast and unwieldy bulks of supposed legal literature. Causes for this are perceivable in the discussions of the general demurrer and its correlatives. We are taught to construe the rule that the general demurrer cannot be waived. Then this rule must be protected by construction at the stages of the motion in arrest, appellate procedure, collateral attack, *Res Adjudicata*, and due process of law.

§ 24. The Prescriptive Constitution and the General Demurrer. Look at the Trilogy of Procedure, its trio of principles, and see if they are not indeed "the condensed good sense of nations," each and all standing to protect the attitude of the State in procedure, which depends upon the rule that the general demurrer cannot be waived. Look at *Campbell v. Consalus* and *Clark v. Dillon*, and note that there was something relating to the functions of pleading that the courts did not roundly express and make prominent. And so it will appear from *C. & A. R. R. v. Clausen* (Ill.). Suppose that in any one of these cases the court had said, "There is a trio of principles that are major-organic maxims, that must direct the construction of all codes and practice acts," and had named the Trilogy of Procedure with its cognates. What digest, what Cyc, what rows of books, would have told us as much, and done as much to light up the jungle?
Campbell v. Consalus and Clark v. Dillon arose under the New York Code; and yet does not each sustain the trio referred to? Does not the Illinois case do the same? To make pleading easy and possible for Chicago lawyers a Municipal Court act was enacted. It was hailed by forensic orators and law journals as the emancipation of the lawyer from the yoke of technicality, until the higher courts refused to construe the act by legislative rules, and construed it by the Trilogy of Procedure. The law of Campbell v. Consalus (Guest v. Warren) (Eng.) is paralleled in Walter, 250 Ill. 420; and Clark v. Dillon is paralleled in C. & A. R. v. Clausen. Mondel v. Steel, L. C. 77, 3 Gr. & Rud., is reflected from all of these cases. Thus the rules of the general demurrer and the Trilogy of Procedure are reaffirmed in a variant language.

Take all these cases together, and see if they are as worthy of attention as the Trilogy of Procedure. These are in the language of all nations, while if we seek to express them in cases, we meet with great perplexity, and uncertainty attends our efforts. Cases are multitudinous, and each province, each court, each author, each school, each publisher is ambitious or interested to select a new or a different set. Mr. John W. Smith, the progenitor of leading case books, selected Rushton v. Aspinall (De non apparentibus); Bristow v. Wright (allegeta et proba must correspond); and Dovaston v. Payne (Verba fortius). Of all these cases selected, which is unworthy and ought to be recalled? Which could be recalled without consequent judicial anarchy? Whose are better? These stand for the Trilogy of Procedure. For New York we have selected Campbell v. Consalus, Clark v. Dillon, and Tooker v. Arnoux; for Illinois, Thomas v. P., Wright v. Dodge, and Fish v. Cleland, L. C. 12c, 3 Gr. & Rud. Elsewhere we present the Federal cases and those from other states. The lines of cases selected are endless and constantly changing. Story would reject those that Thompson and other professional writers would choose. Commercialism insists on the “late” case, and advertises this as the “case winner.” But choose as you may you cannot choose better cases than did Smith (see L. C. 5, 135, 217, 3 Gr. & Rud.). Cases may come and cases may go, but the maxims go on forever. They are the law, and the cases merely illustrate their application. They are old and well worn, but then they have worn best.

§ 25. The Prescriptive Constitution the Organic Law of Procedure. The attitude of the state has not been taught the student, and
therefore he does not appreciate the importance of the maxim *Interest reipublicae ut sit finis litium*, and the rules of evidence and of pleading that it dictates. (See Rules of *Res Adjudicata*, 4 Gr. & Rud.) Many authors make no mention of the requirements of the state, and Story himself merely intimated some of these. The Code cases followed the English, as did *Campbell v. Consalus, Clark v. Dillon*, and *Tooker v. Arnoux*. Illinois made notable decisions in *Thomas v. P., Walter*, 250 Ill. 420 (Municipal Court act), and in *P. v. Gray*, 260 Ill. 140, 49 L.R.A.(N.S.) 1215 (what the mandatory record must show in the criminal case). In the latter case it is held that the indictment must appear. In the other cases it is held that the statement of the cause of action must judicially appear. So we see that pleadings are required in civil and in criminal cases alike. (1 Gr. Ev. 61–65.) *Mondel v. Steel*, L. C. 77, 3 Gr. & Rud. applies to all cases alike. It is cited and followed in *Milbra* (Ala.) 46 L.R.A.(N.S.) 274, 277, 278; *Palmer v. Humiston* (O.) 45 L.R.A.(N.S.) 640; *Nalle v. Oyster*, 230 U. S. 165; *Vicksburg v. Henson*, 231 U. S. 259; (pleadings are jurisdictional and limit the judgment—a judgment without or beyond the pleadings is void); *Munday v. Vail*, L. C. 79, el seq.; *Garrett*.

Look at the maxims—Trilogy of Procedure—and note how they interact, and that from each all can be deduced, also, their very important cognates. *Quis, quid, coram quo and Quod ab initio*. Pause and consider each of these maxims under the light of the above cases and the leading provisions of the Code as to stating the "cause of action," and the general demurrer; and from all of these see if it is not true that the latter cannot be waived, because of the attitude of the state as explained above.

If the judgment (contract) was entered without authority—jurisdiction—this affects the state, which, in effect, says to such a contract, *Non haec in fædera v ni*: I did not come into this compact. The record is *coram non judice*, or void. In other words, it is a case of *In pari delicto*. When a judgment record is bad we call it *coram non judice*. If a contract is illegal, we call it *In pari delicto*. The idea is the same, only the expression changes. It is like the general demurrer at all the stages where it may be raised. The idea is the same at the motion in arrest, at Collateral Attack, *Res Adjudicata*, and due process of law. The ground of the general demurrer is never waived. The state is an implied and silent party to the record, and it has its own interests, which are vindicated by the general demurrer and its correlatives at
all times, places, and stages. Its interests cannot be waived. *Alterum non ladere; Res inter alios acta.* (See Contract, ante.)

The attempts of courts and of authors to make individualistic and partitioned rules for each stage of raising the general demurrer in its various forms have simply submerged the lawyer's literature with what is nothing more than useless grists of profuse jargon. The discussions of the statute of amendments and of jeofails are a thousand "Shelley Cases."

Fix the Trilogy of Procedure in the mind, perceive it in the codes and practice acts, and note its various phases in the above cases; then will appear the logic and philosophy of the maxims, the old law, the law of all nations and times, expressed in the one scientific, fixed, and unchangeable language of earth. It is incomparable. Recognize these facts, and then the causes of judicial anarchy will be clear.

The effort to get away from the frets of the general demurrer and its guardian maxims—the Trilogy of Procedure—*Verba fortius,* and its cognates,—has dictated the statutes of amendments and jeofails, the liberal provisions of the Code, and the establishment of courts like the Municipal Court of Chicago. The statutes referred to have, in the last analysis, added nothing to the law. *C. & A. R. R. v. Clausen; Dovaston v. Payne,* L. C. 217, 3 Gr. & Rud.

Studying statutes and cases that lead away from the light—from the "datum posts" of procedure—has never made and will not make a lawyer. The law is a spirit, and is not type on paper. (See Code.) "When its philosophy is lost the law is lost."

*Non in tabulis est jus.*

§ 26. Recapitulation; Outlines of the Argument. Recapitulating, it seems well to state that in the above résumé we have sought to indicate that the law can be restated from its fundamentals, by selecting the leading subjects and the major-organic maxims, which underlie those subjects. Of this effort the student can judge.

Next we have sought to demonstrate that from maxim views we can explain important rules of procedure that have been neglected by the authors, and which the courts are deciding in every way, relating to the general demurrer and its correlatives. Upon these matters have come floods of statutes and supposed liberal provisions to clarify the law, and each new statute has made matters worse. In Illinois the legislature heard the cry and tried to give relief to Chicago by creating the municipal court, of which the lawyers in Chicago had all kinds of views
except that the supreme court of that state would show its learning and ability, and would inform the profession that their supposed imperial statute had added nothing to the law,—that the Trilogy of Procedure was the fundamental law, and that to this the letter of the statute must yield. (In præsentia majoris cessat potentia minoris. End stat. § 182.) The interest of the state has been recognized by that decision, and this fact we have sought to make prominent by showing that the attitude of the state is protected by the prescriptive constitution. To this we cite Alterum non lædere; also Verba fortius accipienitur contra proferentem.

We shall seek to enforce these views further by picking the major and organic maxims and setting them for ready reference; and shall suggest their supreme importance. In connection with them we shall associate cognate maxims, illustrative cases, and topics, to aid the student and to point the way to maxim study. We seek to demonstrate that the law rests on a few fundamental principles, although these have indeed vast ramifications and multitudinous expressions. We have indicated what can be related to the Trilogy of Procedure in the Text-Index, whereby the few fundamentals can be worked and spread out.

The American Bar Association have commended the familiar maxims, the general principles, and the leading cases to the student. To enable him to reach these easily and directly we present this gathering of great principles.
TEXT-INDEX

The master key to the library: Roman, English and American
(See the title "Finding the Law.")

The original key number plan: The plan that leads the way through all books as well as digests.

AN AMPLIFICATION OF THE MATTER IN THE
RESTATEMENT SECTIONS

A view from the great stars therein the rivulets can be traced down below. The great principles worked and spread out.

THE MAXIMS, GENERAL PRINCIPLES AND
LEADING CASES

These correlated.

From the topic the maxim, the leading and the best cases are directly led to in all works.

EXTENDED DISCUSSIONS OF WORTHY AND
LEADING SUBJECTS

An exposition of Procedure from maxims, general principles and leading cases. From these all systems are correlated.

AN EXCELLENT CODE AND PRACTICE ACT
EXPOSITION

The leading and most instructive Code cases picked and annotated. (See Campbell v. Consalve, Clark v. Dillon and Tooker v. Arnow.) These cases combined and annotated—the fundamentals in these cases disclosed and interrelated in the Restatement.

Origin of Conflicting Theories
(See Story; Rushton; "Theory of the Case.")

Various Authors Classified: Their Antinomies
(See Literature; Codes.)

An extended résumé of the six leading subjects: Procedure, Equity, Contract, Crime, Tort and Construction. The matter of all these subjects presented.

Amplification of the matter in this Text-Index indicated by apt citation to the Grounds and Rudiments of Law; also the Equity In Procedure.

The maxims of Broom, the leading cases of John W. Smith, of White and Tudor's Equity, Bennett and Heard's Criminal Cases. The leading rules of Greenleaf, of Story and of Bishop have been sought and gathered. The very excellent cases in the L.R.A. Reports have also been freely cited. To all of these works is presented a veritable "Grab And Get It." For this it is maximus in minimis.
TEXT-INDEX

From this Text-Index it will appear that the author has correlated the greatest principles of jurisprudence with the much-overlooked, the trite and commonplace rules. To demonstrate this he selects that rule of Pleading which no author or court has so impressed as to save the last two generations of lawyers from going far astray in all that depends upon it. This rule is that the general demurrer cannot be waived. To find this rule we turn to the title Demurrer in its alphabetical place. Thereunder we shall find the rule stated, and in connection with it a reference to the maxims and the best cases explaining it. So we are led to \textit{Alterum non iadere}, which is a part of the greatest of maxims—the Lawyer's Golden Rule. Thereunder we shall find an explication of the rule, that is also original, high and true from a logical and philosophical viewpoint. We are introduced to the attitude of the state in Procedure, which is essential to a right understanding of many rules of Evidence, Pleading and Practice. It is from these heights that the rule referred to is explained at entirely different angles from those given by the Feudal authors and their followers. (See Codes; Feudal Lawyers.) Here we learn that what concerns the State cannot be waived nor stipulated away. This logic and philosophy is introduced and pervades the entire work. Herefrom the correlatives of the general demurrer are introduced, among which are Appellate Procedure, Collateral Attack, \textit{Res Adjudicata} and Due Process of Law. Here begins a demonstration that all of these subjects have interactions. And so these are all grasped and brought under review and tied into \textit{Alterum}. It is a demonstration of the morality, the logic and the philosophy of the law.

To further illustrate we will start from the idea that fraud and illegality vitiate all into which they enter. Now by turning to Fraud or to Illegality, we find in connection with these titles maxims and cases that serve as keys and guides. And so we find \textit{In pari delicto}, \textit{Ex dolo malo}, and their cognate maxims and cases, and are referred to their citations in the Restatement itself. From the topic we are led to the maxims and the cases. With these in hand the entire library—Roman, English and American—is opened as with a key, a key that unlocks all,—and thus a master key.

Further, suppose the root idea is that no one can act where his integrity and his interest are in conflict. We are led to this principle from Agency, Trustees,
Hereunder we are led to *Idem agens et patiens esse non potest*. By turning to this maxim we are afforded the leading cases, also the finest discussions of this principle in the library. Further take the law of assent to a contract. Under this title we are led to the maxims and cases, as above indicated. If the best discussion of the liability of Infants is desired, we turn to this title and thereunder the cases and rules will be indicated. If we desire the best discussion of the liability of husbands for the wife's debts, then under the title Husband and Wife we are led to the discussion desired. If the question of Remoteness or Privity or Causation is sought then we turn to these titles and thereunder we are led to *In jure non remota*; and under these titles and the maxim we are led to the *Squib Case*, also to the most exhaustive résumés of that important principle. Or if we desire the law of intent in crime, then from the title Intent we are led to *Actus non facit reum nisi mens sit rea*. By turning to this maxim and its citations in the Restatement we find the cases.

Abatement: What is matter of abatement, or formal or dilatory matter, calls for a consideration of what can be waived and what cannot be waived. Nothing is more important to a practitioner, or to a judge, than a technical knowledge of the line of cleavage that separates the matters that can be waived from those that cannot be waived. (See §§ 101-308, Equity in Procedure; also § 53, 1 Gr. & Rud.)

To start and to get right, the student should fix in his mind the table in 2 Hughes' Procedure, also in 2 Gr. & Rud., and what is said in these respective works of abatement and of matters of substance. See also L. C. 149-152, 290-299, 3 Gr. & Rud. This table is equally applicable to all systems and kinds of Procedure; and here we have the proof that there can be picked from the mass of legal literature a few principles that are common to all systems. In every system where the state or government makes demands that cannot be waived, there that table, its logic and its philosophy are the law. Elsewhere we dwell on the guides that point to these important distinctions, so important in every argument of the general demurrer and its correlative, to and including Collateral Attack, Res Adjudicata and "Due Process of Law." Scientifically stated it is Consensus tollit errorem and its cognates, on the one hand, and Quod ab initio and its cognates, on the other hand. Upon the latter maxim and its cognates depend the safeguards of the state's attitude in Procedure, or in other words of Constitutional Procedure. Here we can only state that whatever belongs to the Statutory Rec-
Abatement.—

final judgment thereon. The article shows what the "modern doctrine" is at p. 53. This very clearly requires identity of the "cause" and so did the old law. It also requires that the "cause" be made to appear by the pleadings—that these be pleaded, as in Res Adjudicata. And so did the old law. What is really "modern" is but hinted at on p. 66, where we are informed that in determining the identity of the issues do not control, for the evidence and the judgment and the "opinion" will be examined. Here let us observe that if a final judgment has been entered, it is no longer a case pending of another cause, for that cause has passed into a judgment recovered, and so the supposed former action pending is, instead, a former judgment recovered. And this is matter for a plea in bar, and is not a matter of abatement, as is supposed by the learned annotators. As to the opinion being consulted, at any time or place, to determine the identity of causes of action—that may be disposed of by observing that the opinion might be made up of dicta. (Cohen v. Virginia, L. C. 244, 3 Gr. & Rud.; Martin v. Evans, 4 Gr. & Rud.) Opinions are limited by the Pleadings; and so are judgments. Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Vicksburg v. Henson. Verba generalia restringuntur. Indeed, on page 86, the discussion shifts to Res Adjudicata and its tests. But this is a plea in bar, and is never in abatement. It does not give the plaintiff a better writ. It is only in abatement in this sense, that if one is sued a second time for the same cause, he should lay before the court in some way the record of the former suit and submit if the court will again try the same matters or issues. (See Res Adjudicata.) And on principle the record must be produced and juridically presented so it can be compared, and this before a second trial is entered on. For the very object of the plea is to prevent a second jeopardy or trial. But the confusion relating to this is indicated in Kingston's Case, L. C. 76, 3 Gr. & Rud. also in 4 Gr. & Rud. From this data we think the pages last cited fail to fully present the ratio decidendi involved. Moreover the doctrine of the "theory of the case," so clear in many courts, receives no attention. See Gulling and its cluster of cases. On page 92 id., we are told that if a suit is prematurely brought this does not bar or abate a subsequent action. Of course this ought to go without saying, for if a transaction is sued on before it is a wrong there is a jurisdictional defect; for no "cause of action" could exist before a breach of contract or the infliction of a wrong. Fabula non judicium; Legis non verbi et rebus sunt imposita. At page 102 we are instructed that the general demurrer can be waived, "Under the Code provisions," notwithstanding the Code provides that filing an answer waives all objections except that the "court has no jurisdiction." Of course if the statement shows on its face that another court has jurisdiction, then no other court can rightfully acquire jurisdiction of that subject matter, for reasons of public policy—the comity of courts. When this fact appears it seems confusing to state that the demurrer can be waived. At page 105 we are told that under Codes all issues may be tried together. Under the Code so construed (ita lex scripta est) no one could tell from the record whether the case was tried on its merits or was disposed of upon matters of form. If the latter then there can be no place for a plea of Res Adjudicata, and this plea is of first consequence. It concerns the public—Interest republcar. The public should be safeguarded. Therefore the record ought to be certain as to what was tried. (See L. C. 23–30, 3 Gr. & Rud.) Next, the rule of the Civil Law is stated, which requires that dilatory matters be first tried. And why should not this be the rule of construing all Codes and Practice Acts? And why should not courts and authors plainly state what the law should be? Why mix up and commingle all kinds of matter without star or beacon light? The pages referred to nowhere plainly state that "Pleadings are the juridical means of investing an court with jurisdiction of a subject matter to adjudicate it" (§ 47, Equity in Procedure), and that by these and these alone, the juridical presentment of "a cause of action" must be judged.

Pleadings are jurisdictional, and for construction depend upon the Trilogy of Procedure, elsewhere introduced and explained. In these major-organic maxims are embedded the logic and philosophy of the law. Herefrom the law of Abatement and Revival must be
Abatement.—viewed, and correlated with all other parts of the law. The law is an entire. And this important truth can be picked out of the pages of the Corpus Juris Cyclopedia. This great effort to present the law from cases, without regard to the fundamental principles, well illustrates the necessity for restating the law from its first principles (see Feudal Lawyer). Merely citing the maxim, the general principles and the leading cases—the great trees of the grove—would lighten and blaze the way through the "legal jungle." For this true and necessary direction, Justinian required, under severe penalties, that they be cited. Receditur a placitis juris. The Feudal Jumbler and his followers are certainly barring the upward progress of the lawyer and his establishments. The bewildering discussions that befog and muddle the student already constitute overtopping bulks that are a menace to juridical progress. And strange as this may seem those who have contributed most to the mire of jargon and judicial ancestry have been the most sought and esteemed for more than a generation (see Story).

Multitudinum imperitorem perdit ouiam.
Abatement of ex delicto actions. Ahern, 52 L.R.A.(N.S.) 858; Woodford, 52 L.R.A.(N.S.) 1215.
ACCESSORIUM NON DUCIT, SED SEQUITUR SUUM PRINCIPALE: The incident shall be governed by the principal thing, but not the principal by the grant of the incident. This maxim is a useful one in the construction of deeds, covenants, and sales. It has many cognates and often appears as a part of Expressio ejusdem: q. v. It is well illustrated in Pinnington v. Gallant (ways of necessity). Also in McCulloch v. Maryland, L. C. 147, 3 Gr. & Rud. See Cuiuscumque aliquid quiet, etc.
ACCIDENT. See Actus Del.
ACCOMPILCE: See Accessories.
ACCORD AND SATISFACTION: Cumber v. Wayne.
ACTA EXTERIORA INDICAND INTERI,ORIA secreta: Subsequent acts construed previous intention. Acts indicate the intention. Six Carpenters Case. See Presumptions.
ACTIO NON DATUR NON DAMNIFICAT: An action is not given to one not injured. Cited, sec. 17, Restatement.
Only an injured can complain to a court. Ashby v. White, L. C. 273, 3 Gr. & Rud. There must be a wronged party and he must describe himself. See Qui, Quid, Qui. See what Qui. Fabula et.
ACTIO PERSONALIS MORITUR CUM PERSONA: A personal right of action dies with the person. See 2 Gr. & Rud. The ablest exposition of this maxim is in 2 British Ruling Cases, 694-721.

ACTORE NON PROBANTE REU ABSOLVITUR: If the plaintiff does not prove his case the defendant is absolved. The burden of proof devolves upon him who holds the affirmative of the issue. Factores abituros etc. Cited, secs. 1, 9, 10, Restatement. Bonnell v. Wilder, L. C. 185, 3 Gr. & Rud. This was a case concerning a mortgagee's right to possession. Stokes v. P. 155 N. Y. 581, 590-594 (dissenting opinion).

ACTUS DEI NEMINIS FACTIT INJURIAM: An act of God is so treated by the law as to affect no one injuriously. See 3 Gr. & Rud, also ACCIDENTS.

ACTUS NON FACIT REUM NISI MENS HIT REA: An act does not make one guilty unless his intention were so. Cited. §§ 18, 19, Restatement.


AD DAMNUM: The damages claimed are jurisdictional. See Quis, quid, corum quo, etc. Plaintiffs are jurisdictional. Mc Dermott v. Severa, 202 U. S. 600; Marone, 175 III. App. 449. See title, AD DAMNUM, 2 Gr. & Rud, also sec. 275, Equity In Procedure.

ADEQUATE REMEDY AT LAW: This may be waived where the allegations and the proofs are sufficient. But allegation cannot be waived. Lough v. Outerbridge, L. C. 203, 3 Gr. & Rud. See Altemus, McDermott v. Severa, 202 U. S. 600; Marone, 175 Ill. App. 449. See title, AD DAMNUM, 2 Gr. & Rud, also sec. 275, Equity In Procedure.

AGENCY: Its leading maxims are: Qui et alium factit, factum per se; Respondent superior; Qui sciat commodum actere debet et onus, et Idem agens et patiens case non potest. See §§ 14-19, Equity In Procedure; 2 Gr. & Rud.

AIDER: Its various kinds and the havoc it has spread throughout the law will be next indicated. We know of no author who has taken the pains to outline this very important topic which involves what we call the technology of liberal construction (§ 101, Equity In Procedure). Which are 1. Consensus; 2. Ut res magia; and 3. Omnia praesumuntur rite. The extravagant and indefensible application of these maxims is indicated in discussions of the Statute of Amendments and Jeofails. (See Guling and its clus-
Aider.—None have contributed more to this besom of destruction of the logic and the philosophy of the law than Sergeant Williams whose Feudal views were parroted by Tidd and all of his followers. All of these can be cited to the point that the rules of construction deepen and widen in favor of upholding a pleading after passing the stage of the general demurrer. This fact shows how superficially they comprehended the maxim *Verba fortius*, also the attitude of the state, *Alterum*, also *Quod ab initio*. When Tidd came to discuss how the record was construed at the stage of the motion in Arrest he wobbled and straddled over great principles and finally, Feudal like, dove into the bewilderment of cases and statutes. (2 Tidd Practice, 619, 620; this misled the court in *State Bank*, N. M., 53 L.R.A. (N.S.) 120, 126, 127 (the general demurrer may be waived); 6 Encyc. Pl. & Pr. 354, notwithstanding the language of the Code). See *Goldham v. Edwards*. For the operation of the Feudal motto, “Parliament is omnipotent,” the student has to find his way around such texts as Tidd and his followers gave. (See Literature.) Tidd, Chitty, Stephen, Gould, Pomeroy and their followers have written Procedure from local and fast standpoints. They had trouble with the general demurrer and more with the motion in Arrest, and still more with Appellate Procedure (jumbling the two records), and here they stopped possibly for the reason that they could think of nothing sufficiently liberal for the stages of Collateral Attack, *Res Adjudicata*, and Due Process Of Law. The wreckage of statutes and cases piled at the latter stages choking the channels of legal reason and philosophy has as a natural consequence caused an inundation of many fields of the law with nothing less than judicial anarchy. This menace to jurisprudence is the natural, direct and probable consequence of gathering and teaching the cases of “native sons” and that their cases make the law. (See page xvii, Preface Equity In Procedure.) The English lawyer has had a struggle to see that the general demurrer cannot be waived nor legislated away. *Goldham v. Edwards*; now the American is still in the toils. *Gulling; Baker v. Warner*. Cases like *Nalle v. Oyster* and *Vicksburg v. Henson* (Pleadings are jurisdictional), are greatly clearing the way.

Tidd and his followers thought there were three kinds of Aider (Chapter X, 1 Chitty Pleading). To these has been added a fourth species which the “new” school call *Express Aider*. This is founded on the notion that a subsequent pleading brings with it substance to make or to aid or to patch out an antecedent pleading; that the omission of a material allegation may be first brought forward by a response pleading. That is, that a court does not know what it has jurisdiction of until all of the pleadings are presented. This species denies the maxim *Quod ab initio*; also *Quis, quid, coram quo. Slack, 9 Pick, 62; Hughes, 90 Mo. 399; Garth, 72 Mo. 622, 630; Welch, 28 Mo. 30; 3 Bl. Com. 394, 395; Remsberger, 31 Colo. 79–82. *Gulling*. (See Story.)

The fifth kind passes Tidd and his school and the express waiver by contending that at the stage of Collateral Attack that the rules of the general demurrer are greatly broadened and deepened. This sect often dwell on the effect of failing to take an appeal or to prosecute a “direct proceeding” for a reversal for error in an appellate court. (See *Windsor v. McVeigh*, L. C. 1, 3 Gr. & Rud.)

The sixth species depends upon intermingling and jumbling the functions of the mandatory record and of the statutory record. Striking illustrations of this kind are found anent *Gulling*. See Introductory Chapter, Restatement.

Importing matter from one document to another to aid and to patch out is involved in the fourth and fifth kinds above mentioned. And this they claim can be done as between the records last mentioned. This kind of aider is carried forward in violation of the greatest rule of Evidence which is “What ought to be of record must be proved by record and by the right record.” This rule is generally respected in the Federal courts as will appear from the cases relating to the Removal of causes from state to Federal Courts *Quod ab initio*.

A seventh kind is introduced in Smith’s now Clark’s Elementary law. This is founded upon a supposed new and modern application of a maxim of Equity and which is that “Equity regards as done what ought to be done.” This “new” view is that in an action...
Aider.—

of Specific Performance (Lester v. Pozzobon, L. C. 341, 3 Gr. & Rud.) the general rule is not to allege and prove either tender or payment nor full performance upon his part of all conditions precedent (Tucker v. Armouz, to the contrary) for the reason that the maxim last cited will be so applied as to supply both the _alegata_ and _probata_ by implication. (See 2 Tindall 619-620 above cited.)

Thus by the aid of presumptions _alegata et probata_ is supplied; thus the necessity of alleging and of proving are _aided_ by presumptions.

Thus this maxim of Equity is made to stand for much more than the maxim of regularity—_Omnia Praesumuntur Rite_; also _Probatis Extremis Pramera_; also _Res Ipsa Logitut._ So we see that this new explication of a maxim is made synonymous with maxims of Evidence and of Pleading. This is the "new" way of simplifying the law and this "new" way is quite in accord with the "Theory of the Case." Also of the Code as is contended for in New York (Baylies Code Pleading and Practice 1-4), which is to make "every man his own lawyer" we are told. But this is not the "new" way for it was the practice of Asian and African courts in all ages. (S. V. Muench.) Those who contend that more than 5,000 "new" principles are stated and developed each year may find here an illustration of some of these "new" principles, also of the growth of American law.

The _eighth_ kind is applied in those courts which view an _appearance_ as a juridical element or factor from which the _substance_ of pleading can be supplied or aided. These courts distinguish between cases where there is an _appearance_ and where there is a _default_. They hold that if one was present and did not protest that then such omission aids the pleadings. That one who does not speak when he might speak that he shall not be heard when he desires to speak. That this rule of _Equitable Estoppel_ will aid the record which is to become the basis of proving an _estoppel by record_. Of course the statutory record must be turned to and its matter be used to show an estoppel of record. _E. v. Fasse_. North Carolina.

It seems well to observe that the element of Aider enters into and is a part of the Construction of Pleadings and of Judicial Records, also the functions of the general demurrer and its correlatives and of course of the mandatory record for all of its varied purposes. Without more we show that a veritable babel of antinomies is around the doctrine. Elsewhere we refer to the law, language and the morals that the lawyer gives. (§ 151, Equity In Procedure.)

There are limits of Aider and of validating by consent. _Oakley v. Aspinwall_; _Campbell v. Consalve_; _Consensus tollit errorem_ applies only to formal matters. _Quod ab initio_. Hughes' Equity, §§ 100-205, 250. See _Gulling._

Construction in the light of a few fundamental principles constitutes the best Code and Practice Act. Bliss Code § 141, quoted under the title Codes Equity In Procedure and discussed by Chitty in his Chapter X, Pleading. Here he discusses 1. Aider by Pleading over; 2. by Verdict and 3. by the statute of Amendments and Jeofails. Chitty followed Tind, 2 Practice, 619, 620. The discussion by Chitty is neither logical nor philosophical to one familiar with the logic and the philosophy of law; it is from the standpoint that "Parliament is omnipotent;" that the law is _local_ and _flat_ and from Serjeant Williams's view that _substance_ can be waived. This treatment shows that Chitty was not a good constructionist and that he did not understand as Story and Mansfield did. (See _Story_; _Literature_; Chitty; §§ 19, 73, 1 Gr. Ev.)

Aider and waiver are reciprocals. To illustrate: If a defendant says to the plaintiff your complaint is bad, and the latter replies but you have cured or waived the defect by not having aptly objected, or by pleading over, or by verdict or by the statute of Jeofails; or you supplied the omission of the allegation by a response pleading (the latter is express waiver). Such responses are applications of waiver.

Aider and waiver support the contentions of the "theory-of-the-case" advocates whose range includes supplying the _alegata_ from the _probata_ (irrelevant evidence) Gulling and cases cited; or from irrelevant argument. (8 Collo. App. 282, 285; _S. v. Fasse_; See _Literature._)

Aider as applied by the "theory-of-the-case" courts is a rule of Construction founded upon and depending upon the Trilobyte of liberal Construction and applying to the mandatory record.
Aider.—
as these maxims apply to the statutory record. They do not perceive the attitude of the State. (See Alterum.) They have no definite or fixed theory of the mandatory record; for according to them, what it should prove may be proved by all documents also oral evidence. Gulling; 1 C. J. Cyc. 68, 100. They hold that after a judgment is once entered that then a court should go to almost any extent to uphold it. 3 Bouv. Dig, title Pleading, 3 Rawle ed. (1914); Collateral Attack; Demurrer; Ut res. They also hold that a "cause of action" may first appear from the answer, or the reply, or from the evidence. Thomsen in his Trials signaled this distinction by denying that Pleadings are jurisdictional. (See Story.) The late case of Henry v. Hilliard, 49 L.R.A. (N.S.), 1-44, may be said to follow the doctrines of Smith, Clark, and Thomsen. Gulling.

The attitude of the state is the same in all kinds of cases and in all systems. The supposed distinctions as to certainty of the civil and the criminal case do not in the logic and the philosophy of the law exist. Certainty is measured from the necessities of Res Adjudicata and the great authors we have mentioned should have plainly told us so. They should never have allowed us to believe that one system of Pleading is more certain than another. (1 Gr. Ev. 63); Story's Equity Pleading, 10, 25-28, which are reaffirmed by Codes and Practice Acts; Bliss Code § 71, quoted under the title Codes 4 Gr. & Rud. The true line is stated in Mondel v. Steel, R. v. Waters, R. v. Warrington, L. C. 77, 70, 71, 3 Gr. & Rud. See Garrett.

The practice of supplying the mandatory record from the matter of the statutory record, or by parol or even by oral evidence is well illustrated in Gulling, 29 Nov. 266. Also Henry v. Hilliard, supra. These cases oppose Palmer v. Humiston; Milbra v. Steel Co.; Mondel v. Steel, cited and followed in Milbra; (Sayre J.) Short v. Taylor (Barclay J.), 116 Mo. 630, 38 Am. St. 626, 38 S. W. 952; Johndahl, 72 Minn. 119, 45 L.R.A. 541, 71 Am. St. 471, 473, citing Mondel. Whoever will master this Mondel Case will perceive limitations of Aider.

Omission of material allegation cannot be cured. These are jurisdictional. Palmer v. Humiston; Nalle v. Oyster; Vickburg v. Henson. Such a defect is available upon Collateral Attack. Windsor v. McVeigh L. C. 1, 3 Gr. & Rud. and cases cited. Nalle. The logic and the philosophy of Procedure has been wrecked by the application of Aider. (See Mandatory Record.) Aider is limited by the Trilogy of Procedure, §§ 1-13, Restatement. Clark v. Dillon; C. & A. R. R. v. Clausen (III). See citations to these cases in the Restatement.

Concordare leges legibus est optimus interpretandi modus. 2 Gr. & Rud.; Bliss Code Pleading § 141.

Aider can be mastered from the attitude of the state. Alterum considered with Quod ab initio and Concursus tollit errorem. See also Rushton, Dobson and Goldham v. Edwards. From these maxims and their citations in the Restatement the logic and the philosophy of Procedure can be comprehended. As Contract is embedded in a few maxims (§ 17, Restatement), so is Procedure. The attempt to write Procedure from statutes and cases has led into bewilderment. The law of Aider in the American courts will illustrate this fact. Of such have come the gifts of Feudalism, its Jackson v. Pesked and its Stennell v. Hoog.

"When its philosophy is lost the law is lost."


ALLEGANS CONTRARIA NON EST AU-

diciendi. He is not to be heard who alleges things contradictory to each other. 2 Gr. & Rud. See Naugaur. per se partes. L. dedit se parte, L. d. s. Gr. & Rud.: Horn v. Cole, 2 Gr. & Rud. (equitable estoppel). One cannot admit and deny the same time. Davenport v. Cole, et seq., 3 Gr. & Rud. One offering incompetent evidence cannot object to it. Jackson, 35 App. Cas. D. C. 41. (See Modus et Convenio).

ALLEGATA ET PROBATA MUST COR-

respond. See Frustra probatur quod proba-

butum non reverat. A recovery must be Secundum allegata et probata. Briscoe v. Wright, L. C. 135, 3 Gr. & Rud. A "cause of action" must be alleged. Quis, quid, quorum quo; De non apparentibus; section 10, Story's Equity Pleading, quoted in section 44, Hughes' Equity In Procedure; Campbell v. Conatus; Walter, 250 Ill. 420, (municipal court case); Magruder, 7 App. Cas. D. C. 303, 310; Browne, 30 Ind. 415; Vickburg v. Henson, 231 U. S. 255. See Allegations, 2 Gr. & Rud. There must be allegations to give jurisdiction. Quis, quid. Entry of a judgment does not render the pleadings functus officio. Vickburg v. Henson; Monday v. Vail, L. C. 74, 3 Gr. & Rud.; Nalle v. Oyster, 250 U. S. 265; Palmer v. Humiston (Ohio); Neudecker, 81 N. Y. 296, 50 L.R.A. (N.S.) 14; Milbra,
Allegata, etc.—


ALTamaha v. SHEE, 23 Cal. 2d 578. Hurt us not one another. Cited, Preface, also secs. 4, 11, 12, 13, 14, 16, 19, 20, 21, 22, 25, 26, Restatement. This maxim is a part of Juris praecipua sunt haec, &c. post. For brevity we cite it as Alterum. This has long been conceded to be the most instructive maxim of the law. It has been thought to contain the germs of the law. From it the law can be unfolded. We have called it the Lawyer's Golden Rule." We also make it one of the Trilogy of Equity (see Equity in Procedure). Manifestly it is related to Interest reipublicae and its cognates. So we see that it involves Rea Adjudicata—Former Jeopardy—their cognates and ramifications. Thus it is related to Salus populi suprema lex, and its cognates. It is on the title page of Broom's Maxims, next after which he introduces Salus, and discusses it without any mention of Alterum, which he nowhere cites in the body of his work. We think this was a grave omission or oversight. While Broom had a good idea his vision was not broad. Alterum, by Interest reipublicae, is related to the rules and the necessities of Rea Adjudicata and its public policies. These call for and dictate the Mandatory record and its Requirements—the substance which Serjeant Williams unwisely thought could be waived or legislated away. (See Williams, Serjeant; also Story.) It is also related to In pari delicto, which is so vastly different. The maxims of Equity are: "He who hath done iniquity shall not have equity;" "One must come into courts with clean hands;" "He who seeks equity must do equity." Of the last we may well observe here that one must "render unto Cesar the things that are Cesar's"—which, in a general way, may be said to mean, he must give to the court the record required if he would have a Coram Judice proceeding. For this he must know and respect the Trilogy of Procedure and its cognates and especially Quis, quid.

The mandatory record, its requirements, rules, tests and ramifications, have nowhere been better outlined than by Story. Most authors and courts have either dodged or straddled its requirements and left them in cloud and fog. Judges on the bench at last ac-

Alterum, etc.—
knowledge this fact, as Judge Lamm did, in Penmonsky v. Coever.

The failure to dwell upon the mandatory record and its cognates has been a grave sin of omission, while the open denouncement of that record by authors and courts has been a sin of commission of still graver consequence. We refer to some of these instances in speaking of Story. The initial of Constitutional Procedure lies in that record. It is a constitutional implication. No useful protecting court can be operated without it. The Greek knew the initial from which the Parthenon was drafted, and that initial perished with him. The Roman knew the initial from which Constitutional Procedure must be drawn and developed, and but for his maxims the Prescriptive Constitution, the initial of good government, would also have been lost, like the initial from which the Parthenon was drafted. But humanity was blessed by the preservation of the greatest bulwarks of all our rights and liberties, as we shall, from many angles and viewpoints, show.

If a Sheik in Morocco would respect the foregoing, he would give a better government than would an American court which denounced and denied the Prescriptive Constitution, because no one could "put his finger on it" in the Declaration of American Independence, and in the Constitution of the United States.

To this pass we have come at last. See Gulling; also Story, Rushton.

This maxim is also related to Res inter alios acta: (Sec. 4, ante) a maxim important in the law of Evidence. One of its phases is Non haec infedera teni—the law of assent in Contract. Two cannot waive or affect what belongs to a third. Id quad nostrum: Pacta convena: Pactis privatorum juri publico non derogatur. The "theory-of-the-case" courts cannot understand why the parties cannot stipulate away the Pleadings. See Gulling; also Story and Rushton.

A great case was decided in New York on the Code. It held that "The parties could not by stipulation dispense with the Pleadings." This was in the case we cite so often,—cite and try to make prominent in order to indicate its importance—Campbell v. Consilus. But it is a naked decision, quoting and following Guest v. Warren (Eng.) The logic and philosophy of these decisions is imbedded in the
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above maxims. These defend the attitude of the state—Caesar—in judicial proceedings. Failing to make these facts comprehensible has been a sad omission, and the leading away from them has been saddier, and we say that good government should not have permitted it. But it did, and as a result we have the jargon of judicial anarchy for legal literature. We have cited enough clues to justify these accusations. The call for "Revolution" in Bar Associations is well warranted. The legal profession is not of less importance to this government than is its military establishments. See Multitudo imperitorum perdit curiam.

The contention for a judicial hierarchy is absurd. For it is contended that courts are not bound by their records. Any decision that they are is timely. Vicksburg v. Henson; Walter, 250 Ill. 420 (Municipal Court Act of Chicago). See Story; Introductory Chapter, Restatement.

Melius est petera fontes quam sectari rivos. (4 Gr. & Rud.)

The general demurrer and its rules must be comprehended from the fountains of the law. There are high policies of Procedure of the state, and one of these is Res Adjudicata, which is founded on Interest respublicae. The test of the mandatory record for this function begins at the stage of the general demurrer, which continues, throughout, the same thing although it changes its name at one stage to Motion in Arrest, at another to Order of Repleader, at another to Appellate Procedure, later to Collateral Attack, to Res Adjudicata; and to Due Process Of Law. The general prevailing view that at these different stages the rules of Construction vary is opposed to first principles. Goldman v. Edwards. For you have only to consider that at all stages the question is a jurisdictional one. This question concerns the state, and not more at one stage than at another. For the state—the third person—the tests are always the same. No one can waive, to affect the state Alterum, etc. Res inter alios, etc. The general demurrer cannot be waived (Secs. 4, 10, 11, 22, 26), but it could be, if at the stage of the motion in Arrest more liberal rules could be applied than at the first stage. But many courts and authors assert that the further the case progresses, or the longer the test is delayed, the more liberal will be the construction to uphold a pleading; and that a pleading that would be held fatally bad on general (not special), demurrer, may be good at a later stage. 3 Bouv. Dict. Rawles 3d Revision (1914 ed.), Title Pleading.

And with blindness to reason and congruity and to the continuity of the logic and philosophy of the law, it is constantly held that on down, at each successive stage, the construction to uphold the pleading deepens and widens until the verdict is reached, wherefrom it is held that the omission of material allegations is cured! (See Rushton; Story; Magis.) That from the jury's findings, the pleading that would have been fatally defective on general demurrer is made good by the verdict! (See Hitchcock v. Bight, L. C. 12, et seq., 3 Gr. & Rud.) To illustrate: In Henry, 49 L.R.A. (N.S.) 1-44, there was an omission of the main and leading equity in that kind of an action (Lester, L. C. 341, 3 Gr. & Rud.; Halligan, 49 L.R.A. (N.S.) 112-120), but the omission of this main equity was held supplied from the findings of the referee (the verdict in an equity case). From the findings, and from irrelevant evidence, the omitted allegation was imported into the bill in Equity. See Story. The referee and the trial court found for the defendant, but on appeal the case was reversed. Here it seems well to observe that if one material allegation can be imported from the findings, so can another, and thus on until all material allegations are supplied; and therefore from a bare verdict the entire pleadings can be found! (Probatia extrema praesumuntur mediae.) And so we see how it is that the general demurrer can be waived in some courts. The sophistry and loose talk about this important matter is indicated in Rushton; also under Story. See Quod ab initio, etc.

Uno absurdo dato infinita sequuntur.

That the law is a spirit, and not type on paper, is illustrated by Alterum non labire and the maxims that are cited with it in the Restatement. It is cited in the Preface; also in sections 4, 10, 11, 14, 16, 22, 26. It is a part of the Lawyer's Golden Rule, the greatest maxim of the law, as indicated in the Introductory Chapter; also in the Preface and in section 26. The Restatement of the law is not dug
ALGER, etc.—

from the ground, but it is triangulated from the Mount Everests of jurisprudence (See Preface, Equity In Procedure) and chief among these is Alterum. To comprehend this fact is most important to the student. In
the Restatement, this maxim and its cognates are gathered for a center, and the vital principles of the six leading subjects are gathered and set out around this center, in a periphery. And as will be seen the reasoning is both centrifugal and centripetal. See Preface; also §§ 16, 26, Restatement.

This maxim protects the attitude of the state; wherefrom the logic and the philosophy of the law begins. Deductions herefrom are the rivulets flowing on down below. Melius est petere fontes quam secti ri culos (4 Gr. & Rud.). A maxim which the Feudal Lawyer took for its center the mottoes of Imperialism (§ 21), such as “the King can do no wrong,” and next, “Parliament is omnipotent.” With these ideas he next gathered his statutes and his cases and commenced his career of confusion and bewilderment. (See Feudal Lawyer; Equity; Literature; Story; Rushston; Codes.) See how he emasculated the Code. And now after a domination of two thousand years what block, what stone or brick has Feudalism given that can be laid into the foundations of a great government? See the truth of this proposition from The Law Restated.


ANDREWS v. ANDREWS, 188 U. S. 14-43. A record is not a verity. The entry of a judgment does not foreclose inquiry into the facts upon which it was entered. Sufficient facts must exist and must appear in the right record to sustain a judgment at all stages, times and places. Entry of a judgment does not render the pleadings functus officio. They still continue a part of the judgment record, and at all times they limit the judgment to the facts stated in the pleadings. A judgment rendered on insufficient facts, or which extends beyond the facts (Vickburg v. Henson), is null and void. Whenever the judgment is offered in evidence, it must be attended by these pleadings, and these are opened without regard to the compacts (Campbell v. Consulate) or the relations of the parties, their wishes, exceptions or objections or assignments of error. Nalle v. Oyster.

The facts upon which a judgment is entered must be real, bona fide, and show a right to recover. Scott v. Neal; Melius est petere, false and sham pleadings do not attract jurisdiction. Grauer, L. C. 103, 3 Gr. & Rud. Es dole malo: Haddock.

Pleadings are jurisdictional. De non. The general demurrer tests them and it is never waived. Alterum.


ANOTHER ACTION PENDING: 2 Gr. & Rud.; Equity In Procedure.


ANTIISRDEL v. R. R. 26 Wis. 145, 7 Am. R. 44, Pom. Code, 533. This case is a cognate of Dovaston v. Payne, also of Clark v. Dillon. The latter is a Code case extensively discussed under the title Code. The student cannot do better than connectly read these three cases. They stand for verba fortius. Antiisrde also stands for the rule that a statutory record must affirmatively state that it includes “all of the evidence.” This is a most important rule of Appellate Procedure. The learned editor of the American Reports did not include the Procedural features of Antisrde. These he omitted. He made a Railway case of it. See LITERATURE.

The rules in Antiisrde are among the most important to a practitioner. It also shows that verba fortius is an important rule of Appellate Procedure. The rule involved was made a special demurrer by Sergeant Williams in Dovaston v. Payne. By reference to this case we can see the kind of matter he cited to support his points. And such is the matter cited in Tidd, Chitty, Stephen and their followers.
THE LAW RESTATE

Registro: See Process; Penoyer, L. C. 58, 3 Gr. & Rud.

APPELLATE PROCEDURE. Error must
be presented. Windsor, L. C. 1, 3 Gr.
& Rud. Appellant must present it. Von-
deventer. It must prejudice. De min-
mus; Morningstar.
Assignment of errors depends upon the mo-
tion for a new trial. S. v. Dunn; S. v.
McCray; sec. 53, 1 Gr. & Bud; Con-
sensus.
Formal error; how presented. See Statu-
tory Record; Leading Cases 290-299,
3 Gr. & Rud.

ARMORY v. DELAMIRE, Smith's Leading
Cases, L. C. 180, 3 Gr. & Rud. See
Omnis juris non est infra spoliatores.

ARRAIGNMENT OF PLEA: Essential to
invest a court with jurisdiction Cruis
S. 842. Many cases cited in 27 L.R.A.
(N.S.) 1181-1187.

ASHBY v. WHITE, Smith's Leading Cas-
es, L. C. 273, 3 Gr. & Rud. Ubi jus ibi remedium (who is one injured—who is a
wronged party); Actio non datur: S1
Cas. 720.

ASSENT: Essential to a contract. See
Yox, how, etc. Lampleigh v. Braithwaite,
L. C. 301, 3 Gr. & Rud. Contract.

ASSIGNMENTS OF ERROR. See 2 Gr. &
Rud. Depends on motion for new trial.
E. v. Dunn, E. v. McCray.

ASSUMPTION OF RISK: Volenti; Pricetly v. Fowler.

AUDI ALTERAM PARTEM: The law
hears before it decides. Standard Oil Co.,
224 U. S. 270; Windsor, L. C. 1, 3 Gr.
& Rud. (ablist résumé). Due Process of
Law; Hughes, Proc. 61-77.

"Quicumque aliquod stauerit, parte in-
auditu altera, Aquam non statuerit
hanc acque facerent; (he who de-
cides anything, a party being un-
heard, though he should decide right
does wrong.) Bro Max. 113; 1
Hughes, Proc. § 77.

AUTHORITY: An authority must be
pleaded. See Rix v. Arndt; Mandata
RY RECORD; Wilson v. Loutenthal;
Pleadinga.

AUTOMOBILES: Contributory negligence
of driver of horse meeting on the high-
way. Breider, — 1a, — 50 L.R.A. (N.S.)
566, n.
When used for members of family of own-
Owner's liability for injury to guest: 50
L.R.A. (N.S.) 1100.
Driven by a third person; liability of own-
er: Sigler, — Cal. — 1, 51 L.R.A. (N.S.)

Damages by child driving: Kaysner, 125
Minn. 277, 51 L.R.A. (N.S.) 970.

Taxis of; validity of excise or license tax
upon. Hoefler, — S. D. — 52 L.R.A.
(N.S.) 949-959, n.

Homicide by operation of; S. v. Goetz, 83
Conn. 437, 90 L.R.A. (N.S.) 458, n.; Min-
ne, 85 Wash. 428, 42 L.R.A. (N.S.) 1178
(care required of pedestrians).

Who liable for negligence of the chauffeur.
Meyers v. Tri-State Co. Minn. 44 L.R.A.
(N.S.) 113-119; Cases, Forbes — Ark.
— 51 L.R.A. (N.S.) 1104 (liability for
chauffeur).

Owner liable when the machine is driven
by another. Stone v. Morris, 147 Ky.
356, 39 L.R.A. (N.S.) 224, stated 41
L.R.A. (N.S.) 777; cases. McNeal —
Okla., — 41 L.R.A. (N.S.) 776.

— 37 L.R.A. (N.S.) 834, n. — 94 N. W. 14
Carrett — Wis. — 40 L.R.A. (N.S.)
457, 136 N. W. 186. Minne v. Kane —
Wash. — 36 L.R.A. (N.S.) 88. See
Agency; McManus v. Cricket.

Qui sentit commodum sentire debet et anim.
This maxim is the burden of the above
cases.

Statutory liability of owner. Daugherty,
White Oak Coal Co. — Ohio — 46
L.R.A. (N.S.) 1091, n.

Unlicensed as affecting damages. Bourne,
Mont. 46 L.R.A. (N.S.) 702, n.

Care to be exercised in the use of. Kel-
logg, 204 N. Y. 92, 30 L.R.A. (N.S.). See
Authority.

Speed of; To show negligence: Dugan,

— N. J. — 44 L.R.A. (N.S.) 70-76.
BAILMENTS: Cogge v. Bernard, et seq., 3 Gr. & Rud. Duty of carriers to passen-
gers. Readhead v. R. R.

BAILY v. HORNTHAL, 154 N. Y. 648, 61 A. S. 106. Conduct before a court
may supply pleading. Gulling. See Campbell v. Consul; Bartlett.

Affidavits may not be admitted. It is by oral
statements of counsel. Pleadings may be
dispensed with. See Campbell v. Con-
sul; Knickerbocker; Bartlett v. Cro-
zier, L. C. 6, 3 Gr. & Rud.

Pleadings cannot be supplied by affidavits

BAKER v. WARNER, 231 U. S. 588-
593. Cited, secs. 8, 20, 22, 23. Re-
statement. See Goldham; Garrett, North
Carolina.

BANK: Liability for default of correspon-
dent. Brown, 59 Fla. 608, 52 L.R.A
(N. S.) 606-608, ext. n.

BARRON v. BALTIMORE, 7 Pet. 243, L.
C. 241, 3 Gr. & Rud. States not bound
by Federal Constitution unless they are
named to be bound. Roy n'est, etc. The
first ten amendments do not apply to
the states. Abanks, 208 U. S. 481; Ensign,
227 U. S. 597.

BARTLETT v. CROZIER, 8 Am. Dec.
426. De non apparentibus. Kent re-
naffidavits may not be admitted. It is a
cognate of Campbell v. Consul; Garrett.

BEAUMONT v. HEEVE, 8 Q. B. 483, L.
C. 367, 3 Gr. & Rud. Bartlett, sec. 15.
Restatement. Entry of judgment does
not foreclose inquiry into the "cause of
action." Anansea v. Andres: Huddock;
Fabiola non judicium; Aliterum.

BELKNAP v. SCHILD, 161 U. S. 10, L.
C. 260, 3 Gr. & Rud. Hopkins v. 224 U.
S. 636, 35 L.R.A. (N.S.) 243-251. So-
vereignty can only be sued by its consent.
Res non potest peccare.

BENEDICTA EST EXPOSITIO QUANDO
res redimirit a destructione: Blessed
is the exosition when the thing is saved
from destruction. 4 Coke, 29. Cited,
secs. 8, 16. Restatement.

BENIGNAE FACIENDIAE SUNT INTER-
pretationes proper simplicitatem; et a
corua ut res magis valeat quam pererat;
et verba intentionem e contra debent
insinuere: A liberal construction should
be put upon written instruments, so as
to uphold them if possible. See Ut res
magis valeat quam pererat; Verba inten-
tione debent insinuere. 2 Gr. & Rud.: This
is the rule of construing a pleading on
general demurrer also on motion in
Arrest and at all other stages. See also

BIDDE v. BOYCE 13 Mo. 532-534.
Hughes' Equity In Procedure. Cited, sec.

A glimpse of the Code from Biddle and
its cognates Gramp v. Dunnivant with
which we cite Carson v. Ely, which is
opposed to Gramp and, both in the same
volume and almost on succeeding pages,
also from Bowen, Weber v. Lewis, and

Biddle, etc.—Clark v. West, Eno v. Woodworth and
Allen v. Paterson, (the latter three N. Y.)
will be very instructive to the student.
With Biddle the black clouds began to
gather over the way and these have
never gathered and never will in his
acts; are quite lost to view; now, the only
"Datum Post" and guide are the gather-
ings of cases from digests and Cyce. None
of these have plainly pointed out that
the thing lacking is familiarity with a
few fundamental principles which we

Supra; and their cognate cases. The
text cannot be cited and explained. (See Pom-
ery; Chitty; Stephen; Literature; Logic.)
Great guiding star has been a
jargon of words.—Coke's three degrees of
certainty. Doe v. Payne. Ex-
position of the Code has been in the
style of Jackson v. Peaked, and of Eyre,
J. in Doe v. Payne. The quotations from
Tidd under the title of Literature will
show. The bold, direct, unequivocal
and quite clear style of Story has been
avoided; his sections are among the best
Code sections, still he is not quoted and
followed. (See Story; Rush ton; reprinted
in Bartlett, by Kent.)

How to plead a contract under the Code
has not been settled and the more
cases and decisions that have been

greater the confusion. Tucker v. Ar-
noise (N. Y.) stated under the title Codes,
Restatement. Where the code is silent and

cannot look at, and by the rules of the
Code has not failed by attempting to
construe it by feudal and modern and its
local and flat doctrines. (See §§ 1-15.
Restatement; also consider Baily and
Baker and their cognate cases.) An
impression gained by such investiga-
tion will disclose facts that the student
should know. See Monday v. Vail; Wing.

BLISS: Code Pleadings, § 141, fundamen-
tal principles rightly construed are the
best code. Campbell v. Consul; Wal-
ter, 250 Ill. 420 (Municipal Court Act
for Chicago). End Stat. 162, 182. See
Coda.

BONA FIDE PURCHASERS: 2 Gr. &
Rud.; Cases. Also Equity In Proc. See
Swift; Miller v. Race; LeNer; Basset.

BONI JUDICIS EST AMPLIARE JURIS-
dictionem: It is the duty of a judge,
when requisite, to amplify the limits of
his jurisdiction. Lex non cacete; Ex-
presso corum. To uphold fundamental
law the letter of the act may be de-
parted from. Receditur a platicis jure.

BONNEVILL v. WIDDER, 67 Ill. 327.
L. C. 196, 3 Gr. & Rud. "Hed. Equity In
Procedure, also sec. 9, Restatement.

ACTORS.

BONUM NECESSARIUM EXTRA TER-
minos necessitatis non est bonum: A
thing good from necessity is not good
beyond the limits of the necessity. See
Self Defense, 4 Gr. & Rud. Like a plea
of accident it must be unmixed with
negligence or illegality. Salisbury.

BOWEN v. EMMERSON, 3 Gr. 432. Hin-
ton's Code cases, cited, stated, 34 L.R.A.
Bristow, etc.—

Why these things are so the student should stop, pause and consider. See Feudal Lawyer; Literature; Logic; Departure; Restating the Law; Pomeroy; § 18, title Codes, Restatement.

In all systems of Procedure where Pleadings are required there must be allegations. Allegations are jurisdictional; therefore one thing cannot be described and a different thing recovered. Expressio unius. There shall be no departure; therefore variances cannot be waived. Frustra probatur quod probatum non relevat. It is claimed in some quarters that the rules of Equity are more liberal than they are at law. Now what these are in Equity may be judged from Lester v. Foscroft. If one sues for specific performance of an oral agreement he must allege possession taken under and in pursuance of the agreement in order to state a case. Lester, L. C. 341, 3 Gr. & Rud. Without this allegation he states no “cause of action.” Probate will not supply the omission of that allegation. Lester, Contra: Henry v. Hilliard; Guling. Reference to these cases will indicate to the student the importance of the question in Bristow.

Bristow applies to all systems, general or special. It is a Code Case.


BURDEN OF PROOF. See Actora. A phrase of Verba fortius.

CAMPBELL v. CONSANUS. 25 N. Y. 613; 616. An instructive case. See Codes.

CAUSE OF ACTION. Must be certain. See the right Pleading. De non Quis; quid. See Allegations. Campbell v. Consanus; Walter, 250 Ill. 420.

"What ought to be of record must be proved by record and by the right record." Milburn, Jr. 45 L.R.A. (N.S.) 277; 277, 278, citing Mondel v. Steeell, L. C. 77, 3 Gr. & Rud. Altemus.

CAVEAT EMPTOR. Let the purchaser beware. Chandelor v. Lopus, L. C. 374, 3 Gr. & Rud; also post, Pasley v. Freeman, L. C. 375, 3 Gr. & Rud; Laidlaw v. Orgon. See Leading Cases 374-384, 3 Gr. & Rud. Also under appropriate titles in this work.


Rules of certainty are dictated by requirement. 129 Res Adjudicata and Due Process of Law; Kecacoue County v. Decker, L. C. 30, 3 Gr. & Rud; Clark v. Dillon; See Doe; Fleckburg v. Henson.

CERTUM EST QUOD CERTUM REDDIT potest: That is sufficient to certain that can be made certain. Ut res magis volcat quam percipat. These rules are applied to uphold a pleading or a record.

CESSANTE RATIONE LEGIS CESSAT ipsum lex: Reason is the soul of the law and when the reason of any particular law ceases, so does the law itself. Lex non est sine ratione.

CHAMPERTY. S. V. Chitty; See Champerty, Maintenance and Barratry, in 2 Gr. & Rud; also in 4 L.R.A. 4 1st.


CHICAGO & A. R. R. V. CLAUSEN, 173 Ill. 100, 103, 70 Ill. App. 550, 43 Chic. Leg. News. 357-359. Cited in Sec. 8, 21, 24, 25, Restatement. This is one of those progressive cases that recognizes a limitation of legislative authority to interfere with the necessities of the judicial department. These cases might well be noticed by those who attempt to treat Constitutional Law as a partitioned and irrelevant subject. In this connection consider Bliss Code Pl. §§ 138, 141, quoted under title Codes, 4 Gr. & Rud.; also Clark v. Dillon; Rose v. Milne, 12 Leigh (Va.) 204, 37 A. D. 346; 1 Gr. Ev. 73; Davis v. Jacksonville Line (Judge Barclay, Mo.). Follow these cases through the Restatement, and the

CHICAGO, etc.— Prescriptive Constitution will be dimly outlined. Statutes cannot change the substance of Procedure. Walter, 250 Ill. 420. Nor can the parties contract it away. Introductory Chapter on Action. See Codes. Campbell v. Consanus. Look from these cases and see what Constitutional authors omit.

CHICAGO MUNICIPAL COURT ACT: Universal, Constitutional principles; the Trilogy of Procedure applies to. See Preface; also §§ 13, 21, Restatement. Oral statements and affidavits will not enlarge or vary Pleadings; a "cause of action" must be stated Walter, 250 Ill. 420. Mondel v. Steeell, L. C. 77, 3 Gr. & Rud.

This title should be read along with C. & A. R. V. Clausen; and Campbell v. Consanus. Popular and brilliant reformers and essayists are filling lay journals and Bar Association Reports with their oratory and demands for "plain and speedy justice" without any regard whatever to the fundamental principles. Indeed it is difficult to find where they have ever specified one for which they show any respect. (See Story.)

CHILDREN: Must be guarded. McDermott; Lynch; Turntable. See Infants.

CHITTY: The following article is one of three which appeared from the pen of Edward D'Arcy, in the Central Law Journal at pages 99, 415. After his review those who were older and who had owed a duty to the young Bar to speak before so much damage had been done to the profession, then ventured out to mention the shortcomings of Chitty,—of whom it was observed that learning the logic and philosophy of the law from his works is like learning astronomy from an almanac. Whoever will read the article will get the clues that lead to the truth concerning the Feudal Lawyer and his followers. (See Literature.) Elsewhere we refer to the manifest high crimes against good government. (See Codes). Why did not the Feudal authors cite and explain the maxims introduced in the Restatement? (See Pomeroy.) Instead of those of sections, and forms of pleading. He did not drink at the foun-
Chitty—

tain, but instead he wandered down the rivulets. (See Meius est petere fontis.) Chitty taught from forms—Forms of Actions and Forms of Pleading. He did not "drink at the fountains."

"LIMITATIONS OF CHITTY: All must concede that a subject which lies at the base of the administration of justice must necessarily be founded on certain immutable principles which cannot be ignored or abolished. Now did Chitty ever impressively elucidate such great, high, true principles? In our first article on the high principles, there were enumerated:

1. De non apparentibus et non existentibus-eadem est ratio: What is not judicially presented cannot be judicially decided, considered or determined. Proceedings must be coram jusce; this is the first rule of reasoning. The State demands this as an implied third party to the record, and therefore its mandates cannot be waived by the parties named on the record. Res inter alias acta. In effect the state says: 'Don't injure or destroy my interests in your procedure. Alturam non lade.' These interests of the State are safeguarded by the general demurrer. Its correlative, as explained in Hughes' Equity in Procedure. Where the general demurrer cannot be waived, and therefore it results that the general demurrer cannot be waived. "It's Deep, Deep."

2. Frustra probatur quod probatum non relecit: This maxim is a logical deduction from the first—lie non. But did Mr. Gould understand these principles and this logic? A reference to his Preface and his qualifications will show that he did not perceive the logic really involved. His Preface, 1852, also shows that he did not believe in Blackstone, Tidd, Chitty and Stephen.

3. Verba forti mis accusantium contra proferentes: The words of an instrument are construed most strongly against the composer or, in other words, every precaution will be taken to avoid that he did not perceive the logic really involved. His Preface, 1852, also shows that he did not believe in Blackstone, Tidd, Chitty and Stephen.

Now, how stand Chitty and his followers on the above trio of principles? Whatever that may be, Gould, in 1852, Tyler, Heald, Swan and Pomeroy wholly overlooked the above principles and failed to perceive its true meaning. Gould, in 1852, expressly says that the science of pleading cannot be learned from Chitty and Stephen; that their books are for reference rather than teaching the philosophy of the law. The student who will read the matter referred to can see that discord and even aversion filled the minds of the great authors who have led the profession. Not an author fully comprehended the nature and immutable character of the great principles above enumerated. The antiquity and simplicity of these principles is beyond their scope, they thought there could be different systems in a constitutional government; they thought procedure was a local and flat establishment. To illustrate this fact, we quote the preface from Swan's Pleading and Practice. It is as follows:

INTRODUCTION.

The system of pleading in Ohio is contained in the seventh Title of the Code of Civil Procedure, and occupies five pages and a half of the published statutes of the state.

All pleadings are to be tested by it. Much of the Common Law System of Pleading consists of rules to determine the construction and legal effect of allegations and the technical interpretation of language.

There is an omission of all such rules in the Code, and an express abbreviation and exclusion of them. Language and allegations, instead of being interpreted by the rules of Common Law Pleading, are restored to their ordinary meaning.

One of the objects of this work is to enforce and illustrate this difference between the two systems—a difference radical and irreconcilable, frequently overlooked—sometimes perversely disregarded. (See Pomeroy.)

The name of the Code from the artificial and technical rules of common pleading must devolve upon the rising young men of the bar who have mastered both systems; and,

TO THE YOUNG GENTLEMEN OF THE BAR THIS WORK

is respectfully dedicated.

"September 1, 1860."

So we write as a prominent and widely respected author and writer in 1860. No doubt he had seen the first code cases, Biddle, Eno, Ramsey and Eno v. Wardworth (N. J.) also McFaul v. Ramsey (U. S.), and Eno v. Tennessee, 1 Black, 390. He knew that Gould as early need. He did not need to quote and the above cases and the above

The latest editors of that work, and of Gould, are also so wedded to the cases that they have no room to make prominent vindicate the great principles that antiquity is against us, but that follow Tidd and Chitty who for texts on the cases and statutes. They did not quote and impress the trio of great principles above introduced which, if understood and comprehended in all the myriad of cases, and their unwieldy Digests, Cycles, and annotated cases.

Next: He was impressed with Chitty, Stephen and the above opinions of the Supreme Court of the United States. And Tyler got off what Charles O'Connor is said to have written to David Judley Field, namely that practicing under his Code was like:

"An old woman telling her yarn." (Compare the May number of Case and Comment which has Field's picture and is eulogistic of the great jurist.) Now if O'Connor is so impressed with that letter, then he should be consigned to the same class as the Judges in the Biddle, Eno, Ramsey and Eno cases, and all those judges who do not know the elements of due process of law. Great courts that never quote and vindicate a great principle so that all can see and understand, cannot lend the bar to an appreciation of the principles needed for the establishment of mutual confidence among individuals, states and nations. Commerce, the great civilizer, depends on the lawyer and his judiciary. Now what has been the lawyer's gift to the United States?
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What has happened to the American Tidd, Chitty, Gould, Gould, Pomroyo, Helmer, and Perry prefaces? See these prefaces and Judge. Look at Par. 2, Preface 1876, Pomroyo & Common Pleas, 30. 514, 533, 540, 596, et seq.; 2 Thompson's Trials, Sections 2510, 2511, quoted in 4 Guindon and Rudiments, under Title Variance. Read all the prefaces under the light of the above trio of principles, from of old, and then judge. Is not Section 10, Story's Equity Pleadings, worth more than all these local, hit and run and provincial, 'late case' and statutory systems, as contemnated in all the above prefaces? We also quote from one of the latest works. In 1908, Gould reappeared as Will's, Gould, and from its preface we quote:

"The aim of this edition is to exhibit pleading as both a science and an art. During the development of the art there have been, in the regulations that govern its practice, alterations, elisions, additions and modifications, of the old rules and the modern rules of pleading, taken together, form but one entire system.

"Now, what are the old rules, except the maxima quoted; and are not they the everlasting rules, and always the same? And are they not of all systems? Does illegality change the rules?

"In the first letter of this series (74 Cent. L. J. 99-101) we attempted to show that it is as easy to learn astronomy in an almanac, as to learn the philosophy of pleading in Tidd, Chitty, Stephen and their followers. The study of the above masters and our modern book factory output has taught procedure so that the 'ignorance of the laws is no pleading' no more; and the Dean of Harvard Law School is all at sea, as appears from a truly astonishing speech of his on page 836, 34 Am. Bar Assn's Report (1909). He wonders why the English 'bench, bar and law books are the best. He had only to look and see why the English student is ahead of the American. To get abreast, the latter must drop his 'late case' hunt and pause to learn a half dozen principles and perceive their logic and philosophy. To illustrate the condition, let us ask a student the reason for the doctrine that the general demurrer cannot be waived?

"Ask twenty lawyers this question and see if thirty-two will give the same answer. Their answers will show why it is that 'the ignorance of the law is no pleading'.

CLARK v. DILLON, 97 N. Y. 370. Bradbury's Rules of Pleading 9-16. Cited: § 17, 8, 10, 12, 21, 22, 24, 25, Restatement. The burden of this case is the maxim 'In a suit at common law no person can be compelled to testify as to his own conscience.' It is the maxim as Donastor v. Payne, C. A. A. R. v. Clausen, Rose v. Miles; Kewaunee County v. Becker, L. C. 30 Gr. & Rud.; 50 L.R.A. (N.S.) 1-32. It is a cognate of Campbell v. Consulato; and Tooker v. Arnoux. These cases are stated in short on the Code. They involve the leading questions of Consent discussions. They ought to be mastered. They can be cited to sustain the Prescriptive Constitution. Indianapolis v. Horst, L. C. 223, 3 Gr. & Rud.; Dunnivant; Taylor v. Sprinkle; Thomas v. R. R. Mallinckrodt, l. c. 126, 3 Gr. & Rud.

CLARK v. WEST, 103 N. Y. 349. Cited: § 17, Restatement. Denies Clark v. Dillon. In relation to Codes we refer to the unsettled views prevailing in New York. The origin of the trouble is indicated in Clark v. West; we make further reference to that case under the title of Classics. It is an interesting case on both the Code and Contract. See Story.

CODES: § 1. The titles Chitty, and following titles last above set out will lead to discussions that illustrate why the Code has failed. The two original Code states, New York and Missouri, are at this time asking commissions to try and formulate something to rescue the land from manifest bewilderment in these states. In each of it is recognized that there is something fundamentally wrong in the operations of its Code. Each is attempting to solve the trouble by more legislation and more decisions but under the guidance of the Feudal motto, "Parliament is omnipotent." Neither appears to be seeking light and guidance from the few fundamental texts of all ages, and from the truth that all Codes and Practice Acts must be construed by these. (See Literature.) Neither appears to recognize that it is these great stars of all ages and climes that control, and not local capitals, legislatures and courts. Neither appears to perceive that the Municipal Court Act of Chicago and the Code of New York have been construed to mean the same thing. (Campbell v. Consulato.)

The idea of something "new" is most pronounced and leads the way. (See Literature.) It is not apparent that the new system or proposed amendments will better serve the necessities of Res Adjudicata and of "Due Process of Law;" nor that these conserving principles of Procedure will dictate the meaning of the legislation now sought to be brought forth. We know of no Code that has been brought forth and construed to serve those ends except in a hazy, indirect and haphazard way. Starting from those high principles
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we can see that there is a unity, a logic and a philosophy of Procedure that has not been clearly pronounced and defended by any court or author, certainly not by any Feudal author.

Local and tribal laws are threatening the dismemberment of the "due administration of justice;" and courts, authors and schools do not seem to grasp the fact. (See Feudal Lawyer, also Literature.) The lawyer and his establishments have not comprehended the Code. How fallacious is the theory, that Procedure is of local and flat origin, and that it may be partitioned off and taught without reference to the leading subjects of the law, we have tried to show in the Restatement. We have sought to show that Procedure must be broadly taught; that its major-organic maxims are canons of Evidence, Pleading and Practice alike; that these are Constitutional, Universal Principles, applicable alike to all systems and, of course, to the Codes and Practice Acts. The maxims referred to, we for brevity, call the Trilogy of Procedure (Sec. 1 et seq., Restatement). Further we have sought to demonstrate that these maxims are also rules of the general demurrer, of the motion in Arrest, of Appellate Procedure, of Collateral Attack, Res Adjudicata and of "Due Process Of Law." In the argument of these matters we have defined our position so as not to be mistaken, well knowing that our propositions are opposed to prevailing doctrines. We confess that we are unable to cite a single authority fully to support our views, except the maxims, the cases of Mansfield, Story and others referred to under the title, Literature. Every "theory-of-the-case" advocate denies the above propositions. Elsewhere we contend that it is this "Theory of the Case" that has shattered and distorted the logic and the philosophy of the law. (See Story; Rushoton; Logic; Literature.) We have sought to give full credit to Story and Greenleaf, although it must be conceded that neither of these authors so clearly and precisely stated the heart and vitals of Procedure as to impress their own generation, much less the succeeding (see Literature). The Code was enacted in 1848, and its expositors at once assumed that a "new dispensation" had come (see Pomeroy; Chitty) and that they were the appointed ones to pre-

sent its logic and philosophy. Not one of them picked the underlying maxims that were reaffirmed, nor the leading sections of Story and of Greenleaf, or pointed out that it was these sections that had been paraphrased by the legislatures. Not one plainly stated that the fundamental maxims perceived in sections 10, 25–28, Story's Equity Pleading, and 63–65, 522–540, 1 Gr. Ev.; also 7, 2 Id. also 10, 3 Id., also 35–37, Id., had been merely paraphrased and reaffirmed. Had they done this there would have been no "theory-of-the-case" sect. (See Literature.) Such teaching would have excluded the notion that the law can be learned in a partitioned way (see Bish. New Crim. Law pp. vi, vii, Preface). From little and narrow teaching the Code failed; and finally it has given us cases like Gulling and its cluster; also the idea that lawyers can be made by statutes; and it has ended in a jargon of judicial anchovy as to what these cases mean. (See "Theory of the Case;" Story; Rushton and the situation described under these titles.)

At the beginning, the old law, the Trilogy of Procedure and the sections above referred to should have been gathered and impressed and the fact pointed out that Codes must be construed by these and not by the letter of the acts. (Ita lex.) (Bliss did hint this, see Codes, 2 Gr. & Rud.) It should have been made clear that Greenleaf discussed Frustra probatur quod probatum non relevat in his sections 49–74, Vol. 1, also that this was a maxim both of Evidence and of Pleading.

Had the Federal supreme court in some of its excellent cases like Slacum, and Nalle v. Oyster and Vicksburg v. Henson only clearly stated and expressed the Trilogy of Procedure and declared that all systems of Procedure are bottomed thereon and that all statutes must be construed accordingly, such a decision would have been another Magna Charta.

It is long overdue from some court to state and defend fundamental law away from local and tribal attacks (see Prescriptive Constitution, Equity), and to announce that these principles will govern construction, and that the letter of Codes and Practice Acts must be made to harmonize with
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organic law, whose principles are supreme.

In praesentia majoris cessat potentia minoris.

§ 2. No Code author has done more for the Code than Story and Greenleaf. As to Judges, Stephen J. Field, in California did much; not enough, however, to enlighten the adjacent states which have sought needed light from California. This will appear from Gulling and its cluster. Later decisions in California have a marked "theory-of-the-case" tendency. Wisconsin must be viewed as altogether the best Code state. There are judges who have spoken in Kenovaun County v. Deckey, L. C. 30, 3 Gr. & Rud.; and Judge Marshall of that state has done much in cases like Emerson v. Nash to withstand the commands of "theory" of the law, legislation and tendencies. Several of the late cases show a strong disposition to renounce Kenovaun County. But after all it must be admitted that these very able decisions, like Story and Greenleaf, have failed to open and clear the way as it should be.

The Gulling case and its cluster show that we should not look to legislation and wrangling courts to settle the fundamental principles of the Code. (See Title Codes, 2 Gr. & Rud.; also Story and Rushon; also 44 Chicago Leg. News, 125–166. Under the Title Variance [4 Gr. & Rud.] several prominent authors are quoted; these should be well introduced to the student, that he may see and judge for himself.)

Codes merely reaffirmed Roman roots; they brought nothing new of substance. Feudal Lawyers, given this Code to construe and apply, have utterly failed. They have even construed away the provision that a "cause of action" be stated, (Quis quid: See "Theory of the Case"). And that the general demurrer cannot be waived. They have decided that irrelevant evidence may be admitted, and, if admitted without objection, that this will take the place of Pleadings. (See Literature.) And whether Verbo fortius is a canon to be respected must be picked out here and there from babbling authors and theorists and conflicting cases. (See Secs. 533, and 546 Pomeroy's Code; Antisdell v. R. R. [Wis.], is a cognate of Doxastan v. Payne, L. C. 217, 3 Gr. & Rud.; then why did not authors plainly state this fact?) What has happened to the Code should be plainly stated and defined; therefore we often cite Campbell v. Consaulus, Clark v. Dillon, and Souker v. Arnoux. They are cases from New York, and most excellent. These and the cognates we cite with them should be well understood by the student. Clark is like C. & A. R. R. v. Clausen (Ill.), also Rose v. Milne (Va.). Compare these cases with Clark v. West and Baily v. Hornthal, Antisdell, Doxastan, C. & A. R. R. v. Clausen, Campbell and its cognates and Walter, 250 Ill. 420 (Municipal Court Act for Chicago), may all be cited to support the higher law—the Prescriptive Constitution.

Code authors have not set out and cleared fundamental principles and then in the light of these opened the way and construed the letter of the Acts. (See Cheever, Pomeroy; also Common Counts.) Instead, they never get away from the letter of the statute and cases, handicapped with the dogma, "Parliament is omnipotent." Contrary to the fact they assume that something "new" has come. Their Prefaces will show. (See also Pomeroy's Code sec. 506–508.) They call for more statutes and cases until the entire establishment is flooded and broken down with cases. (See Literature; Pomeroy.) Each state assumes that it has a sui generis Code. This assumption is very pronounced in Ohio as the Prefaces of Swan and Judge Nash will show. And so it is in Missouri and California. How it is in New York will appear by discussions of Clark v. Dillon in that state. (See Bradbury's Rules of Pleading pp. 9–16; 1564–1570.) But a Mansfield, a Kent, a Story, a Bishop or a Carter would see no difference wherever, at least as to substance. They would construe all Codes and Practice Acts by the Trilogy of Procedure. And so the Federal Supreme Court might have done long ago. (See §§ 1–26, Restatement.) The greatest asset of government, the due administration of justice, ought to be defined and settled by the Nation's highest tribunal. The failure to do this has invited judicial anarchy, as will appear from the condition in New York and its adjacent states, and likewise in Illinois and its adjacent states. Start with Gulling and its cluster of cases, and see what these will lead to. And do we point to any thing less than judicial anarchy?
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Judge Bliss was right in stating that the best Code would be the re-affirmation of a few fundamental principles, leaving regulation and details to rules of court, or, so to speak, Praetorian Edicts. A supreme court can make the best Code.

From the fundamental principles, the minor rules can be deduced and comprehended. The Restatement can be worked from and spread out through the Text-Index.

Codes should be dictated and drawn from the great stars of the juridical Heavens, such as Alterum non ladere. These should be recognized and fixed; from the fountains the rivulets can be traced.

Melius est petere fontes quam sectari rivulos. (4 Gr. & Rud.)

§ 3. Campbell, Clark; Tooker. Introductory to a Code see sections 1-26, Restatement; also the cases of Campbell v. Consalus, Clark v. Dillon, and Tooker v. Arnoux, the citations to and the cognates of these cases. In several relations the importance of these cases is indicated. See Preface to Restatement; Story; Rushton; Pomeroy; Chitty and Literature.

Codes reaffirm the old law, §§ 1, 5, 6, 7, 12, 21, Restatement.

Construction of Codes; Leading principles. See sections above referred to; Lex non exacta. Equity in Procedure; title Codes, in Equity; also 2 Gr. & Rud.

"Parliament is not omnipotent!" Codes cannot be construed by the maxim Ita lex scripta est. See Parliament.

The great principles of, stated. §§ 6, 7, 8. Restatement.

Quis, quid: reaffirmed, §§ 6, 7, Restatement; See this maxim.

Construction must harmonize with first principles, § 10, Restatement; See Theory of the Case.

"Theory-of-the-case" advocates as-sail Verba fortius, Pomeroy upholds it here, and denounces it there. Antidote v. R. R. (Wis.) is a cognate of Dovaston v. Payne, L. C. 217, 3 Gr. & Rud. But Code authors do not inform us of the origin of Code cases. Antidote is quoted and approved by Pomeroy, § 533, and next in § 546 he denounces Verba fortius. He never cites the great decisions gathered in Smith's Leading Cases. See the excellent Code cases, Rushton, Briar, Dovaston and J'Anson v. Stuart; also § 21 Restatement.

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Campbell v. Consalus; Clark v. Dillon and Tooker v. Arnoux combined and annotated. The fundamental principles in these cases deduced and stated and impressed as guiding stars. From Alterum non ladere deductions are drawn which are the rivulets on down. Melius est petere fontes quam sectari rivulos (4 Gr. & Rud.).

A grasp of the fundamentals of the Code and of Practice Acts will show that these principles are the same as the maxims of the Trilogy of Procedure (§§ 1-14, Restatement). To perceive this fact, follow the citations to the above cases through the Restatement. To bring out this fact from the "legal jungle" and away from Feudal theories is a leading purpose of the Restatement. The principles are few and are from of old but the cases illustrating their application are simply illimitable. To read cases without a clear perception of the principles is to grope in the dark forever. And for two generations the legal profession has so grooped. (See Feudal Lawyer.) In other relations we refer to the unending call for more legislation and more cases. (See Pomeroy.) With plenty of cases, authors and courts have looked away from them and contributed a greater babel and menace to enlightened government. Any—the least change in the terminology of a statute although it did nothing more than reaffirm the old principles and authors assumed that something "new" and "modern" was brought forth and that this newcomer called for entirely new cases and principles. The Prefaces of Judge Nash and of Swan (Ohio), will show. And the Preface to Tyler's Stephen's Pleading wherein Charles O'Conor's screed is held up as respectable and fit for the consideration of students will indicate the prevailing views of the American profession. And cases like Gullage have come and still they heed not but continue to show their reverence for Coke, Blackstone, Tidd, Chitty, Stephen, Thompson and the "theory-of-the-case" errorists of two generations. (See Story; Literature.) 33 Am. Law School Revised 602-617.

Not a single Code author has shown
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that he read the Code in the light of the necessities of Appellate Procedure, Collateral Attack, Res Adjudicata, and Due Process Of Law. To have done so would have been a recognition of the Prescriptive Constitution and this could not be done without an assault on the motto of Feudalism that “Parliament is omnipotent” (§ 21 Restatement). The fact is that Courts and authors have discussed the Code from the viewpoint that the statute is local and flat even as to the reaffirmation of the Trilogy of Procedure. (§§ 1–14, Restatement.) And to end the Antinomian wrangle cases and statutes have been sought and looked to while all the time these simply more emboiled the fray. And so they will until the fundamental law is comprehended and respected. (See §§ 1–26, Restatement.) The logos of the law and the ped. osophy of the law are not the gifts of statutes and of courts. In praesentia majoris cessat potentia minoris.

§ 4. Campbell v. Consalus, 25 N. Y. This case quotes and follows Guest v. Warren (Eng.). These cases stand to limit the power of the parties to dispense with the pleadings even by express stipulation in writing filed. They set a limit to waiver. (See Story.) And we think that this limitation to contract is also the limit of legislative power; that legislative power is defined, as is the power to contract and to waive. There are limitations of the power of legislatures, and of the parties, to contract a procedure unto themselves. What these limitations are is of much consequence to all students (see Consensus tollit errorem; Modus et conventio vincunt legem).

That there are limitations of waiving Pleadings, see §§ 83–123, 1 Gr. & Rud.; Consensus: Introductory Chapter, Restatement.

Campbell is cited in the Preface, also in Restatement §§ 4, 7, 8, 10, 12, 17, 20, 22, 23, 24, 25. Here we have sought to show the Code and Practice Acts in connection with fundamental law. By tracing the discussion from these citations the unity, logic and philosophy of all procedure will appear, — at least all that can serve a Constitutionalism. All systems that require pleadings that will pass the general demurrer and its Correlatives must and do respect the Trilogy of Procedure. § 7, Restatement. Campbell and its cognates, Clark and Took-

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er, should be read in the light of this Trilogy.

From these three cases, all Code cases, it will be seen that the “Theory-of-the-contract are act opposed to the principles there enunciated, and that they take their stand with cases like Gulling and its cluster.

Parties can neither directly nor indirectly waive nor dispense with the pleadings nor the mandatory record. The general demurrer cannot be waived (see Story). Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Nalle v. Oyster.

Pleadings limit the court’s authority, and all its judgments and recitals are limited by the Pleadings. Mondel; Palmer v. Humiston; Millora v. Steel Co.; Knickerbocker v. R. R. (N. Y.); Vickenburg v. Benson. Oral statements and affidavits will not enlarge the Pleadings or the issues. Walter, 250 Ill. 420 (Municipal Court Act for Chicago) “What ought to be of record must be proved by record and by the right record.” Fiunt enim de his contractibus.

The state requires pleadings, and sufficient pleadings. Interesse republĳca; Quid, quid, coram quo. The state’s interest cannot be contracted nor consented away. Alterum non labdre; Res inter alios; Consensus; Modus et conventio; § 17, Restatement.

§ 5. Clark v. Dillon, this notable N. Y. case is a cognate of Campbell, also of Tooker. These three cases present the phases of the Trilogy of Procedure. §§ 1–7, Restatement. It is cited in Preface, also in §§ 7, 8, 10, 12, 21, 22, 24, 25, Restatement. By following these citations the reader can trace its logic and philosophy, as well as its repulse, of which latter there are many. See Bradbury’s Rules of pleading, 9–16, 1564–1570; 50 L.R.A.(N.S.) 1–32. Its notable cognate cases will be found along with Doxaston v. Payne, L. C. 217, 3 Gr. & Rud. Among these are C. & A. R. R. v. Clausen, and Rose v. Milne; Indianapolis R. R. v. Horst, L. C. 223, 3 Gr. & Rud.; Dunnivant; Taylor v. Sprinkle; Thomas v. R. R.

The burden of Clark is Verba fortius; it also shows that Parliament is not omnipotent,—that legislation cannot change the substance of Procedure. C. & A. R. R. v. Clausen; Rose v. Milne. Lex non exacte definit.

A Pleading is construed against a pleader. Verba fortius; Collateral
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Parties cannot stipulate to dispense with Pleadings: nor can legislatures so impair them that they will not serve their functions on Collateral Attack. Res Adjudicata and Due Process Of Law. These points can be picked out of Campbell, Clark and Tooker. Follow their citations in the Restatement.
In præsenta majoris cessat potestas minoris.

A pleading cannot be “fish, flesh or fowl” as the pleader may choose to present it in changing attitudes. Kewaunee County v. Decker, L. C. 30, 3 Gr. & Rud.
§ 6. Tooker v. Arnoxx, 76 N. Y. 397, presents a question of Aider by Pleading Over. Cited, in the Preface, also in §§ 4–12, 17, 20, 22, 24. Restatement. It was contended that the omission of a material allegation omitted from the statement could be found in the answer and transferred into the statement, and thus show a “cause of action.” But this view was rejected in a decision that supports the rule, “What ought to be of record must be proved by record and by the right record.” (Mondel v. Steel, L. C. 77, 3 Gr. & Rud. § 10, Story Eq. Pl. 47, Equity in Procedure.) This decision accords with the requirements in the Removal of Causes also in Constructive Notice, in ter alia, §§ 85–123, 1 Gr. & Rud. It also accords with the very Code which requires that a “cause of action” be stated in the Complaint or Petition. And wherever Pleadings are Jurisdictional this must be so. Jurisdiction cannot be picked up in a haphazard way. Quis, quis, quid, coram quo. It cannot be gained from any and every pleading—the Complaint, the answer or the reply, or from the evidence (see “Theory of the Case;” Story), or oralities or affidavits (Walter, 250 Ill. 420), or agreed statement of facts, or arguments, or instructions, or irrelevant evidence. (See Story; Rush ton; Gulling; C. C. J. C. 45, 66, 100.) Quod ab initio non valde, posterior non convalescit. See this maxim and trace it from its citations through the Restatement.

The statement of a “cause of action” cannot be supplied by stipulations (Campbell), nor by any construction that offends Verba fortius; (Clark) nor be imported from the answer (Tooker). Here let us ask the student to turn and read the Trilogy of Pro-

procedure and its cognate maxims §§ 1–7, Restatement, and then contemplate what it would have been worth to the cause of the Code if these maxims had been exactly named and discussed in this Trilogy of cases. Note the difficulty of developing the exact ideas from cases. Note also that the “case system” (2 Gr. & Rud.), has not abated the disorders of the “Theory of the Case.”

Tooker v. Arnoux quoted:
1. A “cause of action” must be stated as the Code demands, and this is a good ab initio proposition: “When the complaint in an action does not state facts sufficient to constitute a cause of action,” the objection is available on trial upon motion to dismiss the complaint.
2. “When a motion is made upon that ground, the granting it is not a matter of discretion, but of legal right.”
3. “Where the objection was raised and was not waived, and no amendment of the complaint was made or asked for on the trial, the correctness of the ruling in denying the motion to dismiss must be tested upon appeal on the complaint as it stood, not as it might have been changed by amendment; and if the ruling was erroneous, it is fatal to a recovery.”
4. “The provision of the Code of Procedure (Old Codes 162) which provided, that in an action upon an Instrument for the payment of money only it should be sufficient to set forth a copy of the instrument, and allege the amount due thereon, was not applicable where the liability of the party, by the terms of the instrument, was conditional, and depended upon outside facts; in such case those facts must be averred.”
5. Plaintiff’s complaint set forth a copy of an order upon defendant, requesting him to pay the plaintiff a sum specified, ‘out of money to be realized from the sale of certain houses described;’ it alleged an acceptance of (p. 308) the order by defendant, a payment of a part of the sum, and that the balance was due. Held, that the complaint did not state a cause of action; that no sale of the houses and the receipt of money from such sale were conditions precedent to defendant’s liability, and should have been averred; that a denial of a motion to dismiss the complaint on trial was error.
6. “Also, held, that a denial in the answer of the receipt of any such money did not supplement the complaint in this respect.” S. P. Florida Co., 178 U. S. 328, 329. De non. See Aiders.
Ripaljo, J. At the opening of the trial the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied and excepted to. The reason assigned was that the defendant should have demurred.
“His position is in conflict with section 148 of this Code and with many decisions of this court. If the complaint was bad in substance the objection was available on the trial and the motion to dis dismiss should have been granted (Schofield v. Whitlegge, 49 N. Y. 239; Coffin v. Reynolds, 266 N. Y. 440, Peck, 262, 62; Bogardus, 101 N. Y. 328; Van Lewen v. Lyke, 1 N. Y. 516, Leading Case 14 3 Gr. & Rud. Omission of fact of
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*scienter for injury by a domestic animal:* Rushon v. Aspinall, L. C. 5, 3 Gr. & Rud.

"We think the complaint was clearly bad. The sale of the horses mentioned in the order and the receipt of money from such sale were conditions precedent to the defendant's liability on his acceptance, and those facts should have been averred. In the absence of such averments no indebtedness on his part to the plaintiff appeared (Munger v. Shannon, 61 N. Y. 251, 260)."

"The denial in the answer of the receipt of any such money did not supplement the complaint in this respect. In Bate v. Graham (11 N. Y. 237), the answer contained an affirmative allegation of the fact which the complaint should have averred, but in Schofield v. Whitelegge, as in the present case, the answer contained a denial of the essential fact, and it was held that such denial did not cure the defect in the complaint. Van Leersum v. Lyke."

"The complaint in the present case cannot be sustained by virtue of section 162 of the Code, which provided that in an action upon an instrument for the payment of money only, it should be sufficient to set forth a copy of the instrument and allege the amount due thereon. It was decided by this court in Fulling: Ganda (1 Keyes, 231), that section 162 was not applicable where the liability of the defendant was conditional, and depended upon facts outside of the instrument; that in such a case the facts must be averred." (Lex non exacte definit.)"

"The objection to the complaint was not waived upon the trial. The defendant not only took the objection of the insufficiency of the complaint before any evidence was taken, but when the plaintiff offered evidence of the fact that the horses had been sold, he objected to such evidence on the ground that the fact had not been alleged in pleading."

"We see no ground upon which this case can be distinguished from the numerous cases in which it has been held that a party may upon the trial lawfully demand a dismissal of the complaint on the ground that it does not state facts sufficient to constitute a cause of action."

"The court below at General Term concurred that the trial judge has warranted the motion to dismiss it would have been bound to sustain this action. The necessary consequence of this concession is, that in denying the motion the trial judge erred. It was not a question of discretion, but of legal right, whether the complaint should be dismissed, and if it would not have been error to grant the motion, it was error to deny it. It is true that an amendment of the complaint might have been allowed in the court below, but no amendment was made or asked for, and the objection to the complaint having been taken in due season and overruled, the correctness of the ruling must be tested by the complaint as it stood, and not as it might have been changed by amendment."

"The judgment must be reversed and a new trial ordered, costs to abate the event."

"All concur."

"Judgment reversed."

This otherwise excellent case is misleading in one respect: The language of the court implies that the defect, although of substance, might have been waived.

If the defect is a formal one, then such defect is passed, and gone forever unless objection is promptly and specifically made. Let the student learn this and learn it well. (See L. C. 290a –299, 3 Gr. & Rud. and cases cited; also § 53, 1 Gr. & Rud. It is a jurisdictional question that is involved. Consensus tollit errores.) But when the defect is one of substance it cannot be waived. Then it is a question of the general demurrer, first, last, and forever. It is never more nor less, for the general demurrer is never waived. Alterum non iudicem. Tooker was correctly decided but the ex gratia remarks of the court about objections and exceptions lessen its usefulness. (See Rushon; Bartlett v. Crozier, L. C. 5, 6, 3 Gr. & Rud.)"

"To repeat, even the express stipulations of parties to add to, or to detract from, or to vary the Pleadings, are of no effect. Campbell v. Consaulus. Is it not absurd, then, to say that a waiver of Pleadings which cannot be worked directly and formally, in writing, may nevertheless be worked indirectly. The extension of Consensus, and the minimizing of Quod cib initio touching the last proposition is quite common, but this notion that the substantial part of Pleadings can be waived in any way is offensive to organic law. De non; Quando aliquid prohibitur."

If the parties cannot by express contract vary the Pleadings (Mondel, L. C. 77, 3 Gr. & Rud.) then it is certainly illogical and absurd to contend that the admission of irrelevant evidence even without objection will supply the Pleadings, for what concerns the State cannot be waived. Modo et conventio vincunt legem; Alterum."

Tooker v. Arneus is a cognate of Campbell, Clark. These cases illustrate the Trilogy of Procedure—De non, Frustra and Verba fortius:

These maxims are the north star and its "pointers" the "Datum Posts," and always were and ever must be, in a government of protection. They have not been changed for they cannot be changed. It is these maxims and their cognates that the Code codified. These cases have many cognates and of these are:

Schofield v. Whitelegge, 49 N. Y. 259 (the facts must be pleaded—conclusions of law will not do—a denial will not
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aid the latter. C. & A. R. v. Clausen, Ill.).

Coffin v. Reynolds, 37 N. Y. 640 (a general demurrer cannot be waived—a statement is not aided by going to trial—this waive nothing of substance; Alstyne v. Freday, 41 N. Y. 174).

Emery v. Pence, 20 N. Y. 62 (limits of liberal construction—if enough is stated a remedy will be afforded in equity though the case fail at law. Dobson v. Campbell; Ut res: Wright v. Dodge, Ill.).

Munger v. Shannon, 61 N. Y. 251 (an answer need not have greater respectability than the statement that called it forth; an answer will not aid a complaint; Florida Co. v. Bell; Rogers v. Life Ins. Co. 101 N. Y. 328.

De non).

Vicksburg v. Henson (a judgment is limited by its Pleadings; where these end so the judgment ends—Knickerbocker Trust Co. (N. Y.); Verba generalia restringuntur).

§ 7—Campbell, Clark and Tooker, also Oakley v. Aspinwall, L. C. 222, 3 Gr. & Rud. are worthy of study in all jurisdictions, under all systems. A great Code case is a worthy case under all skies although it may not have arisen under a Code nor may it have the word “Code” in it. And on the other hand a good case at law or in Equity or in Crime or in Federal Procedure is good anywhere and everywhere. Study the New York cases above cited, and therewith Rushton v. Aspinall and Bartlett v. Crozier (Kent), quoting and reaffirming Rushton, L. C. 5, 6, 3 Gr. & Rud. also Mondel v. Steel and Munday v. Veil, L. C. 77, 79, 3 Gr. & Rud., and the mystery of the Code will be revealed. Add to this revelation Nalle v. Oyster, Milbra v. Steel Co., Palmer v. Humiston, Slacum v. Pomery and Jackson v. Pesked. Consider with these cases the maxim, Quis, quid, coram quo; and follow it through the Law Restated and in comparison therewith note what Serjeant Williams said (see Williams). This will illustrate the fact that the legal profession sometimes becomes obsessed with the notion that some supposed great one has spoken; and it will catch up the supposed holy words and parrot them on down the line through generations, as it has done in the case of such nonsense as “Aider by Verdict.” See Rushton; also

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Story. Here let us ask the student if Quis, quid is not worth more than what Serjeant Williams said? Now why will the legal profession worship Williams, Blackstone, Tidd, Chitty, Stephen Gould and Thompson and renounce the beacon lights of antiquity? “Remove not the ancient landmarks which thy fathers have set.” Why will the legal profession set up and follow for generations an author who assumes that substance can be waived? Well, it has. (See the Preface to Tyler’s Stephen’s Pleading; also Chitty.)

Story §§ 10, 25, 28, which we so often cite, are worth more than whole volumes which concede that the general demurrer can be waived. See the struggles over this question in New York, in Missouri. (Davis v. Jacksonsville, L. C. 328; Lilly v. Menke); also in Illinois (Walter, 250 Ill. 420.) (See citations to Walter in The Law Restated.)

We tabulate, for easy reference, a few important results.


Trilogy of Procedure sustained by Clark and Cowell v. Chung. These cases should be connectedly considered.

Verba fortius is ably sustained by Clark.

This is a universal and constitutional principle. Hughes’ Equity in Proc. 163-159; DOTSON v. Payne, L. C. 217, 3 Gr. & Rud.; Stephen v. Beall, 22 Wall. 239; U. S. v. Linn.


A cause of action must be stated: Florida Co., 0. S. 329. Answer will not aid.

Id., 328. Tooker. There are limitations of Aider Garrett.


The dictum (Quis, quid:) we next cite is the law: Quis, quid, coram quo.
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Story's Equity Pleading 10, 25–28; Bow-


An order of court must be supported by its record. Ephraim v. P., 79 N. Y. 546.

New York courts and authors have not had uniformity and consistency in citing cases: Bradbury's Rules, supra; Clark v. West; Bayles Code Pleading and Practice 1–4.


In American courts ater or waiver is one of the most unsettled questions. In some courts there are eight kinds of ater. See Aider. Note the bewildement herefrom.


A pleader states his case at his peril. He is charged with the consequences of a lack of motion in arrest and non obstante tertedocto. Slocum: Appellate Procedure; Davis v. Jacksonville Line; Nalle v. Oyster; Campbell v. Porter, L. C. 2, et seq.; 3 Gr. & Rud.; Collateral Attack; Windsor v. McNeil; also the state of Res Adjudicata; See Rules of 4 Gr. & Rud.; also Bowen v. Emmerson; Andrews v. Lynch; Tooker; Lilly; Clark; De non apparentibus; Ignorantia lepis neminem excusat. See Appellate Procedure, Windsor, L. C. 3 Gr. & Rud.

A cause of action must be stated; it is: jurisdictional: Nalle v. Oyster. The general demurrer cannot be waived. Clark; Campbell v. Consul; Boren v. Emmerson; Green v. Palmer; L. C. 90, etc.; 4 Gr. & Rud.; Thomas v. F. F. (lll); Florida Co., 176 U. S. 329 (answer will not d.) See authorities last above cited, also Collateral Attack.


The general demurrer cannot be waived. See authorities above cited. Nalle v. Oyster. There are limitations of Consensus tollit errorum. Quod ad inititio: Oakley v. Aspinall; Clark; Campbell v. Consul. "Theory-of-the-case" must carry out and set up cases and defenses from conclusions of law, irrelevant evidence, arguments and forensic conduct. See Aider; Gilling v. Bank.

There are universal, constitutional principles of law—Procedure—and to sustain this view Clark and its cognate cases can be cited: Clark recognizes the nonreformative Constitution, so does Oakley. It should be connectedly considered with Campbell, v. Consul; and Verba fortis. Law. 230 Pa. 458; Boyles v. R. R., 166 Ala. 516; 39 Am. St. 50; Story's Equity Pleading 665; 44 Chicago Legal News 119.

Procedure has a deeper meaning than is generally understood. It is derived from discipline and so called adjective law, or the definitions and narrow views of feudal authorities and their followers, who accept the view that "Parliament is omnipotent." This deeper meaning can be picked from the cases above cited. From these can be perceived the logic and the philosophy of law—Procedure. To support this view we have picked Clark and its cognate cases. Reference to the citations of them will show how Code authorities have regarded them.

§ 8.—Judge Peckham in McMullen v. Hoffmann saw a part of the great and necessary truth, although but dimly, when he said that the law of Contract was invested in the Maxims of ages (see § 17, Restatement). All admit that Equity has arisen from a few maxims (§ 14, Restatement; also the title Equity). Yet Equity cannot be separated from Procedure, and if Equity has immutable principles then why has not Procedure? It is conceded that they exist in Crime, Tort, and Construction. The American Bar Association informs us that the schools are most valuable for teaching the familiar maxims the general principles, and the leading cases. In a few schools the oral teaching recognizes the importance of the maxims, but the literature is mostly widely advertised and sold and given to the students does not teach the maxims but presents, instead, digests and Cycles of hodgepodge. (See Literature, and references to Elementary Law.) The literature by which the student tests himself and is guided is really more important than the conceded excellent oral instruction given in the schools. In the foregoing observations will be found the causes of the failure of the Code. Its literature is made up of confusing and straddling arguments. To Illustrate: the Preface to Tyler's Stephen's Pleading where Charles O'Connor assail the Code and his manifest ignorance of it seems to be commended rather than denounced as it should have been by every court and author who referred to his attacks. And so we might observe of Judge Grier's screed in the same Preface. No enlightened and protecting government ought enact good and necessary legislation and then allow ignorance and empiri.
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eanism and their handmaid commercialism to nullify that legislation. (See *Melius est petere: 4 Gr. & Rud.*

§ 8.—The statesmen of the hour knew all about arms and navies and orate about these, but of that which is more important, for the tranquility and perpetuity of government, namely, the due administration of the law, they have for generations shown profound ignorance. They have been more active in some governments to advance the cupidityous machinations of greed and rapacity, against the lawyer and his establishments, than to protect the greatest asset of the State. The student deserves the protection of government not less than the military establishments. He has been given supposed friendly and apparently needed legislation, and, next, a judiciary that has not only destroyed that legislation but also all the fundamental law which the Acts merely reaffirmed. To test these assertions, look at the Trilogy of Procedure §§ 1-7. Restatement: also the illimitable discussions over this in cases like Clark v. Dillon and its cognate cases. Intellects shattered and befogged with such discussions and teaching cannot go forth, as did the Pretors and jurisconsults of another mighty empire to gladden and protect the weak and defenseless under all skies. A government that cannot protect its own juridical establishment cannot give to others the very essence, the heart and vitalis of good government (see Story; Ruatton; Literature; Gulling and its cluster of cases; also Federal Lawyer).

If when the Code was enacted some court or author had plainly answered the "Macedonian cry" for more statutes and cases by showing that the Code was nothing new and that it merely reaffirmed old and archaic principles which were well illustrated in Ruatton v. Aspinall, Bristow v. Wright, Doraton v. Payne and J'Anson v. Stuart, all in Smith's Leading Cases (L. C. 5, 135, 217, 91, 3 Gr. & Rud.) this would have been a "case system" that would have saved the Code. But other views prevailed (see Pomeroy; Chitty).

§ 10.—"Consent to error" has become a great juridical factor in American courts. They seek to minimize *Quod ab initio* by magnifying *Consensus toluti errores*. Most of them seek to keep up with, if not to pass the Federal Supreme Court in its decisions reviewing cases from the highest court of a state for questions of Due Process of Law. The practice in this class of cases has not developed general rules, but each case is viewed as individualistic. Under the practice a court becomes a bureau rather than a court settling the law of the land. How to raise and present a Federal question is a matter of great perplexity. If this question can be judged from fixed stars we do not know what these are. It seems that this part of Federal procedure is viewed as a mass of statutes and conflicting cases—as *terra incognita*. Nor. Carolina.

Under Codes it is no better, where consent is permitted to interfere with the interest of the state (see Alterum non lade). The bulwarks of protection in judicial Procedure are thrown down wherever the pleadings and the mandatory record are waived. To this point *Campbell v. Consalus* can be cited; but the case does not roundly state the fact. And Clark v. Dillon is no clearer. As to *Tooker* it can be cited by the practitioners to indicate that, if consent is shown, a fatally defective pleading may be aided—that the omitted allegation may be supplied by liberal construction. (See Rushton; also the Introductory Chapter.) In the light of these observations, even these best cases of New York are open to criticism. Had the Trilogy of Procedure been set out, plainly stated and defined, and declared to be the law, it would have clarified all these cases. It would have done the same for the confused and straddling sections of Professor Pomeroy and his followers (see Pomeroy). By failing to cite and explain the fundamental law, and the citcases reaffirming this law, such as Ruatton, which Kent followed in *Bartlett v. Crozier* (L. C. 5, 6, 3 Gr. & Rud.), the cases have led into bewilderment. *Nalle v. Oyster* and *Vicksburg v. Henson* are Code cases. The true cases declare as fixed rules Universal, Constitutional principles. They repudiate the idea that the pleadings can be enlarged or limited or varied by matter which may or may not be made to appear from the statutory record. To this point *Campbell v. Consalus* and *Clark v. Dillon* can be cited. Also *Walter, 250 Ill. 420 (Municipal Court Act for Chicago) also S. v. Meuch; Sache v. Wallace* *Tuesday v. Vail, L. C. 79, et seq. 3 Gr. & Rud.*
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Wherever Consensus tollit errorem is enlarged in disregard of the State's Rights, there the "Theory-of-the-case" finds a footing. There the general demurrer is waived. (See Collateral Attack; Rea adjudicata.) The loose talk in Tooker countenances waiving the general demurrer. (Nalte v. Oyster; Mondel v. Steel, L. C. 77, et seq., 3 Gr. & Rud. See these cases in the Restatement.)

Relating to waiving the Pleadings the views of Judge Stafford in the Introductory Chapter, ante, deserve careful consideration. He takes the position of Story and the constitutional writers. (See Story.) And has he not made the situation more plain than any of the authors on Pleading? Suppose the New York case, or Professor Pomeroy, had made the reason as clear as does Judge Stafford.

The Code has been construed, here, by one sect, believing that "Parliament is omnipotent" and there, by another sect believing that the law is made by cases and yonder by a few who see fundamental law in the Prescriptive Constitution (§§ 509—522, Equity In Procedure; Oakley v. Aspinall, L. C. 222, 3 Gr. & Rud.). This result is a mass of conflicting decisions. (See Gulling and its cluster.)

§ 11.—In a case in New York [Morningstar, 52 L.R.A. (N.S.)] a querulous guest sued an inn for refusing entertainment. The inn defended upon the ground that the guest repudiated fair and reasonable charges. This was pleaded and proved; the court informs us. If so, the defense was sufficient. The substance of the issue was proved and could not be overcome by mere surplusage. But the guest's bad reputation was proved, outside the defense's allegations. To this evidence objection was made, and exceptions were taken, by the guest. (In such a case allegata et probata must correspond—see Bailey v. Hornthal.) This surplusage did not augment the recovery; that could be rested on material matter alleged and proved. The averments were sufficient and the over evidence was surplusage. Ut res magis valeat quam pereat.

Upon such a record the interests of the State attached. Interest reipublica ut sit finis litium. In the presence of this, the minor faults of the court ought to be condoned in appellate procedure, and therefore the case ought to have been affirmed, not reversed and sent back for a trifling. De minimis non curat lex. Surplusage does not vitiate matter of substance. Utile per inutile non vitiatur. Error without injury is no ground for a reversal.

Cases like Morningstar make those technicalities which orators mold into a club to assail the substantive law of procedure.

The rights of the State must be sought and vindicated at all stages of the general demurrer; minor faults will not prevail over major ones. In præsentiæ majoris causa potestia minoris. Morningstar had been given due process of law and substantial rights. After this his grievance became too small for the law to notice.

§ 12.—Let the serious, earnest student pause and look and consider. For this let us ask him if every system of Procedure must be confined not to respect the fundamental principles gathered and stated in sections 1-13 of the Restatement of law? Are not these the great Universal, Constitutional principles which must be known and respected by any intellect that can aspire to be a real lawyer? For this he must see and understand. For this we address him and seek to give him the clues. It is due to tell him that at least three distinct types of lawyers have written and taught. Also that each of these types have been interpreting the Code. One of these types is the Feudal Lawyer, whose leading motto is, "Parliament is omnipotent." (See Parliament); another, the Coke type, believes that the law is local and flat and arises from cases. (See Case System, 2 Gr. & Rud.; Melius est petere: 4 Gr. & Rud.) The other type believes that the law arises from fundamental principles and that from these a logic and a philosophy can be traced and taught. Of the last type are James C. Carter, David Dudley Field and the Court that decided Oakley v. Aspinall, L. C. 222, 3 Gr. & Rud.; also Riggs v. Palmer, 4 Id. also 8. ex rel. Henson, 4 Jd.; see Literature.

Let us ask if a student would spend his time over an astronomy that had been prepared by several professors who disagreed as to the basis or datum line from which they reckoned? If one insisted on the moon, and another the sun, while another reckoned from a fixed star what else could result but delay, strife, and confusion? But for the lawyer it is even worse than it
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would be for the astronomers. (See Blackstone's Theories, § 15, 1 Gr. & Rud.; also Literature.)

§ 13.—The efforts of Professor Pomeroy should be well comprehended for he was a New York lawyer and certainly ought to be accepted as a fair average. Of him it is just to say that he was a hybrid of the first two types. He accepted the view that "Parliament is omnipotent!" also that the cases made the law. We base our opinion upon his sections 506–608, Code Remedies; and more particularly, Paragraph, 2, 1876, Preface; also §§ 75, 509–514; 533, 546, 592, et seq. Not one of these passages was written in the light of the maxims above referred to, although in his Municipal Law and in his Equity he approved and commended maxims. If Maxims are the lights for one subject, why not for all? Has not Procedure its maxims as well as Equity? Where did Professor Pomeroy cite and explain one of these maxims? (See §§ 1–13, The Restatement of the Law.) Did he not find his exposition on the statutes and the cases? Did he anywhere plainly state that the Code merely reaffirmed old and archaic law? Did he cite or mention Collateral Attack, or Res Adjudicata or Due Process of Law; or explain the general demurrer and why it could not be waived? Look at the matter in §§ 1–13 of the Restatement and see how the Professor stood as to the value of this matter? Did he not approve Verba fortius (Antidedel v. R. R.) in his section 533 and then renounce it in his § 540? Did he understand that Antidedel and Dovaston were cognates? Also Rushton and Bartlett v. Crozier (Kent)? Why did he cite the English cases from White and Tudor's L. C. Equity and wholly omit all reference to the great Code cases in Smith's Leading Cases? Are there any better Code cases than Rushton or Dovaston or Bristow or J'Anson v. Stuart; or Guest v. Warren quoted and followed in Campbell v. Conseaus? What value would he have added to his work if he had cited and quoted the Trilogy of Procedure and the old English cases that reaffirmed these maxims? Suppose he had stated these maxims and cases and had plainly stated that he either approved or disapproved of them in his sections referred to, would it not have tremendously improved his work? We deem the last interroga-

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istory of much consequence to the student.

And here let us ask if any Feudal author ever said as much as that Res Adjudicata dictated the law of substance in Procedure? Now this is a fact but only the Roman school has perceived it.

Blackstone, Tidd, Chitty, Stephen, Gould, Thompson, Pomeroy and their followers exploited Procedure from statutes and cases and not from the universal, Constitutional canons of all ages. Just what these are is set out in §§ 1–13, of The Law Restated. They saw the little things—the tails, but never the major things, the heads. Herefrom the student can see whether the law can be restated. At least he can see that the hearts and the vitals of the six leading subjects can be stated in some other way than from statutes and cases. Whether or not this is the needed restatement, he is left to judge. One thing is certain, the Code brought no Restatement of the law with it, as was hoped by its friends, and why? Because its expositors straddled; they undertook to ride both the Roman and the Feudal. And so by Construction the Code, which was conceived in the Roman Spirit, became Feudal. To-day it is more than Janus faced, for it has been made to look every way; to-day it is the worst tangle of snakes in the entire body of the law (see De non). Look at Gul ling and citations of it in the Restatement. Look at the discussions of the question, whether a recovery must be secundum leges et probata in New York, 40 L.R.A. (N.S.) 1085, 1086; also Morningstar, 52 L.R.A. (N.S.) also Theory of the Case.

The Code can be stated upon the maxims, or upon the old English cases, or upon the statutes and supposed Code cases. Now the student can look and choose from all efforts the Restatement he likes best. The statement of the Code in New York may be compared to the statement that the Federal courts have tried to set up. How they are progressing may be judged from cases like Baker v. Warner. Had it not been for a few cases like Windsor, Pennoyer, Nalle and Vicksburg v. Henson the Federal jungle would have to be passed over as terra incognita.

§ 14.—Story intimated much in his Equity Pleading, § 10, quoted in § 47 Hughes' Equity; Davis v. Jacksonville; but such intimations have not been suf-
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Sufficient. Cases are needed and the judiciary have not been clear and positive. Thus the above cases prove it. Authors have waited for the judiciary to lead the way. The Prefaces of Professor Pomeroy and of Judge Nash show (see Chitty). Had the Judiciary been clear and positive as to the fundamental law, authors and warring sects would have fallen into line, and would have followed the thread that leads from the labyrinth, now called the "legal jungle."

Suppose that some court or author had set out the Trilogies of Procedure (ante), and along with it its Case-nomenclature, Rushton, Bristow and Devonast, and had plainly said, we approve, or we denounce these principles and these cases, what would have been the results to the profession? But instead, like the Feudal authors and their followers, they too, saw dimly, and they straddled the fundamentals, upholding them here and denouncing them there exactly as did Professor Pomeroy. (See Pom. Code §§ 533, 546.)

State the fundamental principles of all systems to any serious and earnest student, and see if he cannot readily comprehend the major, organic, principles of all Systems, without regard to the individualized and partitioned kinds of procedure, which are so generally assumed to exist. It is this assumption and supposition that feeds the loose talk in some quarters that something new and sui generis has come (Baker v. Warner; and contenions for the Municipal Court of Chicago, construed in Walter, 250 Ill. 420). These assumptions have led into bewilderment. (See Theory of the Case; Literature.) 32 Am. Law School Review, 602-617.

§ 15.—To sum up the foregoing, attention is called to the old law which was merely codified. Also to the fact that the Trilogy of Procedure logically allies itself with the greatest maxim of jurisprudence—Altérum non lèderea and its cognates. Also that the trio of cases selected, and their cognates of all ages and countries, are consistent with that Trilogy, and that they all reaffirm it; and that this fact is apparent to all who are familiar with that Trilogy, which can be read through those cases. Now can any other maxims be picked and stated that will be in harmony with each other and with the rules of the general demurrer and its correlatives to and including Rea Adjudicata and "Due Process of Law?" We say there are none.

Such being the facts, why have not Code expositors named all of these matters and plainly stated the situation away from local and flat laws and so cleared the bewilderment that it could be comprehended above the fog and mists of Feudalism and its theories. For three hundred years the lawyer has been kept on the march through the desert to reach a land of light and reason foretold by Bacon.

The Trilogy referred to should be familiarized as is Caveat emptor or Ignorantia legis or Volenti non fit injuria and also made index topic heads so as to be readily turned to, taught and impressed.

When a statute or a decision reafirms the old law, this fact ought to be known (See Oakley v. Aspinall). Such maxims, made index topic heads, are the most accurate and certain clues for finding the law (see Literature). Look at these facts and note how the "new" literature leads away from the fundamentals; also the manifest effort to discard the text-books,—the work of Story, Greenleaf, Broom, Bishop, and of J. W. Smith. (See Literature.)

To gather from the older books the old cases that cannot be recalled nor blown away by every wind of doctrine, such as Rushton v. Aspinall, Bristow v. Wright and Janson v. Stuart, and present the pith of such matter, is at this time almost unappreciated by the legal profession. At present its tastes and appetite are ravenous for books that are nothing less than "jokes" upon the lawyer his intelligence and his establishments. The medical profession and scientific men will step forth and defend their professions against the ways of audacious publishers and their empires. But it is otherwise with the legal profession (see Literature).

The trio of maxims and cases above presented and integrated have many sides and angles. They profoundly enter into Construction, also into Constitutional law.

To illustrate: Suppose that a judgment is entered in disregard of the rule that a general demurrer cannot be waived, and this judgment, being obnoxious to that rule, is offered to prove an estoppel of record to sup-
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port an execution or judicial sale in any court, either state or Federal; should not that judgment be held coram non judice on Collateral Attack* (Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.)


Uno absurdo dato infinita sequuntur.


§ 16.—From Rushton and its cognates the heart and vitals of Universal Constitutional Procedure can be picked and demonstrated to be common to all systems that can serve a Constitution- alism. And we have named the fundamental maxims that these cases reaffirm and which the fundamental lawyer sees through Constitutions, Statutes and Decisions. Local and flat laws are construed by the above maxims and these cannot be legislated and decided away. They are imbedded in the greatest maxim of jurisprudence —Altemus non iedere q. v.

The logic and the philosophy of Procedure is around the above maxims. They are imperial law in Procedure. They are all related and they are only reaffirmed by Codes and Practice Acts. These maxims are, so to speak, datum posta, from which most is reckoned. The law is an entirety, and when its philosophy is lost the law is lost. To learn the logic, philosophy and history of the law, one must begin with its first principles. The law does not arise from cases; cases simply show the application of the principles. This important fact is well illustrated by considering, Campbell, Clark and Tooker, supra. (See case system; Literature.)

The Code was a codification, not a creation. The Code unified, simplified and expedited but it created nothing whatever of substance. Now what did it codify? Every Code author should have plainly and clearly have told us that it codified the fundamentals of Procedure—the above maxims and their cognates some of which will next be mentioned. Also that these maxims are from the Roman—from Equity which is Roman—and not from the common law except as the common law adopted Equity. It was principles of Equity that the Code codified and not anything of the Feudal Common Law, which was not molded and directed by the rules of Res Adjudicata, which is also Roman. (See Chapter I. 1 Gr. & Rud.; also Literature.)

§ 17.—Clark v. Dillon, 97 N. Y. reviewed and discussed from a New York viewpoint in Bradbury's Rules of Pleading, 9–16; 1564–1570. (See New York.) Clark v. Dillon is often cited to support what is intimated in Campbell v. Consalus relating to a higher law, a law that cannot be waived and dispensed with by the stipulations—the compacts of the parties to the record. It stands to support the attitude of the state in Procedure. Also a Universal, Constitutional canon of Construction of all documents, and, of course, Pleadings, where it is paraphrased thus: Every presumption is against the pleader. See Vicksburg v. Henson. It is a paraphrase of a rule of Res Adjudicata which is: "Estoppels are odious and are strictly taken." See Vicksburg v. Henson.

Clark and its cognates may be cited to oppose the Feudal motto, "Parliam-ent is omnipotent," which has been one of the most disrupting elements in Procedure. It is opposed to the logic and the philosophy of the law. It stands to oppose the view that Procedure is a local and flat question.

It stands with Dobson v. Campbell, L. C. 232a, 3 Gr. & Rud. also O. & A. R. v. Clauson (III.) to fix the limits of liberal Construction. For this it is a cognate of Jackson; Rushton; Portland, — Or. —, 46 L.R.A. (N.S.) 1121. See Ut res; also Baker v. Warner (U. S.), discussed anent Vicksburg. Equity In Procedure, §§ 434, et seq.

§ 33.—The Trilogy of Procedure was reaffirmed by statute in legislative ex- pressions. And these principles have also been declared by courts. This we will next call attention to:


Elsewhere, ante, we combine and
Codes.

briefly annotate this trio of cases to show that they are in harmony with and vindicate fundamental law—the Trilogy—already introduced.

These Universal, Constitutional Principles have led to the authentic construction of Codes and Practice Acts where they have been comprehended. They now lead the Construction of the Municipal Court of Chicago. (Walter, 250 Ill. 420.) And the Federal court sometimes respects them. (Florida Co. v. Bell, 176 U. S. 328, 329. [Quod, ab initio]; Vickenburg v. Henson, 231 U. S. 259; NalStreet v. Oyster.)


In England Rushton, Bristow and Davison L. C. 5, 135, 217, 3 Gr. & Rud., support the fundamental law of all ages. See these cases cited in Equity. Look at the old law and the Code and see if it brought anything new.


This case has many objectionable features of both contract and of Procedure. It defined a condition precedent (Cutter v. Pocell, L. C. 308, 3 Gr. & Rud.), as a penalty, and upon this change of definition swept away a condition precedent in a written contract upon the testimony of a claimant in opposition to the rule protecting a writing. (Master v. Miller) quoted in 44 L.R.A. (N.S.) 388, and made a new contract for the parties (Hoare v. Remnie).

It also assumes that the old "Datum Posts" of the law no longer guide. It is like Baker v. Warner, Gross Coal Co.

Codes.

148 Wis. 70, and Biela, 139 Wis. 150, all of which assume that a "new dispensation" is at hand. They do not in plain language say that a pleading cannot be all things—"fish, flesh or fowl"—as the court said in Lincoln County, and in Emerson v. Nash, (Wis). They can be cited against Antisdel v. R. R. also Rushton and its cluster. They are not clear and positive like Campbell v. Consalus and its cluster.

These vague, hazy and indecisive cases give rise to the claims of commericalism that "more than five thousand new principles are stated and developed each year." They found the claims that "the law is the last interpretation of the law by the last judge." Also such expositions of the Code as we find in Pomeroy's Remedies, 506-608, and Bradbury's Rules of Pleading, 9-16; 1564-1570; and 40 L.R.A. (N.S.) 1085, 1086, 50 Id. 1-32; and such straddles as are perceived in the Preface to Stephen's Pleadings by Tyler, also in Stephen's Pleadings, 149, 150, quoted in Equity In Procedure, §§ 117, 118; 273. In the 50 L.R.A. the old rule Ut res magis valeat quam percip was called something new and under the heading "Theory of the Case," which is another thing altogether. See 4 Gr. & Rud.; also Thompson; also Story.

Bogardus v. Ins. Co., 101 N. Y. 328, is an application of Ut res: holding that reference can be made from one count to another to sustain a judgment or sentence. That formal defect must be aptly objected to Rushton: Bogardus simply reaffirmed R. v. Waters, L. C. 71, 3 Gr. & Rud. Bogardus is not new law, as we are left to suppose by New York authors cited. Bogardus is not peculiarly a Code case because it arose under a Code or has the word Code in it. Changing the terminology of Ut res: and arguing it under the title of some exotic as something "new" does not make it "new" law. Such treatment simply bewilders and leads the student away from the fundamentals. Applying Verba fortius in Antisdel or Ut res: and Verba relata in Bogardus, do not make these singularly and peculiarly Code cases. Campbell v. Consalus followed Guest v. Warren and so both of these cases stand for the Code and for organic principles as well. But what Code author has told us this important fact? Campbell v. Consalus and its
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cluster will unfold the fact that the Code brought nothing new of substance also that rambling discussions over and around fundamental law without any express reference to it simply adds to the babel—the jargon of judicial anarchy in New York.

Multitudo imperitorem perdit curiam.

They have not settled Secundum allegata et probata, 40 L.R.A. also 50 Id. supra.

§ 20.—In conclusion it seems well to state plainly that we know of no author who has taken the view that the Code is only a few fundamental principles well comprehended and worked out. It is in this light that we have sought to present it. The principles are named and defined in sections 1-13, of the Law Restated. All other statements of the Code are from statutes and cases. They omit the maxims referred to. We have introduced them and explained them as Universal, Constitutional principles common to all systems,—as rules of logic and of sense, as canons of Construction and of the Prescriptive Constitution. Herefrom the student can see what is lost by trying to teach paraphrases of these principles as belonging to each individual system. If there is one canon common to all systems then this should be broadly taught and be recognized as a Universal principle. Then why has not Verba fortius been so taught? Code authors speak of “central ideas,” of “organic” principles of; “primary rules” and of fundamental law but where do they comprehensively define them, is the question? Looking to statutes and cases has been the rule, and these have led to discussions like Clark v. Dillon and Gullion v. Bank and to sections that impeach the greatest authors of a generation. (See Story.)

Every author on Evidence, Pleading, Practice, the Code, Construction and Constitutional Law might well have introduced and discussed the Trilogy of Procedure (§§ 1-13, The Law Restated). They could have written much that gathering and much away from statutes and the motion, “Parliament is omnipotent,” but not one of them has. To justify this conclusion turn to Verba fortius, and follow its citations through The Law Restated, and the situation will appear.

From that maxim you will be led to Docaston, Antisdel, Clark v. Dillon, C. & A. R. R. v. Clausen, Rose v. Milne and many other cognate cases. Now note that it is around that canon and these cases and their cognates that a furious strife has raged in New York, Missouri (Mallinckrodt), Illinois, and other states that have sought to follow those states. Appeals to the Federal courts have been in vain. The decisions of these have not been broad and sweeping enough to lift the fog and guide through the darkness. And now come cases which appear to strengthen the “theory-of-the-case” doctrine. (See Baker v. Warner.) Good government depends upon the due administration of the laws.

A reference to the cases cited will too plainly tell what is the matter; they will plainly point to causes that are dismembering Procedure and all that depends upon it. The discussions amply Prove Of Law in the Federal court will show that the jurisdictional character of pleadings and of the mandatory record are not understood. It is upon these frail moorings that good government depends; but this fact is not comprehended by the Feudal Lawyer and his followers. (See Feudal Lawyer; Melius est petere fontes quam sectari rivulos, 4 Gr. & Rud.) The addresses in Bar Associations calling for Revolution are patriotic and well founded.

Multitudo imperitorem perdit curiam.

COERCION: To commit crime when im- dicitable. P. v. Curry, 253 Ill. 143, 39 L.R.A.A.(N.S.) 143, 97 N. E. 142; R. v. Torpey. Wife a clerk selling obscene cards for hus- band is presumed to act from. S. v. Mardini, N. J. L. 72 Cent. L. J. 137-140: Cases. Exception: Keeping bawdy house. 1 Hawk’s P. C. 1, quoted, S. v. Jones, 23 W. Va. 913 (“A thing is construed according to that which was the cause there- of”).


COLLATERAL ATTACK: 2 Gr. & Rud.; Equity In Procedure.

This we classify as one of the Cor- relatates of the general demurrer, whereat the grounds of the latter may be raised and considered without re- gard to objections, or exceptions or stipulations (See Campbell v. Con-
Collateral Attack.—

*salus; Guest v. Warren*. The general demurrer is never waived; but that would be the result if the theory of the "new" school were true; that is, that after the entry of judgment the Pleading is to be construed more liberally than it is before the entry of judgment. (3 Bouv. Dic. Rawle's 3 Revision 1914, title Pleading.) And such is the doctrine of others. (See Story; Rushton; Literature; 1 C. J. Cyc, 45, 66, 100 (identity of cause how proved) "Theory-of-the-case;" Baker v. Warner. But see Goldham v. Edwards and cases cited therewith; Alternum non ladiere. Is a correlative of the general demurrer. See Demurrer; Nalle; § 23, Restatement.

The mandatory record is tested by and upon that record, and nothing else. See Mandatory Record; also Statutory Record, § 13, Restatement. Yet it is sometimes held that not only the Pleadings but the evidence, the bill of Particulars, the agreed statement of facts, the instructions and the arguments, and forensic conduct in general, may be offered and admitted in evidence to oppose the objection upon collateral attacks. See "Theory of the Case"; Bouv. Dic. supra; also Story; Literature.

Pleadings are opened upon. Nalle; Rushton; Story; Campbell v. Consoleus; Mondel v. Steel, L. C. 77, 3 Gr. & Rud.

Trilogy of Procedure are rules of. §§ 1–20, Restatement.

Great maxims of, are the Trilogy of Procedure; Quis, quid: Quod ab initio: §§ 3–5, Restatement. Worsor v. McVeigh, L. C. 1, 3 Gr. & Rud.

Searches the substantial—the mandatory record. §§ 12, 22, Restatement see Nalle; Vicksburg v. Benson.


**COMMERCE:** Interstate Commerce Act; Discussion. See Minnesota Rate Cases. 230 U. S. 352–560; Gibbons v. Ogden, 2 Gr. & Rud.


**COMMON CARRIER:** Liability for acts of drunken persons, admitted upon its premises. Adderly v. Brit. Gt. N. R.
Common Counts.—

philosophy of the law from term to term. For all these matters he relied on his statutes and his cases. His most esteemed and sought authors never saw anything in Procedure but a mass of statutes and cases and the result of their teachings is that the rules of certainty are sought in local and flat laws and not in the higher matters we have mentioned, his definitions of pleadings, of the mandatory record and his learning general forms of Actions, forms of Pleading, his general issue, his general allegations and his aider. He thought he was a great lawyer if he could put his finger on the statute—on its letter—and read a case, or quote Sergeant Williams or his Tidd, his Chitty, his Stephen or his Gould.

We do not know the author or court who stated that Pleadings are jurisdictional and are servitors of the high policies above mentioned. (See §§ 83–123, 1 Gr. & Rud.; also §§ 121–146, 1 Hughes’ Procedure; also its Preface.) Story was the ablest, but even he failed to dwell sufficiently to impress his great sections. He merely hinted the logic and the Philosophy of Procedure.

What the mechanical annotators of commercialism have written of the above matters would fill volumes. They begin with a case good, bad or indifferent and wander around it in the "jungle" and never get anywhere except to a period where they call for another case. The cases of Allen v. Patterson and Roper v. Clay will illustrate. (See these cases discussed in Equity.)

The common counts are offensive to the genius of the Code. Sturges v. Burton, L. C. 111, 3 Gr. & Rud. To the first and leading provision of the Code. 50 L.R.A. (N.S.) 1. Also to the rule that Pleadings ought to be true. Fabula non judicium. Actio non datur: To the idea that Pleadings are jurisdictional. To the idea that Pleadings are to limit the issues and to narrow proofs. Charging a case in varied and fictitious forms may, however, from necessity, be permitted in some cases. Whitney v. R. R. L. C. 115, 3 Gr. & Rud.

From the start it should have been the construction of Codes that the language of a common count might be employed to avoid proximity. Beyond the call of necessity and to avoid proximity the idea of the blunderbuss

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pleadings of the Feudal Lawyer should have been denounced, as the Code provided. A "cause of action" must appear without unnecessary repetition. 50 L.R.A. (N.S.) 1. The courts are in hopeless conflict as to employing them. 2 Gr. & Rud.; also Equity In Procedure. Weber v. Lewis, upholds and Bowen v. Emmerson, denounces. These cases are mentioned in relation to Contracts.


The abuse of the common counts was an great step towards the "Theory of-the-case." (See Story.) Wing.


COMMUNIS ERROR FACIT JUS: Common error sometimes passes as current as law. Consensus facit legem; Consensus tollit errorem. Modus et convenio:


CONSENSUS TOLLIT ERROREM: Abrogation in error obviates its effect. This maxim may be classified as one of the liberal "rules of Construction. It is closely related to Ut res magna valeat quam percat; also Modus et convenio vicinus legem; also Omnia praeambulat ratio. See Presumptions. It is cited in §§ 20, 22 Restatement. Its philosophy is indicated in § 22, 1 Gr. & Rud.; also L. C. 290–299, 3 Gr. & Rud.; §§ 245–269. Equity In Procedure. Ader by verdict is a part of this maxim. See Rule 113. There are many expressions of this maxim. See Consensus facit legem; Consensus error facit jus; Pacta consistat.

Formal error is waived if not objected to. § 73, 1 Gr. Ev. See Jurisdiction. Statutes do not change this maxim nor do they create it. They often reaffirm the old law however. Dufour v. U. S., 37 App. Cas. D. C. 437, 500 (the statute emphasized). See also Tooker, under the other Codes. (Observations relating to this maxim.)

No maxim is more important than is Consensus; and none is less understood. The logic and the philosophy of Consensus, is that whatever is formal, or dictatorial, or is surplusage, or immaterial may
Consensus, etc.—be waived and is waived as a matter of public policy unless it is aptly and precisely stated. The exception is to keep good by a proper demonstration on the facts. The statutory record also prohibits the issuance of errors founded on this record. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud. (1852) 103, 104, 120, 1 Gr. & Rud.) Rightly comprehending this maxim eliminates the importance of Jackson v. Peaked, a case most dear to Sergeant Williams, Tidd, Chitty, Stephen and their followers. (See Literature.) We believe that the most dangerous quagmire of the law will be understood from a collective study of Story's sections, also 1 Gr. Evidence, 19, 73, 522-540; Jackson v. Peaked; Biennell v. Hopp; Sperce v. Parker; Dobson v. Campbell (Story) L. C. 232a, 3 Gr. & Rud.; Kushon v. Aspinall (Mansfield, L. C. 5, et seq., 3 Gr. & Rud.) The common law pleaders attached much importance to their truth and in fact statutes have nothing to do with the logic and the philosophy of the law of substance. See Aitchison. Repealing, we say, that if the matter is formal, immaterial, surplusage, it is waived and judgment on it is imposed in contravention of public policy as above stated. It cannot be recalled. Story's § 10, and Kushon are right; Greenleaf's §§ 19, 173 are unfortunate because of their loose expressions. But he no doubt had the Jackson v. Teale in his mind, before which he allowed some of this nonsense and jargon in his lines. See Alder. He could have said that substance must affirmatively appear and be capable of establishment on general demurrer; that this is never waived, but that it is otherwise with the special demurrer. See Goodham v. Edwards and a restatement of this case under Literature; Contra: State Bank, 53 L.R.A.(N.S.) 120, 120, 127.


CONSTRUCTION: The maxim, gathered in the Rastatement are from many angles rules of construction. Of such are the Trilogy of Procedure. These are rules of strict construction. But there are liberal rules. See Consensus: Boni jure dicis; Lex non esse definit; also Equity In Procedure; Kushon 2 Gr. & Rud.


CONTEMPORANEUM EXPOSITIO EST optima et fortissima in lege. The best and most efficacious mode of expounding an instrument is by referring to it the time when and the circumstances under which it was made. "Once a mortgage, always a mortgage." U. S. v. N. R. R. 91 U. S. 72, Washington Terminal Co., 36 App. Cas. 190. Lex non esse exactus.


CONTRACT: § 1—There are three leadmaxes of contract law and which are:

1. Non hae in fereda vet: I did not come into this compact. This maxim involves the law of assent (the union of the minds). It is discussed in the case of Cutter v. Poucel, L. C. 303, 3 Gr. & Rud.; also in Hoare v. Ronne. This case is stated in 38 L.R.A.(N.S.) 541. Boston Ice Co. v. Potter, L. C. 320, 3 Gr. & Rud.


3. In pari delicto potior est condicto defendentis: In equal fault the condition or position of the defendant is presumed. He who hath done a wrong shall not have equity. One must come into court with clean hands. The state interdicts illegal acts and will not enforce forbidden contracts. Hoiman v. Johnson, L. C. 303, 3 Gr. & Rud. and following cases: Trist v. Child, L. C. 314, 3 Gr. & Rud. In effect the state says to the illegal contract: Aliterum non est fortasse. Also to the judgment-contract founded on the coram non judice record.

The above maxims are more extendedly referred to in The Grounds and Rudiments of Law; also in Equity. See Contract 1 Gr. & Rud. §§ 280-290; also 2 Id.; also L. C. 301-417, 3 Gr. & Rud.; also Equity In Procedure pages 406-472, the leading maxims, general principles and the leading cases. Therewith the general principles are worked out and spread out.

The request, the consideration, the promise and the acceptance. Lampleigh v. Brathwayt, L. C. 301, 3 Gr. & Rud. and the cases that next follow. Each student is invited to examine these.

The contract, the tort and the crime are often closely related. South Wales Mining Federation (1905) A. C. 239, 1 Brit. R. C. 1-21. Thomas v. Winchester; R. v. Wheatley.

Its major and organic maxims from which most of the law of Contract is deduced are: Non hae in fereda vet; Ex nudo pacto non oritur actio and In pari delicto potior est condicto defendentis. These are the great stars and the secondary things are the rivulets down below. Phases of these maxims reflect the greatest maxim of the law from various angles. (See Aliterum non fereda.) Public policy (Salarus populi
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-suprema lex-has many interactions with Contract and the latter maxim is only a part of Alterum. The law of Contract arises from a few maxims (Judge Peckham in McHellen v. Hoffman, § 17, Restatement). In pari delicto is as much a maxim of Procedure as of Contract. Sec. 15, Restatement. The interactions of these maxims with Alterum reveal the interactions of Contract with Equity. (See the title Equity.)

Contract is closely related to Procedure. A Judgment is a Contract as elsewhere explained. Without more it can be seen that Contract has interactions with Procedure, Equity, Crime, Tort and Construction. See Secs. 15-17, Restatement.

Pleading of Contract. Sec. 17, Restatement. Bowen v. Emmerson, Weber v. Lewis. By following these cases the dreadful conflict will be perceived. It is indicated in Sec. 17, Restatement.

Outline considerations of Sec. 17, Restatement. A few maxims bottom the law of Sec. 17. Restatement.

There are limitations of Contract to alter or vary Procedure in courts. This was the question in Campbell v. Consalas which we cite so often and make so prominent under the title Codes. Herefrom can be seen a phase of Consensus tollit errorem. This phase discloses the intimate relations of the fundamentals of Contract and of Procedure.

In pari has many paraphrases. Three of these the Feudal Lawyers accept as maxims of Equity. (See Equity.) A study of In pari will show that a great principle pervades and underlies the entire body of the law. Phases of it are reflected from all branches of the law. The law is an entirety. It cannot be learned in a partitioned way. (Preface 1 Bish. New Crim. Law. Pages vi, viii.) To support this conclusion we ask the student to study In pari and its paraphrases.

8. Non hue in foderæ veni: I did not come into this compact. In other words, a contract is an agreement depending upon mutual assent, express or implied.

A contract cannot be enforced upon unwilling parties, or against the mind’s consent, in a government of freedom and protection. Herefrom will appear the importance of the technical safeguards in juridically presenting the elements of a contract.

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which requires the words, at the “instance and request.” It is these words in pleading a contract which tenders an issue on the important element of the assent. These, or equivalent words, are necessary to juridically present the element of assent, which is an essential factor of contract.

A contract is a mutual agreement, between competent parties for a valuable consideration, relating to a lawful subject-matter, expressed with certainty and satisfying the requirements of the statute of frauds.

Contracts are divided into three classes, namely, contracts of record (Judgments), deeds and simple contracts. Juridically presenting a judgment is either pleading it for a recovery thereon, as in debt, or for pur- poses of Res Adjudicata, or estoppel of record. 1 Gr. Ev. 522-542. Pleading a judgment in debt, for a recovery thereon, is simple, for it is aided by presumptions, at least when it is from a superior court of record, acting according to the course of the common law. Unless aided by statutes—Codes—pleading a judgment of an inferior, or statutory tribunal, is attended with strict requirements; these strict rules are indicated in Crepps v. Durden (Smith Leading Cases, Leading Case 113, et seq., 3 Grounds and Rudiments).

Pleading a judgment as an estoppel of record involves many rules. Such a plea is one of the most refined and learned of the law, as is indicated in the discussions of the Duchess of Kingston’s Case (Smith’s Leading Cases, Leading Case 76, 3 Grounds and Rudiments) and Outram v. Morewood (Leading Case 25, et seq., 3 Grounds and Rudiments). See RULES OF RES ADJUDICATA, 4 Grounds and Rudiments.

Pleading a deed is attended with allegations, that it was made, executed, signed, sealed and delivered, and a copy thereof should be appended. A deed conclusively imports a consideration. Jackson v. Cleveland, 2 Grounds and Rudiments; see Skal, 4 id.; Pym v. Campbell, Leading Case 46, et seq., 3 Grounds and Rudiments.

Juridically presenting a simple contract depends on averring the assent and the consideration, where these are not implied from other facts alleged, as in cases of commercial paper. Rann v. Hughes, Leading Case 313, 3
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Grounds and Rudiments. See Weber v. Lents.

Expressio unius est exclusio alterius (The express mention of one thing implies the exclusion of all others) is a cognate maxim of non hae in jadera veni. The latter maxim is illustrated in many cases which discuss the admissibility of oral evidence to affect a writing.

Non hae in jadera veni is a principle that is safeguarded by the rule, that oral, contemporaneous evidence is inadmissible to alter or affect a writing. 1 Greenleaf Evidence 275; see Oral Evidence, 4 Grounds and Rudiments. The writing that the parties have made for a witness of their contract cannot be set aside and a different contract be substituted. Expressio unius est exclusio alterius. This canon of construction applies to constitutions, statutes, codes, pleadings, records, judgments, commercial paper, indeed to every gathering and collocation of words. It is a rule of logic and a universal canon of construction. It is a rule that safeguards the maxim, non hae in jadera veni, the discussions of which often involve procedure, equity, construction and constitutional law.

Parties must make their own contracts. 44 L.R.A.(N.S.) 388. Courts will not make contracts for them. Courts were not created and ordained for that purpose. It is not their function. Res inter alias acta (38 L.R.A. (N.S.) 548). Many cases illustrate this principle. One of these is: Cutter v. Povell, 6 Term Rep. (D. & E.) 320, 101 Eng. Reprint 573, 2 Smith Leading Cases 1-53, 8th ed., Leading Case 388, 3 Grounds and Rudiments and cases there cited. A sailor hiring for an entire voyage, must perform it before he or his representatives can recover. There can be no apportionment for a part of the voyage.


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The express agreement controls. An authorized surgical operation must not be varied by the operator, while the patient is under an anesthetic. Relator — Okla. —, 50 L.R.A.(N.S.) 880. See Deviation; also Presumptions, Expressio unius, Non hae.

Accident and impossibility can be stipulated against. One is bound by his contract, although it becomes an impossibility. March, 162 Ala. 295, 36 Am. St. 24, n.; Paradine.

Entire contracts can be lawfully made, and if so, then they should be enforced.

Nullus commodum capere potest de injuria sua propria (One should not be allowed to take advantage of his own wrong).

One who has made a contract and violated it should not be allowed to recover thereon.

One who makes a contract and breaks it is not entitled to the aid of a court, 44 L.R.A.(N.S.) 388. See Clark v. West, supra; also Alterium.

Non hae is illustrated by cases that cannot be blown away by every wind of doctrine and of “new” ways of writing and teaching the law. There are cases that cannot be recalled. See Lampleigh v. Brathwait and its cognates and the discussions that attend these cases.

3.—Ex nudo pacto non oritur actio: No cause of action arises from a bare agreement, or in other words, a consideration is necessary to support a promise to assume an obligation, to pay something or to do something, unless the promise is under seal—a formal contract or specialty. A seal
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The idea is, that a promisee must give or part with something in order to have a valid and subsisting "cause of action." This idea is illustrated in many cases. *See* Leading Cases 301–333, 3 Grounds and Rudiments; Hughes' Equity In Procedure 467 (title Contract).

It is no consideration for one to do what in law he is already bound to do. This phase of the maxim is well illustrated by the widely cited and notorious case of *Cumber v. Wane* (1 Smith Leading Cases 633–679, 8th ed., 1 Strange, 426, 93 Eng. Reprint 613; cited, 2 Greenleaf Evidence 28, 31; also in Anson Contracts, Parson Conts. Wharton Conts., and generally in all well written contract works. It is the leading case on Accord and Satisfaction.


*Parker v. Mayes*, — S. C. —, 70 Cent. L. J. 353 (follows *Cumber*).


There are many illustrative cases of the principle, *Ex nudo pacto*. In *Stilk*, the sailors could not charge extra to do all they could do to save the ship. Leading Case 313, 3 Grounds and Rudiments, where other cases are cited.

*Officers cannot charge for doing what they are already bound to do.* To illustrate: They cannot charge for making an arrest, nor claim a reward for arresting a criminal. *Greenhood Pub. Pol.* 326–368: cases; *Mason v. Manning*, — Ky. —, 150 S. W. 1020, 76 Cent. L. J. 119–122, notes; *Kinn,*

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118 Wis. 537, 99 Am. St. 1019; *Smith v. Vernon County*, 188 Mo. 501, 70 L.R.A. 59, 9 Cyc. 328.

*Cook v. Bradley*, 1 Conn. 57, 18 Am. Dec. 79, Huff. & W. Cas. Conts. 133, Leading Case 314, 3 Grounds and Rudiments. A promise to pay for a past consideration, not moved by a previous request, is insufficient. As where a son promised to pay one who had already made advancements to the promisee’s indigent father. *Cook v. Bradley*.

*Bulkeley v. Landon*, 2 Conn. 404, Leading Case 315, 3 Grounds and Rudiments. A promise to pay for past services or advancements already made is insufficient. This is illustrated in the discussions of *Lampleigh v. Brathwait*, Leading Case 301, 3 Grounds and Rudiments (services rendered at request will support a subsequent promise to pay for such services). But otherwise if the services were gratuitous, as in *Bartholomew v. Jackson*, Leading Case 302, 3 Grounds and Rudiments.

*Mills v. Wyman*, 3 Pick. 207, Langdell Cas. Conts. 370, Huff. & W. Cas. Conts. 201, Pattee’s Cases 284, Howe’s Civil Law 201, 9 Cyc. 350, Leading Case 316, 3 Grounds and Rudiments. *Ex nudo pacto* is illustrated by many cases, and in all cases the principle is the same. If one is already bound to do a thing, it is no consideration for a promise to allow him more or extra for it. This is the correct principle. It is the burden of *Cumber v. Wane* and its cognate cases. *See* Leading Cases 311–319, 3 Grounds and Rudiments.

*Contra*: Dreyfus, — Ark. —, 69 L.R.A. 823; *Clayton*, 74 Miss. 499, 60 Am. St. 521, n.; *Clark v. West*, 193 N. Y. 349, 86 N. E. 1, elsewhere extendedly referred to.

*Lampleigh v. Brathwait*, L. C. 301, 3 Gr. & Rud. *Stated*: B. was in the clutches of the law for killing M. He was poor and this fact was known to L. who at the request of B. went to London and by his influence at court secured a pardon for B. out of friendship and not from expectation of recompense. At this time there was no contract. But years later when B. became the heir to an estate he then for the first time promised L. £100 for which L. afterward sued B. who defended upon the ground that the services of L. were a mere gratuity—a mere voluntary courtesy to pay
Contract.

for which there was no obligation. (Bartholomew v. Jackson, L. C. 302, 3 Gr. & Rud.) However L. recovered
upon the promise to pay for a con-
sideration moved by a previous re-
quest. Had there been no request then
there would have been no recovery.

There are no more instructive cases
than Lamplough and Bartholomew L. C. 301, 302, 3 Gr. & Rud. They pre-
sent the maxims Non hæc in fæderà
evni and Ex nudo pacto non oritur
actio in clear and forceful illustrations. See 1 Sm. L. C. 268-293, 8th Am. Ed. (table résumé). See also the
cases gathered in Equity In Procedure
at pages 466-472. These should be fa-
miliar to every student.

The assent and the consideration for a contract are presented in cases, 301-333, 3 Gr. & Rud.

It is no consideration for a wife to agree to acquit her husband of all
claim to support; nor to give a sher-
iff a reward to do what he is already
bound to do; nor to pay one for his
gratuitous acts or advancements al-
ready performed, or made. Herefrom
arises the rule, that a volunteer paying a
debt cannot recover it. See title
Cowper, Hughes’ Equity In Pro-
cedure, and cases there cited.

The law of the consideration is one of the most important elements in
the law of contract. See Leading
Cases 301-333, 3 Grounds and Rudi-
ments.

In all simple contracts a considera-
tion must be alleged and proved, ex-
cept in cases of commercial paper,
wherein a consideration is prima facie
presumed. Rann v. Hughes, Leading
Case 313, 3 Grounds and Rudiments, and cases cited. 50 L.R.A. (N.S.) 21.

The statement of a “cause of action”
in a simple contract must contain an
allegation showing the consideration, other-
wise the statement of the “cause
of action” would be subject to general
demurrer, which of course cannot be
waived, but may be first raised or
renewed at the stage of motion in ar-
rest of judgment, or at the stage of
collateral attack; or such infirmity
may arise in the tests of Res Adjudi-
cata. The allegation of a considera-
tion is essential for the “cause of ac-
tion;” for the maxim is, Ex nudo
pacto non oritur actio (Out of a nude
pact aris no “cause of action”).

Herefrom becomes involved the first
rule of procedure, which is, De non
apparentibus et non existentibus ead-

Equity in procedure: Hendrick v. Lind-
say; Lawrence v. Fox, is a mixed
question of both contract and of pro-
cedure as to the rights of a third
party under a contract made in his
behalf. The question is who must sue
upon the contract—may the third
party sue the promisor? As Simple’s
Case was discussed in England so
Lawrence has been discussed in New
York. It was decided in 1869 and
we are told that it has been in ques-
tion 260 times and that the citations
to it cover 18 pages. (See Calendar
Ad. Am. Law Book Co. 1913.) The
discussions are a part of Ex nudo
pacto non oritur actio; they also in-
volve phases of Quis, quid, coram quo.

Generally and upon principle one
who parts with no consideration has
nothing but a nude pact and this will
not support a promise. But where
the promisor received a consideration
and has had the benefit of it then on
principles of Equity he should be held
to an accounting to someone. Now so
far as the promisee is concerned he
is not really wronged for the benefits
of the contract belong to the third
person and not to the promisee. And
the maxim is Actio non datur ex
damnificatio (An action will not lie
for one who is not injured). But
Equity enforces great moral principles
of duty and of right and will not suf-
er a wrong without a remedy—Ubi
jus iti remedium. Juris præcepta
sunt hæc: Honeste vivere; alterum
non iadere; suum cuique tribuere—
The Lawyer’s Golden rule and which
is the highest law. The demands of
these maxims for a remedy cannot be
denied wherever morals and good faith
are respected. But who shall sue for
the wrong is the question. Some
argue that there being no privity be-
tween the third party and the promis-
Contract.

or he cannot sue on the contract. But why must the promisee sue for the benefit of the third person? To require him to do so is only a matter of form and Equity regards substance and not form. Courts led by these principles have followed the Equity idea and have finally come to let the third person—the real party in interest sue as a plaintiff. And so the Codes provide. The equity rule does not violate the contract for the reason that it is but fair to construe the contract to mean that the third party might sue for a breach of the contract and this construction is consistent with Equity and what the parties intended. "Verba intentione debent servire. Equity looks at the intent and not form. On principles of estoppel the promisor should not be permitted to deny the right of the third party to sue in his own name.

Principles of Equity gave the action of money had and received; also the assumption of the vendor's mortgage liability to the property when it is sold to a vendor. See Hendrick v. Lindsay, L. C. 319, 3 Gr. & Rud.

The foregoing are illustrations of the progress of Equitable Principles in both Contract and in Procedure and also how these aid the law of commerce and business relations.

84.—In pari delicto potior est conditio defendentia: In equal fault the position of the defendant is preferred; or in other words, one who hath done iniquity shall not have equity; or, one must come into court with clean hands. Ex causa turpi non oriitur actio.


Government in its scheme of protection advances the cause of morals and education; it renounces all that makes against its scheme. The state, or government, demands the coram judice proceeding in judicial operations; and it demands the lawful subject-matter of contract. If one establishes a judgment (contract) by proceedings in violation of fundamental law, the state, or government, will not respect such judgment (contract), but will set it aside and declare it null and void without regard to the relations or wishes of the parties to such a proceeding; the coram non judice proceeding is obnoxious to the welfare of the State. Windsor v. McVeigh, Leading Case 1, et seq., 3 Grounds and Rudiments.

The first rule of Res Adjudicata is, that the proceedings shall be coram judice. The judgment (contract) that is coram non judice is null and void, and will be so held at the stage of collateral attack; also at the stage of motion in arrest of judgment.

The contract by deed and the simple contract must relate to a lawful subject-matter else they will be declared In pari delicto. The attitude of the state in procedure calls for the coram judice proceeding. In contract law the state demands that the agreement shall relate to a lawful subject-matter, else the state will refuse to enforce it. If a plaintiff sued a defendant for services rendered the defendant, at his instance and request to corrupt a court, or its functionaries, no court would permit judgment to be entered upon such a statement—such a "cause of action," and if the judgment were entered on such a "cause of action," the court would afterward set it aside, even at the stage of collateral attack.

Jurisdiction does not attach to matters that are unlawful, that are forbidden by the State. But see In pari. Courts are not created to act on forbidden matters, and if they do, their proceedings are coram non judice. And so it is that the State will not enforce an illegal contract. Collipa v. Blantern, Smith's Leading Cases; stated, 2 Grounds and Rudiments; Holman v. Johnson, Leading Case 363, et seq., 3 Grounds and Rudiments.

If the statement of the "cause of action" shows that it is tainted with illegality, then no valid judgment can be founded on such a statement; and it matters not whether it is demurred to or objected to. The trouble is, that an illegal subject-matter will not attract jurisdiction; a court has not power to enter a valid judgment upon a matter that is In pari delicto. Section 10, Story's Equity Pleading, quoted section 47, Hughes' Equity In Procedure. A lawful subject-matter is indispensable for the Coram judice proceeding. No one who has not been lawfully injured has a right to complain to a court. One is never an injured party who shows that his wrong arose from an illegal contract. Ex dolo malo non oriitur actio.

Fraud, crime and illegality vitiate
Contract.—

all into which they enter. Nullus commodum cæpere potest de injuria sua propria. (No one can take advantage of his own wrong.) Crimen omnia ex se nata vitium (Crime vitiated all into which it enters).

Fraud, crime and illegality need not be objected to, if it appears, either from the pleadings, or from material evidence. A court will sua sponte notice, either the Coram non judice proceeding or the In pari delicto compact.

When such defect appears from the mandatory record, then it may first be objected to on collateral attack. When it appears thereto from it is always vitiating. But when such defect appears from the evidence, then it must be objected to at the stage of the trial. In Occanyan v. Winchester Arms Co. (Leading Case 41), 3 Grounds and Rudiments the statements of counsel disclosed the illegality, and of this statement the court acted upon its own motion.

The attitude of the state is in all of the affairs of men. Its requirements and maxims cannot be waived. Campbell v. Consuls, Pacts privatoorum; Oakley v. Aspinwall, L. C. 222, 3 Gr. & Rud. Res inter alios acta; Allocutum, Modus et conventio sunt legem. In pari delicto.

§ 5.—Maxims and cases of contract.

Key numbers and points for brief making.


The "instance and request." Lamplough v. Brathwaite, Leading Case 301, et seq. 3 Grounds and Rudiments.

Gratuitous and unasked services will not support a promise: Bartholomew v. Jackson, Leading Case 302, 3 Grounds and Rudiments; Boston Ice Co. v. Potter, Leading Case 320, 2 Grounds and Rudiments.

Entire and severable contracts: Cutter v. Powell, Leading Case 308, et seq. 3 Grounds and Rudiments.


Contract.—


Misrepresentation; false representations; liability for: Carec v. Freeman, 34 L.R.A.(N.S.) 375, et seq., 3 Grounds and Rudiments.

Consideration essential: Ex nudo pacto: Cumber v. Wane, Leading Case 313, 3 Grounds and Rudiments, see Y. C. Co. Contracts, Hughes' Equity in Procedure, also, Leading Case 301, et seq. 3 Grounds and Rudiments.


Inducing breach of contract; liability: Schow v. Ok — 30 L.R.A.(N.S.) 854, 122 P. 203; Dr. Miles Medical Co. 220 U. S. 373.


Contracts not to be performed in a year; contracts which may be performed in a year; Ut res magis valeat quam percipiat.
Contract.


Bona fide goods worth less than $50; goods to be manufactured: Lee v. Griffin, 1 B. & S. 272; Leading Case 338, 3 Grounds and Rudiments; Smith, 64 Conn. 264, 42 Am. Jur. 554, 153.


Betapppel; contract founded upon a course of dealing; Allegans contraria non est rubenda: Mulh. v. Gates, 119 Wis. 643, 4 Grounds and Rudiments; Ut res majus valet quam percut.


Bona fide; Corridors; Contracts with: Cogan v. Bernard, Smith Leading Cases, Leading Case 350, et seq., 3 Grounds and Rudiments.

Insurance contracts relating to: See title, Insurance, 2 Grounds and Rudiments, and cases there cited.

Partners; contracts by and with: See title, Partnership, 4 Grounds and Rudiments, also AGENTS, 2 Grounds and Rudiments.


Commercial paper; negotiability of: Bona fide purchaser; who is; principles relating to: Miller v. Race, supra; Swift v. Tyson; Miller v. Race, Smith Leading Cases, 4 Grounds and Rudiments; Swift v. Tyson, 4 Grounds and Rudiments.

Bona fide purchaser; who is; principles relating to: Miller v. Race, supra; Swift v. Tyson; Bassett v. Nowotny, 2 White and Tudor's Leading Eq. Cases, Leading Case 385, et seq., 3 Grounds and Rudiments.


Alien contra; one cannot assign a contract on one ground and then contrary this, 2 Brit. Rul. Cases, 550. See Aliens.


Insane persons; contracts of: Molton v. Camronx, 2 Exch. 487; affirmed, 4 Exch. 10, Ewell Lead. Cas. Inf., Id. & Cov. 76 R. R. 664, Leading Case 413, et seq., 3 Grounds and Rudiments; Keener Case 553-556; Walker, 142 Ala. 500, 110 Am. St. 509.

Subrogation; priority; law of: Dering v. Whinglesea, White and Tudor's Lead. Eq. Cases, 2 Grounds and Rudiments; Holmes stated; Stockwell, 101 Cal. 102, 98 Am. St. 25-50, ext. n.; Mobile Insurance Co., 41 S. E. 408, 44 Am. St. 725-730, ext. n. Volunteers paying debt are not subrogated. See title, CONTRACT, Hughes' Equity in Procedure; Crumlish, 14 S. W. 500, 23 L.R.A. 120-134, ext. n.


Huguenist property; White & T. L. Eng. No one can contract where his integrity and his interests conflict; Idem agnus et paternos, se nolent portare: Keech v. Sandford, 2 Grounds and Rudiments; Michoud v. Girod, 4 Grounds and Rudiments.

Idem agnus et paternos, see Hughes Equity in Procedure, Secs. 590-522.

§ 6. How to plead a contract is in much confusion. On the other hand is found Bouce v. Emmerson and on the other hand Weber v. Lewis and,
Contract.

16 Mo. 174. All of these are Code cases. The discussions of Criminal cases are not more refined and unsatisfactory than are the discussions of these cases. In Boucen the court refused to infer from the allegations, that flour was sold and delivered, that there was any promise to pay therefor. Of course the rule is that when no time is fixed for payment that the payment is due at once. The maxim Verba fortius: was destructively applied in this case. In contract law if no time for payment is expressly agreed upon then it is due at once. Ut res: Quod pure debetur presenti die debetur (That which is due unconditionally is due now). In such a case as Boucen the maxim supplies the omission. Regula:

In Weber, the court went to the other extreme and supplied the omission of the allegation that a promise was made from the failure to aptly object. From the verdict or judgment the defect was cured. Although it was conceded that the statement was demurrable. See Alterum: In effect the court held that the general demurrer can be waived. If waiver supplied one allegation then it might supply all and therefore from the verdict or judgment the pleadings might be supplied. Omnia praesumuntur rite.

In Wing, it was not alleged to whom the goods were furnished except that they were furnished to a third person (who was not named). And had he been named this would have made no difference for the court held that in effect the goods might have been furnished to a child or servant of the defendant and therefore the statement was sufficiently certain. Ut res: Criminal cases are not more refined and technical than this case. See Moore v. C., L. C. 21, 3 Gr. & Rud.; also R. v. Wheatley, L. C. 19, 3 Gr. & Rud.

Lester v. Fozcroft, L. C. 341, 3 Gr. & Rud. involves the equitable exceptions of frauds. This class of cases surpasses all criminal cases in technicalities. Halligan v. Frey, 40 L.R.A. (N.S.) 112–120. See Garrett.

But on the other hand in Henry Id. 1–44, the allegation—the main equity that possession was taken under the oral contract—was supplied from the findings of the referee although he had decided the case in favor of the defendant. However the appellate court reversed his decision and found that the failure to plead to a fatally bad bill aided the omission of the material allegations. Also the admission of irrelevant evidence without objection. Here an appellee was required to present a bill of exceptions to save his recovery. Altogether we think this case is a fit companion to Gulling which we cite so often.

The law of pleading a Contract must be picked from decisions holding every way. It is Story on one side and Thompson on the other side. See Story; Rush ton.

In the first code cases began the struggle which has never ended. We refer to Biddle v. Boyce (Mo.), and Eno v. Woodworth, and Allen v. Patterson (N. Y.), of which we make due mention in other relations.

Judge Nash and Professor Pomeroy wanted more cases and legislation to round out the Code. Both have come and now we have such contentions as we find in Weber.

In observations anent Lamplough v. Brathwait, L. C. 301, 3 Gr. & Rud. and in Rann v. Hughes, L. C. 312, Id. are found the principles which ought to govern the pleading of contract. The situation shows that cases have not settled the law. In Tooker v. Armous, statutes and cases were discussed and the language of the statute was rejected against the view that the facts must be stated. De non.

In Weber, Boucen, and Professor Pomeroy were quoted but he failed to cite the above maxims to light up the way as he did in Equity.

It must be alleged that the consideration moved at the "defendant's instance and request." Carson v. Ely, 13 Mo. 265; Lamplough.

Contra: Gramp v. Dunnivant, 23 Mo. 254. This case and Carson are set out and discussed in Equity In Procedure, §§ 463–482. Wing.

Bibliography of Contract: 1 Hughes' Gounds and Rudiments, sections 290–290: see title, CONTRACT, 2 Id.; also Leading Cases 301, et seq., 3 Id.; sections 13–19, Hughes' Equity In Procedure; also sections 463–482, Id.; also title, Contra, pages 463–478, Id.; where the maxims, leading cases and general principles are stated. In connection with the above maxims and Key Number cases consult Lawson Conta., Anson Conta., Keener and Parson's.

CONTRACTS EX TURPI CAUSA. VEL contra bonos bonos nullus est: One cannot derive a benefit from his own.
Contractus, etc.—
wrong. See In pariX Nullus com-
modum: Ex dolo male non oritur
actio.

CORPORATIONS. 2 Gr. & Rud. Also
Equity In Procedure. What is doing
business in a state, Wendell, 40 App.
Cas. D. C. 1, and note.

CONTRA SCRIPTUM TESTIMONIUM
non scriptum testimonium non furtum.
A fact which the unwritten testimony
shall not be brought. Oral evidence
is inadmissible to alter or affect written.
See Oral Evidence, 4 Gr. & Rud.; Funt
enim de hoc contractibus: This maxim
involves phases of the Trilogy of Proce-
dure, L. C. 46-54, 8 Gr. & Rud. Oral
Evidence Quod per recordum.

CONTRIBUTION: Dering v. Earle of
Winchestr. Wh. & Tud. L. C. Eq. 2 Gr.
& Rud.

CONVENTIO PRIVATORUM NON PO-
test publico juris derogare: An agreement
of persons cannot derogate from
public right. In pari. Mandel v. Beale,
L. C. 77, 3 Gr. & Rud.; Campbell v.
Consulius: Salus; Aliterum.

CONVENTIO VINCIT LEGEM: The agree-
ment of the parties overcomes the law.
See Consensus. But the rights of third
parties may not be affected. Aliterum non
idem; Rea inter alios. Campbell v.
Consulius.

CORAM JUDICE: A record that will stand
the tests of the Trilogy of Procedure.
Coram non judice: a record that is fatally
defective. See Windsor v. McVeigh, L.
C. 1, 3 Gr. & Rud.; Hober v. Miller, 44
W. 625, 63. Some order of court, see
Presumptions; Galpin v. Page, 3 Sawyer, 93.

CORPUS DELICTI: Must be proved. 69

COUNSELMAN v. HITCHCOCK, 142 U. S.
547, L. C. 180, 3 Gr. & Rud. Nemo ten-
tor iussum accurare.


CREPPE v. DURDEN, L. C. 113, 3 Gr.
& Rud. Cited, sec. 20, Restatement. Omnía
praemuniri rite; Green County; Quin-
lan; Rice v. Farris, cited in Equity; Pové-
R. R. 240 Ill. 238; § 540. Equity In
Gr. & Rud.

Creppa is stated and instructively discussed
in P. v. Tacep, 60 N. Y. 559, 19 A. R.
211, cited in Knickerbocker. The student
will do well to turn to these cases and
get at least a good impression of them.
They are very instructive. They stand
for the Trilogy of Procedure. § 1. Re-
statement. They fix the limits of liberal

CRIMEN OMNIA EX SE NATA VITIAT
Crime vitiates everything that springs
from it. In pari. Ex dolo malo. Mc-

Crimen, etc.—
35, Restatement.

CRIMES: Defunciation, 1 Gr. & Rud. 291;
Maxims and cases of, 1 Gr. & Rud. 291-
294. The leading maxims of, next follow
ignorantia legis neminem excusat:
Ignorance of law will not excuse:
Ignorance of fact will excuse. Mc-
Naughten’s Case, L. C. 195, 10 Gr.
& Rud. Lecrett’s Case, 4 Gr. & Rud.
Actus non facit reum nisi mens sit
actus se facit: The act does not make the
guilty unless his intention were so.
Slayton’s Case, L. C. 195, 10 Gr.
& Rud. Lecrett’s Case, 4 Gr. & Rud.
See R. v. Almon et seq., 4 Gr. &
Rud.; P. v. Roby, 4 Gr. & Rud.; 220
U. S. 59; cases.

3. Quis primum poecat, ille facit reiam
Person responsible to the jury is
responsible to the jury is
guilty of the offense.

CRIMES EST INSTRUERE EJUS EST
abrogare: Whose is to institute his
jus est usque ad column: Whoever owns the
column to the sky. 132 Am. St. 94.

CUMBER v. WANE, SM. L. C. 131.
3 Gr. & Rud. Cited § 17 Restatement
Ex male portus. Check sent on
condition of payment in full accepted. Is not pay-
ment. Whittaker, 210 Mass. 204.

CUSTODIUM AND USAGE: How pleased.

CUTTER v. POWELL, SM. L. C. 306.
3 Gr. & Rud. Cited § 17, Resta-
agement. (Non habe in fera.) Expres-
so in fera.

Cutter is one of the great Contract
cases. It should be familiarised along with Cumber v. Wane and Lampley v. Braithwaite,
L. C. 301, 3 Gr. & Rud. See those cases
in Smith’s Leading Cases; they are stated
in relation to the title Contract, once.
also in Equity In Procedure, pages 466-
472. See also 1 Gr. & Rud. §§ 280-289.
In these citations the maxim cases and
general principles can be found. See also
the Restatement sections. Look at those
and get an impression.
DASH v. VAN KLECK. 7 Johns. 417, 5 A. D. 291, L. C. 257a, 3 Gr. & Rud. (The prescriptive constitution is the higher law.) In praesentia majoria. 2 Kent, 8-12.


The general demurrer is never waived.

What will not pass as coram judice on collateral Attack cannot pass as such at the stage of Appellate Procedure. Umo aburodo dato infinita sequuntur. See definitions. Story's Equity Pleadings, ch. 47, Hughes' Equities of Alien. Rush- ton; Story (Joseph).


DEAD. 2 Gr. & Rud. Mutilation of, right to sue for. Floyd; N. C., 64 L.I.C. (N.S.) 510.

DEATH. Presumption of. See Presumptions.

DEBILITATE FUNDAMENTUM FALLIT opus: Where the foundation falls all go to the ground. Cited, 10 § 1, Restatement, also Equity In Procedure (Secs. 206-217, (The Presumption).) Vickers v. Houston; Nalle v. Oyster; Garrett, Campbell v. Consulat; Walter, 250 Ill. 420; Windsor, 254, 420; Gr. & Rud.


DELEGA VETUS POTESTAS NON POTEST delegari: A delegate authority cannot be delegated. See Taylor v. Brown; Van Blyke.

DELEGATUS NON POTEST DELEGARI: A delegate cannot appoint another. This is a principle of agency.


DEMMERER: The general demurrer cannot be waived. Altemum; Linn; Story (Joseph); Garrett, 1 Gr. & Rud. 201-261.

Its rules arise from the Prescriptive Constitution and are discoverable at the discretion of the Trilogy of Procedure. See De non; Quod ab initio; Campbell v. Consulat. Walter, 250 Ill. 420 (Municipal Court Act of Chicago) Quod nullum est, nullum est aucturum. See Equity In Procedure, pages 479-481, also secs. 2, 12, Restatement.

The general demurrer is always governed by the same texts. Secs. 2, 16, Restatement. See Goldham v. Edwards; Verba fortius.

The claim that pleadings are construed by fluctuating rules in effect stands for waiving a pleading that has no merits or in other words that a pleading that is subject to the general demurrer has no merits and therefore does not come within the rule. For the general demurrer cannot be waived. Tucker v. Armouz.

In legislative language this rule is reaffirmed in Codes.


Verification.

The State Bank case cites and follows 6 Encyc. Pl. & Pr. 384; also Hosier v. Elia- son, 14 N. Y. 525; 2 Tid's Practice 919, inter alia. See Collateral Attack, 6 Rul. C. L. 97.


De non, etc.—

Construction and of Evidence and might well be vindicated in every broad discussion of Constitutional Procedure. Nothing is more incredible than the way these great principles have been ignored and assailed as the discussions of the statutes of Amendments and of Jefails will show. These statutes are aimed at the extirpation of these principles. And authors, almost, without exception have encouraged those attacks. (See Theory of the Case.) The Code reaffirmed these principles and other statutes deny them. (See Gulling v. Bank [Nev.])

These principles are the bulwarks against arbitrariness and usurpation. They are jurisdictional and dictate a certain definition and place for Pleadings and thus: “Pleadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it.” It is this view that most of the American courts reject.

Upon uniform respect for and application of these principles depend the due administration of the laws. Wherever these principles are denied there the way for arbitrariness and abuse of power is paved; and there the logic and the philosophy of the law is turned into chaos and procedure has become a mass of statutes and conflicting cases (see New York, Illinois and Missouri. In Equity in Procedure).

De non is a canon of logic, of Evidence of Pleading and of Construction. It calls for the rules of the general demurrer and all of these defend the attitude of the state at all stages, times and places exactly alike. (See Collateral Attack; Res Adjudicata.) These are the rules of substance which statutes cannot abolish. There are limitations of legislative authority.

DEPARTURE: There shall be no departure. See Frustra; Res Adjudicata. The Trilogy of Procedure dictates as rule. Blackstone, Tidd, Chitty, Stephen, Gould, Pomeroy and their followers assert this rule but without sufficient elaboration to impress it as the same thing in the maxim Frustra probatur quod probatum non relevat. It is vain to prove what is not alleged. 1 Gr. Ev. 51, 61-65 (applies with equal force to both civil and criminal cases); 2 Tidd Prac. 920, quoted Literature, post; Story; Bristow, L. C. 135, et seq., 3 Gr. & Rud., Garrett. In other language the Code reaffirms it. Cockerell, 50 L.R.A. (N.S.) 1, and cases in notes pro and con, upholding Story here and Thompson there. The latter is upheld in Henry, 49 L.R.A. (N.S.) 1-44, in an extremely offensive way to the maxim also the logic and the philosophy of the law (an allegation of possession in cases like Lester, L. C. 341, 3 Gr. & Rud., and Halligan, 49 L.R.A. (N.S.), can be waived. S. P. Gulling; Merchant’s Co. 42 L.R.A. (N.S.) 996, 998, which followed 6 Ency. Pl. & Prac. 468-470. See Literature.

Consider with Henry, Milbra, 45 L.R.A. (N.S.) 274, 277, 278, quoting Mondel v. Steel, L. C. 77, 3 Gr. & Rud., also the rule that “What ought to be of record must be proved by record and by the right record.” Palmer v. Humiston, 46 L.R.A. (N.S.) 640; Campbell v. Consalua; Walter, 250 Ill. 420.


The language of the Code is a paraphrase of Quis, quid, coram quo, 4 Gr. & Rud. This language is clear and peremptory that the “cause of action” must appear in the statement, complaint or petition and not from the answer or reply. And a fortiori not from matter that belongs to the statutory record, nor from oral evidence as in Gulling and in Henry. From the notes to Cockerell, 50 L.R.A. (N.S.) 1-32, all kinds of cases can be picked. Story is upheld here and Thompson there. This is the “Theory of the Case” but under a case of a mild type of variance. See Federal Lawyer; Devine v. R. R.


DEVIATION: By Carrier withdraws from him the defense of accident. It makes him an insurer; it is a change of contract: an implied contract to be sure but still and nevertheless a contract. Note here: Kish v. Taylor (1911), 1 K. B. 625, 2 Brit. R. C. 575, ext. n.


Dovaston, etc.—

Dovaston have been recalled. So we see that it was the lawyer and his establish-
ments that set going the notion that great cases can be recalled.

Had the lawyer plainly expressed Verba for-
itas and elucidated it so it could be com-
prehended as a great Universal, Constitu-
tional principle then there would be
some other "Datum Post" to reckon from
instead of "in jargon of words."—Coke's
three degrees of certainty. See Litera-
ture. Monday; Trilogies.

DREDSD SCOTT CASE. 19 How. 393-633.
Excellent forms of Pleading. History of
Slavery.

DRUNKENNESS, when a defense to crime.
U. S. v. Drew, when to contract, Gore
v. Gibson, L. C. 413, 3 Gr. & Rud. Matz,
54 L.R.A. (N.S.) 1121.

DUCHESS OF KINGSTONS' CASE: Sm.
L. C. 1 C 76, 3 Gr. & Rud. The rules of
Kee Adjudicata. Estoppel of Record,
4 Gr. & Rud. See Kingston's Case.

DUE PROCESS OF LAW: Must be de-
finied from the Trilogy of Procedure. It
means notice, a hearing according to that
notice and a judgment entered in ac-
cordance to that notice and that hear-
ing. Standard Oil Co. v. Mo. 224 U. S.
278; Vicksburg v. Henson, 232 U. S. 259;
Naille v. Oyster, 230 U. S. 165. See
Audit Alteram partem. See 2 Gr. & Rud.;
Equity in Procedure. Starbuck v. Mur-
ray.

The law of nations demands the elements of
an 11. Restatement. Feudal Lawyer. Pleadings
are Jurisdictional. Garrett; Palmer v. Humiston. Authority depends
upon. Mercella, 255 U. S. 578.

Due Process of Law.—

Reputation pleading is a question of local
es parte, L. C. 107, 3 Gr. & Rud. Nihil
possumus contra veritatem.
Pleadings are to give notice. Garrett;
Parasio v. U. S. (See §§ 1-13, Restate-
ment).

DUE PROCESS OF LAW RECORD. See
Mandatory record. Dictated from the
Trilogy of Procedure which includes In-
terest replecias. See secs. 1-11, Re-
statement; 8 Ruil. C. L. 457-485.

DUPLE'S CASE. Sm. L. C. 2 Gr. &
Rud. Technical rule for construction of
leases; a condition if once waived is
waived forever (a feudal rule that has
long been a stumbling block).

129-156, L. C. 106, 3 Gr. & Rud. Fraud
vitiates service of process. Ez dolo malo
See Pettibone, 4 Gr. & Rud.

DURLESS: Sasportas v. Jennings; Wat-
kins. Non hac.

DUTTON v. POOLE, cited in Equity. 86
Eng. Reprint, 205, 215. Cited, § 11,
Restatement. One may contract for the
benefit of a third. Hendrick v. Lindsay,
L. C. 319, 3 Gr. & Rud.; Lawrence v.
For. Contract.

DYER v. DYER, W. & T. L. C. Eq.; Re-
sulting trusts. See title Equity, in
Equity In Procedure.

DUPLICITY: A formal objection which
is waived as such. Consensus tollit er-
Reputation vitiates a pleading. Pain,
L. C. 107, 3 Gr. & Rud.
E

Ego incumbit probatio qui dicat, non qui negat: The burden of proof lies upon him who afirms not him who de-
nies. See Burden of Proof: Actor: Bonnell v. Wilder, L. C. 185, 3 Gr. &
Rud. This maxim and its cognates which are many reflect glimpses of Verba for-
tius; Favorabiliiores.

Eighmy v. P., 79 N. Y. 546-560, cited,
Sec. 20, Restatement. In this case it was held that in a perjury case
facts might be made to appear by al-
legations of conclusions of law. This
case stands for Omnia praeumuntur-
rite, and it is a cognate of Rice v.
Travis in Illinois; also the Green
County Bonds (U. S.). Also Balse-
weis v. R. R. 240 Ill. 238, § 346,
Equity in Procedure. The most ex-
tended discussion of presumptions to
support jurisdiction is in Crepps v.
Durden, L. C. 113, 3 Gr. & Rud.

The above American cases offend the
maxim De non, § 1, Restatement.
Also Clark v. Dillon and Tooker v.
Arnold.

In some cases it is manifest that
a judge makes up his mind to reach a
certain conclusion and that for this
end he will not only stretch the law
but that he will also tear it, or break
it. Judges not appreciating the Tri-
ology of Procedure very often flagrantly
violate the Constitution. And so all of the "Theory-of-the-case" judges
have distinguished themselves. These
judges often go from one extreme to
another. In one case no Pleading can
be certain enough and in the next
omissions of material allegations are
supplied by extravagant applications
of aider. See Story; Rush/on; Lit-
terature; Morningstar; Wing Clark v.
West.

Aider; In some cases the arguments
are not only bitenight, but they are
Jesuitical as well. Many examples of
these facts can be pointed to in the
Federal decisions. See Pettibone;
Perce v. Fernandez; Terre Haute R.
R. v. Indiana; § 151, 1 Gr. & Rud.
Conclusions of law did not state a
fact. Hopper, L. C. 4, 3 Gr. & Rud.;
Hanford, L. C. 86, 3 Gr. & Rud. Bow-
en v. Emmerson.

Eisdem generis: Of the same de-
scription. 2 Gr. & Rud. 2 Hughes Proc.

Elections: Betting on are void con-
tracts Quod, ab initio, and a bona fide
purchaser gains no rights under such
contract, not even commercial paper.

Elections:—
Exchange Bk. 139 Ga. 260, 51 L.R.A.
(N.S.) 549. See Script v. Tysom. In
parti L. C. 358, 3 Gr. & Rud.

Electricity: Duty to safeguard and
to confine. Paducah Light Co. 156 Ky.
197, 52 L.R.A. N.S. 566, Fletcher v.
Bylands; Indemnur v. Dames.

Elevators: Great care required of
Indemnur v. Dames; Heaven v. Pender.

Emerson v. Nash, 124 Wis. 369, 100
First Code case in N. Y. Discussion of the
common Counts; Conclusions of law.
Cited in Equity in Procedure.

Enticing one to break a con-
tract. Quinn v. Leathers, wherein is dis-
cussed Quinn v. Hall, The Nopol case,
Lumley v. Gye, Allen v. Flood. These
five cases lead the discussion of a great
principle of both Contract and Tort.
And it often abuts Crime, Conspiracy,
Malicious. The majority of the cases
most every aspect of the question is presented in Quinn.

To commit crime, Perrins, 40 Okla. 539, 51
L.R.A.(N.S.) 718, R. v. Coney. See En-
trapment.

Entrapment: To commit crime. Kemp
8 U. S. 84, 91 App. A. D. 539. See En-
ticement. R. v. Coney.

Equal Protection of the Laws:—

Equitable Estoppel: Horn v. Cole,
cited Equity. See Equity.

Equitable Exceptions to the
statute of frauds: Lester v. Poecroft,
L. C. 341, 5 Gr. & Rud.; 49 L.R.A.
(N.S.) 1112-120.

Possession must be taken under the con-
tact and have been held openly, con-
tinuously, notoriously, exclusively and
unequivocally. And this equity must be
alleged and proved with great strictness.
See Henry v. Howard. — N. C., 49
L. R. A. (N. S.) 1-44; Rush/on.

Equity: Its great maxims, principles
and cases. See Title Equity. In Equity
in Procedure.

Maxims of Equity: See Jurisprudentia
sunt haece: Regula pro lege et deficit lex;
Ubi jus ibi remedium. These three
maxims include many of those hervi-
fore classed as maxims of Equity.

See Equity in Procedure.

Equity: As a river without a main
channel winds its way and percolates
through all fields of the law. It bot-
toms, it ramifies, it shapes and directs
and supports all. It is the spirit of
the law—the "letter killeth but the
spirit maketh the law." This quota-
tion carries with it three of the great-
Equity.—
est maxims of the law and which we
have gathered and sought to impress
as the Trilogy of Equity. (Juris praecptae: Regula pro lege si deficit lex; and Ubi jus ibi remedium). This Tril-
ogy has many cognates particularly in
the field of Construction and in that
of Procedure. Lex non exacte definit
sed arbitrio hominum varii permittit is one of
the most instructive canons of Con-
struction. (4 Gr. & Rud.) It is
closely allied with Expressio corum
quae tacite nihil inaudit operatur. By
the application of this maxim M'Cu-
loch v. Maryland, L. C. 147, 3 Gr. &
Rud., resulted. From this case as a
"datum post" the development of Fed-
eal power has proceeded. Regula pro
lege si deficit lex is the canon of Con-
struction that authorizes the applica-
tion of the Prescriptive Constitution—
the higher law in the Construction
and application of all inferior laws—
of all local and civil law. The letter
of written Constitutions and of statu-
tes and of decisions must be made
to accord with fundamental—the
major—the organic maxims of the law
of reason—of logic and philosophy.
Ita lex scripta est is a narrow falla-
cious rule born of the Feudal motto
that "Parliament is omnipotent." Its
application to Codes of Procedure and
to Practice acts has dismembered and
scattered the logic and the philosophy
of the law. (See Story and data
there cited, also FEUDAL LAWYER.)
Warring schools of Construction will
destroy any branch of the law.

Benedicta est expositio quando res redin-
itur a destructione.

Accordingly we can perceive great
maxims as canons of Construction and
that is not comparable from so called
Constitutional Law. Ubi jus ibi reme-
dium was perceived by Marshall in
Marbury v. Madison where he observed
that it lay at the roots of govern-
ment. It is a universal principle in
the law of procedure. A case that
stands for this maxim is Ashby v. White,
L. C. 273, 3 Gr. & Rud.

Almost all of the great maxims have
come to have a case nomenclature
and each province, each publisher and
almost each school and author appears
to have sought to get away from the
old archaic expressions in the lan-
guage of all nations and coin as they
claim something "new" or "modern"
and led by this ambition for originality
and the clamor and hurrah of com-
mercialism have led into a babel of
tongues—a veritable "legal jungle."
To illustrate: Ut res magis valeat
quam percat in the law of Procedure
has come to be viewed as something
"new" and "modern," and as a prin-
ciple introduced and developed in the
application of Codes where it is called
by the title of "Theory of the Case"
Cockrell, 50 L.R.A. (N.S.) 1-32. Other
authors have a different kind of "The-
ory of the Case" as pointed out in re-
lation to our title Story. The para-
phrases of Quis, quid are supposed
new law, also of several maxims of
Equity.

The maxims are discussed under
various titles in relation to the leading
subjects of the law and often as some-
thing "new." This has led many to
claim that American law is something
"new" and different to the law of all
ages and to lead away from the funda-
mental law—the Prescriptive Consti-
tution. (See this.) There is equity
in Constitutional law also in Proceed-
ure and all the other subjects of the
law. A few Universal, Constitutional
principles found and bottom the en-
tire legal structure. Treating these
irrelatively and away from their roots
has led to a babel.

Construction makes or mars; Con-
stitutions and statutes not led and
moulded by authentic Construction
from the fountain—the fundamentals
of the law leads to chaos—to a babel.
The Code reaffirmed Quis, quid, corum
quo: in the plainest way. Its clear
and unambiguous language is set out
in Cockrell, 50 L.R.A. (N.S.) 1-32.
This provision is necessary, essential
law, and is from antiquity. But these
facts were not perceived by courts and
Code authors for not one of them has
quoted that maxim and stated that it
is the old necessary law of all ages
and must be respected by the courts of
all civilized countries, whatever the
language of local and civil law may
say by its letter or legislative expres-
sion. The Municipal Court of Chicago
and the final Construction of this
Code is a good illustration. (Walter,
250 ili. 420—pleadings cannot be enlarged
nor supplied by evidence, orals and
stipulations of parties.) Also Camp-
bell v. Consalve and its cluster of
cases in New York. But the Feudal
Lawyer could never comprehend the
maxims and their philosophy. He
would cite maxims but the inferior
and secondary and not the primary—
Equity.—

the major—the organic ones. See what a mix-up he made of Res Adjudicata. At one place he has been plainly perceived and impressed that the rules of Res Adjudicata dictate the leading rules of Pleading and of Evidence. And for results we have such cases as Gulling and its cluster and such discussions as attend Cockerell the fundamental provision in which is constantly construed away. The discussions over Mondel v. Steel and Munday v. Vait, L. C. 77, 79, 3 Gr. & Rud., will show. Whether the old law and its affirmation by Codes and Practice Acts shall be longer respected has filled the law with antinomies. (See 8. v. Muench; Sache v. Wallace, 4 Gr. & Rud.; also in Equity in Procedure.)

To erode—eat away and to override the major—organic maxims of all Procedures and to scatter these around into several kinds and species as distinct and irrelevant systems he has given us a multitude of supposed systems all governed by separate and partitioned rules. The great Universal, Constitutional canons he has led away from and silted over with his jargon—his statutes—Amendments and Jeofails and his cases until as Bacon prophesied there would come the bewildermest that would threaten great empires before the lawyer would turn away from Feudal errorists and their masses of "Shelley" cases, so to speak. Look at Gulling and its cluster of cases; at the teachings of the various shades of the "Theory of the Case" sects mentioned in reference to Story, also Rushston v. Aspinall—also Williams, Sergeant. Herefrom arises the teaching of commercialism and of its supposed journals of education that the "law is the last interpretation of the law by the last judge;" also that "there are more than 5,000 new principles stated and developed each year." These assume and hurrah and din into the ears of the student that every verbal change of old principles is "new" law. And such is the teaching in the schools as an investigation will show. In some of these great overtopping digests and Cyes are taught as philosophical-student's works. And only a few lawyers have protested in Bar Associations (See MAXIMS). Some have pointed to the indifference, the stupidity and the torpidity of the lawyer and of his establishment as a great evil; and that the condition calls for more than reform, indeed for "revolution." (See

FEUDAL LAWYER). Blackstone informs us that he did not understand Equity and its maxims (§§ 16, 1 Gr. & Rud.). Chitty as a constructionist left his " aider by verdict" like the "seven lean kind" to eat and devour the fat and worthy kinds. See Rushston.

Equity in Procedure has not been perceived by the Feudal Lawyer for he could not and at the same time defend his motto that "Parliament is omnipotent." This motto excludes the "Prescriptive Constitution." He never quoted and embraced the major-organic maxims of Procedure and demonstrated their Universal, Constitutional character; for these had to be restrained and kept within the policy and teaching of that fallacious and blinding motto. Only here or there some great judge would break away and hint at a superior body of law. But then no one would make of a great principle what its origin, history and ramifications called for. To illustrate: Look at idem aegos et paternus case non potest its paraphrases and ramifications. Note that one of these is the "first principle in the administration of justice" in New York: §§ 500—522, Equity in Procedure. And here let us ask, where prior to 1902, was Keech v. Sandford cited in any work on Contract or on Agency?

Equity was introduced in the Earl of Oxford's Case by Royal Edict. And then it was virtually turned over to Feudal intellects to administer against the frowns and rage of Coke. (See Chapter I., 1 Gr. & Rud.) Its jurisdiction was limited and circumscribed by nearly a score of minor and secondary maxims to suit the Feudal intellect—such as it is coined and thought it comprehended. Elsewhere we have assigned for Equity three of the major-organic maxims (Juris precepta sunt hae: Regula pro lege: and Ub jus ibi remedium—§§ 27—39, Equity in Procedure).

In pari: is susceptible of almost infinite paraphrases; now why assume that "He who seeks equity must come into court with clean hands;" or in other words "He who hath done iniquity shall not have equity," should distinctively be a maxim of equity. If In pari was broadly taught in Contract and in Procedure would it not be comprehended as a great principle in Contract, Equity, Procedure, Jurisdiction and in all other relations?
Equity.—

Now of what earthly use was such paraphrases assigned to Equity? What did these add to the law? And further what did “He who seeks Equity must do Equity” add to the law? Must not one give something—some consideration some Equity for an obligation before he could enforce it? Is not Ex nudo pacto: a maxim of Contract, of Equity and of Procedure as well? What does “non oritur actio” mean? Does it not bring with it a consideration of what is a “cause of action” which is so important in all systems of Procedure? (See Quis, quid, coram quo.) And so we may similarly observe of “mutuality is equity.” Of course both sides must be bound or neither. Cooke v. Oxley, L. C. 321, 3 Gr. & Rud. Elsewhere we have reviewed the feudal maxims that were assigned for Equity. Most of these are stumbling blocks rather than aids. Of course such roots have brought with them more than a thousand “Shelley” cases for each, from which commercialism gathers and confuses, 1 C. J. Cyc. 658.

Equity has been so thoroughly taught as an Irrelevant branch of the law and as “new” law that its Procedure has been treated as sui generis. Elsewhere we point out that the great sections of Story have not been adopted and impressed by a single Code or common-law author. And not one has made it impressive that Pleadings are jurisdictional. (See Story; Rushton; Quis, quid, coram quo.)

Equity came and was turned over to the Feudal Lawyer to apply and of course he failed. The Code came, a spur to Equity and a paraphrase of its maxims and was likewise turned over to his followers and what have they made of it? (See Story; Theory of the Case: Gulling and its cluster; also Pomeroy, Rushton and Chitty.)

Equity was introduced and was then smothered and made hateful and a wilderness by senseless and useless maxims or paraphrases of well worn ones instead of the major and organic ones. And so it was with the Code. It reaffirmed the Trilogy of Procedure and its cognates but instead of recognizing this necessary and illuminating fact these were led away from and were construed out and even denounced both directly and indirectly. The Code was destroyed by attempting to construe it upon the assumptions that it was something new by the rules of the Feudal Lawyer. He has never had the genius necessary for a great government, its commerce, its development and its protection.

In conclusion we ask the student to first read the Trilogy of Procedure and then Pomeroy’s Remedies, §§ 506–608 and see how he viewed the maxims which in other works he quoted also commended. The facts are that where others quoted them so did he and where others excluded and denounced them so did he. Compare his §§ 533 and 546. Why did he uphold Verba fortis in Antidel and denounce it in Dowston, L. C. 217, 3 Gr. & Rud.? Antidel and Dowston are exactly alike. Why did he cite old cases in his Equity and omit them in his Code Remedies? (See Bristow; Rushton, L. C. 135, 3 Gr. & Rud.)

From the start he assumed that the Code was a new institution—that it brought new principles. (See Pomeroy’s S. C. 50 L.R.A. (N.S.) 100.)

And so it happened that Equity in Procedure has had a most tempestuous voyage. But it has come tempest tossed and battle scarred.

One of the late attacks on Equity is the exposition by the Hornbook authors, Smith and Clark, upon elucidating the maxim “Equity regards that as done which ought to be done.” This is in their works on Elementary law. We refer to this new explication in relation to Story, q. v.

Contract principles are elaborately discussed in Equity. Non hora in jure nor in res any is ably and extensively discussed in Rees v. Berrington—the law of sureties, L. C. 334, 3 Gr. & Rud. Mutuality of Contract is also a principle strictly safeguarded. Cooke v. Oxley, L. C. 321, 3 Gr. & Rud. One’s assent is indispensable to a contract in all relations. Lamplough v. Braithwaite, et seq. L. C. 301, 3 Gr. & Rud. Assent to a contract is not implied from the mere acceptance and use of a consideration, in case of mistake. (See Mistake; Boston Ice Co. L. C. 320, 3 Gr. & Rud.; Smout v. Ilbery, 4 Gr. & Rud. Courts will not make contracts for parties. Catter v. Pocell, L. C. 308, 3 Gr. & Rud.; Hoare v. Remsiek.

The consideration—Ex nudo pacta must pass in order to create an obligation in all relations. This is discussed in L. C. 301–333, 3 Gr. & Rud. Generally inadequacy of consid-
Equity.—

erration in the absence of fraud or mistake is no cause for Equitable relief. *Thornborow v. Whitaclere*, L. C. 333, 3 Gr. & Rud. Undue influence—

*Huegum v. Basey* is elaborately discussed in Equity. Also Catching bargains—*Chesterfield v. Janascn*, 2 Gr. & Rud.

In pari delicto transactions cannot be a "cause of action." Jurisdiction does not attach to an illegal cause. Such a claimant has not "clean hands;" he has done iniquity and he cannot have Equity as is above observed. If a judgment is entered upon a statement that shows that it is founded upon illegality such judgment is *coram non judice* and is offensive to first principles of Equity and to Procedure. (L. C. 358-374, 3 Gr. & Rud.; See *In pari.*)

Fraud and mistake in Equity are the subjects of extended discussions. (See Story's *Equity*.)


Crime also borders Equity. In cases of enjoining Crime (Hamilton v. Whitridge, L. C. 280, 3 Gr. & Rud.) there necessarily arise for consideration what is a crime, also the remedies in Criminal Procedure, also the exigencies for Equitable interference. There are cases arising in Contract that also include Tort also Crime and also call for Equitable relief. To illustrate: The cases that include phases of Caesav Emptor, Decet-Misrepresentation and False Pretenses. (R. v. Wheatley, L. C. 19, 3 Gr. & Rud.)

The jurisdiction of equity has been long resisted by the Feudal Lawyer. He has taken no broad view of Boni judiciis; *Lex non exacte*. Statutes limit and define. Littleton,—Wyo.—, 2 L.R.A.(N.S.) 631 (statute must extend its jurisdiction to crime).

Tort also becomes involved in many Equitable questions. In the law of Nuisance are found illustrations (*Sic uterere; Alterm*). The question of enjoining Torts or trespasses is one of the important branches of Procedure. (*Bonaparte v. R. R. L. O.* 278, 3 Gr. & Rud.)

Injunction Procedure should be familiar to all practitioners. It is practically Code Procedure where the general allegation, the general issue, the common counts and the fallacies of

Equity.—

Aider by verdict are not respected. In injunction Procedure the Pleadings are to limit the issues and to narrow the proofs; and they must be true; also certain. See *Dinehart v. Lafayette*, L. C. 279, 3 Gr. & Rud.

In conclusion it may be said that the law is an entirety and cannot be broadly comprehended from any one of its branches. No one branch teaches more than does Equity and its leading discussions. Into it pours almost all of the law. The Trilogies of the leading subjects elsewhere gathered are Equitable roots and there are related to Equity. The major maxims of the law are from Equity.

Recapitulating it seems well to state that Equity pervades all branches of the law. Maine's Ancient Law, 42-69. The Trilogy of Equity (Sec. 14, Restatement) and its cognate maxims bottom Procedure. In pari delicto has many cognate maxims and it is both a maxim of contract and of procedure. (Sec. 17, Restatement.) It often is closely allied with *Alterum non lade*; also such maxims as "He who hath done iniquity shall not have equity;" jurisdiction does not attach to illegality: *In equili melior; one must come into court with clean hands." It also abuts Crime, as will appear from *Crimen omnia* and its cognates. *Ex turpi causa*. Also Tort. *Ex dolo malo*. One cannot contract against his own negligence. *R. R. v. Lockeood, L. C. 353, 3 Gr. & Rud.; Nulit ut usum annualis*. The inadequacy of consideration is also discussed in Equity. *Thornborow*, L. C. 353, 3 Gr. & Rud. See *Recission; Undue Influence.*


Equity: its major—organic—maxims: *Juris praecepta; Ubii jus; Regula pro legis. Idem agent et patiens esse non potest is a great maxim of equity. See a discussion of this maxim in Secs. 500-522. *Hughes’ Equity In Procedure*, and compare with maxims teaching with cases where those are taught without regard to the maxims. *Melius est pere ter fore quam sectari minulas* (4 Gr. & Rud.).


Easopell.—

The rules of Res Adjudicata. See 4 Gr. & Rud.; also L. C. 23-30, 3 Gr. & Rud.
The fundamental maxim is: Alleges contra firmae fortes, that one deny and admit at the same time. Dickson, L. C. 94, 3 Gr. & Rud.
Eum qui nocente infamat, non est aequum et bonum ob eum rem condemnari. Delicta pars nuncium nota oportet expediat: It is not just and proper that he who speaks ill of a man should be condemned on that account; for it is fitting and expedient that the criminal be punished. 2 Gr. & Rud. Harrison v. Bush, 2 Gr. & Rud.

Every act is presumed to be right, regularly and validly done; 2 Gr. & Rud. Omnia praesumuntur rite. See Presumptions.

Every man is presumed innocent until he is alleged and proven guilty. See Presumptions. 2 Gr. & Rud. Scagins v. Case. Coffin v. U. S. See Presumptions.

Every man is presumed to intend the natural, direct and probable consequences of his act. 2 Gr. & Rud. Squib Case.

Every man is presumed to know the law. 2 Gr. & Rud. Ignorantia legis.

Every man's house is his castle. See 2 Gr. & Rud. Scagins v. Case. Every maxim that has the words "non oritur actio" has a procedural phase. It involves the Trilogy of Procedure; and of course the general demurrer—the "cause of action" provided for by the Code. 6 Rul. Cas. Law, 63-72.

Non har; Ex nudo pacto; and in pari delicto, we class as the Trilogy of Contract. There are the leading principles to master. These are the assent, the Consideration and the legality of the subject matter. (See pp. 569-572, Equity.) These principles are variably expressed but the idea is the same. Ex nudo has an extensive case nomenclature which is very instructive. (See Cumber v. Wane, L. C. 311, 3 Gr. & Rud.) Cumber v. Wane and cases that follow it in 3 Gr. & Rud. should be familiar to every student. See Contract; 1 R. C. L. pp. 185, 186; 6 Id. 74.

Where there is no consideration for a promise there is no wrong. Actio non datur non damni fisico. Fabula non judicium. There are in all simple contracts (except commercial paper) the consideration must be alleged and proved, if the allegation is denied. The request, the consideration and the legality of the subject matter are jurisdictional. Rann v. Hughes, L. C. 312, 3 Gr. & Rud. These must be averred to constitute a "cause of action." Lampleigh v. Brathwaite, L. C. 301, et seq., 3 Gr. & Rud. De non ap-
Ex nudo, etc.—

parentibus: The Promise must be averred. Bovim v. Emmerson (Code)
(See Weber v. Lewis, — N. D. —, 36 L.R.A. (N.S.) 362 stated under Con-
tract). The essential elements must be averred. Quit, quid, coram quo; De
non.

The presumption of innocence-morality attends and therefore the legality of
the subject matter need not be averred. Illegality is a matter of de-
fense and must be pleaded except where it appears from relevant evi-
dence wherefrom for the state's atti-
dute. Alterum non ladeere. Res inter
altus acta: the defense is available.
But the evidence must be relevant.
Quod nullum est, nullum est effectum.
(But see Henry v. Hillard, 49 L.R.A.
(N.S.) 1-44, where irrelevant evidence
was treated as a juridical element.
This case is noticed anent Lester v.
Fozcoft. The state intricacies of il-
legal contracts also that its courts sit
and entertain them. Therefore no ju-
risdiction attaches to an illegal com-
 pact. The general demurrer is never
waived. A pleading must state a
“cause of action.” Campbell v. Con-
salus; Clark v. Dillon, and Rushton v.
Aspinall, L. C. 5, 3 Gr. & Rud. The
letter of the Chicago Municipal court
Act yields to the Trilogy of Proce-
dure. Walter, 250 Ill. 420. (Stat-
utes yield to fundamental law—the
Prescriptive Constitution.)

From the above observations appears
the necessity of right notions of the
elements of a contract; also why these
must be alleged to constitute a “cause
of action.” These elements are not
presumed, nor supplied by aider and
waiver. The statutes of Amendments
and of Joefails, the liberal provisions
of the Code and of Practice Acts will
not supply omitted allegations of sub-
stance. There are limitations of lib-
eral Construction. Dobson v. Camp-
bell. Nor is irrelevant evidence a ju-
ridical factor that courts will consider.
Frustra probatur quod probatum non
relevat. (See De non.)

An exposition of the words “non orit-
tur actio” indicates what must be al-
leged in order to pass the general de-
murrer, which is never waived. Alter-
um non ladeere. (See Lampleigh v.
Brathwait, L. C. 301, 3 Gr. & Rud. and
note.)

Naming of a child as a consideration.
1105.

Ex nudo, etc.—

Extending time of payment; what a suf-
cient consideration for. Lahm, 139 L.

New agreements, abrogation, altering,
rescinding, supplementing, cancelling or
supplanting prior contracts. Morecraft,
48 N. J. L. 729, 54 L.R.A.(N.S.) 1-71,
ext. note.

EX FACTO ILICITO NON ORITUR
actio. From an illicit contract no cause
of action arises. In pari; Ex causa
turpi; Alterum.

EXPERT EVIDENCE. To prove cause of
accident. Cumberland Telephone,—
As to cause of death, disease or injury.
Calsine, 249 Mo. 192, 53 L.R.A.(N.S.)
1058-1059, ext. n.

EX POST FACTO LAWS. Calder v. Bull,
L. C. 257, 3 Gr. & Rud.; 6 Rul. C. L
176-300. Branson.

EXPRESSIO EORUM QUAE TACTICE IN-
sunt nihil operatur: The expression of
to those things which are tacitly operat
operates nothing. In other words things
implied need not be mentioned. See Ac-
cessuum: Causique aliquis qui, si
a grantor sells land entirely surrounded
by his own the law will imply that he
intended to grant also a way of ingress
and of egress to such land. If he sells
the vendor has a right of entry to
cut and remove such timber. Causique.

This is a maxim of liberal construc-
tion and is closely allied with Lex non
exacte definit; Ut res magis valeat
quam percipat. Consensus tollit er-
rorem; Omnia praececumur rite; and
Uitile per inutili non vititur. Ex-
pressing what the law implies has no
effect. If the law allows interest after
the maturity of a note to provide ex-
pressly what the law annexes is sur-
plusage.

Fundamental principles annex them-
selves by implication. The maxims of
the Prescriptive Constitution will pre-
vail over the letter of the statute.
Walter, 250 Ill. 420; In praesentia.

In the Construction of the Federal
Constitution this maxim has often been
applied as in M'Culloch v. Maryland,
L. C. 147, 3 Gr. & Rud. and cases
M'Culloch v. Maryland is a case of
liberal construction. It has been much
opposed by the state's rights school.
But it has been often applied by the
Federal Supreme court. Federal pow-
er has been developed upon this case.

EXPRESSIO UNIUS EST EXCLUSIO AL-
terius: The express mention of one
thing implies the exclusion of all oth-
ers. Cited, sec. 12, Restatement.
This maxim is closely allied with the Tri-
ology of Procedure. De non apparenti-
bus requires that a “cause of action” be juridically presented. Qui,
quit, coram quo. And the matter so
presented excludes all others. If the
statement is for “dollars” this excludes
Expressio, etc.—

"acres." If a judgment were entered for acres where dollars were sued for then the judgment would be void. It would be subject to Collateral Attack. A judgment is construed by the Pleadings filed in the case. Vicknburg v. Henson; Nalle v. Oyster; Mondel v. Steel, L. C. et seq., 3 Gr. & Rud. Milbro, 45 L.R.A.(N.S.) 274, 277-278; Palmer v. Humiston, 46 L.R.A.(N.S.) 640.

This maxim is widely cited. World's Fair Co. 224 U. S. 172; Gromer, 224 U. S. 362 (reservations not expressed are not made). It is much involved in discussions of the admissibility of Oral evidence to affect written. See Contra scriptum; Fiunt enim; De non.

Each word must be given effect if possible. See Words; Every; Ita lex. 6 RuL. C. L. pp. 40, 48.

Expressio unius is a cognate of the maxims upon which the oral evidence rule is founded. See Fiunt enim.; Contra scriptum. The rule that oral evidence is inadmissible to alter or vary that which is written is an application of this maxim. See L. C. 46-54, 3 Gr. & Rud. The rationale of this rule is stated in § 53, 1 Gr. & Rud. It is also closely related to Non hae in fadera veni. See Cutter v. Powell, L. C. 308, 3 Gr. & Rud.; Hoare v. Rennie.

The very important rule of Procedure namely, "What ought to be of Expressio, etc.— record must be proved by record and by the right record," is also an application of it. Mondel v. Steel, L. C. 77, et seq., 3 Gr. & Rud. Palmer v. Humiston. De non apparentibus and its cognates from some angles are sometimes an application of Expressio unius.

It applies to all documents, to Constitutions, statutes, contracts and to every collocation of words. It sometimes is closely allied with Ita lex scripsit est where the latter leads the construction of statute.

It is applicable in all relations except where the nature of the subject matter or where fundamental law dictates the application of Expressio eorum or of Lex non exacte sed arbitrio instead. The latter are maxims of liberal construction.

The student will be much instructed to connectedly consider all of these maxims. From them he will get good impressions of the theory of construction.

extremis probatis presupuntur moxas: The extremes being proved the intermediates are presumed.—Ommes presupuntur rite: Manifesta probatione.

Ex turpi causa non oritur actio: No action arises on an immoral contract. In part. Ex turpi contractu non oritur actio. Alterum.

Ex uno disce omnes: From one thing you can discern all. Extrema probatur; probatis extremis.

byre v. shaftsbury; Wh. & Tud. L. C. Eq. Infants; custody and control of. See Infants. 2 Gr. & Rud.


FALSA DEMONSTRATIO NON NOCET: Mere false description will not vitiate. Noctitur a socia. Ut res magis vacat quam peraret.

FALSE IMPRISONMENT. 2 Gr. & Rud. Immunity for West v. Smallwood.


FALES IN UNO FALSUS IN OMNIBUS: False in one thing false in all. Impeachment of witnesses, 2 Gr. & Rud.; 29 L.R.A.(N.S.) 580n. Turpis est pars: Repugnancy.

FALSIFICATORES REI POTIUS QUAM actores habentur: Defendants are to be favored rather than plaintiffs. See Trial- ing Procedure; Verba fortius: Acto: Benedic of Proof.

FEDERAL PROCEDURE: 2 Gr. & Rud. Procedings are jurisdictional. Vickburg v. Henson; Garrett.


Certainty is reckoned from what the defendant can understand. Pasaiso v. U. S.; Garrett.


FEUDAL LAWYER: His views of Procedure. See Squib Case; Variance; Rushton; Alterum. Of the real party in interest. Hendrick v. Lindsey; Lawrence v. Pou. See Contract.

Feudalism and imperialism have led into bewildement (§ 21, Restatement of Law). They have not comprehended and taught the Prescriptive Constitution (§ 21, Restatement).
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the Romans does not give the same protection under all skies and in all climes."

That the only fundamental law is to be found within the four corners of a written constitution and depends upon its letter. *Ita lex scripta est*. These facts can be picked from the writings of American constitutional writers. 6 Rul. Case Law 34. At the same time they assert that there are underlying principles which control. They can be cited to sustain either view.

In one case, the court of appeals will decide that no man can be judge of his own dispute, and in the next a late judge of this court, will advise a high court that he cannot find "anything in organic law" that interdicts a prosecuting committee from sitting as judges to try one whom they have indicted. See *Nemo debet esse judex*.

4. That local and flat laws may change, or derogate from, or deny fundamental principles; also that it may either give or withhold the necessities for operating the judicial department *i. e.*, such matters as necessary records for essential certainty, to defend the attitude of the state and its high policies of Procedure—*Rea Adjudicata* and its correlates (See Introductory Chapter; Garrett). The attempts to follow these tribal views have made the mystery of the Code; also the desecration of the elements of Due Process of Law. (See Codes; 3 Am. Law School Review, 602–609.)

5. That whether or not a "cause of action" need be stated depends upon local and flat law. (See *Quis, quid, coram quo* also its citations in the sections of the Restatement; also Story.)

6. That the general demurrer may either be abolished or disregarded as may suit the whim or caprice of the court. That it is competent for a statute to provide that the general demurrer, unless made particular, or special, may be disregarded. (See *Quis, quid.*)

7. That the state's attitude in Procedure may be waived by the litigating parties or either of them; or that it may be legislated away; that the state's mandates for the *Coram judice* proceeding may be minimized or disregarded. (See Gulling and the citations to it; also Oakley.)

8. That he has filled legal literature with illusory jargon about three degrees of certainty, when the only certainty required is to protect the state's attitude in Procedure. (Garrett) This is an element which is the leading star, he does not introduce, explain and impress. It is hinted at in a notable Code case *Campbell v. Conesus* which leads our discussions of the Code. (See this case and citations to it in the Restatement.) It reaffirmed *Guest v. Warren*. These cases defend the attitude of the state and this fact might have been so plainly stated that argument for *Interest reipublicae* would not be necessary. These cases are made prominent in relation to Codes.

10. That there are several kinds of aider or enlargements of liberal rules of Construction to aid defective Pleading and even of the omission of substance. (See Rushton; *Quod ab initio*; and citations to these titles in the Restatement.)

11. Ignoring the state's attitude and its necessities for certainty, §§ 56–60, 83–123, 1 Gr. & Rud., has jumbled and confused the distinctions between the mandatory and the statutory records and by this means there has been driven into the logic and the philosophy of the law a wedge which dismembers the machinery of certainty and the bulwarks of protection given by the Prescriptive Constitution (see Introductory Chapter, Restatement; also §§ 12, 13 Restatement; *Planing Mill v. Chicago*, L. C. 2d et seq., 3 Gr. & Rud.; *Pienkowski v. Coever*; *Garrett*; Mandatory Record).

12. By either destroying or by keeping the distinctions between the two juridical records above referred to in a state of judicial anarchy, he has paved the way for the "Theory of the Case." This new doctrine removes all protection from the mandatory record, the Trilogy of Procedure stated and discussed in §§ 1–13, Restatement. Feudalism and imperialism have always opposed the Prescriptive Constitution; (§ 21, Restatement). In Justinian's time his subjects stood out for the higher law as did the Anglo-Saxon at Runnymede. The latter Charter is insignificant to the Prescriptive Constitution but the Feudal Lawyer has not so taught it. In the face of the generalities of Magna Charta he has impressed his courts that they may enter judgments and decrees and orders without the authority of records; that there need be no record to bind a court. That there are no *dicta*, but that everything a court says carries with it a conclusive presumption of authority; that a judgment entry
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brings to it the necessary authority. This denies that Pleadings are jurisdictional. Gulling. (Contra Vicksburg v. Henslo; Nalle v. Oyster; Knickerbocker.) These three cases are opposed to the “Theory of the Case.” See also Campbell v. Consalus; Clark v. Dillon and Tooker; also Codes.

13. He denies that “Pleadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it.” (See the Trilozy of Procedure, §§ 1-7, Restatement.) Common Counts.

14. He is a poor constructionist for he contends that more liberal rules of construction obtain at the stage of Collateral Attack than do on general demurrer, or at the stage of Appellate Procedure. (See Goldham v. Edwards.) And next he will concede that strict rules of Res Adjudicata—that estoppels are odious and are strictly taken. This latter expression is only a paraphrase of Verba fortius. How feudal literature hand down this maxim will appear from the discussions over Clark v. Dillon in New York. Follow the citations of this case through the Restatement and the Antonyms will be seen. (See Codes.) And the greatest of code authors stumbled over Verba fortius: (See Pomeroy’s Code Remedies, §§ 533, 546.) Weber v. Lewis, 34 L.R.A. (N.S.) 364-371, ext. n. citing Boren v. Emmonson. It is the salient in the discussions, the statutes of Amendments and Jeofails. This maxim has prominent mention in Sections 1-13, Restatement. Feudal literature has not comprehendedly presented it. Carefully read the opinions of Justices Eyre and Buller, in Dovaston v. Payne. Also of Lord Kenyon, in Roberts v. Moore.

15. That the rules of Construction fluctuate in tests for the coram judice proceeding in its various applications and tests to safeguard the attitude of the state.

16. That Codes and Practice Acts have abolished and swept away old principles and have established a “new dispensation.” 3 Am. Law School Review, 602-609. That at the stage of the general demurrer an individualized rule obtains (Baker v. Warner), while at the stage of the motion in Arrest or the motion Non obstante corredicto a different rule attaches (Goldham v. Edwards); while at the stage of Appellate Procedure a far more liberal rule attaches to uphold the pleading; Davis v. Jacksonville Line; while at the stage of Collateral Attack a still more liberal rule prevails to sustain the proceedings (3 Bouv. Dig. Rawle’s 3d Ed. 1914, title Pleading). But at the stage of Res Adjudicata a very strict rule is applied to defeat the pleading if possible; “Estoppels are odious and every intention is against them.” (See L. C. 25-30, 3 Gr. & Rud.) Dovaston v. Payne. In tests of Due Process of Law the pleading is construed both strictly and liberally from step to step with whim or caprice the Universal, Constitutional canon Verba fortius is applied at the various stages (see Collateral Attack).

17. That the rules of Res Adjudicata are irrelevant and are established to serve an individualized branch of the law.

18. That the rules and tests of Due Process of Law are individualistic in their application and that they do not include the same logic and philosophy that governs the tests of Res Adjudicata. Garrett. That the elements of the Coram judice proceeding are not the same at all stages and times. He denies that these matters are interactions. That he treats all of the above matters as irrelevant and that at one stage a pleading is held sufficient which would be held insufficient at an earlier stage. It is by such views that the general demurrer is waived. (See “Theory of the Case.”)

19. That he does not understand the distinctions between the two juridical records (§ 21, Restatement). Nor does he understand that a primum rule of Procedure which is “What ought to be of record must be proved by record and by the right record,” Faint enim. Sections 1-21, Restatement.

20. That distinctions between superior and inferior courts are lost in bewildering and mires of discussions. Crepps v. Durden, L. C. 113, 3 Gr. & Rud. and cases cited therewith; see also Green County Bonds.

21. That in relation to all of the above matters fundamental law can be denied or abolished. That “Parliament is omnipotent.” See Campbell v. Consalus and its cognate cases under the title Codes.

22. That the maxims of antiquity are “old” and “outworn” and that the reaffirmation of these is distinctively
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"new" and "modern" law. (See §§ 1-13, Restatement; also Equity.)

23. That there are no Universal principles common to all systems of Procedure. See Codes; also §§ 1-13, Restatement; Quis quid; Garrett; 3 Am. Law School Review 602-609.

24. That for the presentation and the discussions of fundamental law "empiricism" labelled as "Modern" and "New" and "enlightened" is most sought and respected by the lawyers of this generation. (See Story.) Elsewhere we refer to the lawyer's appetite for the outputs of the slums of quackery. (Bishop's New Criminal Law, pages vi, vil, Preface; see Literature.)

25. That the gifts of the Feudal Lawyer and of his followers have been nothing more than mystification (see 1 Gr. & Rud. § 15) and obscurantism of great principles (see the Trilogy of Procedure, § 1, Restatement) and the glorification of Feudal authors as Deities and their times with all of their contradictions and narrowness, and palpable absurdities with consequent demoralization to the due administration of the laws. (See how Blackstone, Glanvil, and the times of Edward the I. are extolled; also what Tyler says of Stephen as if a most juridical scholar could be employed to frame a new system of Procedure; if Stephen had set out and dealt with the fundamental maxims he would only have thought of paraphrasing these in any performance he would enlist in; also Maine's Ancient Law.)

26. That he has not placed the literature of the law above and beyond the attacks of empiricists, mountebanks, and errorists and their employers, the book factories who have flooded the land with digests, Cyes, gatherings of cases and of supposed educational matter that have not and never can present the logic and the philosophy of the law (See Introductory Chapter; Restatement also maxims). Look at the title Codes, Restatement and there-under the demonstration of the causes that have destroyed the Codes. (See Pomeroy; Story) also the "Central ideas" of a Code in the maxims and then see if one Code author has understood them. Turn to the titles Campbell v. Consalus, Clark v. Dillon, Tooker v. Arnoux, and Oakley v. Aspinwall, L. C. 222, 3 (Gr. & Rud and see glimpses of the Prescriptive Constitution from varying angles. Follow cita-
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as the errors of Sergeant Williams were caught up and parroted by Tidd, Chitty, Stephen and their followers? Feudal theories and teaching feeds upon local and flat ideas. They depend upon statutes and late cases, and the outgrowths of these digests and Cysns.

28. That the juridical anarchy prevailing in American states (See Gaming and its cluster of cases) too plainly point to the failure of the lawyer and of his establishments. Look at his literature and his teaching; also the fact that herefrom arises the judiciary that rules the country; that gives law to the Western Hemisphere. The Code came from Roman roots (see Quis, quid, corum quo); it rested upon a Roman stump and should have been construed therefrom and not from Feudal conceptions, its general allegations, general denials and its aiders by verdicts (see Rushton) and its explications of Equitable maxims (see Story). The time is overdue to plainly state the facts and to afford the means of enabling each to judge for himself. The way is open and plain for all who will look and consider.

In the above specifications we cite great principles, maxims and cases. Now what has the Feudal literature done for any one of them? Turn to these matters and follow their citations through the Restatement and the glories of the Roman law will break through the black cloud of the Feudal night—a long dreary night of more than one thousand years. It is from the Roman law that right impressions are given. Right impressions are most important for the mastery of great principles. This fact will be next illustrated.

Hartnett v. Boston Store, 55 L.R.A. (N.S.) 460, will greatly instruct the student of the maxim In jure non remota quoted and most elaborately discussed in Gilson, 36 A. S. 803–861, wherein are the greatest gathering of cases including the "Squib Case;" also Dixon v. Bell, 105 Eng. Reprint, 1023, 19 Eng. Rul. Cas. 26, 36 A. S. 814 (one employing a child to bring a firearm is liable for the injury it causes a third person); Carter v. Toune, 36 A. D. 682, 36 A. S. 814 (seller of gunpowder to a child is liable for the injuries caused by use of the gunpowder); stating the rule in the "Squib Case," stating and following Dixon v. Bell. In Hartnett, the sale was to a fifteen year old boy in viola-
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attention to obvious facts will prove timely. An investigation will show that a tragedy has come to the juris-
prudence of a great nation; and that it has brought with it a blight to the
lawyer and his establishments. (See Codes; Literature.)

As Shelley's Case has been discussed so have each of the above propositions,
ancient procedure, all of which radiate and circulate around the questions,—
Is Parliament omnipotent? and 2. Are Pleadings jurisdictional; and are they of equal import and dignity as
is jurisdiction of the person and of a subject matter? (See Theory of the
Case; Gulling.)

The above questions are to-day ex-
acting more attention than are the
Shelley Cases, that the Federal court
has given us in M'Culloch v. Maryland,
L. C. 147, 3 Gr. & Rud.; Gibbons v.
Ogden, 9 Wheat. 1; The Police Power
Cases; The Legal Tender Cases; The
License Cases and the Municipal Bond
Cases (See Green County Bonds), and
the records that are necessary to
support a tax or an adjudication. (See
1 C. J. Cyc. 66, 100.) The Federal
court has not been able to fix with
certainty the limitations of the maxim
Omnia praesumuntur rite. However
the proposition that pleadings are jur-
isdictional can be picked out of some
cases. Garrett; Nalle; Vicksburg (a
quite clear and forceful decision).

Nothing can be more important than
what constitutes jurisdiction and how
it shall be evinced—what documents
and what record shall evince it. Ju-
risdiction is the heart and vitals of
"Due Process of Law." If it appeared
that the court convened and sat and
adjudicated in the wrong jurisdiction,
venue, as the court did in Milligans
Case, 4 Gr. & R. must not notice be
taken of that fact? (Nalle v. Oyster.)
Or that the clerk or the sheriff con-
sidered the case and ordered judgment
instead of the judge? (Flournoy v.
Jeffersonville, L. C. 146, 3 Gr. &
Rud.) Or that the judge usurped the
function of the jury and arbitrarily
heard the case and disposed of it and
ordered judgment? (Turney v. Barr,
4 Gr. & Rud.) Or that the judge was
an interested party as in Oakley v.
Aspinwall? If a court opens a record as in Nalle v. Oyster, then ought it not
know about objections, exceptions and assignments of error?

When and where do the interests of the state and its greatest of guaranties

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"Due Process of Law" cease? (Win-
sor v. McVeigh.)

Now do we not point to universal
principles, essentials to protect with-
out regard to any particular system, in
any singular region? What is a rec-
ord and a court for except to protect
from arbitrariness and its insidious
ways? See Introductory Chapter, Re-
statement.

Jurisdiction; validity of judgments found
title to property; pleadings involved.—
The question of jurisdiction is the
inquiry after the Coram judice pro-
ceeding and often of course of the
validity of deeds founded upon judi-
cial and execution sales (1 Gr. &
Rud. 124-134). And the same ration-
ale extends to inquiries into the founda-
tions of administration of estates,
also tax sales, also municipal bonds.

For all of the above matters the
state provides for and demands a rec-
ord (Secs. 83-123, 1 Gr. & Rud.) and
requires that this record be construed
by the greatest rule of evidence which
is that "What ought to be of record
must be proved by record and by the
right record." This is the state's
record and is mandatory and peremp-
tory and must be respected for and on
account of the state, the mandates of
which cannot be waived by the parties
to the record. And to every attempt
to waive this record the state in ef-
fect says Alterum non l exercet. Res
inter alias acta. The above rule arises
from the Trilogy of Procedure else-
where introduced and explained as or-
ganic principles and among the first in
importance in a Constitutionalism
(See Garrett.) That record is a bul-
work against the possible establish-
ment of a judicial hierarchy and its in-
sidious ways of tyranny and oppres-
sion. Herefrom the Constitutional
character of Pleadings will appear.

Every work on Evidence or of
Pleading might well and clearly in-
troduce the above rule and its cog-
nates above mentioned. It is hinted at
by Story and also in Nalle v. Oyster
(1913); also in Windsor v. McVeigh
L. C. 1, 3 Gr. & Rud. The failure to
sufficiently impress the above matters
left the way open for the "theory-of-
the-case" doctrine and the discussions
over the rules involved in Clark v.
Dillon and in Gulling v. Bank. Else-
where where we cite and discuss these cases
and indicate the Antinomian laws
respecting them. But Tidd, Chitty,
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Stephen and the Code and Practice Act authors have not so written and cleared their subjects as to lead away from the bewilderment and what has come to be called the "legal jungle." Shelley's Case was discussed through centuries and until both legislatures and courts revolted. Likewise American courts are rambling and trying to define "Due Process of Law;" from some cause they are receptive to the idea that something new has come and that what that is will be decided in a nearby case.

As Kent saw and spoke of Shelley's Case so some judge will look and speak of the American "Due Process of Law" and at last set the profession at rest as to what that phrase means. Kent's apostrophe to the departing glories of Shelley's Case is perhaps the most eloquent juridical passage (see Shelley's Case, 4 Gr. & Rud.) while the "Manner of the Romans" and Story's sections which we so often quote are the most useful for the guidance and exercise of judicial power. It involves jurisdiction which is always of Constitutional significance.

As Kent ended the muddle referred to, so some judge ought to end the bewilderment of "Due Process of Law." This depends upon organic law and the American has not and certainly cannot create any new principle of substance—no organic law differing from that of Rome and of England and the great principles and cases introduced in the Restatement referred to. Minimizing the state's rules and magnifying the "omnipotency of Parliament" have bred consequences that is at last attracting attention from Patrician and Proletariat alike. The attitude of the state is lost and unknown to him who accepts the view that "Parliament is omnipotent."

Those propositions are antagonisms and have made way for the warring theories and sects of lawyers. One of these reasons from logic and philosophy and the other from a statute. Of course all statutes make disturbances for generations afterward. Look at the statute giving the bill of exceptions (Statutory Record); the Statute of Frauds and of Limitations and of Amendments and of Joefails and from all of these can be seen long and endless struggle over the construction of these statutes, every line of which, yea; every word of them has called forth a dozen Shelley Cases.

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And so it is with the Code. The Fields saw and construed it one way and Charles O'Connor saw and construed it in an opposite way. And so it is with all Codes.

To indicate the importance of jurisdiction we will observe that the question often arises as to whether or not the purchaser at the judicial sale must open the Pleadings and judge of their sufficiency as they would be tested upon general demurrer and upon Collateral Attack. In other words does jurisdiction of the person and of the subject matter limit the extent of diligence—Caveat emptor—Ignorantia legis seminum excusat? Now look and see how the "theory-of-the-case" lawyers have treated this question. (See Windsor v. McVeigh, L. C. 1 et seq. 3 Gr. & Rud.; Hoback v. Miller [W. Va.]; Nalle v. Oyster.) Knickerbocker.

In other words the leading question is: Do the rules of the general demurrer mean what they say, that is that the general demurrer is never waived. If these rules have exceptions then should not the great expositors have mentioned and have stated and have defined those exceptions? Now could they do that and at the same time exclude essential Pleadings as a jurisdictional element? Herefrom consider the 28 propositions above stated. How these have been discussed and taught may be judged from the review of the authorities we make in other relations.

The jargon over the "Theory of the Case" also of Verba fortius is far more perplexing than the discussions of Shelley's Case.

The author who fills his lids with discussions of that case and of nonsense about the "omnipotency of Parliament" and that a "record is a verity" and invulnerable to attacks for fraud, or objections upon Collateral Attack has made no worthy gift to a Constitutionalism.

Whoever dodges or avoids or straddles the 28 propositions above enumerated makes no vindication of the logic and of the philosophy of the law.

The philosophy of the law has never been comprehended by the Feudal Lawyer and his followers, the modern "scribes and Pharisees" and the local and flat schools of "native sons" its Cokes and its Blackstones referred to in other relations. (See Literature.)
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To support these conclusions we have cited and quoted those who have not discerned the "star," "sextant" and "compass," and consequently fail and acclaim every new statute and case as a "new dispensation" and adding a "new" principle to the law which when rightly interpreted will enable "every man to be his own lawyer." (See Bailes' Code Pleading and Practice, 1-4.) Quotations we make point to the causes of the Babel and its "legal jungle" (see Story). That the attacks upon our jurisprudence by commercialism and its force has entrenched itself into state power in some quarters which by legislation and the influences of a blind judiciary have been led to disregard the protection that is guaranteed by the Prescriptive Constitution from judicial records and also that rule that requires a court to be bound by its record. (See Theory of the Case; also §§ 1-21, Restatement.) From all of these evil forces Pleadings have been excluded as a jurisdictional element in many of the states. Whether or not Pleadings are opened and looked to or Collateral Attack is one of the leading questions of the day. (See Codes.)

The forces above referred to have sought to Enlarge the maxim Omnia praesumuntur rite and to drive it as a wedge into the logic and philosophy of the law (see Introductory Chapter, Restatement), into the substance, the bulwarks of protection—the mandatory record by legislation and transcendent Construction. See how the general demurrer has come to be waived (Gulling; Story; Rushton), also that at the stage of Collateral Attack only two questions may be raised in many quarters; also the attacks upon the necessities of Res Adjudicata, also the law of Taxation (Crepps v. Durden, 113, et seq., 3 Gr. & Rud.); also Municipal Bonds (Green County Cases), that fraudulent bonds will be aided by an application of the maxim last cited notwithstanding that the record shows to the contrary—the record from which the bond emanates. (Green County Bonds.)

As has been observed by great judges, that a power that can be abused is sooner or later certain to be abused. The bulwarks of protection are not statutes and cases but they are the higher law—the Prescriptive Constitution (2 Kent, 8, 12). The Restatement shows that the law arises from old and archaic principles and these must ever be respected in a land of law and freedom.

Writings and teachings that have given a great empire judicial anarchy instead of due process of law, and have dismembered the logic and the philosophy of the law is an ominous cloud in the horizon threatening a more perfect union, the ways of commerce and the necessities of progress and the establishment of justice, should now and at last be interdicted by a restoration of Justinian's Edict for the protection of the lawyer and his establishments. The law student is a necessity if we would have lawyers and courts. The student must not only have good oral instruction but he must have good literature besides (look at the condition of the Code establishments: also its literature. See Story; Rushton; Literature). When leading members of the legal profession proclaim in Bar Associations that the trend of legal education is to make a person a nuisance and a menace to society it is time for those who address the student to suggest the dangers that confront him.

It is overdue to submit to the lawyer if the time has not gone past when he should take an inventory of his consistency, his congruence, and his logic and philosophy. He upholds Story on the one hand and a prominent author on the other hand. Look at § 10, Story's Equity Pleading (47 Hughes' Equity) and §§ 2310, 2311, Thompson's Trials on the other hand. At this time it seems that more schools are teaching Thompson than Story. It is claimed that all can understand Thompson. Here let us ask if we can turn to Blackstone, Tidd, Chitty, Stephen, Gould or Pomerooy and their followers and determine which is right, Story or Thompson. The smart young graduate hurries to tell you that Story is out of date and that a "new dispensation" has come, and grabs Baker v. Warner, 232 U. S. 588, 593 and reads to us. Vainly we appeal to Goldham v. Edwards (Eng.), for we are told that it is an old English case and that the general demurrer can be waived and that when we change its name to Motion in Arrest or Non obstante veredicto we change the rules that govern the general demurrer and that thus it has come to pass that the general de-
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murmer can be waived. On every hand we are told that Story is out of date and that he is superseded by Thompson and his up-to-date theories. Vainly we appeal to the correctness of the dissenting opinion in Gulling v. Bank, 29 Nev. 266, and the correctness of the lower court in Henry, 49 L.R.A. (N.S.) 1-44; also the fact that Illinois has faithfully and devotedly followed the prominent authorities above mentioned and as a consequence has come to hold that the rules of construction are more liberal at the stage of Collateral Attack than at the stage of the general demurrer. Here let us ask if Illinois decisions are anything more than hodge podge at least so far as the general demurrer is concerned. The sentiment that fostered the Chicago Municipal Court Act found a footing in Illinois cases. But it is due to say that Story was returned to in Walter, 250 Ill. 420 (a cause of action must appear from the right record and not from affidavits and oral claims and forensic conduct). This case reaffirmed Campbell v. Consalus, a Code case of New York. Also Mondel v. Steel, L. C. 77, 3 Gr. & Rud. cited and approved in Milbra, 45 L.R.A. (N.S.) 274, 277, 278. Now here let us observe that Walter, Campbell, Mondel, and Milbra, are all Code cases and most worthy. The principles they illustrate are among the greatest of Procedure. They reaffirm the Trilogy of Procedure which we shall express and seek to impress—the “Manner of the Romans” as Festus defined this in Saint Paul’s Trial.

Feudalism has not stated and defended the great principles above hinted for it could not and at the same time contend and teach that “Parliament is omnipotent.” Caprice and whim must be made way for in Feudal establishments. The occupant must keep the “horn” or lose his land (Pusey). It steadfastly refused to acknowledge the supremacy of the higher law—the Prescriptive Constitution. (See In Presentia majoris cessat potestia minoris.) Universal, Constitutional principles are not the gospel of Feudalism but on the contrary its tenets were that “Parliament is omnipotent,” that the law is local and flat and comes from the little capital of each tribe or province—of each feudatory. See Equity, Literature.

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“When its philosophy is lost the law is lost.”
Melius est petere fontes quam sectari rivulos.
As the Rhine has made its bed with the silt of ages from Denmark to Belgium and cuts for itself a new channel from day to day so Feudalism has obstructed the channels of legal philosophy with its silt of judicial decisions not founded on legal philosophy, not even consistency or congruity. See how it treats the general demurrer and its corollaries to and including Collateral Attack, Rea Adjudicata and “Due Process of Law.” All of these matters are treated and presented in an irrelavent way. And the rules relating to the attitude of the state are changed from case to case in the same volume. Look at Ransom v. Williams, 2 Wall. 313, and Harvey v. Tyler, Id. 328; L. C. 122, 123, 3 Gr. & Rud.; also 8 Colo. App. 38, 40 and Id. 285, 288; Gramp, 23 Mo. 254, and Carson, Id. 265, Hughes’ Equity 463-480 (Conflicting rules as to pleading a contract).


Who can name a greater, universal and constitutional canons than this maxim? Now why should Feudalism mire and flounder with it from generation to generation and for each decade get up a new cluster of cases for each tribe or feudatory? And this is exactly what it does.

The contention that “Parliament is omnipotent” is completely overthrown by a right comprehension of this maxim and its cognates in the rules of Rea Adjudicata. Vickeburg v. Henson.

Fix this maxim in the mind and
The feudal lawyer—then read Pomeroy’s Remedies, §§ 506–608, also Bradbury and 50 L.R.A. (N.3.) 1–32, and the marsh above referred to will appear. Relating to it is fog and cloud, the drudge in the treadmill hunting through digests and Cyclopedia pages culled from these for a case or a statute. Such elaborations are pervaded with the idea that the canon is a question of local and flat law, Pom. Rem. 546. And most all follow him; most all prefer his ramble in the jungle without regard to the great trees of the grove. The only beacon sought is a statute or a case. Clark and its cognates are more often disregarded than respected. Clark v. West, 193 N. Y. 349; Baily v. Hornthal, 154 N. Y. 658, 61 A. S. 643; (a decree rested on irrelevant evidence as in Gulliver and in Henry, 49 L.R.A. (N.S.) 1–44. Here are a gathering of the real kind of “Theory of the-case” discussions advocated by Thompson. These should have been cited in 50 L.R.A. for they belong to that gathering of cases. They are in contrast to Kecausse County v. Dockr, L. C. 30, 3 Gr. & Rud. cited at pages 10, 31, 50 L.R.A. supra.

From the Trilogy of Procedure this definition of Pleading is deduced: “Pleadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it.” And so it is that Pleadings are jurisdictional. Nalle v. Oyster; Vicksburg v. Benson; Milbro; Palmer v. Humiston, 45 L.R.A. (N.S.) 640.

The “Theory of the Case” broadly and boldly introduced by Thompson is at war with Story, the Trilogy of Procedure, and the cases last cited. Now why should these fundamentally opposite authors be carried along and be cited and treated as homogeneous—in harmony and as most worthy? One or the other ought to be rejected. And in any full résumé their differences ought to be noticed; justice to students and courts demands that they be fairly presented. For a full generation Thompson was accepted as one of the foremost jurists and authors. In other relations we observe of the viti-ated notions and tastes of the legal profession. From the above facts judgment can be formed.

The feudal lawyer attached great learning and consequences to his forms of action; his aider by verdict; his “defective title and his title defective” stated (see Rushton, 53 L.R.A. (N.S.) 120, 126, 127); his abate- ments; his general issue and his general denial; and his irrelevant theories of Equity and of law; and his irrelevant treatment of the general demurrer and of its correlatives; his waiver of substance; and of the general demurrer and of his statutes of Amendments and Jeqe fails; his common counts; and of course of his notion that “Parliament is omnipotent,” and that it can create distinction and irrelevant systems without regard to fundamentals. All of the above matters are chiefly vagaries. In other relations we give them due attention. The feudal intellect was not and could not be a great lawyer. Which one ever anywhere explained why the general demurrer cannot be waived. (See Al- terum.) Which one introduced and explained the Trilogy of Procedure? Look at the treatment of Verba for- tius already introduced. Had he explained one of these maxims properly it is doubtful if the profession could have been submerged with the outputs of book factories and empiricism. They would have never believed that Pleadings can be dispensed with in a Constitutionalism. Now his followers have introduced a euphemism that they call the “Theory of the Case.” To support this vagary there can be picked eight kinds of Aider from the various jurisdictions. Several of these can be picked from the 50 L.R.A. (N.S.) 1–32; to illustrate: that an answer may supply an omitted allegation in the statement (see Florida Co. 176 U. S. 329, 329; Quod ab initio) or the reply; also the evidence. The full blown species is that a case is not presented by the Pleadings but by the evidence—not by the allegata but by the probata. That the Pleadings are nothing more than scraps of useless paper to haggle over and to be blown around or away like dust by every wind of doctrine. To support these statements we cite and reply upon 2 Thompson Trials, 2310, 2311, quoted under Variance, 4 Gr. & Rud.; also Gulliver v. Bank, 29 Nev. 268–280; Henry v. Hilliard, — N. C. —, 49 L.R.A. (N.S.) 1–44; Merchant Co. — Okla. —, 42 L.R.A. (N.S.) 996, 998; 9 Encyc. Pl. & Prac. 468–470 (departure can be waived). The authorities last cited support the view that irrelevant evidence may supply a bill—a statement of the
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"cause of action." This is plainly held in Gulling also in Henry. That assuming a case presented, or a defense presented will supply the Pleading omitted. Also an issue. Garland v. S. 232 U. S. 640. Cases like these deny the Trilogy of Procedure and its cognate maxims. No greater bulwarks of protection can be named than these maxims—there are no greater principles of protection than are these maxims and what they call for and dictate—the mandatory record. See Windsor v. McLeigh, L. C. 1, 3 Gr. & Rud.; Mondel v. Steel, L. C. 77, et seq., 3 Gr. & Rud.

We learn on the one hand that the general demurrer cannot be waived, Cockerell; and on the other hand that it can be, Henry; in other words that a departure can be waived. That Frustra is not the law. 6 Encyc. Pl. & Prac. 468-470.

Where and when did a Feudal lawyer or his followers so define the Mandatory that it could be comprehended and distinguished from the Statutory record? Courts say they cannot teach the bar the distinctions. Pennacsky v. Coover, 205 Mo. 135. Now the trouble is that the courts teach every thing in every way from every angle for everybody relating to these records except that they are governed by the Trilogy of Procedure. Thompson was a judge in Missouri and see what he advocated. Could he understand a case like Nalle v. Oyster? Or that the general demurrer cannot be waived? Are not cases like Gulling and Henry and Weber v. Lewis, 34 L.R.A.(N.S.) 304, and Merchants Co., and many of those cited in the notes 50 L.R.A.(N.S.) such as support Thompson? If a case arises from the evidence and not from the allegata then must not we often prove the case orally? (See Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Milbra, 45 L.R.A.(N.S.) 274, 277-278, citing and following Mondel.)

Now how can the "Theory of the Case" be discussed and all of the above matters be omitted? If a statement shows it is founded on an In pari: cause of action then no jurisdiction attaches. But now we are informed that if only judgment is entered that then the fatal defect is cured? This is good Thompson doctrine because according to him Pleadings are not jurisdictional. McKee v. Verner, 44 L.R.A.(N.S.) 727: Cases. And we are told that the general demurrer can be legislated out by a statute providing that all errors not raised by a motion in Arrest are waived. Id. Here is genuine "theory-of-the-case" doctrine. It is a disappointment to see that doctrine at last caught up and discussed and all of the above matters omitted. Phases of these matters were hazily touched in 50 L.R.A. but neither top, bottom nor sides of the Juggernaut in Procedure was plainly stated and likewise referred to. Weber, is given on the one hand and on the other hand it is denied, 50 L.R.A. 21 (a consideration, also a promise, must be averred to present a contract).

Bacon against Coke, Mansfield and Story against Thompson, The Trilogy of Procedure on the one hand and the "new" and modern school on the other hand are as widely apart as the antipodes. Of the latter are Smith and Clark, § 3, Restatement. The former wrote his Elementary Law in 1806, and the latter his, in 1908. Each of them explicated the maxim "Equity regards that as done which ought to be done." Each made this maxim a part of the "Theory of the Case," and thus: That the vendee seeking specific performance of a contract for the sale of land need not aver that he either paid or tendered the purchase price as either of these facts will be presumed by an application of that maxim. So payment need no longer be pleaded according to the "new" school. Omnia praesumuntur rite is thus made a most useful rule of Pleading. The law of Lester v. Foxcroft, L. C. 341, 3 Gr. & Rud. is no longer the law. In the same kind of a suit, Halligan, 49 L.R.A.(N.S.) 112-120 the taking of the possession is a leading equity and must be alleged and proved with great strictness. But Lester and Halligan are denied in Henry, 49 L.R.A.(N.S.) 1-44. In this case it was held that failing to plead to a fatally bad bill cured it; also the admission of irrelevant evidence. Frustra probatur quod probatum non redivit was denied; also Verba fortius. Indeed all of the Trilogy of Procedure was denied in Henry as it was in Gulling. There are important phases of the "Theory of the Case" omitted in the extended discussion of it in 50 L.R.A.(N.S.) 1-32.

Cockerell, 81 Ka. 335, 50 L.R.A. (N.S.) 1-32, is not a most instructive case for it only involved a shadowy
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pressed the logic and the philosophy of the law; they did not cite and explain one of the major or organic maxims of Procedure. Now there are these maxims and why did not they cite them? This would have been enough to arouse inquiry and investigation. And these would have led to the essential truths. The Code paraphrased the Trilogy of Procedure. Quis, quid, coram quo can be seen in the leading Code provision. Cockerell, 50 L.R.A.(N.S.) 1. To have pointed out such facts would have put to rout the views of Judge Grier, and Charles O'Connor quoted in Tyler's Preface to Stephen's Pleading. The judge spoke and O'Connor spoke and condemned and this pointed the way to the bewildement. All then straddled as did Blackstone and the others. Sergeant Williams had said that substance could be waived and then they all said so. This is the basis of the "Theory of the Case." (See Story; Ruathton; Williams.)

Get the Trilogy of Procedure in mind and in its light read §§ 306-608, Pom Rem. and herefrom judge if he understood the fundamentals. (See Pomeroy.)

And the profession has preferred the Feudal, its local and flat laws, its empirics, mountebanks and the clamor and hurrah of commercialism. Generally it thinks better of Coke, Pomeroy and Thompson than does Bacon, Mansfield and Story. See how Professor Tyler relished and inclined to Judge Grier and the indefensible attacks of O'Connor. And this is the way the Code has been introduced and taught. (3 Am. Law School Review, 602-609.) Really a protecting government should have shielded the student; anybody have told him there was fundamental law.

Did any one of these Feudals know the Trilogy of Procedure and its cognates? Let the student look at Quis, quid, coram quo, and then see it in the Code (Cockerell), and see how his vision is broadened. But note that all the Code writings are pervaded with the notion that it is a new creation. And this is what has destroyed it. The notes in 50 L.R.A.(N.S.) assume that it is new, peculiar and distinctive. And so the Cyes assume (31 Cyc. 1-778.) (See Chitty.) All prefer to follow Pomeroy (See Par. 2 of his Preface, 1876; also his §§ 75, 509-514, 533, 546, 592, et seq.). Herefrom it will be ap-

phase of variance. It found a new terminology for Ut res magis valeat quam pereat by calling it "Theory of the Case." In 42 L.R.A.(N.S.) 998, Kansas cases are cited showing that departures are allowed in that state. These are the broader, deeper phases of the euphemism wherefrom the jurisdictional defects of the doctrine are exposed. Why the learned annotator swept back over the reports from the 92 to the 81 is not apparent. He might well have chosen later cases in the later reports and such as Brumbaugh, 82 Ks. 56, or Duphorne, Id. 159. These present stronger phases of the matter than does Cockerell. This case does not mention "Theory of the Case." It was correctly decided in reference to a class of cases that involve both contract and tort; like Langridge v. Lenz, Thomas v. Winchester and Pasley v. Freeman, L. C. 375, 3 Gr. & Rud.; or where a passenger is injured by the carrier's negligence. On this perfectly sound stump, on another kind of a question, an exotic was grafted in an extended way. In Henry which was a "Theory of the Case" in the most flagrant character another exotic was grafted (pleading the statute of frauds). Henry did not call for a plea; it stated no "Cause of Action" as is required in Cockerell. The Code requires that a "Cause of Action" be stated. The Trilogy of Procedure requires it and the Code reaffirmed the maxim—Quis, quid, coram quo. But Henry is offensive and viciously so to both the old and the "new" law—the Code. It did not state a "Cause of Action." It called for no plea. There was nothing to plead to. It would be error to cite Henry to the points that it is annotated upon. No lawyer would cite it when his attention was called to its character. It is as bad as Gulling. It is not apropos to the question when must the statute of frauds be pleaded. We can cite the notes to that point but not Henry. But it is "Theory-of-the-case" doctrine. It ought be cited in relation to that on all occasions. See Theory of the Case, 4 Gr & Rud.; also in Equity In Procedure; also Alterum, ante.

To please the demands of the age and to fend the prejudice of the Feudal lawyer Blackstone (§§ 15, 1 Gr. & Rud. Maine's Ancient Law, Prefrent (XIX.), Tidd, Chitty, Stephen, Gould, Pomeroy and their followers wrote their works. Not one of them ex-
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parent that he straddled and generally inclined to the Feudal theories.

Cockrell is much like the "Squib Case," the first Code case and to which Blackstone dissented. One may plead his facts. Whitney, L. C. 112, 3 Gr. & Rud. A statement of Coggs v. Bernard, L. C. 350, 3 Gr. & Rud. might be either contract or tort.

The Contract sounding in tort and vice versa makes no difference where the procedure is identically the same. Ubi eadem ratio ibi idem jus. Why should so much space be given to a distinction without a difference?

We call on the smart young graduate with the old lawyer who has his story, and Greenleaf and Smith's Leading Cases and observe that they have much useful matter. Generally the response is hurried that they are no longer cited in his courts. Then we ask for those most preferred and he points to Digests, Cycles, Brief Making, Smith's and Clark's Elementary Law and Thompson above referred to. To support these he quotes Warner v. Baker; Clark v. West, and several late cases impugning Kewanee County v. Decker, L. C. 30, 3 Gr. & Rud. quoted pp. 10, 31, 50 L.R.A. (N.S.) It is futile to observe of Smith and Clark and the supposed "new" matter he is so conversant with. And from the 50 L.R.A. (N.S.) he can pick much to sustain his views.

Joshua with his horn might blow down the walls of Jericho but he would certainly blow vainly against the inrenchments of Feudalism in its last great stronghold—the lawyer, his judiciary and establishments. And at last he is told by the leading orators in Bar Associations that it is too late to talk reform that "Revolution is called for." To prove the stupidity, indifference and prejudice of the legal profession we have only to look at the origin, genesis and development of the "Theory of the Case." Look at Gulling, and Henry above cited.

To sum up: The Theory of the Case is more than a shadowy rule of liberal construction as in Cockrell. Its genius is to break down and smother the Mandatory Record with matter that belongs to the Statutory Record. Thus it is aimed at the attitude of the state in procedure (See Alterm; Mandatory Record.) It has no respect indeed it denies the rules of the general demurrer; for its theories are that more liberal rules attend at the stage of the motion in Arrest and on Col.
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may study these reports for a month
and he will gain no real information.
Only a few cases in New York and In-
diana can be cited to sustain the
Trilogy of Procedure as does Camp-
bell and its cognates.
The Feudal lawyer did not under-
stand Res Adjudicata. See the hag-
gles over it in Kingston’s Case, L. C.
76, 3 Gr. & Rud.; nor has he showed
the way to plead it (L. C. 25-30, 3
Gr. & Rud.). He has nowhere shown
that he sees Interest reipublicae as a
part of Alterum, and how these prin-
ciples dictate causes like Campbell v.
Consalusa (Parties cannot stipulate to
dispose with the pleadings); nor how
they demand and dictate the rules of
the general demurrer and its correla-
tives. Look at the wreckage at the
stage of Collateral Attack, and around
Res Adjudicata. The principle in
Creps & Durocher is as much unsettled
today as it was a century ago. (L. C.
113-130, 3 Gr. & Rud.) He and his
followers are in the same old ruts, try-
ing to straddle, as they wallow along,
every great principle of Procedure.
The student asks for bread and he is
given a stone; and he is strangled and
smothered like the victims in the
Laocoon. See Literature.
Multitudo imperiorem perdit ou-
riam.
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greatly depends upon the intellect.
To illustrate: Suppose we are in a vast
botanical garden wherein is found the
flora of earth. Most all of this was
discovered, studied and classified and
given a nomenclature by antiquity.
Now what have we to gain by renounc-
ing the efforts of the Ancients—the
greatest of teachers and insist upon
new names and a new classification?
If the oaks, the pines, the maples and
all the fruits and nuts and grasses
were gathered and named in Asia and
around the Mediterranean, why should
we renounce the work of the ancients
and their cosmopolitan efforts and em-
brace only the efforts of some petty
province or capital?
And what should we think of a
botanist who taught that the root had
no relation to the stump, or trunk or
the heartwood or the limbs and branch-
es, or the late sprouts of the stems,
the leaves and the “late buds.” That
the same sap does not course through-
out all parts of the plant? That all
that should be sought or studied is the
“late bud” or the leaf that had grown
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in a particular province? Could a
botanist who would deny the rela-
tions of the root to the “late bud com-
mand the respect of any scientific or
reasoning intellect?
It appeals to be the exclusive glory of
the legal profession to have the
keenest appetite and relish for jokes
upon their intelligence and their
courts, their literature and their
school. From the slums of quackery
most everything has come to the
lawyer and his establishments and he
embraces all, if only it is laid before
him with the elanor and burrah of
commercialism and its advertising
methods that are nothing more than
the fullest utilization of the liar’s op-
portunity. (See Unfair Trade.) Their
ways and outputs would have been en-
joined and punished by Justinian. But
in this age commercialism has been al-
lowed to stretch and flourish by be-
clouding the law and submerging the
lawyer and his establishments with
empiricism and quackery. The facts
are widely abroad and the call for
“Revolution” is timely. Anent Vicks-
bury v. Henson observations are made
that should be read in this connection.
See also Case System.
Whoever knows the familiar maxims
and the old cases illustrating the ap-
plication of these maxims knows the
roots and the heartwood of the law,
and he will not turn away from
Broom’s Maxims, Smith’s and White
and Tudor’s leading cases, Story’s
Greenleaf’s Evidence and Bishop’s
Books for the late bud theories, and
the acclaim for Digests and Cycas and
for the “new” and the “modern”
school and its famous works on “Ele-
mentary Law” in the outputs referred
to. He prefers to seek the root and
the reason and secure this as easily
and as directly as possible, and to
work from the root to the “late bud.”
He will not be content with the latter
alone; he will not be satisfied with the
theory of the “late-case” advocates.
See Literature.
The old lawyer sought the maxims
or leading case on the subject he was
considering and with these in hand he
regarded his work as more than half
done. If a dog case was wanted he
would think of Animals, and the lia-
ibility for keeping ferocious animals
or of keeping a nuisance. And so he
would look into a work on tort or damages
and would herefrom be led to May v.
Burdett (Eng.) and to its annotations.
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by able specialists wherein the law of all animals would be ably resumed and impressively stated. Herefrom he could find all the dog cases he wanted; also the law of the scinter which is so important to the pleader. (See Van Leuten v. Lyke, L. O. 14, 3 Gr. & Rud.) So from the monkey case or the hog or the cow case the law of the dog cases could be perceived. What is wanted is May v. Burdett and where it is annotated. This information cannot be learned from local and provincial Digests in America since the Key Number case is an English case. So we see what is needed is a true "Key number case and the annotations of this which is more comprehensive and impressive than is the vast Digest and Cyc gatherings of cases with the such cases as May and lead away from the works that most ably discuss it. Substituting some local and provincial case for May makes against the deeper, most condensed and the broader way.

A plan of leading the student directly from the subject he is considering to the maxims or the case illustrating what subject is founded on a true conception of the importance of knowing the root and the trunk. The English student understands this better than does the American. The former has long had his Mews' English case law attended with its table of cases. And with that truly excellent Digest before him he could not be duped by the efforts of commercialism to convince him that another Digest on the same plan was something "new." A Table of Cases is an old idea that commercialism bitterly assailed in the last generation as a "useless pad;" and next it heralds it as something "new" — a "new and progressive addition." And the works that commercialism hawks oft on the student, evidently omit all reference to such a digest as Mews'. (See page 46, 1 Hughes Proc. [1906]). Volumes supposed to teach the student "how to use law books" omit Mews, Digest and all reference to it. Tables of abbreviations proclaimed and sold as the "student friend and guide" omit all reference to many current and valuable works,—to works that the well educated student should know of. (See Literature.) And such is the manifest effort to misled and to injure, paralleling the claims for and the presentation of a "key number system" that omits all English cases and the maxims and without any reference whatever to those factors and of the original efforts of others who sought to present the roots, the trunk and all parts of the plant. It was after these efforts and such a demonstration that commercialism discovered from those efforts and from Mews' English Cases law that therein was a plan that might be appropriated and applied to endless shelves of Digests stuffed and padded with millions of local and provincial cases that are nothing less than the tangles of tyros and the mines of bewilderment. And with these gatherings of jargon there attends the bluff and of bluster of how the law is found and learned in these overtopping bulks wherefrom the student can never learn why the general demurrer cannot be waived. (See Alternum.)

The original "Key number system" picked the Roman, the English and the American matter and so arranged and integrated it that the plan became an index to all books, digests as well, for it often cited and led to Mews' English case law as will appear by reference to the original performance. Splitting and riving off a part of the plan and making it adaptable to a local and provincial Digest is no warrant for the representations that have been made to the profession and which has certainly greatly misled it.

Such is a supposed "new system" and such are the facts upon which the claims for it rests. But the system referred to is not all that is advertised and hawked off on a gullible and submerged profession by means of deception and misrepresentation. We will next refer to other "new" and "modern" ideas.

"New" and "modern" law is also written by tangled tyros. To illustrate: In Smith's, and now Clark's Elementary law anent Maxims and this one "Equity presumes that what ought to be done was done" or "Equity regards that as done which ought to be done." This maxim is then explained by the statement of law as follows: If a vendor is seeking the specific performance of a contract for the conveyance of land that it is sufficient to allege the contract and then therefrom the court will presume that the purchase price was either tendered or paid. Such facts are presumed from the fact of making the contract. Elsewhere we mention the above "new" law.
Finding the Law.—

Acccordingly we see that *Vehba fortis* is revered in its operation and that all presumptions are in favor of a pleader and not against him. To support such claims for new and "modern" law cases like *Baker v. Warner*, 231 U. S. 588, 593, can be cited. See *Vicksburg v. Henson*; also *Garland v. S.*; *Stare decisis*; Literature. Cf. *Campbell v. Consalus*; *Clark v. Dillon*; *C. & A. R. R. v. Claussen*.

Such are some of the claims for finding the law also an illustration of one of the "new" laws that has been brought forth by commercialism and therefore is only found in its own output. It also tells us that more than 5,000 "new" principles are stated and developed each year. See *Vicksburg*.

And of such is the literature most widely used and commended to the schools and sold to students. It is this literature that is designed to make every one his own lawyer. (Daylies' *Code Pleading and Practice* 14.) Fully satisfying any and all excellence of the oral instruction afforded students, still we ask what progress can they make if the outputs of commercialism constantly lead them away from true principle and the fundamentals, are commended to him as a key and a guide and means of testing and of suggesting to him. Now can the Pleadings for specific performance be made as short and as simple as that on a bill or note? Such are the "modern" Pleadings advocated also the rules by which they are to be construed. Now have the Codes settled any of these questions? Professor Pomeroy is the expositor of the New York Code and Judge Nash of the Ohio Code. Each of these expositors failed to see that each Code was founded on the same fundamentals; the Prefaces of these authors will show, that each assumed that his code was a local and flat edict and must be construed by the respective courts; each asked for more legislation and for more decisions when all they needed was *Rushton v. Aspinall*; *Bristow v. Wright* and *Outram v. Morewood* (L. C. 5, 135, 25, 3 Gr. & Rud.). The rules of *Res Adjudicata* dictate the substantial rules of Pleading in every Constitutionalism. This fact is indicated in *Campbell v. Consalus*; in *Clark v. Dillon*; *Palmer v. Humiston* and *Mibra v. Steel Co.* (Ala) are cases for all systems. *Vicksburg v.*
Finding the Law.

The law on the subject how the above record supports the title to property sold on execution and judicial sales; Caveat Emptor and Windsor, C. 1, 3 Gr. & Rud. &c.; also Campbell v. Connaught, Clark v. Dillon; Rushton v. Aspinall, Bristow v. Wright; Milbra v. Steel Co.; Palmer v. Humiston, and Nalle v. Oyster. Codes codified; they did not create.

Now what did they codify? This is an important and significant question for him who construes a Code. Now which Code author has told us what were the principles that were codified, and whence came they? We have stated that Res Adjudicata dictated the rules of Pleading, and that this is Roman. The requirement that a "cause of action" shall be stated is dictated by Res Adjudicata—Interesse respettor. And these brine with them the "Manner of the Romans," and the chief maxim of Pleading which is De non apparentibus. (See Alterum non leedere; Demurrer.) Rules of Pleading are dictated by high laws and their operation. And it was these rules that were codified. These rules were not new but they were paraphrased by legislatures. One knowing the older law would look through the statute and see the Universal, Constitutional principles of all systems and construe for them statute or no statute and regardless of the blunders of courts and the tangles of tyros. But whoever looked only at the letter saw as did the authors we have classified ancient literature.

Those who viewed the Code as a local and flat edict did not comprehend the Universal, Constitutional principles of Procedure. All they saw was type on paper to be construed by Feudal ideas. They did not understand the attitude of the state in Procedure and its old, immutable and necessary rules of Construction—the Trilogy of Procedure elsewhere explained. They did not understand why the general demurrer cannot be waived. To explain all of the above matter was undertaken by commercialism and its empirics which has dug up the land with their jejune literature that has duped the statesman and established and fattened millionaire publishers who have submerged the lawyer with overtopping bulks of confusion with the result of establishing judicial anarchy and degrading the legal profession.

Antiquity contended that the law was founded upon a few fundamental principles well worked out and comprehended. Therefore, not more than a multitude of principles underlie any one of the principal branches. Now give to Procedure ten fundamental maxims and these will be ample for the explication of the subject from a fundamental standpoint. We do not insist that fifteen ten are involved. Paraphrases and variant expressions of the same principle do not multiply principles as has come to be claimed by Commercialism. (See Vick'sburg v. Hanson.) Stating Ut res magis valeat quam pereat as a new rule and not applicable before reaching the stage of the motion in Arrest or at Collateral Attack is not new as is supposed in the "late" case. Ut res is applicable at the stage of the general demurrer and likewise at all the stages where the sufficiency of the mandatory record is called in question. This must be so in order to protect the integrity of the general demurrer. (See observations anent Vick'sburg.)

The Feudal lawyer and his followers have not and they cannot admit that there are Universal, Constitutional principles of Procedure because if he did he would indirectly impugn his dogma that "Parliament is omnipotent." The claims that constitutions create and limit these fundamentals is a narrow and mischievous view.

The literature of the law must be rewritten in the lights of Universal, Constitutional principles and away from the mottoes and theories of Feudalism. Constitution of Constitutions and of the Code by Feudal ideas has proven destructive.

Feudalism and its followers have not given a single book on Pleadings that is worthy of the student's attention. Better than any Volume that Feudalism has given is the "Manner of the Romans" in Saint Paul's Trial and sections 10, 25–28 Story's Equity Pleading. From these passages is perceived the Trilogy of Procedure, or the trio of principles by which the mandatory record is construed and upon which the attitude of the state in Procedure depends. Herein lie the heart and vitals of Constitutional Procedure of a rational "Due Process of Law." Herefrom may be perceived the Universal. Constitutional principles that Feudalism has scattered all around in a general way but never once plainly stating that these principles underlie every
Finding the Law.—

system of Procedure that can serve the requirements of a constitutionalism.

The commendations of the American Bar Association are to teach the familiar maxims, the general principles and the leading cases. Now which author of American comment, or Code Memorand, has met that requirement? On the contrary have not they led away from these essentials and even denounced the maxims as ancient "dogmas" and the old cases as the old system? (See Vicksburg.) The "manner of the Romans" is quite generally recognized in the Criminal Procedure also in Equity. But in the Court of Law wholly different ideas prevail. Here the Pleadings are waived under the "new dispensation." (See Theory of the Case.) In the law case the attitude of the state is denied. And wherever this is done there the logic and the philosophy of the law are not understood. In the face of these facts we are now instructed that in Law Cases pleadings are not strictly judged. Garrett.

The fact last stated is illustrated anent Alterum non ladere and the matters therein referred to. The maxim last cited does not arise from cases; not from Davies v. Mans as is claimed by supposed educational journals. Now Davies is an English case and if the principle Alterum arose in the case then why is not Davies the true "Key Number" Case. And if so then why assign some late American case for the "Key Number."

Fish, etc.—

Illinois cases that clearly decide that Pleadings are jurisdictional. The question of direct conflict as will appear from the cases pro and con. Courts in other States find it difficult to determine the attitude of Illinois cases upon the points in Fish. They are in conflict. See Gullion; Bristow v. Wright, L. C. 135.

JEOVINE: amendments statutes are extravagant and are generally upheld. See COLLATERAL ATTACK.

FIU NEM DE HIs CONTRACTIBUS scripture, ut quod actum est, per eas facilium probandi potest; : The case, fa-

FI xITUR

Parties have the right to contract what the muniments of evidence shall be of their private transactions and these will be respected by courts. Expres. protes. § 551. Gr. & Rud.; 44 L.R.A. (N.S.) 388, quoting from Justice Garrett.

The state prescribes what shall be the evidence of transactions and proceedings in its courts. Herefrom arises the tril-

ory of Procedure and the first rule of evidence which is "What ought to be of record may be proved by record and by the right record." Campbell v. Cons-

sinus; Mondial v. Steel, L. C. 77, 3 Gr. & Rud.; Mandate in cases of Garvin.


land; Mondial v. Steel, L. C. 77, 3 Gr. & Rud.

FIXTURES: Elices v. Mauc, Sm. L. C. 2 Gr. & Rud.

FLAG: As an advertisement forbidden. Haldy. 121 Am. St. 754-757n.

FLETCHER v. ASHBURNER, Wh. & Tud. L. Eq. Cases Equitable Conversion.

FLETCHER v. PECK, 6 Cranch, 87. Gr. & Rud. Legislatures and town councils are immune from attacks of fraud. Ex dolo malo; has an exception.


ware & Hudson Co., 30 Am. St. 304-305, ext. n. See Actus Dei: Injure: Alterum: Sic utere: 27 Eng. Jud. Cas. 39 (accident). One holding a noxious agency upon his premises must confine it. He is liable for injuries caused by savage animals. May v. Burdett; 4 Gr. & Rud.; or no-

xious fumes. St. Helen's Co. 4 Gr. & Rud. One is presumed to intend the natural di-

rect and probable consequences of his act. Squib Case, 30 Am. St. 303-301n.


FORMER JEOPARDY: 2 Gr. & Rud.; De-


FOUR IDENTITIES: Discussed in Res Adjudicata, 4 Gr. & Rud. See Zeller v. SHOW.

The "Theory of the Case" has been recog-

unknown in several Illinois cases. Derive v. R. R. See title Illinois in Equity Pro.

Procedure. It is difficult to find the
Fraud.—
Vitiates everything into which it enters. See Fletcher v. Peck. Recriminatory;when a defense. White

FRUSTRAS AND PERJURIES: See L. C. 333-341, 3 Gr. & Rud.
Departures are not allowed is a rule that arises out of this maxim. It does not allow departures and variances. Bis-

ODES confirm this maxim by providing that all 

FUNDAMENTAL LAW; FUNDAMENTAL principles: See the six leading subjects, EQUITY, PROCEDURE, CONTRACT, CRIME, Torts, and CONSTRUCTION. The Trilogies of these subjects are fundamental law or principles like Alternum non Iudicabile, Iudicium Aliud in iudicio, etc. Non potest, etc. are fundamental law. The latter maxim is extendedly discussed in sections 500-522, EQUITY IN PROCEEDING; DIVISION OF STATE POWER. doi are

FUNDAMENTAL, etc.—
duce it to speak as it did in P. v. Tweed, 60 N. Y. 559, 60 A. R. 211. Akin to this case is Huntsman v. S. L. C. 231, 3 Gr. & Rud. Organic law prescribes the rule that a court is bound by its record. Knickerbocker, 201 N. Y. 379. This is flatly denied by the "theory-of-the-case" courts. These contend that the Code is a new and revolutionary system declared and upheld by local and flat edicts. (See Pomeroy.) Being obsessed with this idea they commenced construing the Code as we indicate in reference to Biddle v. Boyce, also Gulling and its cluster of cases. These cases deny the Trilogue of Procedure which is, 1: De non apparentibus; 2: Frustra probaturo quod probatum non relevant; and 3, Verba fortius. These maxims we present as fundamental law in the Restatement. Restating the law depends upon gathering and naming the organic, major maxims of the law and elaborating from these the multitubous branches of the law. (See Preface. Restatement: Dowston.) Had the Code been construed in the light of organic principles it would not have failed. It was emasculated by construction. (Biddle v. Boyce.) Code authors and expositors have studied Feudal form and style more than they have the fundamentals. They have too closely studied the style of Tidd and his disciples and far more than they have that of Mansfield and of Story. The facts about this are stated in the Restatement sections. (See Feudal Lawyer.)

Why it is that the general demurrer cannot be waived has not been made clear to the profession, and we think the reason is that cases have been awaited, sought and cited to elucidate such questions. Such are the claims abroad. (See Feudal Lawyer.) It is submitted if this question is not best explained from fundamental principles. (See Alterum.)

From many viewpoints Constitutional law must sooner or later have a rectification, for all must admit that there is some cause operating to destroy the logic, philosophy, the unity, harmony and the simplicity of the law. Cases like Campbell v. Consalbus, Clark v. Dillon, Ross v. Mine, and Huntsman v. S. are bottomed and pervaded with some reason why it is that the parties cannot contract a procedure unto themselves, also why it is that there are limitations of legislative authority to interfere with pro-

From the viewpoint of American jurists, the title In praesentia majoris, we gather and cite cases that sustain the contention that there are principles that do not arise from cases, nor local and flat law. (See Prescriptive Constitution.) Okla-

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Fundamental, etc.—

To demonstrate that the limitation to contract is also the limitation to legislate would greatly aid in raising the clouds of doubt and conjecture. To do so, no doubt, would prove that there is fundamental law that has too long been kept in a nebulous state. To demonstrate this would be the beginning of the rectification referred to.

To demonstrate that the certainty required in judicial operations is reckoned from Res Adjudicata and not from Coke's three degrees of certainty (Dovaston) would push into the field of Constitutional law Procedure and all its substantial parts. And such a classification would clarify the cases last above cited; this ought come from some source. The struggle over Clark v. Dillon in all jurisdictions is a serious stumbling block if not a bar to the progress of the student. It often appears as a great Universal, Constitutional axiom that is mired in a bewildermont of cases. Under the title Code, Restatement we have stated it.

The student cannot do better than familiarize himself with Verba fortius. And is it not, a Constitutional principle of the profoundest character, far above and beyond Statutes and decisions of courts?

Fundamental, etc.—

The lawyer has his deicalogue as well as the theologian. Its principles are but few but the various expressions of these are multitudinous. (See §§ 509–522, Equity In Procedure.) These principles must be familiarized and in their various expressions. A great city often has more than one name. Now should not any geographer or historian know its respective names when he sees it? And should not the druggist know the various names of each drug? And the botanist of each plant? And for accurate classification must not he know the Latin—the scientific name for it?

The fundamental principles of the law are from the Latin. They were first conceived and named by the Roman who alone gave his law a logic and a philosophy. His great principles we have gathered and explained in the sections of the Law Restated. In these sections we offer the fundamental law of all civilized countries.

Those who call for a return to fundamental law can only offer the major, organic maxims of all ages for that law. The Prescriptive Constitution is the fundamental law of the land. (See Nemo debet esse judex.)


The omission of a material allegation is fatal to a recovery. Omission to state that the plaintiff was damaged cannot be aided either by consent nor by proving the damages. A "cause of action" arises from the allegation and not the probata. The "theory-of-the-case" doctrine rejected. (Gaulting.) A case can be no better in law than in pleading. Frustra probandi quod probas non relevat. The old rule and the modern. What one does not allege he is presumed not to have. An every presumption is against a pleader. Verba jortitio. This Trilogy of Procedure is the whole. It all can be picked and argued from cases. Mansfield spoke for it in Kushton v. Aspinwall which was cited in the opening of Bartlett v. Crozier, also in Williams v. Hingham Turnpike Co. (Mass.) L. C. 5, 6, 1, respectively. 3 Gr. & R. U. S. v. Cruikshank, L. C. 232, 3 Gr. & R. Involved identically the same question. The principle applies to all systems and to all cases alike and Garrett must be construed to accord with the old law and to withstand the intimations of differences in cases at law and in Equity. The case before the court was a statutory cause of action like the Bartlett and the Williams cases. In all these cases the above maxims of pleadings are the law. Certainty in Pleadings is reckoned from Res Judicata and not from requirements of trial practice alone (but see Paraiso v. U. S.; Garrett). There are other and higher functions of Pleadings than giving notice to the party for trial purposes. Pleadings are Jurisdictional. Consent will not confer jurisdiction of subject matter as it would if Pleadings were merely to give notice to a party for trial purposes. Pleadings are required by the state. Alterum; Res inter alios acta. They cannot be contrived away. Campbell v. Conscience, 233 U. S. 579. Frustra. This is the law in all systems. The rule that cases at law must be more strictly pleaded than in Equity, is opposed to many authorities. See Story; Res Judicata.

Verba jortitio is strictly applied in Appellate Procedure. See Baker v. Warber. It will not be implied that damages resulted to a parent from the killing of a child. Nor will the proof supply the omission of an allegation of damages. 235 U. S. 313; Quius, quid. The rules of construction do not vary and fluctuate in different cases, nor systems, nor at different stages. Goldham v. Edwards; Aider. See Baker v. Warner.

1 Chitty's Pleading, 270 and Daniel's Chancellor and Practice Sec. 368, have not been understood by the "theory-of-the-case" advocates. See Story; Rush ton; Gaulting; THEORY OF THE CASE; FRUDIAL LAWYER; LITERATURE; RES ADJUDICATA; ALTERUM.

Garrett should be read along with Nolle v. Oyster; Vicksburg v. Henson; Baker v. Warner; Paraiso v. U. S.; Dectaine v. Los Angeles, also the maxims above cited. See Chitty; Pomeroy.

We leave it to the student to judge of the value of Gianvill, Bracton, the "Golden period of Edward the III. of Coke, Littleton, Hale, Bentham, Blackstone, Tidd, Chitty, Stephen, Gould, Dan leis and that long list of supposed great works and illuminated pages from which the required light cannot be seen by great courts and authors and educational journals. (3 Am. Law. School. Review, 602-617.)

GENERAL DENIAL: is incompatible with the idea that Pleadings are to limit issues and to narrow proofs. It is alien to the Code.

GENERAL SUBLATA SPECIALIBUS NON DECGOANT: Things general do not degenerate from things special. 2 Gr. & R.

GENERAL ISSUE: Like the general denial it is offensive to the genius of the Code. It is an instrument of Crime. Ex parte v. R. 240 Ill. 328, § 346. Ely in Procedure.

George v. Claggett, Sm. L. C.; 2 Gr. & R. Factors right to set off.


Glossa Viperinaest Que Corrodit Vincula Textus: That is a viperous gloss which eats out the vitals of the text. See THEORY OF THE CASE.

Goddard v. Winchell, 41 Am. St. 17 L.R.A. 758. Aerolite belongs to land upon which it falls. Accessorium; Cujus est solum.


Godsall v. Boldero, Sm. L. C. Also English Reprint. Life insurance is a contract for indemnity only. Contra, Dalby, 2 Gr. & R.

Goldham, etc.—
defects are waived; and these are
waived the instant they are passed
without apt and prompt objection.
Consensus. At the stage of the motion
in Arrest the tests for substance are
exactly the same. As to formal ob-
jections they are governed by Con-
sensus, at all times. The notion that
one may plead to the merits and not
waive all formal objections eo instanti
is untenable. But many cases can be
found pervaded with the idea that de-
fects of form may hang in abeyance
and after waiver by pleading over,
still be available afterward. State
To illustrate that a pleading vulnera-
able to general demurrer may be ob-
jected to at any time even after fail-
ture to promptly object. That after
waiver of all formal defects by failure
to object before the trial that still at
the trial then it is still time to object
to what has already been waived. This
view violates a fundamental principle
which lies embedded in Consensus tol-
it errorem. For if a formal matter it
is easily waived and if waived then it
is gone forever and cannot be recalled.
Jurisdiction over formal matters are
waived unless there are prompt and
precise objections. What ought to be
raised by special demurrer is waived
if not so raised. But a matter of the
general demurrer is governed by other
considerations altogether. A matter
of the general demurrer concerns the
state and its interests cannot be
waived. Alterum. These views are
dictated from the Trilogy of Procedure.
§§ 1–13, Restatement. These views
involve the Trilogy of strict Construc-
tion on the one hand (the Trilogy of
Procedure), and the Trilogy of liberal
construction on the other hand which
are 1. Consensus tolit errorem; 2.
Ut res magis valcat quam perceat; and
3. Omnia prasumuntur rite. See
Equity In Procedure. The attitude
of the state dictates these distinctions.
But these distinctions are overlooked
in many cases, wherein it is assumed
that the further on down beyond the
stage of the general demurrer the more
liberal will be the rule to uphold the
Pleading. Of course if this were so
then the general demurrer could be
waived by the effect and operation of
fluctuating, ever widening and enlarg-
ing rules of Construction. Davis v.
Jacksonville Line; McAllister v. Kuhn,
L. C. 3, 3 Gr. & Rud.

Jackson v. Peaked is very hazy;
Baker v. Warner, 232 U. S. 588, 593,
is equally so; also Slocum v. Ins. Co.,
228 U. S. 364–428.

It is held that after the stage of the
general demurrer, that, the tests vary
and widen to uphold the Pleading.
Penna. R. R. v. Ellet, 132 Ill. 654,
citing and attempting to follow Jack-
son v. Peaked; Warren, 2 Gilm. 307
(general demurrer may be waived);
Brumbaugh, 82 Kas. 55 (denies Gold-
ham); Guling and its cluster of cases
are antinomies of Goldham; and very
plainly so is 3 Bouv. Dic. 3 Rawle
Revis. title Pleading (1914); State
Bank v. W. U. Tel. Co. — N. M. —,
55 L.R.A. (N.S.) 120, 128, 127.
citing cases also 2 Tidd's Prac. 919, which
reiterates the jargon of the "defective
title" and the "statement of a title
defectively stated." (See Rushton
which is cited by Tidd; also Litera-
ture; Roper v. Clay; § 173 Equity In
Procedure.) We do not consider the
presentation by Tidd, who is followed
by Chitty, Stephen and Gould as in-
telligible. They merely state conclu-
sions drawn from what Sergeant Will-
iams said, about waiving substance.
This is denied by Goldham, also Story.
Acent Rushton we state much that re-
lates to Goldham. Perhaps the broad-
est rule of construction compatible
with any useful existence of Pleading
is found in State Bank Case. It in
effect holds that matters of the general
demurrer are waivable. This case
should be considered with Guling. See
PLEADING.

Goldham should be studied with
Dobson, wherein are found the limits
of liberal construction. See LITERA-
tURE.

Intellecits not familiar with the iden-
tities of the general demurrer, the mo-
tion in arrest, the requirements of Ap-
pellate Procedure, Collateral Attack,
Res Adjudicata and "Due Process of
Law," have made of these matters one
of the worst snails of the law. See
FEUDAL LAWYER; LITERATURE. Gar-
rett.

GOOD v. ELLIOTT, 3 T. R. 603, L. C. 358.
3 Gr. & Rud. Wager Contracts: In pari.
4 Brit. R. C. 369.

GOOD v. ADAMS: Sought In Construction.
Ex dolo malo. Statutes cannot be satis-
fied by subterfuge. Caker v. D. C. 33 D.
C. App. Cas. 572.

GORDON v. GORDON, 3 Swanst. 400.
Mistake will avoid contract when; Com-
promise will be set aside when. Mistake;
Ignorantia facti.


Grace v. Mitchell, 11 Am. Rep. 613. Not only must an officer have regular process (Saucovol v. Boughten, L. C. 104, 3 Gr. & R.), but he must act bona fide, and he must have process. Blair v. Reading, L. C. 176, 3 Gr. & R.


The matter of the statutory record may not be mixed with the matter of the mandatory record and vice versa. Chicago Planing Mill Co. v. Chicago, L. C. 34, 3 Gr. & R. "What ought to be of record must be proved by record and by the right record."

It need not be alleged that the consideration issued at the promisor's "instance". Contra: Carson, 23 Mo. 205. See Equity, 480. Compare these cases with Bowen v. Emmon and Wehe v. Lewis.


Fish v. Cleland. All of these cases are consistent with Rushton, Brittain, and Navasota, Ill. 572 Ill. 135, and 277, 3 Gr. & R. Also Nalle v. Oyster and Vicksburg v. Henson.

Guest is also cited and followed in Campbell v. Consulati. Accordingly we see the English case in the basic cases of the Code. Also in the Federal cases. Goldam v. Edwards.

The Trilogy of Procedure is vindicated by Guest; and of course by its cognate cases. It is denied by Gulling, and the "Theory of the Case" authors. (See Brown). Compare the above cases with Gulling v. Bank.


Gulling v. Bank of Warshau County, 29 Nev. 266-250; cases, 80 P. 25. Cited, Preface, also §§ 2, 3, 7. 22, 23. Restatement. The issues in a case must be proved without the pleadings, by evidence oligarch. (Nalle: and Mondell, L. C. 77, 3 Gr. & R. Prefaced). It is also held that the matter of the statutory record may be substituted for the matter of the mandatory record: that the identity of issues may be gathered and admitted in evidence without its origin and in denial of the rule that "What ought to be of record must be proved by record and by the record." (Seeissing Mill Co. v. Chicago, L. C. 421, 3 Gr. & R.). 1 C. J. Cyc. 66, 100. Talbot, J. discerned in Chicago Co. v. Fordham, piling which every student should read.

He vainly cited Campbell v. Consulati, and other N. cases and likewise from Illinois, and other states; also Mondell. His opinion accounts with Munday v. Vail, L. C. 79, 3 Gr. & R.; Martin v. Edwards, 85 Md. 8, 90 A. S. 36 L.R.A.(N.S.) 248 (dicta of courts are limited by the mandatory record). Vicksburg v. Hens et; Fish v. Cleland, L. C. 120, 3 Gr. & R.; Rushton. Under the supposed liberal rules of the Municipal Court of Chicago the Pleadings are not to be enlarged or modified with oral claims and affidavits, Watson 260 Ill. 420; Mondell v. Steel. There are limitations of legislation in our courts: Hunstman v. S., L. C. 231, 3 Gr. & R. Also of power to contract away or to consent away the Pleadings. Campbell v. Consulati. Alterum.


These cases stand to deny Vicinage of jurisdiction and the rules of Res Judicata, 4 Gr. & R. They support the contentions that the amends of Amendment II is that the states are to be construed literally. See Clark v. Younger, 32 Ohio, Fokker v. Arnow.

With Gulling, the Henry Case and Rensereger v. Britton, 31 Colo. 77-82, reviewed in Hughes Procedure de-
serves to be classed. There are two
Reneberger cases. In the second one
a plea of Res Adjudicata arising from
the record in the first case was dis-
cussed. The latter case can be cited
to support sham, mythical and moot
cases and how these may be employed
for purposes of chicane and covin in
a willing court which was an accessory
in denying Exceptio falsi. The at-
tempt to plead a plea of Res Ad-
judicata upon the record in the first
case was nothing more nor less than a
flagrant contempt of court for the mat-
ter set up for that plea was not heard
in the court a quo. That matter was
not heard nor disposed of upon the
merits. For that plea it seems that
only a judgment entry was pleaded,
nothing else was pleaded. To this
fatally bad plea a replication was
filed—a mere denial nothing more. As
in the Henry Case it was held that a
fatally bad pleading is made sufficient
by forensic conduct. A mere denial
was held to supply the omitted facts
from the pleading, and too where the
court must take judicial notice of its
own records and that the supposed
matter litigated in the former suit
was not heard at all for the reason
that it could not be heard in that
case because it was stricken from the
record as a matter that could not be
pleaded as set-off or counterclaim. And
it was properly stricken. This ended
that matter. And the court knew it—
for its own records showed the fact.
Still from a mere denial—a true de-
nial the court assumed a sufficient
plea as in Gulling and in Henry and
in S. v. Fassc and upon its assump-
tions proceeded in the face of the rule
that "Estoppels are odious"—in other
words Verba fortius:—“that estop-
pels are strictly taken" (Vicksburg
v. Henson) and judicially declared
there was a sufficient plea when its
own records in the former case showed
the contrary. Here is usurpation and
abuse of power in its most flagrant
and insidious form. With the record
facts speaking plainly and powerfully
and binding the court to truth and
the facts the court a quo ignored these
and proceeded in a tyrannous and
most oppressive way and bound a lit-
gigant by sham pleas that were plain-
ly a contempt of court. And they
should have been punished as such.
And the appellate—the court ad quem
upheld these flagitious proceedings.
Elsewhere we refer to the comity of
courts to uphold and to advance a
judicial hierarchy.

And further still: The appellate
court after upholding an outrage for
a plea of Res Adjudicata did not stop
with such a plea as it should have
done; but it went beyond and assumed
to hear and consider matters de novo.
After finding the plea this was a bar
to all further consideration of that
matter. Elsewhere we review these
cases which are among the most offen-
sive to the due administration of the
laws. They ought not pass as "Due
Process of Law" in any Constitutional-
ism and they would not wherever
there are courts invested with equita-
ble or with superintending powers.
For such cases the writ of prohibition
ought issue from any appellate court
having power to enforce respect for
first principles. See Codes; also S.
v. Fasse; Blockum v. Ins. Co.; Morn-
ingstar, Stokes v. P., 155 N. Y. 581,
590-594; Weber v. Lewis, stated under
Contract (material allegations in Con-
tract may be supplied by presump-
tions); Carson v. Flyn, 23 Mo. 263,
Contra, Gramp v. Dumonicat, 23 Mo.
254. See these cases stated Equity
In Procedure §§ 463-480; Garrett (U.
S.).

Multitudo imperitorem perdit curi-
am.

There must be pleadings and they
must be certain as to parties. Leonard
v. Pierce, 162 N. Y. 431, 1 L.R.A.
(N.S.) 161, n. Quis, quid. Ut res.
HITCHCOCK v. HIGHT, 7 Ill. 604, L. C. 12, 3 Gr. & Rud. See Bowren v. P. 114 Ill. 474. Limitations of alder. Walter, 250 Ill. 120; Fish v. Cleland; Campbell v. Consalve; Guest v. Warren. Alder by verdict. Rushton. Alterum.


HOOCHTER v. DE LA TOUR, 2 El. & Bl. 678, L. C. 308b, 3 Gr. & Rud. 38 L.R.A. (N.S.) 410, 1 Labatt, Mas. & Ser. 334, 6 Bus. C. L. 374, 385.

HOLIDAY: See Dies non.


HOPE v. BLAIR, 24 Am. St. 366. Pleadings essential for protection. This is a non-case; i.e., along with S. v. Muench. These cases are cited in Equity. K. v. O'Brien.

HORN v. WARENBERGER, 9 Tex. 313, 58 A.D. 145, L. C. 85, 3 Gr. & Rud. An authority must be alleged and proved.

Jurisdiction cannot be retrospectively acquired. See this case cited in Equity. Wallence, 38 App. Cas. D. C. 145 (If the court a quo has no jurisdiction, the court a quo acquires none).


HORN v. BAKER, Sm. L. C. Equitable estoppel. Fixtures.

HORN v. COLE, 12 A. R. 111. Equitable estoppel. (Abest résumé.)


HUME v. ROBINSON, 23 Colo. 359, 2 Gr. & Rud. Also Equity. See Guling.

HUNT v. BOURMANIER, 8 Wheat. 174. Death of principal revokes the agency.


Huntsman, should be considered anent the title Fundamental law ante. It involves considerations of the limits of legislative authority to interfere with the means of judicial operations. And there are limitations of the right to contract away those means. Campell v. Consalve. But it is due to observe that this line is not well defined and established by the authorities. When it is no doubt it will lead the way to a rectification of the province of Constitutional law. There is no doubt but that the TRILOGY OF Procedure is a gathering of principles that are profoundly Constitutional from many viewpoints. See the presentation of these in §§ 1–13. Restatement. Cases like Clark v. Dillon and cited cognates vaguely hint at a higher law that must be respected and which led the way of such decisions but they lack positiveness and clearness of statement. Clark is stated anent Codes Restatement.

From these cited it can be gathered that Pleadings cannot be dispensed with; that a court is bound by its record. Knickerbocker. Both criminal and civil cases are judged by the same rationale. Knickerbocker; Nalle v. Oyster; Vicksburg v. Irason. The trilogy of Procedure applies to all cases alike. §§ 1–13, Restatement.

HURRADO v. CALIFORNIA, 110 U. S. 516, L. C. 220, 3 Gr. & Rud. Due process of law against substance not form. What we call it makes no difference. It is the "Manner of the Romans." See TRILOGY OF PROCEDURE; Prescriptive Constitution; Huntsman v. S.

HUSBAND AND WIFE: Coercion; Contracts; Usufructuary.
In pari, etc.—
Restating the law depends upon showing the ramifications of a few great principles.

A judgment founded on an In pari contract in Coram non judice and is subject to Collateral Attack. Weltmer v. Bishop, L. C. 268, 3 Gr. & Rud.; Beaumont v. Reeve, L. C. 317, 3 Gr. & Rud.; Quod, ab initio.

Illegality in the statement of a "cause of action" is ground for the general demurrer and this is never waived. Alterm. The Code expressly provides for the operation of the general demurrer. See Demurrer. Crimen omnia; Fabula non judicium; In presentia.

However it is held that if the judgment is only entered that then it cannot be set aside. Venner v. McKee, 239 Pa. 69, 44 L.R.A.(N.S.) 737, n. To support this view Gulling and its cluster of cases can be cited; also Henry v. Hilliard, 49 L.R.A.(N.S.) 1-44.


The Code provisions anent stating a "cause of action" and testing the statement by a demurrer should not be overriden by other provisions. See De non: Nescit genus.

In presentia majoris cessat potestas minoris: In the presence of the major the power of the minor ceases. Cited §§ 11, 14, 26, Restatement. The Major-Organic maxims are the basic and fundamental law which control all lesser laws. This maxim leads the way for the operation and effect of the Prescriptive Constitution.

q. v. This body of law has been kept in haze and mystification by Feudalism and its followers. For this reason they have proven bad and misleading Constructionists as the history of Codes and Practice Acts will show. See Gulling Procedure, Ex. Pomery; Codes. They never cite and elucidate the dominating maxims of Procedure,—its Trilogy. They have never explained why the general demurrer cannot be waived. See Alterum; Quod, quod. Even the quite commonplace maxim Verba fortis, is
In presentia, etc.—rarely cited and it has never been so explained as to be given a prominent and commanding place in their writings.

There are limitations of statutory power not expressed in constitutional enumerations. Oakey v. Aspinwall, L. C. 222, 3 Gr. & Rud. S. v. Terrell, Ind. 2 L.R.A. (N.S.) 251 (a crime charged “18902” is not aided by statute.) See Repugnancy.

Looking from the maxims and cases above cited it seems well to state in this connection that there are high and controlling laws with which all others must be construed to accord. (Lec non exacte.) From and to this high body of law the whole law must be comprehended as an entirety. This body of law should, at the beginning, be introduced and explained to a student. Melius est petere fontes quam sectari ravulos. How this initial performance is given the American student may be judged from the discussion of Constitutional law. As this is exploited and taught so are Codes and Practice Acts.

To start he is interested that the law is local and flat, the introductory of Constitutional law permits him to think that he must look to a constitutional enumeration or tabulation of principles to know what fundamental law is. He is taught that the law is type on paper and depends upon the fundamentals that “native sons” have gathered and upreared and that to and from this declaration of organic laws he must ever turn for a start. So he is handicapped from the beginning. The prevailing school has taught that the law is type on paper (See Non in tabula est jus.) That the law arises from the resolves of some convention, or statute or cluster of decisions. What is not found in this is assumed not to exist. (Quod lex non estat permittet.)

The Prescriptive Constitution is not introduced and explained to students. (See the Law Restated.)

And so it is that we find the American statesman, court, author and teacher hunting for the written and tribal laws to light and to pave the way for his progress. Herefrom arises one reason why it is that if he leaves his state he leaves his profession with it. Each jurisdiction has its own cluster of cases, its own “totem pole.” Starting with this handicap there fol-

In presentia, etc.—lows a discussion of Constitutional law pervaded with constant references to “fundamental” law and maxims, which we are left to infer are somewhere gathered and comprehensibly explained. These are often referred to as trite and commonplace and “known to us all.” But are they? We think not for one great volume after another wholly omits them. Once in a while some author may in a thousand page book set a half dozen maxims but rarely the major and organic ones. This fact we think is demonstrated by the Restatement sections. What author or court or digest or Cyc clearly sets out and explains the Trilogy of Procedure? (See §§ 1–13, Restatement.) Here are the maxims, the fundamentals of Due Process of Law which is given so much attention in Constitutional discussions. Facts amount this are stated in the Restatement of Law. After learning the major, the organic maxims, then the defects of teaching apart and away from them will appear. By working from them instead of the “straight jacket” imposed by “native sons,” the student will find his vision greatly broadened and his understanding deepened. Then he can see why McCulloch v. Maryland and Marbury v. Madison are upheld on the one hand and are denounced upon the other hand.

The Trilogy of Procedure (1 De non.; 2. Frustra.; and 3. Verba fortuna...), have not been so explained that they are seen through the vague references to a higher law than statutes and cases. To illustrate: Exactly why Pleadings cannot be stipulated away is not made sufficiently clear in cases like Campbell v. Consaulus and its Guest v. Warren. Further illustrations will be found in Clark v. Dillon and C. & A. R. R. v. Clausen and their cognates. Gramp v. Dunnivant cited in Equity In Procedure; Indianapolis R. R. v. Horst, L. C. 223, 3 Gr. & Rud. U. S. v. Kirby, 4 Gr. & Rud. 

Legislatures cannot abolish Pleadings and the safeguards of protection that they afford. See Introductory Chapter, Restatement. Huntsman v. S., L. C. 231, 3 Gr. & Rud.

Constitutions and statutes yield to fundamental laws. To illustrate: No man can be made judge of his own dispute. Oakey v. Aspinwall, L. C. 222, 3 Gr. & Rud. P. v. Seymour; P. v.
In presentia, etc.—


Idem agentia et patienda esse non potest and its cognate principles are related to many branches of the law. It has various paradoxes but the idea is the same. A restatement of the law must deal with principles like this and Alterum and in pari, and show their interactions with the various branches of the law. To illustrate see §§ 509-622, Equity In Procedure. This maxim is closely related to Summa ratione legis est qua pro religione facit. And so it is that in pari yields to idem agentia. Brooks v. Martin, L. C. 370, 3 Gr. & Rud.

The laws of God are high laws for which all others must give way. Summa ratio. The interests of the state are also high laws and these cannot be waived. Alterum non iadere; Interest reciprocus ut sit finis litium. For Res Adjudicata there must be Pleadings, and these cannot be waived. A stipulation to dispense with pleadings is void. Campbell v. Consalus; In pari; Pacta conventa; Modus et concitatio; Quod ab initio; Taylor v. Sprinkle.

The Prescriptive Constitution is the supreme law. Oakley v. Aspinall; State ex rel. Henson v. Shepphard, 4 Gr. & Rud. Contracts, stipulations and compacts to dispense with the higher laws are void. In pari; Pacta conventa. Riggs v. Palmer; Taylor v. Sprinkle; Thomas v. R. R. Herefrom arises the reason why Pleadings cannot be waived. Campbell v. Consalus. They concern the public. Interest reciprocus. Res inter alias; Alterum.

The logic and philosophy of Pleadings must be understood for a right comprehension of Campbell v. Consalus and Clark v. Dillon. See Codes.

Mention Constitutional law to the American student and his mind flies to some great written charter.—Magna Charta or some other written document. He does not think of it as a spirit, as logic and a philosophy. He thinks of it as a local and flat matter. He wants to see the letter and not what the local courts have said about it. And so he has constructed the Code and Practice Acts. (Biddle, R. C.) He wants to see the letter from which to start and to found his argument. He refuses to see law from its spirit, its logic and its philosophy. He wants the letter, the book, the case, the letter of the Constitution and from this law and inspiration. It looks to his capital, to his court for light, and "Datum Posse." He has not

been trained to think of a few great principles creating Magna Charta and expanding the construction of its declarations, expanding them here, and contracting them there. He is not wide visioned like Kent. (2 Kent, 8-12.) Few courts can speak as did the court in Oakley v. Aspinall; L. C. 222, 3 Gr. & Rud.; or as did the court in Penoyer v. Neff, L. C. 58, 3 Gr. & Rud.

The maxim of antiquity in Ruston v. Aspinall, L. C. 6, 3 Gr. & Rud.; in Albritton v. Wright, L. C. 135, 3 Gr. & Rud.; and the Triology of Procedure (§ 1, Restatements and Particular is that part of the Prescriptive Constitution that governs the operations of the judiciary in a constitutionallaw. In relation to these maxims we have submitted if civilized governments have gathered or declared any greater or more useful principles. Now have they been respected in American courts. (See Quelling and its cluster of cases), also "Theory of the Case."

Interest reciprocus ut sit finis litium is, also a principle of the Prescriptive Constitution §§ 122-146, I Hughes' Procedure. It is one of the greatest principles of Constitutional law whether named or called for in a Constitution or not. From it as a fountain the law of Procedure can be unfolded. (Melius est petere fontes quam secuti riuulos 4 Gr. & Rud.) But legal literature is not developed in the light of these facts. This fact will appear from works on Pleading; these authors have not presented Res Adjudicata as a dominating subject, as a "Datum Posse" from which the logic and philosophy of Procedure may be articulated. Their indexes and the matter of their works will show. Story wrote four editions broadened by more closely respecting Story. But the fact is that all authors have treated Res Adjudicata in a fragmentary and stunted way. It is at all. (See Chitty, Stephen, Pomery.) If the students turn to the rules of Res Adjudicata (4 Gr. & Rud.) and then compare the works on Pleading, then he will get right and a necessary impression. Herefrom he will see that the best cases such as Donasten v. Payne and Clark v. Dillon lack a fulness of expression instead of nothing more than vague and hazy hints of a line where legislative interference ends. This is quite plainly stated in C. & A. R. R. v. Clausen (Ill.); also in Hunsman v. S. (Tex.). In these cases it was a question of legislative power, while in Campbell v. Consalus, it was a question of the validity of a stipulation to vary Pleadings.

So we can see that there is a barrier fixed to limit statutes also Contract to alter, vary or to dispense with Pleading. We think this barrier is the same thing whether we look from statutes or from contract. Now is not this barrier the Triology of Procedure to the De non; 2. Fratum; 3. Verba fortius. If these conclusions are well founded then may we conclude a reasonable convergence of the views of Constitutional law and of Procedure is demanded. If Procedure has Constitutional overtones, now these lines be made prominent and clear in works on Pleading and Evidence? To
TEXT-INDEX

In presentia, etc.—
support these conclusions we refer to the sections of the Restatement.

Elsewhere we submit as plainly as we can any chart or written Con-
stitution has within it any greater prin-
ciples than are the maxims above cited.

In the light of these Story wrote also
Kent and Stephen J. Field. They always
respected these maxims. And so did
Manley in 1857. See also Aspinal and
his Briton v. Wright L. C. 5, 305, 3
Gr. & R. The law in all systems,
in all furlongs and angers, in all
thykes. But these decisions were despised by the
Feudal lawyer and his followers. (See
Feudal Law and the antique Plead-
ings to serve the demands or Res Ad-
judicata can be traced from Clark v. Di-
lon and in cases where apparently trifle
ways were involved. To illustrate, the question
arose in Leonard v. Pierce, 182 N. Y. 431,
1 L.R.A. (N. S.) 161, n. Whether or not
a claim presented a defendant in his
individual capacity and next in the State-
ment he was described in a representative
capacity if the pleading was demurrable; and
it was held by a divided court four
to three, that it was not. We mention this
for the sake of the reason, the Talfies, and
Ut res. Therefore such an objection
would be available on Collateral Attack
at the further stage for the ground of
the general demurrer is never waived.
Here are technicalities to be sure but
there are the safeguards of the higher principles.
A plea of Res Adjudicata is almost always a technical plea.
In the following paragraphs further stages for the
reason that the rules and the necessities of Res Ad-
judicata dictate and dominate many of
those of pleading and Evidence.
This fact is particularly striking when we come to consider Verba fortius.
This and the principles that statutes of
Amendments and Jeofalies are enacted to
extirpate. The discussions over this
principle would fill volumes. Whoever
will follow these discussions, especially in the Code states will clearly
perceive Judicial Anarchy.

INSANITY: See McNaughten's Case, L. C.
195, 3 Gr. & R.; Davis v. U. S. 160
U. S. 160, 4 Gr. & R. (Duties);
K. u. S. Oxford, 4 Gr. & R. (Criminal);
Actus non facit; Molton v. Comroux, L.
C. 413, 3 Gr. & R.; (Court of
How. Prov. S. v. Marler; Davis v.
U. S. 160 U. S. 469.

INSTALMENT CONTRACTS: Cutter;
Horn.

IN STIPULATIONIBUS EX QUÆRITUR
quid autem sit verba contra stipulato-
rum interpretaanda sunt? in contracts
when the question is what was agreed
upon the contract is to be interpreted
against the seller. Verba fortius.

INSURANCE: 2 Gr. & R. See Godsell.
is a contract for indemnity only for
Contrary cases also Carter v. Boehm (material
representations); Behn, all in 2 Gr. & R.

Waiver of conditions in policy. See
Modus; 4 Gr. & R.

INTENT: Actus non facit; Ignorantia: As-
sent: Non heo (contract); Volenti
(tort). Presumed from act. Res ipsa
loquitur; Probatia; Verba intentione de-
bel incertaeve. (Construction.)

INTER ARMA LEGES SILENT: In the
midst of arms the law is silent.

INTEREST REIPUBLICÆ UT SIT
this lissium: It is the welfare of the pub-
lic that there be an end of litigation.
Cited, secs. 2, 20, 22, 25, Restatement.
See Equity.

This maxim dictates many rules of Pro-
cedure. It is the foundation of Res Ad-
judicata For the vindication of this,
high policy of procedure construction is
always made. It is for these policies that
Campbell v. Consul decided. For
these De non is mandatory. See Consul;
Mandatory Record; Alterum non lade;
Modus et conveniunt.

INTERNATIONAL LAW: This is a body
of laws made by the family of Nations
to be respected and vindicated by each
and all of them. A violation of these
laws wins for the offender the con-
tempt of the civilized world and arouses resemtes to revenge and expected
ways. To illustrate: If one
nation denies to another rights under
the axiom that man's highway for commerce and intercourse
and physically obstrutters this right
then civilization and its handmaid
commerce suffers and any and all of
mankind may interfere to remove or
abate the obstruction exactly as any
one may interfere to stop a brawal or
a breach of the peace or to abate a public
nuisance. Fundamental law molds and
directs International law. Many of
its principles arise from Alterum non
lade; also Salus populi suprema
lex. The major maxims of Procedure
are also International law. § 11,
Restatement. The Prescriptive Con-
titution is the basis of International
law. Its principles pervade the entire
mass. Its fundamental principles are
molded from the great maxims and so
these are almost automatically en-
forced by the dictates of civilizations
of religion and of humanity. To
respect and to enforce these high laws
are among the highest duties of great
and useful national life; for no higher
purpose can a nation exist. For
these ends any and all may appeal to
the potencies and dignitaries of the
world. Well might any nation have
interfered to arrest the operations of
Pizarro and of the Spanish Inquisi-
tion or of prying of prisoners of war
alive or starving them to death. Hor-
rors that appall the moral and hu-
man sense of mankind and that are
disgrace to mankind may be right-
fully arrested and repressed by any
and all the forces of civilization.
International Law.—

Personal and private injury are only a makeweight for interference for the right and duty to interfere are dictated by the higher law. Governments that turn away from their high and protecting duties have not long been permitted to rule mankind. Authority to rule depends upon power,—force, and if necessary its exercise. Nations and their perpetuity like all other developments depend upon the law of the survival of the fittest, however coarse and brutal this may seem. The highest principles of international law are paraphrases of moral rules of conduct spoken by Him who said that He “came not to bring peace but the sword.” The way of civilization has only been opened by the sword. Only by force has the road of progress been opened and kept clear. It is useless to only preach to arbitrariness, jealousy and hatred.

If one nation were to make exclusive claims to the ocean and menace and threaten all who would venture thereon, such acts would justifyarming to resist such encroachments and such arming would be no provocation for an attack by the predatory claimant. The abuse of a right given by the law, renders the assailant a trespasser ab initio. Acta exteriora.

Great governments must have and employ force in order to make the world higher and better for men and women to live in and to stay the hands of aggression and arbitrariness. For the maintenance and vindication of superior laws all potentates and administrators of nations must stand forth and perform if they have any regard for the past or for the present or for the ages to come.

INTERVENTION: 123 A. S. 276–314, ext. n.


IRRELEVANT: Evidence is not a juridical factor. It is at most surplusage. But in “theory of the case” courts this surplusage and matter of the statutory record, if it has a place anywhere, is held to supply omitted matter from the mandatory record. If it is admitted without objection it will supply substantial pleadings. In Henry v. Hilliard, 49 L.R.A. (N.S.) it supplied the omission of the allegation that the vendee took possession under and in pursuance of the contract and held it as is required under the equitable exceptions to the Statute of Frauds. (Lester v. Foscroft; Frustra probatur; See Jansen v. Hyde.


The evidence must correspond with the allegations and be confined to the point in issue. Frustra probatur quod probatum non reeleat. See IRRELEVANT; Jansen v. Hyde.


Craig v. U. S., (issue essential), reversed in Garland v. R., 232 U. S. 642. (Stare decisis does not bind courts.) The Feudal lawyer defined pleadings from an issue standpoint. See COMMON COUNTERS.

ITA LEX SCRIPTA EST: The law is now written. Cited, sec. 8, Restatement. Quis horae et iure? Exspecto unius: "Parlamentum is omnipotent. Lex non exspecta: 2 Gr. & Rud.; Equity. See PUBLICATION: INFERIOR COURTS; WORDS; FEUDAL LAWYER.

IVERSLIE v. SPAULDING, 32 Wis. 394. L. C. 49, 3 Gr. & Rud. Taxation: must be certain: "What ought to be of record" (Oral evidence inadmissible).
J

JACKSON v. CLEVELAND, 90 A. D. 268-271 n. Deed; how far conclusive. Real consideration may be shown. 25 L.R.A. (N.S.) 1194.

JACKSON v. PESKED, 1 M. & S. 234, 105 English Reprint. 84, 14 Rev. Rep. 417, 132 Ill. 564; 31 Cyc. 763. Cited second, 8, 21, 23 Restatement. Stated §§ 117, 118, Equity in Procedure, §§ 18, 73, 2 (itr. Ev. This case involved the same point that was in Dobson v. Campbell, also in Davis v. Jacksonville Line, in Ruhotz v. Aspinall, L. C. 5, 3 Gr. & Rud.; Bartlett v. Crozier (N. Y.) L. C. 6, 3 Gr. & Rud. Also § 10 Story's Commentaries quoted § 47 Hughes, Equity. It was a discussion of illiberale Construction. It involved The Tragedy of Justice and lost in this bill cited and clearly vindicated it would have thrown great luster over the court. But it was not a clear case. Tid. Chitty and Stephen could not deduce the fundamentals from it for when they would of it that it would also come with condemnation what Sergeant Williams said about waiving substance. None of these and a judgment saw the state in procedure. They never cited the Tragedy of Procedure and its cognates not even, Quod ab initio; or Justus per publicum; or Quis, quid, coram quo. They understood Jackson, exactly like the courts have that cited it. Look at Illinois. In Missouri (Roper v. Clay, 18 Mo. 383, 59 A. D. 314-320a, cases.) The promise in contract is supplied by verdict—Weber v. Leis, 34 L.R.A. (N.S.) 364a. The general demurrer can be waived.) § 273 Equity. See Works cit- ing Jackson and not how they confuse. The true rule can be spelled out of Jackson, Dovaston and their cognates. Still the fact appears that his and his followers wabbled and wriggled over Verba fortius until its importance was lost to view. Illinois tried to follow these cases, and sent the general demurrer and its correlative, its courts are mired in contradictions. Like the Federal courts they tried to imitate the style of Tidd instead of Story. See LITERATURE.

The Federal supreme court informs us that it will adopt new and progressive rules. Baker v. Warner, 232 U. S. 585, 593. In this case the language that is not direct and clear is quoted. See AIDER, JEOFAILS; Quis, quid, coram quo; LITERATURE.

Cases like Jackson have not instructed a single court in the logic and the philosophie of Procedure. To support this con- clusion we need the consideration of the Tragedy of Procedure and its cognate maxims; under the light of these laws. See Justice of the court is widely cited in works on common law pleading which also parrots the usual jargon. By this time.

JANSEN v. HYDE, 8 Colo. App. 38, 40, quotes Monday v. Falet and a paraphrase of It. 110. It can affirm and plainly says that the statement of the `cause of action' must appear at a first judgment. Winslow v. McVeigh, L. C. 1, 3 Gr. & Rud. Hoback v. Miller. In Holman 252, 285, in the same volume the court denies Janssen and finds the

Jansen, etc.—

Pleadings and the issues in irrelevant evidence, instructions and argument. See Hume. In the same book both Guesit and Gulling are upheld. And is not this judicial anarchy?


JEOFAILS: The Statutes of Amendments and of Juiacles are generally a paraphrase of Sergeant Williams' view that substance can be waived. See Jackson v. Pesked. Aroue hired firm stated are a thousand "Shelley Cases." These have decided everything in every case from everyday for everybody. See Guesit and Gulling v. Bank. Clark v. Dillon is viewed in every way by New York courts and judges, Bradbury's Rules of Pleading, 9-16: 1564-1570. See 2 Gr. & Rud.; also PRESCRIPTIVE CONSTITUTION. In Present day majority. These statutes are directed from the idea that the law is local and flat, and has no logic and philosopher's course. They are directed at the Tragedy of Procedure; and particularly at Verba fortius. They generally command that Pleadings be construed in favor of the Pleader. Gulling v. Bank; and courts threaten to proceed without statutes and overwhelm the major the organic maxims. See Warner v. Baker, cited under Jack- son v. Pesked; Rushotn.

Apply to formal matters only. Wiston's Executor v. Francisco, 2 Wash. 189; Young v. Schofield, 132 Md. 650; B. v. Terrell. Ind. — 2 L.R.A. (N.S.) 251; Clark v. Dillon.


All participating in a tort are joint trespassers. Elements of the law is that they be agreed to board them. He contracted with a husband and wife to board the hands who were given an unwholesome food. All were held liable. Malone v. Jones.


JORDAN v. GREENBOURNE FURNINERIES CO. 78 A. S. 544-546. ext. n. L. C. 228, 3 Gr. & Rud.; Statute of frauds must be pleaded when. Henry v. Hilliard. 40 L.R.A. (N.S.) 1-44 (this is a very objectionable case. See Irrelevant). JORDAN v. NORTON. 2 Mass. W. 145, 6 R. C. 142-220, L. C. 324, 3 Gr. & Rud. Non naso in fadere vent. JUDGE: Immutity of. Lang v. Benedet, 1 L. 159, 8 Gr. & Rud. Cannot delegate his functions. Ven Styrke. See Division of State Power. JUDGMENT RECORD: Essential to support a judgment. See Mandatory Records. Nulla v. Opator; Windsor v. McFerrin, 4 Gr. & Rud. S. v. McFerrin, 12 Gr. & Rud. Res Adjudicata; Wilson v. Lovencat. JUDGMENTS: Are contracts and the state is a party to. See Contract; Equity. If coram non judice they are as in part. Mandatory record supports and this is tested by the Trilogy of Procedure. Windsor. JUDICIAL ADMISSIONS: See Dickson v. Cole; admissions of record are conclusive. Bradbury v. Cranfield, L. C. 35, 3 Gr. & Rud. North Carolina. JUDICIAL ANARCHY: Observations on. See Coder: Literature; Story; Contract; Pleading of; Rushton; Feudal Lawyer. JUDICIAL NOTICE: Omnia prasinatur urbs antiqua. Manifiesta prohibito. Lescop in vino. JUDICIAL REVITALS: Depend upon the Pleadings. See dictum; Res Adjudicata; Vickenburg v. Henson, 201 U. S. 259 (U. S. in general may); Knickerbocker v. Trust Co. 201 N. Y. 379; Ferguson v. Crawford, L. C. 264, 3 Gr. & Rud.; Gramp v. Dunn; intro due. Chapter. Restatement. JUDICIAL SALES: See Execution Sales; Are subject to Collateral Attack; Hoback v. McNaught; Windsor v. McNaught, L. C. 13, 3 Gr. & Rud.; Williamson v. Berry, L. C. 65, 3 Gr. & Rud.; Knickerbocker. JUDICIAL TERROR: The final arbiter. Marbury v. Madison, L. C. 142, 3 Gr. & Rud. Cura est institutre; In praesentia maiesta. Must respect fundamental law. See Equity; Division of State Power. S. v. Sheppard, 4 Gr. & Rud. JUDICIAL VACUUM. NEMINEM cum alterius rettremi et injuria fieri locupletiorem: According to the law of nature, it is just that no one should be enriched with detriment and injury to another (1. e. at another's expense). L. C. 308, 3 Gr. & Rud.; Bright v. Boyd, 2 Gr. & Rud. Jurisprudentia. JURISDICTION: Depends on three things: 1. Of the Person, Pennoyer; 2. A judgment in sufficient form; and 3. Of the Pleadings. See Due Process of Law. Theory-of-the-case advocates limit jurisdiction to the first two elements. Gulding; Henry. "Pleadings are the juridical means of inventing a court with jurisdiction of a subject matter to adjudicate it." Nalle v. Micah; Vickenburg v. Henson; Garrett. See Judicial Recitals; Mandel v. Steel, L. C. 77, 3 Gr. & Rud., quoted, 45 L.R.A. (N.S.) 274, 277-278. Campbell v. Consalus. The Trilogy of Procedure, is the test. Introductory. JURISDICTION.— Chapter. See Allegation, 2 C. J. Cyc. (Feudal definition.) An order beyond the power of the court is void. S. v. Muensch, 4 Gr. & Rud.; Chapman, 66 W. Va. 307, 135 A. S. 1033. Quod ab initio. Essentials of jurisdiction. Windsor, L. C. 1, 3 Gr. & Rud.; 2 Gr. & Rud.; also Equity. Coram Judice; Garrett. Nothing in law is more unsettled than jurisdiction. See Theory of the Case; Crepe v. Durden; Collateral Attack; Pleadings. Jurisdiction is the central idea in Procedure. The study of Res Adjudicata, Due Process of Law and of Collateral Attack will indicate its importance. It is from these subjects that Pleading, Practice and Evidence should be studied. The feudal authors and their followers have not included these subjects neither in the body of their works nor in their indices. They have relied upon discussions of the summons, of the forms of action, and forms of process and of Pleading to instruct and to lead the way through the wilderness. They have not taught the attitude of the state and its high policies, why the general demurrer cannot be waived, and why it is that the construction of a pleading is exactly the same at all stages; why it is that Pleadings are the juridical means of inventing a court with jurisdiction of a subject matter to adjudicate it. Looking from high policies of Procedure, Pleadings are a jurisdictional question. (Sc. 83-123, 1 Gr. & Rud.) But this fact is denied in all "theory-of-the-case" courts. In these, Pleadings can be waived also legislated away by statutes of amendments and ofjoefails. See Gulling v. Bank and its cluster of cases on the one hand and Rushton v. Aspinall, L. C. 5, et seq., 3 Gr. & Rud. and Campbell v. Consalus on the other hand; also Story. From these cases the true condition of the leading thing in jurisdictional inquiries—the Pleadings may be judged. In many courts the theory is that after judgment is entered then the Pleadings are functus officio; that from the judgment the authority of the court is presumed; that if jurisdiction was laid for "dollars" that by consent or conduct at the trial jurisdiction of "acres" could be given. They have not taught the rule that the general demurrer cannot be waived. If a complaint shows no "cause of ac-
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"Pleadings are the juridical means of investing a court with jurisdiction of a subject matter ad judicata."

"Mondey v. Steell, L. C. 77, 3 Gr. & Rud.; cited and followed in Milbra v. Steell Co. — Ala. —, 45 L.R.A. (N.S.) 272, 277, 278. Campbell v. Consalve and cognate cases. And in all courts where Pleadings are required—in all cases where a statement is required the above definition and all that it implies is the high, inexorable—

the imperial law for reasons discoverable in Interdict reipublicae, and its cognate maximis. (§§ 83–123, 3 Gr. & Rud.) Codes and Practice Acts are bound by the higher law—the law of necessity. In all Courts that can serve a constitutionalism the necessities of Res Adjudicata and of "Due Process of Law" must be imported by Construction, if statutes and local and flat laws, are either silent or ambiguous. In presuisia majoris cessat potentia minoris.

From the foregoing the importance of Pleading as a jurisprudential element may be inferred also the central idea from whence Certainty is deduced. The Rules of Certainty are deduced from Res Adjudicata, and its necessities. There are also other high policies of Procedure. (§§ 83–123, 1 Gr. & Rud.) As many courts quote and cite Munsey v. Valt, L. C. 78, 3 Gr. & Rud., also Story, so Coke appears to have lauded the science of Pleading as will appear from a quota-

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tion in the Preface in Gould’s Pleading, also in other works. Thus he is authority for the importance of Pleading although his followers soon laid it down that suadence could be waived. See Story. We do not know where any Feudal author has made it clear that there must be Pleading and that these must be certain to serve Jurisdiction and Res Adjudicata. But we do know that they have taught that Pleadings are a matter that can be waived and that they are functus officio when the judgment is entered. In other words that there are no dicta of courts—that a judgment is not limited by its record—the Pleadings. (See Vickersburg v. Benson.)

In "American law" there are two distinct sects writing and teaching the law. These sects are above indicated. (See "Theory of the Case"). What this diverse teaching has led to we must in this connection leave it to the student to contemplate. In other relations we make reference to commercialism and its allies empiricism and arrogance upheld and supported by supposed great schools, publishers, authors and reformers. We do not know which one of these has given a true definition of Jurisdiction, Pleading or of the mandatory record and of the necessities of these to support the attitude of the state. (See Story, Demurrer, Rushton.)

The "new" and "modern" view that Pleadings can be waived or contracted away ("Theory of the Case"; Campbell v. Consalve), and are not a jurisdictional element as indicated in Nalle v. Oyster has led many courts to believe that a valid judgment can be supported on two elements only and namely, 1, Jurisdiction of the person (Penneyer v. Neff); and 2, a judgment entry which a court could or might enter under its constitutional powers without regard to the existence or the state of the Pleadings. Necessarily this is "theory-of-the-case" doctrine. It depends upon a construction that gives to a judgment entry all its assumptions in its favor—Omnia praesumuntur rite; that a judgment entry carries with it all necessary implications. It depends upon the view that the Pleadings are not opened at the stage of Collateral Attack as indicated they may be in Nalle. Look at the latter case and Gulling v. Bank and consider the antinomies taught the lawyer in the "new" and "modern"
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and "American"—law doctrines. (See Story, Rush ton; Quis, quid, coram quo; De non apparentibus; Camp bell v. Consaius; Codes; Prescriptive Constitution.) From the facts shown it will be seen that juris- diction is profoundly a Constitutional question and is related to many sub- jects hitherto taught as partitioned and irrelative branches. From Juris- diction the law appears as an entirety.

Jurisdiction often involves ques- tions of the Prescriptive Constitution as appears in discussions of Nemo debet esse iudex; Oakley v. Aspenwall. Secs. 509-522, Equity In Procedure. No judge can sit in his own cause not even by consent. Oakley, L. C. 222, 3 Gr. & Rud. For the operation of this principle Const itutions and stat- tutes yield. In presentia majoris cessat potestas minoris.

Constitutional law is involved in discussions of Jurisdiction. See Audi alteram partem. Courts and their jurisdiction, when, how and where and upon what matters are always matters of Constitutional law. See Tril ogy of Procedure; Quis, quid, coram quo. Consequently the relation- ship of Pleadings to Constitutional law appears. See Introductory chap- ter, ante.

Public policy is also involved in the acquisition and the exercise of Jurisdiction. If one court has ac- quired jurisdiction of a "Cause of Action" the comity of courts forbids that any other court interfere. The com- ity of courts establishes this rule. And so it is that if such fact appear upon the face of the statement of the "Cause of Action," then it is sub- ject to a general demurrer. Codes and Practice Acts reaffirm this old and necessary rule of public policy. (See ABATEMENT.) Legislation to the contrary would not be respected. The ground of the general demurrer is never waived. The general demurrer and its rules are rules of jurisdiction.

The issuance and service of process is also governed by rules of public policy. Dunlap v. Cody, L. C. 168, 3 Gr. & Rud. See Process 4 Gr. & Rud.

Process and its service are essen- tial for the exercise of Jurisdiction. See Process, 4 Gr. & Rud. Pennoyer, L. C. 58, 3 Gr. & Rud.

Territorial jurisdiction of courts also limits jurisdiction. Milligan's Case, 4 Gr. & Rud. Crimes can only be prosecuted where committed. R.
Jurisdiction.

then the appellee would be deprived of his day in court.

Consent will not confer jurisdiction. Wallace, supra. Story, Equity Pleading § 10; Campbell v. Consalus. Hanford, L. C. 86, 3 Gr. & Rud.

Sunday: See Dies Dominicus:

Terms of Court.

Jurisdiction of formal matter by an appellate court depends upon a technical practice relating to the objection, exception, the motion for a new trial, and the Assignment of Errors, § 53, 1 Gr. & Rud.; L. C. 290a-299, 3 Gr. & Rud. See Statutory Record; Abatement. Consensus tollit errorem; Appellate Procedure.

What concerns Jurisdiction of substance and the mandatory record are matters within the province of the amicus curiae.

juris praecipitum sunt haec: honesta est vieire, alterum non laderes, suum cuquie tribuere: These are the precepts of the law: We should live honestly; injure no one and render unto every one his due. Cited, secs. 14, 19, 23, Restatement, 46 L.R.A. (N.S.) 437. Jure naturae aquum; Cutter v. Powell, L. C. 308, 3 Gr. & Rud.; Bright v. Boyd, 2 Gr. & Rud.

This has long been considered the greatest maxim of the law. (See Maxims.) It is the lawyer's golden rule. It is above all an Equity maxim and we have made it one of the Trilogy of Equity. And we have interwoven it in procedure. It easily allies itself with the Trilogy of Procedure when the state's attitude is considered. The state interdicts the Coram non judice proceeding. To test the record is the function of the general demurrer which cannot be waived. It concerns the state.

The state is interested and demands the mandatory record. This is the reason why a stipulation to waive or to dispense with the Pleading is In pari delicto: Campbell v. Consalus; Walter, 250 Ill. 420. No one can agree to be ruled by arbitrary law of the despotic or tyrannous whims and caprices of state agencies. Therefore a court must have a record and be bound by its record. If it enters a judgment beyond or out of its record this judgment is void. Vicksburg v. Henson; Munday v. Vail, L. C. 79, et seq., 3 Gr. & Rud. Herefrom arises the importance of the general demurrer and of its correlatives. Also why it is apropos to cite Alterum non laderes to every attempt to waive the general demurrer. To do that is obnoxious to the scheme of the state to protect from usurpation and abuse of power; from the ways of a judicial hierarchy. This is what Story hinted at in his section 10, quoted 47 Equity In Procedure. There is no greater bulwark of protection than Pleadings and the tests of these by the Trilogy of Procedure. Look at the dissenting opinion of Judge Talbot, in Gilling v. Bank. No judge should have power to bind by his judgment where there is no juridical presentment. See De non.

From above explanation will appear why the general demurrer cannot be waived; also why it is proper to cite Alterum non laderes to sustain that view. The state's interests must be respected. Alterum, Res inter alias acta: A judgment-contract must be Coram judice. The state is a party and it does not give its assent to the Coram non judice proceeding. Non habe in laderas veni.

In this connection it seems well to observe that this maxim has interactions with the Trilogy of Procedure also of contract.

This maxim is often cited in tort as Alterum: Its relations to crime are manifest. From it many of the rules of all of the leading subjects can be traced.

There being but a few fundamental principles of law and Juris praecipita being the greatest, must not a restatement of the whole body of the law along broad and scientific lines be taken into account the Universal, Constitutional character of the great principles? (See Restatement.) Antiquity spoke for a restatement of the law respectful of its logic and philosophy. Some one stated that the law could be restated by articulating it around a few great principles; Blackstone repeated this in relation to this maxim. And so others have parroted the prophecy from of old. (See Alterum, 2 C. J. Cyc.) Restating the law must include all fundamental principles and point out the interactions of these. Now can this be done upon a string of topical heads from A to Z, inclusive? Upon such a foundation and plan must
not the gathering and presentment of
matter be haphazard and become so
vast that it cannot be comprehended
as a restatement must necessarily be?
Must not a restatement of the law
be a survey and a reckoning from its
organic and primary principles; and
must not these be gathered and dis-
played to constitute, so to speak, a
dry anatomy of the subject, upon which
its histology can be connected and
arranged? (See Preface, Restate-
ment.) And must not the relations
of this maxim with Salus populi
suprema lex and In pari delicto be
clearly pointed out and impressed?
Must not these major and organic
maxims be laid as a foundation and
upon this foundation the entire struc-
ture be raised? Must not the Restate-
ment present all of the fundamentals
in their original and even variant ex-
pressions as far as possible? If the
great principles have been handed
down in the form of maxims must
not this form be respected in more
than presenting them as they are in
a dictionary or concordance arrange-
ment, and as digests and Cycs present
them?

In our Restatement sections, we at-
tempt to gather the few fundamental
principles from which the entire body
of the law can be co-ordinated. From
Alterum we indicate some of the rami-
fications of this maxim, which is omit-
ted in almost all of our elementary
works and of those sold to students
as a key and a guide. We have re-
ferred to some of these under the title
Literature.

JURISPRUDENTIA EST DIVINARUM
atque humanarum rerum notitia: justi
aque injusti scientia: Jurisprudence is
the knowledge of things divine and hu-
man; Nihil. See Juris præcepta; In pari
delicto nihil possitum.

JUROR; JURY: Province of court and
jury; the constitutional functions of the
jury. See AQUATIONEM. See this maxim
420, 430-438. Right to trial by jury.

JUS PUBLICUM PRIVATORUM FACTIS
mutatis non potest: A public right can-
not be changed by agreement of private
parties. Alterum non loquere; In pari
delicto; Salus populi suprema lex; In-
terest republcae ut sit finis litium. From
this maxim may be deduced the reason
why partio cannot contract away the
substance required by the state for the
operation of the courts. Campbell v.
Consulcis, 103 Mass. 277. Also why
the general demurrer cannot be waived.

JUSTICES OF THE PEACE: See Inferior
Courts. No presumptions of regularity
in. Crepp v. Durden; Omnium praesuma-
tur rite.

JUSTIFICATION: How pleaded JAnson
v. Stuart. Mandatory record esen-
tial for. Howard v. S. L. C. 166, 3 Gr. &
Rud.; Turkle's Case, L. C. 247, 3 Gr. &
Rud. See 2 Gr. & Rud.; also Equity.

JUSTITIA NEMINI NEGANDA EST: Ju-
tice is denied to no one.

JUVENILE COURTS: Effects of statutes.
120 A. S. 935-967, ext. n.; 45 L.R.A.
(N.S.) 908.
K

KANSAS: Conflicting cases in this state are collected in Mercats', Okla. 42 L.R.A.(N.S.) 996 (Departures allowed). The general demurrer is waived. Brumbaugh v. Phillips, 52 Kan. 750; cases. Duffone (liberal rule on Collateral Attack).

KEARNEY v. LONDON R. R. E. 5 Q. B. 41. L. 750; 6 Q. B. 75; 211 L. 211; 3 Gr. & Rud. Res ipso liquitur; Manifesta probations.

KECH v. HALL, Sm. L. C.: Qui prior tempore potior est jure. Tenant taking after a mortgagee takes subject to his right.

KECH v. SANDFORD (RUMFORD Market Co.), Wh. & Tud L. Eq. Cases 2 Gr. & Rud. Idem agens. No one can act where his integrity and his interest are in conflict. 609 L.R.A. Equity In Procedure (greatest résumé). That agent or trustee lost makes no difference. Mayruler, 255 U. S. 107, 120, citing McCloud.

KELLY v. HEMMINGWAY, 56 A. D. 474, 5 L. 304, 5 Gr. & Rud. Contracts must be certain.

KEMBLE v. FARREN, 6 Bing. 141, L. C. 301, 3 Gr. & Rud. Damages fixed and stipulated; 50 L.R.A.(N.S.) 890 n.

KEWAUNEE COUNTY v. DECKER, 50 Wis. 984, L. C. 26, 3 Gr. & Rud. Proceedings must be certain; they cannot be "fish, flesh or fowl." 50 L.R.A.(N.S.) 2.

KING v. CLARK v. DILLO, 29, 3 Gr. & Rud.; 1 Gr. Ev. 528, Res Adjudicata.

KINGSTON'S CASE, L. C. 76, 3 Gr. & Rud.; 1 Gr. Ev. 528, Res Adjudicata.

KINGSTON'S CASE is one of the most widely discussed and cited cases. It was decided in A. D. 1778 and in the days when the Feudal lawyer knew so little of Res Adjudicata, and long before the time that it was perceived that the rules of this subject dictate almost all of the principal rules of the courts. (See the other Proc. §§ 121-140). Had the court said plainly that there were three rules or maxims from antiquity by which a record must always be construed on questions of Res Adjudicata and that these canons are the Trilogy of Procedure (§ 1, Restatement), it would have set beacon lights for ages. But what it did and laid the foundation for, is reflected from pages 734-985, 2 Smith's L. C. 8th Ed. These show one of the leading subjects of the law has been lost in the "jungle." In the notes to this case, there is an attempt to gather the rules of Res Adjudicata, but an investigation will show that some of the most important were omitted. (See these rules, 3 Gr. & Rud.)

Its discussion involves many of the rules of Procedure. The leading rules of Pleading are suggested also of Evidence. An examination will show that the Trilogy of Procedure and its cognate maxims are rules of Res Adjudicata. No better introduction to this subject can be found than the Trilogy, 1-15, Restatement. Every clause of Quis, quid, coram quo is a rule of Res Adjudicata; and so are the rules, maxims and cases of Jurisdiction. The first rule of Res Adjudicata is, that the proceeding shall be Coram Juctis. The tests of this, open up all jurisdictional elements. From the discussions it will appear that the Proceedings are a jurisdictional factor and will be opened and construed by the Trilogy of Procedure. (Velle v. Oyster; Ostrum v. Morewood, L. C. 23, 3 Gr. & Rud.; Kewaunee, supra; Knickerbocker, post; in all relations where the coram judice proceeding is in question the Proceedings are opened and the authority of the court as conferred by the Proceedings according to this definition, namely, Proceedings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it. This rule is deduced from the Trilogy of Procedure (§ 1, Restatement). Such being the rule and its origin the student can see what has happened to the subject of Res Adjudicata from an inspection of Gillog and its cluster of cases. This strife enters into investigations of Res Adjudicata. See Knickerbocker; Rushston; Story.


KNICKERBOCKER TRUST CO. v. ONEONTA R. R., 201 N. Y. 379. Proceedings are jurisdictional and they limit the scope and operation of decree or judgment. A judgment beyond or departing from the pleadings is void. (Vicksburg v. Henson) and such judgment is subject to Collateral Attack. S. v. Muench; Hobaek v. Miller; Nalle v. Oyster. Jurisdiction is limited and is construed by the Pleadings; otherwise there would be no dicta. The stipulations of the parties will not enlarge or vary the Pleadings. Campbell v. Consuelo; Guest v. Warren. Verba generalia.


The above cases sustain the rule that "what ought to be of record must be proved by record and by the right record." See Mandatory Record; Mondei v. Steel, L. C. 77, 3 Gr. & Rud. Monday v. Vail, L. C. 79 et seq., 3 Gr. & Rud.

A judgment is construed from its
Knickerbocker, etc.—

Pleadings; its identity is proved by its issues. This is what the Pleadings are for, inter alia. §§ 83-123, 1 Gr. & Rud. (But see 1 C. J. Cyc. 45, 66, 100; also Story; § 3, Restatement. Rushton and matter cited under these titles; The “theory-of-the-case” sect stand for proving the jurisdiction from the mere judgment entry; or from the evidence, or bills of particulars, or instructions or arguments or oralities, or agreed statements of facts or any forensic conduct. They will cite Monday in one case and then deny it in the next. Jansen; Holman. They contend that after a judgment is entered that then the maxim Verba fortius expires. Gulling. See Colateral Attack.

In Knickerbocker it was contended that from the facts of jurisdiction and a judgment entry which the court could or might have made without regard to the pleadings, that such a judgment was conclusive. But Judge Cullen held that the Pleadings would be opened and the judgment be tested by these. He held that such was the rule in a criminal case in a habeas corpus proceeding (P. ex rel. Tweed, 60 N. Y. 559, 19 A. R. 211) and that the same rule should apply to a civil case as well. (Nalle v. Oyster.) In this case the “theory-of-the-case” doctrine was denied. The Judge held that purchasers under judicial orders and proceedings are charged with notice and defects shown by the Pleadings. There are no bona fide purchasers under a coram non judice proceeding. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.; Hoback v. Miller.

Causa emptor applies to a purchaser at an execution and judicial sale. He must take notice of all jurisdictional elements. (See Jurisdiction.) Knickerbocker.

Pleadings enter into titles to property, both real and personal. Knickerbocker.

Purchasers of property are charged with notice of the coram non judice proceeding. Knickerbocker.

The proceeding that is subject to the general demurrer or the motion in arrest, is Coram non judice, and will protect no purchaser under it. Knickerbocker. Windsor, L. C. 1, 3 Gr. & Rud.
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LAMELLE v. BRAWSTII, 311 U. S. 357. Vol. 4, 15, 17. Restatement. A most in- structive case on contract. The consid- eration, the consideration, the prom- ise and the performance of a subsequent promise to pay will support an assumpsit. But a gratuity promise will not. Hematocole. The request, the promissory note, the promise are important elements in contract. In the present case, the promise was not averred to constitute the "cause of action." Bo堍 v. Emmerson, 3 Gr. 452. See CONTRACT. The promissory note must be averred to constitute the "cause of action." See Weber v. Lewis, — N. D. — 34, L.R.A.(N.S.) 34, 344, 4 135.


LANING v. SHUY, 4 M. & W. 337, 2 Gr. & Rud. Contract; Fraternity: One man may contract for the benefit of a third. Dal- ton v. Lawrence, 23, 27, 27, 278. Winchester (belladonna case); Winter-bottom.


LAWRENCE v. FOX, 20 N. Y. 268, Willist. Cons. 303, 526, stated under Contract. Cite, sec. 17. One man may make a contract for the benefit of a third. Dutton v. Hendrick. The objection to this is that in the third party was not present and thus a novation took place. Hanging to this idea the cases referred to are not in v. But look from Juris praecepta: Justi natu- rae equum; and Alleges contraea non

Lawrence, etc.— est audientur and sufficient reasons will appear to sustain the above cases. The Fraud Lawyer could not understand the "Squib Case" (Blackstone disinterested): The action of money had and received was foreced upon him. Everything that was promoted from an equitable standpoint met his resistance. He has now comprehended the maxims. Look at the battle over the Trilog of Procedure: also what constitutes "Due Process of Law." He has not understood In fictione juris semper aquitas existit. Lex non cogit ad vagam. Look at Guine v. Bank E. Hill.


LEADING QUESTIONS: 47 A. D. 74-85: 1 Gr. & Rud.; also Equity. LE BLANC v. LONDON B. R. L. R. 1 C. P. Div. 256, 4 Gr. & Rud. Ex partecorum. 49 L.R.A.(N.S.) 249. A carrier's ticket with which the tailor had the time to take it. Likewise a baggage check has many in- cidents annexed.

LEE v. FIFTH, 1 B. & S. 272, L. C. 538, 3 Gr. & Rud. Statute of Frauds; thing to be manufactured.

LEGACY OPERATES as payment of a debt when. Fidelity Co. 158 Ky. 252, 54 L.R.A.(N.S.) 1156, n.

LEGATION OF JURISDICTION: CONTRA JUS GEN- nIstum est: It is contrary to the law of nations to do violence to ambassadors. International.

LEGES NON VERBIS SED REBUS SUNT impositae: Laws are imposed on things not words. 4 Gr. & Rud. Fabula: Wob- ba, 46 L.R.A.(N.S.) 214, 277, 278. A cause of action must be real. Scott v. McNeely, 48 L.R.A.(N.S.) 48, 47, 47, 47, 47. Rum and false pleadings offend this maxim.

LEGES POSTERIORUM PRIORAS CONTIN- trarias abrogat: When the provisions of later statutes are opposed to those of an earlier, the earlier are considered as repealed. Bronze v. Kinzie, 7 L. C. 238, 3 Gr. & Rud.

LEGES INTERPRETATIO LEGIS VIM obtinet: The construction of the law obtains the force of law. Causa est in- situet; Guine.

LEGISLATIVE JOURNALS: Admissi- bility of oral evidence to affect. "What ought to be of record must be proved by record and by the right record." Contra scriptum. Hunt v. Koehler v. Hill. 60 Id. 542-704.


LEGISLATIVE LIMITATIONS: Author- ity. 29 Parliament is not omnipotent." Statutes are not construed Lex non estra- definientur ad hanc viri permittit. The very instructive case of Oakley v. Aspinall, 3 N. Y. 547, L. C. 222, 3 Gr. & Rud. shows that constitutions and statutes must yield to fundamental law. See idem aequae et patres casus non potest discussa in Hughen's Equity, 45 505-522. Lester v. Foycroft, 7 L. C. 341, 3 Gr. &
Legislative Limitations.—

Rud. Also in praesentia majoris cessat potestas minoris. And equally clear is S. ex rel. Henson v. Shepard, 192 Mo. 497, 44 Cent. L. J. 125, 4 Gr. & Rud. This cases plainly recognize a “higher law,” which is vaguely hinted in Clark v. Dillon, and U. & A. R. v. Clauens, in Indianapolis v. Horst, 93 U. S. 291, L. C. 223, 3 Gr. & Rud. the power of legislatures to interfere with the courts' administration of the laws is denied. The Trilogy of Procedure is of “higher law” and should be vindicated as such. See Codex: In praesentia, majoris. The Feudal Lawyer and his followers denied the higher law. And now we have judicial anarchy. See Gulling. To regulate contract, Millett.


LE NEVE v. LE NEVE, Wh. & Tud. L. Eq. Cases, L. C. 296, 3 Gr. & Rud. bona fide purchasers of Real Estate. What constitutes.

LESTER v. FOXCROFT, Wh. & Tud. L. Eq. L. 341, 3 Gr. & Rud. (Cited sec. 10, 21) Restatement of Fraud; Equitable exceptions to the Statute Ex dolo malo. Possession taken under and in pursuance of an oral contract to buy and held openly, notoriously, continuously and unequivocally can be specifically performed. This Equity of possession is the main equity to be alleged and proved. Halligan v. Frey, 49 L.R.A.(N.S.) 112-120.

Possession need not be alleged; it is aided by Ex dolo malo. Lester v. Foxcroft, 49 L.R.A.(N.S.) 1-44. See LITERATURE. And observation there made of Tidd's Practice.

Let us consider the case of Lester v. Foxcroft, 155 N. C. 372, 49 L.R.A.(N.S.) 1, 44. Henry and Halligan v. Frey, — Ta. —, 49 L.R.A.(N.S.) 112-120, with notes, are both cases of the same class and might well have been annotated together. Each was for Specific Performance and were Equitable exceptions to the statute of frauds. Each is governed by the principles in Lester v. Foxcroft, L. C. 341, 3 Gr. & Rud. Lester is cited in the notes to Halligan. Each case involved the most refined pleadings and proofs known to the law. And far more so than a plea of Rea Adjudicata or an indictment for perjury. Henry is annotated to the point that a plea of the statute may be waived. And of course it can be waived where no “cause of action” is stated as was the case in Henry. We can pick out of Halligan that the leading equity in such cases is that a contract to sell was made and in pursuance and under this contract the vendee took possession and held under the contract openly, notoriously, continuously and unequivocally. This is the primary, fundamental and jurisdictional equity. It is just as necessary
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utory record is for an appellant in a court of errors only. It is not the appellee's pleading. The point that the defendant did not except to surplusage—to irrelevant evidence—and thus supply the omission of the main equity altogether makes an indefensible case as the Culling Case. The court plainly held that failure to plead and to except to evidence supplied an essential pleading, a jurisdictional pleading.

It is vain to prove what is not alleged. (2 Tidd's Practice 920.) The evidence must correspond with the allegations and be confined to the point in issue. The allegata et probata must correspond. A recovery must be Secundum allegata et probata. Frusta probatur quod probatum non relevat. A case cannot be better in proof than it is in allegations. It is a perverted and distorted view that an appellant must prepare and tender and establish a statutory record to show that he excepted to irrelevant evidence in order to protect his recovery from illogical and astonishing judicial freaks in judicial procedure in a court of errors. Irrelevant evidence is not a juridical factor anywhere. An appellee ought not fear the effects of surplusage and of what the court should condemn rather than to use to overwhelm the fundamental principles of law. These were not comprehended and respected in Henry. Courts that hold that the general demurrer can be waived wabble around and get out of line in every way and talk about most everything except the major—the organic principles of Procedure, as was done in Henry. To concede that the court had no jurisdiction until the defendant down the line of action failed to plead denies the fundamental, Quod ab initio non valet intractu temporis non convale bit. It also denies that the general demurrer searches the substantial pleadings and attaches to the first fault found therein. In Henry the court was blind to the first fault which was the failure to allege the primary, the chief equity upon which the "cause of action" hinged. Also to open the statutory record and pick from its matter irrelevant evidence and import this into the mandatory record to supply the omission of what the latter must contain. To pick from the statutory record the faults of the appellant (introducing irrele-

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vant evidence), and holding this surplusage up and in the face of the appellee and saying to him this is your fault and we charge you with it. But the first fault is when the essential allegation is omitted from the pleading. The rule that "What ought to be of record must be proved by record and by the right record" shall not apply to an appellee who does not object to irrelevant evidence. We charge him as being first at fault and for not having here a bill of exceptions to protect his recovery and so we can apply the rules that the general demurrer is never waived: and that it searches the entire record and attaches to the first fault. We cannot apply these rules because the appellee failed to object to irrelevant evidence. By reasoning like this the rules of the general demurrer are slanted over with nothing less than jargon. § 117, Equity in Procedure, quoting Stephen.

Had the court have said in Henry, the bill filed in this case is fatally defective for failing to allege the element of possession and therefore we must affirm upon the authority of Lester v. Foncroft, L. C. 341, 3 Gr. & Rud., also Halligan what lawyer in England or in America could have denied its correctness?

The findings of the referee ought to stand as a verdict we concede for the purpose of curing defects at that stage, but only formal defects, not substantial defects. Formal defects are waived the instant they are passed without apt and precise objection (L. C. 290–299, 3 Gr. & Rud.). Fatal defects in the statement of the "cause of action" are never waived; as to formal defects in the statement they are waived the instant they are passed without proper objection, and generally long before the stages of the verdict. A verdict cures nothing except the formal errors made the moment before (see Consensus toti error remotum).

Aider by verdict cures only formal defects. C. & A. R. R. v. Clausen (Ill.); Clark v. Dillon (N. Y.); Hitchcock v. Haight, L. C. 12, 3 Gr. & Rud.; Vadakin v. Soper, L. 11, 3 Gr. & Rud. That is not the function of a verdict or of findings. On the contrary judicial findings are limited by the Pleadings. Judicial recitals not founded on the allegations are dicta. Verba generalia restringuntur ad habitationem rei vel personam. Ferguson, L. C. 264, 3 Gr. & Rud.; Knuck-
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erocker Trust Co. v. R. R., 201 N. Y. 319; S. v. Muench (Mo.); Miller, — Utah —, 49 L.R.A.(N.S.) 294.

A judgment beyond the issues is void. Monday v. Vail, L. C. 79 et seq. 3 Gr. & Rud.; Vickburg v. Henson, 231 U. S. 230 (Verba generalia); Garrett.

In after years as in Outram v. Morewood, L. C. 25, 3 Gr. & Rud. under the tests of Res Adjudicata could it ever be said that Henry is the same class of case as Lester v. Foxcroft? Could it ever be said that the issue of possession was litigated? And could this issue be maintained by finding irrelevant evidence in the matter that belongs to the statutory record? And is the latter record ever opened on questions of Res Adjudicata?

The parties cannot even by express agreement, by stipulation filed, enlarge the Pleading, now how could it be done by admitting irrelevant evidence? Campbell v. Consalus. Not even an answer can supply an omitted allegation (Tooker v. Arnoux), now how can irrelevant evidence?

Look from Vickburg v. Henson; Standard Oil Co. v. Mo. 224 U. S. 270, also Campbell v. Consalus, Clark v. Dillon, and Tooker v. Arnoux, all N. Y. cases and see if irrelevant evidence can supply a material issue in the statement of a cause of action. Look from all of these cases and see if Henry will pass for “Due Process of Law.”

If a verdict or the findings of a court can import one entity or one material allegation then all the material allegations can be so imported and in case all that is needed is to get a judgment entered by a negligent or drowsy court and then contend that a judgment entry calls to it all necessary support—also in Eighty v. People (N. Y.). Compare, Nalle v. Oyster, Vickburg v. Henson (U. S.); also Palmer v. Humiston (O.) Henry is opposed to the Code cases, Campbell v. Consalus, Clark v. Dillon and Tooker v. Arnoux all New York cases also the Trilogy of Procedure. Hughes’ Equity, §§ 101 et seq.

It is opposed to the greatest maxim of Procedure which has long been expressed in the language of all nations and thus:

Lester, etc.—

De non apparrentibus et non existentibus cadem est ratio.

All Codes reaffirm this maxim of antiquity which can be picked out of Story’s sections 10, 25-28. Hughes’ Equity § 47. The Federal and Code cases above cited sustain that Universal, Constitutional canon of all ages and climes in a Constitutionalism. Departures from that maxim leads to judicial anarchy. See Restatement.

Lester v. Foxcroft, is one of the most instructive cases, §§ 10, 21 Restatement.


LEX DILATIONES SEMPER EXHORT: The law absours delay.

LEX ES LEX MATER DEUS EST VACUUM aut incertum: It is a miserable state of things when the law is vague and uncertain.

LEX FORI: The law of the forum.

LEX LOCI CONTRACTUS: The place where the contract is made. If a contract is valid where made it is valid everywhere. Van Voorhis v. Bruntall, 4 Gr. & Rud. Wager contracts, how affected by. Moule (1967), 1 K. B. 746, 4 Brit. R. C. 552, ext. n.

LEX NON COGIT AD VANA SEU INUTILLA PERAGENDA: The law forces no one to do vain and fruitless things. 2 Gr. & Rud. Equity. Natura non facit vacuum: Morningstar.

LEX NEMinem FACIT INJURIAM: The law doing wrong to no one.


LEX NON EXACTE DEFINIT SED ARBITRIO BONO VIRI PERMITTET: The law does not exactly define but always leaves something to the judgment of a good and wise man. This is a maxim allowing that construction in favor of fundamental law; it is also a maxim permitting the sound discretion which is so often involved in procedure. As to whether the chancellor will entertain jurisdiction or refuse it involves phases of this maxim.

The Federal “Due Process of Law” Procedure is pervaded with this maxim, for, as to whether the court will or will not entertain jurisdiction of a matter presented by the record is largely a question of discretion. It cannot be gathered from the cases that there are fixed and certain rules.

This maxim is opposed to the op-
Lex, etc.—

eration of *ita lex scripta est*. The strict statutory constructionist opposes the operation of this maxim and its cognate *Expressio eorum*. See Feudal Lawyer. *In praesenti majoris.*

In early Missouri, the law was as follows: *Standard Oil*, 221 U. S. 734, 34 L.R.A. (N.S.) 834, 874, n.; *Church of the Holy Trinity*.

Local and fault laws may be departed from in order that fundamental law may have effect and operation. *In praesenti.*

_Discerne per legem quid sit justum:_

To see what would be just according to the laws in the premises. *Con temporarum.*

The jurisdiction of Equity is made flexible and operative for fundamental law. *Lee v. Pritchard*, 2 Swast. 402, 427, 1 Keener, 59, 1 Scott 149, 36 English Reprint, 679 ("Equity is a roughish thing"); quoted 1 Pom. Equity, 57. The limitation of Equity has given the Feudal Lawyer endless trouble. He has never been able to clearly define it. For centuries it has been a stumbling block to him and his followers. They have respected many witticisms respecting it.

Ambitious and unrestrained judges have often abused this maxim and its cognates so that dread of them has often placed many barriers in the way of exercising "a wise discretion." This is illustrated in the law of contempt; also in recognizing the liberty of the press to publish judicial proceedings. See _Defamation_.

See 4 Gr. & Rud.; also Equity; Legislative limitations.

LEX NON VETAT PERMITTET: What the law does not prohibit it permits.

LEX REPROBAT MORAM: The law disapproves of delay. *Lex dilitiones.*

LEX VIGILANTIBUS NON DORMIENTIBUS SUBVENIENS: Laws assist the vigilant and not the sleeping. 4 Gr. & Rud.

LIBEL AND SLANDER: See _Defamation_; _Fair Comment_; _Eum qui nocentum._


Lickbarno, etc.—

Clothing one with the imputed title gives him power to sell. *Alienus contraria._

Crimen omnia._

LIGHT AND AIR: See _Easements_. 2 Gr. & Rud.

LILLY v. MENKE, 126 Mo. 190, 211-213; *S. P. Clark v. Dillon; Davis v. Jacksonsville*, 126 Mo. 85, 98.

LIMITATIONS OF ACTIONS: 4 Gr. & Rud.; Equity.


LIMITATIONS OF INDEBTEDNESS:

*Beard v. Hopkinsville*, 2 Gr. & Rud.


LINDAY v. COOPER, 33 A. S. 105, 16 L.R.A. 813, 4 Gr. & Rud. Title to land may rest on equitable estoppel.


LIQUOR LAWS; CONSTITUTIONAL right to prohibit. 15 L.R.A. (N.S.) 908, n.

LITIS PENDENS: 4 Gr. & Rud.

LITERARY PROPERTY: See Copyright; 4 Gr. & Rud.

LITERATURE: See this title in 4 Gr. & Rud., also in Equity, also 2 Hughes' Proc.

Authors can be classified according to their theories and careers. There are those who view the law from antiquity and imbedded in statements that have stood the tests of time (see _MAXIMS_), and that from these arise a logic and philosophy. Among these are:


2. Those who have not stated and vindicated the Prescriptive Constitution and who impressed the view that the law is local and flat—that "Parliament is omnipotent" and that the law arises from statutes and cases. They stand for statutes and cases and this claim of commercialism: that "the law is the last interpretation of the law by the last judge," also that "more than 5000 new principles are stated and developed each year." Diests, Cves and mechanical annotators support this view. Among these are:

_Coke, Blackstone, Serjeant Williams, Tidd, Chitty, Stephen, Gould, Pomeroy, Abbott, Dillon, Freeman, Browne and Sedgwick._ See _CASE SYSTEM_, 2 Gr. & Rud. See Restatement for facts about authors.

This class indirectly ignore and
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lead away from the old law and constantly magnify and overimpress local and flat law and late decisions.

3. A third class openly and boldly assert that old things have passed away and that a new dispensation has come. Chief among these are:
   Thompson, Smith and Clark (Elementary law; see Story; Lester v. Foxcroft, ante); all the Code authors who adopted the loose and visionary statements of Pomeroy (see Pomeroy) Thompson and of judges who hold that pleadings can be waived (see Story; Theory of the Case), most of the "Hornbook" authors belong to this class. They rarely cite a maxim or cite correctly English cases. They never state and vindicate the major—organic maxims—of the law. They are statutory and late case digesters and annotators. (See Preface.)

The second and third classes have never comprehended the attitude of the state in procedure and why it is that the general demurrer cannot be waived. Nor that "Due Process of Law" and Res Adjudicata have mutual and reciprocal interactions, and that the necessities of these subjects dictate the rules of Evidence, Pleading and Practice. (§ 10, Restatement.) They have not demonstrated that the Code merely reaffirmed old principles (see Quis, quid). They have not comprehended the Mandatory and the Statutory records (see Mondel v. Steel, L. C. 77, 3 Gr. & Rud., also pages 68, 100, G. J. Cce as to proving identity of causes; also Multitudo imperationem perdit curiam).

The second and third classes have not defined pleading as a jurisdictional element. (See Jurisdiction; Garret.)

Along with the products of the above classes have come works that cannot be classified for the reason that a multitude have contributed to their elaboration. One of these works is the famous student's work called "Brief Making." This somewhat peculiar work has been a class book in several schools and famed teachers among whom can be named an ex-president of the American Bar Association taught [a post graduate class] from this work. (See § 110, Equity In Procedure.) Other works are written by the editorial staff.

A most worthy author has observed of "the exclusive glory of the legal profession" to shower honors and to

exalt mountebanks and to exhibit a greedy appetite for effusions from the slums of empiricism. To justify what he wrote we will observe that doctors and scientific men will investigate and speak out in defense of the public, and for this expose malefactors and imposters; while on the other hand supposed great and good judges and lawyers will give them letters of marque and reprisal and certificates of worth and respectability. See Preface to Bishop's New Criminal Law, pp. vi-vii; also Melius est patera fontes, 4 Gr. & Rud.; also Codes and the matters there referred to.

Is the law student a victim of dupery?

The denunciation of the lawyer and of his establishments are indictments that ought to be laid before every student and lawyer who is not calloused by prejudice, sordidity and commercialism. The most prominent members of the profession have pronounced anathemas in Bar Associations and these can be found in The American Bar Association Reports, also in New York, Illinois, Texas and in other states. They have also written articles in law journals also lay journals deploiring the changed conditions. Many eminent men have spoken of what they conceive to be a national menace. These are agreed that the profession is submerged with ignorance, sordidity, commercialism, blindness and indifference to duty and obligation. Some portray the profession as a horde of howling dervishes around a whitened sepulcher, as a menace to good government and to society; and that the rank and file are behind the times and borrow all of their respectability from being a "member of the legal profession" and not from any intrinsic worth.

Gather the addresses referred to and lay them before the "average" lawyer and generally he assails the speaker as one who owes his eminence to his wealth and long service of the "interests" and for these looting the public. Also for their companionship with multimillionaires. It seems that whoever speaks or acts for the uplifting of the profession receives the taunts and even sneers of the rank and file as in the olden time when the bears in the wood were aroused by the jibes and jeers of juveniles shouting "go up, thou bald head, go up! invest.

The orators referred to seem to
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think that to appeal to Deans and professors is as a "voice crying in the wild-
eness." We speak optimistically for
we think the situation may be likened
to the parable of the sower. But it is
due to concede that only on one day
optimism prevails while on the next
pessimism. However look at the data
we shall cite for a basis of certain esti-
mate.

Paralleling the addresses referred to are the clamors and the hurrahs of
empiricism and of commercialism of
"new" ways and methods of writing and teaching the law. In the light of
the facts, we shall submit whether the
student can make headway against the
deafening din and confusion.
(See Consensueus; Jackson v. Peaked.)

On the one hand he reads of the de-
parted glories of the profession and
of its submergence and retrogression
trying to follow the fruits and methods that have come. The
denunciations of these is clear and em-
phatic and with-out any exceptions to
any quarter or to any plan or of any
way. Indeed any and all light is de-
nied. Let us quote: "It is too late to
talk reform; palliatives will not do.
Revolution is demanded and it is de-
manded now. Like the Romans we
must burn our books and start anew from
the fundamentals." (Elibu Root.)

Here is an exhortation to return to
the old and to the eternal. But con-
tradiction of this admonition is de-
nied by the pictures and the metiers
hung on the wall by commercialism of
almost every lawyer. Among the
latter are found instruction like this
that: "more than 5,000 new principles
are stated and developed each year;"
also that: "the law is the last in-
terpretation of the law by the last
judge." Upon advertisements like
these last quoted the student is asked
to make his estimates of the necessity
for digests, the Cycs, and notes to
reports and the case law outputs.
How successful, hawking off publish-
ers' stuff upon the profession has been,
is attested by the overcrowded shelves
with ephemeral matter gouged out and
set up by office hands and sold by sham
and deceitful advertising. In many
quarters the works last referred to are
sold at the lowest element and philosop-
ical works and are taught as such in
schools. These facts allow us to say
that the student has no friends where
such treatment of him is permitted.
(See Unfair Trade.)

Not one student in a hundred learns or hears of the addresses referred to
while every one has the misleading ad-
vertisements kept under his notice all
the time. In every conceivable way
these are crowded upon and kept before
him. All must concede the power of
advertising; it is a valuable business
asset notwithstanding it is greatly
abused. In no relation and relating to
no other matter is the right to adver-
tise more reckless and more abused
than it is by the book factories in the
law book trade.

Turn as we may, and look, and we
will see there is something wrong. Look at the addresses referred to; also
the advertising mentioned and we will
see that the student is not well advised
as to the troubles that beset his way.
He hears so much about the cases that
naturally he inclines to look to them
for support. Now let us ask him to
examine Guiling v. Bank, 29 Nev. 266-
280; cases, 89 P. 25; also Henry v.
Hilliard, 155 N. C. 372, 49 L.R.A.
(N.S.) 1-44 for some of the supposed
"new" law that has come, and on the
other hand, Nalle v. Oyster, 230 U. S.
165 and Vicksburg v. Henson, 231 U.
S. 259.

Now let the student turn and look
at the Guiling and the Henry Cases
and note that from irrelevant evidence
pleadings were held waived, or in
other words that irrelevant evidence
will supply essential Pleadings. Also
how to plead a contract (see Contracts,
where Weber v. Lewis, 34 L.R.A.
(N.S.) 364, is cited and discussed).
This is the "theory-of-the-case" doc-
tine now prevailing in 38 of the Amer-
ican states and is coming to be recog-
nized in the Federal courts. As we
shall see the Federal Supreme court is
very plainly intimating that it is
going to make a new departure.

In Nalle v. Oyster and in Vicksburg,
we are informed that a judgment de-
PENDs upon its record—its Pleadings
and will be construed and limited by
these. Concede this (for it is right),
and what will become of the judge-
ments in Guiling and in the Henry
Cases? Supporting the Federal cases
are Palmer v. Humiston, 87 O. 401, 46
L.R.A. (N.S.) 640; Milbra v. Steel Co.
—Ala. —, 46 L.R.A. (N.S.) 272, 277-
278. These cases and the Federal
cases cited reaffirm Ruahton v. Aspin-
all and Brisow v. Wright, both by
Literature.

Mansfield and in Smith's L. C. 8th ed., L. C. 5, and 135, 3 Gr. & Rud. Sometimes the late cases are like the old cases. Garrett.

We have referred to cases which demonstrate Judicial Anarchy. Now let us look at authors:

To begin let us first read Story's § 10, Equity Pleading quoted § 47 Hughes' Equity In Procedure, and next read the contradiction of this section in §§ 2310, 2311 Thompson's Trials quoted under the title Variance in the 4 Gr. & Rud.; also note how Professor Pomero y straddled these antimonies in his §§ 533 and 546 in his Code Remedies (in these conflicting sections the student will be introduced to the struggle over Verba fortius in the various courts). Also note the implied denouncement of David Dudley Field in Tyler's Preface to Stephen's Pleading; also the implied obloquy of Charles O'Connor; also the indefensible scree of Justice Grier against the Code, and all in that Preface of irreconcilable instruction. Furthermore, herein, we are informed that Stephen is a foremost juridical scholar. Now where are his pages that will throw light over any of the above contradictions? Where did he or any of his followers clearly explain why the general demurrer cannot be waived? (This has become one of the leading questions of this generation, which is only one phase of Verba fortius.) On the contrary did not Stephen bludgeon that question when he quoted with approval what Sergeant Williams said of waiving substance in relation to Jackson v. Poskett? (§ 117, Hughes Equity.) Now is Stephen on the side of Story or of Thompson? Did he not straddle like Pomero y? And is Chitty any better? Is not the principle Verba fortius accipiatur contra profer entem left in bewildermont and in quicksands by all of these authors? Did not all of them treat it as a matter of local and flat law? Which one of these authors clearly impressed that rule? See its discussion in New York in Clark v. Dillon and the cases pro and con which are beyond human mastery? And cannot Pomero y be cited either way? Here from see why the Code has failed.

In Baker v. Warner, 232 U. S. 588, 593 we are instructed that "new" and reformed rules of Procedure will be respected by the court in the future.

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Now what is one of these oncoming rules? Who can guess? And can these supposed "new" rules be more than a see-saw of Verba fortius which has rent and distorted the Procedure of New York as is indicated on pages 9-18; 1564-1570 Bradbury's Rules of Pleading? It seems safe to say that the supposed "new" rules will simply be attacks from varying angles upon the principle of Verba fortius; also that these attacks will merely be infractions of the law. In Garland v. S. 232 U. S. 642 a new rule is applied that is a serious attack upon stare decisis. In this case it was held that a plea of not guilty need not appear from the right record. In other words that the record need not show an issue. This new departure is much opposed to many cases; also to P. v. Gray, 261 III. 140, 49 L.R.A. (N.S.) 1215; also Munday v. Vail, L. C. 79, et seq., 3 Gr. & Rud.

Whoever will look at the above authorities will see why a return to fundamental law is demanded. Look at the above questions and see if one of them can be settled by any book of the last generation? Look at Gulling; also Thompson's sections and see if these authorities can be reconciled with fundamental law. The question as to whether Pleadings are juridical is one of the greatest of Procedure (Nalle v. Oyster). Over it is raging Judicial anarchy.

Finally look from the cases and authors above referred to; also Campbell v. Consalís, and Clark v. Dillon and Tooker v. Arnow (all Code cases) and with these in mind see the questions for review in the several law quizzes and if these are more than superficial. See if there is anything in them suggesting the maxims, the general principles and the leading cases. See if the matter commended by the American Bar Association can be gathered and learned from the works last referred to.

From these facts are not the denunciations of the lawyer and of his establishments justified? And is not the student a victim of dupery and commercialism? See Preface, Bishop's New Criminal Law, pp. vi, vii.

There is a logic, a philosophy and an identity of all systems of Procedure which fact ought to be impressed upon students. There are not several systems if only we look at the substance and not form. We are told that
Literature.— at the base of a sound knowledge of the law lie Pleadings. (Preface Gould Pleadings, quoting Coke.) Now this does not depend upon studying all of the supposed systems that commercialism and empiricism assumes to exist and are padding upon the student.

There is an identity of all systems if only we look from substance and not form. To show this fact attention is called to §§ 1–13, Restatement. In these sections are the substance of all systems. To see this fact we have only to shut our eyes to the glosses of mountebanks and of local and provincial intellects who write the law from cases and statutes and who confuse the general and the special demurrer and consequently formal matter with substance. In those sections it is shown that the general demurrer, the motion in arrest, of Non obstante veredicto, the requirements for the comity of courts, the Removal of Causes, of Appellate Procedure, of the necessities to pass objections upon Collateral Attack of Res Adjudicata and of Due Process of Law all depend upon the same rationale. (See 1 Gr. & Rud. §§ 82–123.) The case at law in Equity, under Codes and the Federal Procedure all rest upon the same bottom of Pleadings—the mandatory record, and that this record in all cases is constituted upon the same principles, and is construed by the same canons. The necessities of Res Adjudicata are demanded and are conceded and are dictated by the state for its public policies which are suggested by the maxim: *Interpretum est finis litium.* (See 1 Hughes' Proc. §§ 121–146; also 1 Gr. & Rud.)

The tests of a record to support a plea of Res Adjudicata are the same in all systems. These tests are measured from the mandatory record and not from anything else. So we see that record a necessity for the demands of the state to properly evince the essentials to satisfy the state, which requires that its demands affirmatively appear upon the face of that record and in strict obedience to the rule that, “What ought to be of record must be proved by record and by the right record.” This record of the state for the state and by the state cannot be made out of, or aided or patched out by the statutory record, or by the stenographer's minutes, or oral evidence or proof aliunde, as is written, decided and contended for by the "new" school. (See Theory of the Case; also Gulling; 1 C. J. Cyc. 66, 100; Aider.)

The state peremptorily requires a record and that this record be construed by the rules prescribed by the state. This record and the rules referred to are concerns of the state and its concerns cannot be waived. *Alterum nonладere; Res inter alios acta. Interposito rei burg. Campbell v. Consasia.*

Pleadings are required by the state to invest its courts with jurisdiction and that they may have a record and be bound by their record. And so we see that these pleadings are not a matter or subject of valid contract. *Campbell v. Consasia.* These pleadings are a part of the mandatory record and they must on their face show affirmatively that they are sufficient to invest Jurisdiction and thus pass objections upon Collateral Attack and satisfy the requirements of Res Adjudicata and other Conserving Principles of Procedure, *inter alia.* (§§ 1–27, Restatement.)

Such being the logic and the philosophy of the law why should not the Datum Posts of Procedure have been introduced and sufficiently dwelt upon to impress them in all works of Evidence, Pleading, Practice, Trials and their related subjects and to rescue the law from what has come to be called the "legal jungle." How these requirements for the mandatory record have been written (and the teaching is no better) may be judged from the discussions relating to these records. (See Pennockesky v. Coercer.) The views of the Feudal Lawyer may be judged from a quotation we shall make from one whose reputation arouses respect and is next to Coke or Blackstone. We ask that the quotation we shall make be read along with § 10. Story's Equity Pleading which is quoted in § 47 Equity In Procedure. See if the latter section does not say all that the obsequiated Tidd said in his Practice at pages 810, 920, Vol. 2. This section has just been quoted and followed in *State Bank v. W. U. Tel.* — N. M. — 53 L.R.A. (N.S.) 120, 126, 127, wherein the court holds that the general demurrer can be waived. This, commercialism claims, in the law (it being the last case). Story and the writers and judges who wrote and
spoke from the Roman deny that. And note how plainly Story said so. But the followers of Coke, Blackstone (§ 15, 1 Gr. & Rud.), Tidd, Chitty, Stephen, Gould, Pomeroy, cannot from all of their illumined works come to any other conclusion than appears on the pages last cited. Supreme courts familiar with Tidd hold that the general demurrer can be waived. It is not possible to state a sadder fact of the illustrious author. Here let us ask where, exactly where, in any of the works cited can it be made clear to the court last cited that Story is right, also the Code provision which provides that the general demurrer is always available and is not waived by the filing of an answer. (See Demurrer; Tooker v. Armour.) The State Bank Case can be cited to oppose the logic and the philosophy of Consensus. The case holds that merely defects waived by filing an answer or by allowing a case to be set down for trial may afterward be raised when evidence is offered.

This view of allowing formal matter to drag indefinitely through all times and at all stages is intimately in Tooker v. Armour which is extendedly mentioned under the title Como. Here we will observe that formal defects in a pleading are of no greater consequence than is any other formal defect. Such defect is waived like any other defect. All formal defects are waived if passed for an instant without or proper exception. The effect and operation of Consensus is to waive all formal matters; this is the policy of the law. (§ 53, 1 Gr. & Rud.) Statutes often reaffirm the policy referred to but this is not making new law. Had Tidd, Chitty and their followers have understood Consensus they would not have written passages like the one that next follows:

"The parties cannot move in arrest of judgment for anything that is aided by waived. The court last, or can that common law or by the statute of Amendments; or cured as a matter of form by the statute of Feudala." 2 Tidd Prac. 919.

Now let us ask what it is that is not amenable at common law. Does not Stephen inform us that a pleading subject to general demurrer is subject to amendment? See Stephen, pages 149, 150, quoted § 117, Equity In Procedure. Also let us ask what is aided by verdict? (See Rushon.) As already observed formal matters are cured by the operation of Consensus, therefore why mention the statute of Jeofails to the exclusion of a fundamental maxim which that statute merely reaffirms? Why make no mention of the logic and the philosophy of the law not even when it is most instructive to do so? Also note the above quotation; it is the bud of it. Chapter X, Chitty's Pleading. Consider the above quotation with Clark v. Dillon and its cognate cases which expressly hold that the statutes referred to relate only to formal matters and not to matters of substance. Mallincrodt, L. C. 12, 3 Gr. & Rud. Indianapolis R. R. v. Horat, L. C. 223, 3 Gr. & Rud. And further that the statutes referred to mean nothing when read in the light of the logic and the philosophy of the law. But Feudal authors looked chiefly to statutes and to cases as the beacon lights to guide and to lead. They looked to the letter and not to the spirit. To illustrate this fact we will state that had the learned commentator have said that the motion of Arrest like the general demurrer searched the record for substance and not for formal defects he would have said equally as much as he did say. He also accentuated the fact that he was dealing with cases at law and not in Equity. Now why did he place needless limitations on his comments? And then Story said the same thing for Equity. Story spoke for jurisdiction—the general demurrer; now did not Tidd? The latter spoke for the motion in Arrest which is nothing more than a belated general demurrer. And should he not have plainly said so? Each might have stated that he was dealing with a broad, Universal, Constitutional principle of the Roman law which equally applies to all systems and in all kinds of cases. But neither spoke as broadly and as deeply as he could have done. (See Garratt.) Had he, then the Feudal follower would not be looking for the verdict to place the aider upon, but he could see that the order of assessing damages, or the findings of the chancellor all meant the verdict. See Rushon.

The further quotation is nothing more than the Theory of Procedure in a contradictory and equivocal way. See how plainly Frusta probatur quod probatum non relevat can be picked out. Had this maxim been merely cited it seems doubtful if Judge Thompson could have attained a fore-
most place as a great author for a full
generation. (See his §§ 2310, 2311, 2 Trials quoted under the title
Variance, 4 Gr. & Rud.; also "Theory
of the Case.") In effect Tidd said that what is not alleged cannot be proved.
He agrees with 1 Gr. Ev., § 63-68. These
deny that irrelevant evidence will sup-
ply allegations. Utile per inutille non
viatisur is cited by Tidd, 2 Prac. 920.
But why did he not cite the Trilogy
of Procedure? In effect it can be
picked out by one familiar with it from
what we next quote although so many
supreme courts have failed to do so.
See Gullion and its cluster of cases;
(also the Trilogy of Procedure, §§ 1–
13, Restatement).

We have referred to Story, to the
Trilogy of Procedure (§§ 1–13, Restate-
ment) to Ruhston v. Aspinall, L. C.
5, 3 Gr. & Rud.; and to the Codes and
Practices, requiring that the "cause
of action" be stated (Cockerell, 50
L.R.A. (N.S.) 1), also to the necessity
for this deducted from the requirements
of Collateral Attack, and Res Adjus-
cata. (Nalle v. Oyster; Vickenburg v.
Henson; Palmer v. Humiston and Mil-
bra v. Steel Co.) Here are four ways
of teaching why it is that a "cause
of action" must be stated in order to
attract jurisdiction to a subject mat-
ter. We will now quote from him who
has long sat ex cathedra to the
Feudal followers and those who con-
tend that each system of pleading is
a law unto itself, and who have never
written that there are a few Universal,
Constitutional rights that are
common to all systems. To lay the
foundation for important interrogato-
ries (see Pleading), we will now fur-
ther quote from Tidd's Practice:

"At common law, when anything is omitted
in the declaration though it be of sub-
stance (substance), if it be such as that,
without proving it at the trial, the plain-
tiff could not have had a verdict, and
there is a verdict for the plaintiff,
such omission shall not arrest the judg-
ment. This rule however is to be un-
derstood with some limitations; for on
looking into the cases it appears to be
that where the plaintiff has stated his
title or ground of action defectively or
inaccurate (because to enable him to
recover, all circumstances necessary, in
form or substance (substance), to com-
plete the title so imperfectly stated, must
be proved at the trial), it is a fair pre-
sumption after a verdict that they were
proved; but that when the plaintiff
altogether omits to state his title or cause
of action, it need not be proved at the
trial in order that there is no room for
presumption. And hence it is a general
rule that a verdict will aid a title de-
fectively set out, but not a defective title
or in other words nothing is to be pre-
sumed after verdict, but what is expressly
stated in the declaration or necessarily
implied from the facts which are stated.
Thus where the grant of a reversion was
stated, which could not take effect with-
out attornment, but being a necessary
ceremony, might be presumed to have
been proved. But where, in an action
against the endorser of a bill of exchange,
the plaintiff did not allege a demand on
and refusal by the acceptor, when the bill
became due, or that the defendant had
notice of the acceptor's refusal, this omis-
sion was held to be error and not cured
by the verdict. For in this case it was
not requisite for the plaintiff to prove either the demand on the
acceptor, or the notice to the defendant
because they were neither laid in the
declaration nor were they circumstances
necessary to any of the facts charged.
So, where the declaration in debt for
bounties on the Statute of 3 Edw. VI. c. 13,
§ 1, omitted to state that the tithes had
been all paid, and of right ought to have
been paid within forty years next before
the passing of the Act, the court held that it was defective even after verdict and the judgment was arrested." 

Did not Tidd overlook the maxim Ex-
presso corum quattuor nihil iniust opera-
tur (things implied need not be
mentioned)? To illustrate: If the
grantor averred that he contracted for
the property and that under and in
pursuance of this contract the grantor
put the grantee into the possession of
it and that the grantee has ever since
occupied and enjoyed and used the
property under that contract will it
not be presumed that the grantee
made, executed and delivered good and
sufficient deeds of conveyance or writ-
ten contracts to satisfy the statute of
frauds? See Dobson v. Campbell, L.
C. 232a, 3 Gr. & Rud.; Lester v. For-
croft, L. C. 341, 3 Gr. & Rud. On gen-
eral demurrer would not such allega-
tions be sufficient? Ut res magis vo-
leat quam pereat. And if such allega-
tions should be held indefinite or too
general in any court or kind of a case
would the objection to them be more
than formal? And would not they
be waived the instant they were passed
without prompt and precise objection?
Consenue totit errorem. There are
principal allegations from which minor
ones will be inferred and this view is
supported by the cases last cited. But
these minor allegations are not sub-
stance. It is doubtful if they would be
regarded as more than formal in
Tidd assumes that such
allegations would be substance at the
stage of general demurrer but would
not be substance at the motion of Ar-
rest. A careful reading of this page
[920] above quoted certainly justify these observations. And anyway it is apparent that Tidd and his followers have paid no technical regard to the logic and the philosophy of Consensus. For they constantly treat this maxim as one of statutory regulation also capable of being augmented to any extent in its efficiency and operation. Elsewhere we have more fully explained this.

Here let us ask what it is that the above quotation says beyond the few clear, unambiguous and unequivocal and contradictory words of Story which hold that a bill in Equity must on its face, affirmatively show a "cause of action." Now who wrote best, Story or Tidd?

Does the above quotation say more than this: That the statement of a "cause of action" must be stated with sufficient certainty to satisfy the requirements of the general demurrer and of all of its correlative to and including Collateral Attack and Res Adjudicata? (Nalle v. Oyster and cases cited therewith: Tocker v. Armour.) Davis v. Jacksonville Line; Minnesota, 194 U. S. 48.

Why should not the requirements of a pleading to pass objections at the stage of the motion in Arrest, and of Non obstante veredicto, and Appellate Procedure, and Collateral Attack, and of Res Adjudicata and of Due Process of Law be introduced and discussed as broadly and as deeply as all of these matters? Are they not all involved? And is there not an identity of the elements of all of these matters when viewed from a jurisdictional viewpoint? (Nalle v. Oyster.) Why did Tidd and his followers omit all reference to Appellate Procedure, Collateral Attack, Res Adjudicata and Due Process of Law?

Should not all of these authors have barred the way of holding that there are fluctuating rules of construction and that at the stage of Appellate Procedure more liberal rules prevail to uphold the Pleading than at the stage of the general demurrer? (State Bank, 53 L.R.A. (N.S.) 120, 126-127.) And that at the stage of Collateral Attack still more liberal rules obtain? That the above quotation does not mark the extreme limits of liberal construction? (Do bson v. Campbell, L. C. 292a, 9 Gr. & Rud.; Goldham v. Edwards.) That there are no more liberal rules to uphold a pleading at the motion in Arrest than obtains at the stage of the general demurrer? (See Baker v. Warner.) That the above quotation does not stand for the new view that proofs may go beyond the allegations? (See Gulling and its cluster of cases; also 1 Gr. Ex. 63; (Garrett; Frustra probatur quod probatum non relevat; the Trilogy of Procedure, §§ 1-13, Restatement.)

Had any of these authors set forth the Trilogy of Procedure (§§ 1-13, Restatement) and have commented these maxims could the profession have wandered and have wobbled round and round as it has? (See Gulling: "The Theory of the Case.")

Is the above quotation consistent, comprehendible and have authors and courts drawn right conclusions from it? If one matter of substance can be waived then cannot all matters of substance be waived? And if so, is it not true that the general demurrer can be waived? (See Nalle v. Oyster.)

Need there be a presumption of what is expressly stated?

Are not the limits of liberal presumptions shown in Dobson v. Campbell; and Rush ton v. Aspinall?

Do not the cases Rush ton v. Aspin all, L. C. 5, et seq., 3 Gr. & Rud., clearly and impressively teach the matter discussed by Tidd in the above quotation? Looking from these cases was he deep and broad enough?

A leading feature of the above quotation from Tidd is that his passage can be construed to apply to cases at law only. He certainly leaves the view open that it takes a verdict to supply the pleadings. Therefore the findings in Equity, or the award of damages, or the entry of a default, or the assessment of damages or other final proceeding would not involve the law of waiver as a Verdict will. (See Henry v. Hiliard cited under Gulling, also Lester.) Tidd was also a "case system" advocate, for after getting into contradiction and equivocal and ambiguous statements he flies to the cases and statutes for the big trees in the "jungle" and by the blaze of these he tries to clarify the situation. But does he do it? Has he done it? He first lays it down that substance can be waived and after this disrupting statement he tells us that it must be limited by what the cases decide. Among these he states Rush ton which is the commercial paper case he cites. Mansfield whom the Tidd school hated.
so much decided Rushton which shows on its face that a verdict would not supply the allegation of a scienter in a suit to recover for injuries by a savage domestic animal (a bull case). There was no express allegation of the scienter and the verdict could not supply it. And such was the holding in Van Leuven v. Lyke, N. Y. (a hog case). This element the courts refused to presume in the absence of an express allegation. Of this Tidd says "nothing is to be presumed after verdict but what is expressly stated in the declaration or necessarily implied from the facts which are stated. Here had he cited the Trilogy of Procedure he would have moored his argument to the Datum Posts of all systems, in all civilized governments, in all climes and under all skies and in the language of all nations. Mansfield studied the maxims and like Story he made few mistakes. To him the law was not statutes and cases as it is to the Feudal Lawyer and his followers. See how Tidd instructs and compare with the instructions of Festus to the Scribes and Pharisees in Saint Paul's trial in the Acts of the Apostles.

Now was Tidd a good constructionist when he failed to state that when a pleading is construed for substance as it always is on general demurrer that the construction is to conserve and not to destroy. Ut res magis valeat quam pereat. (See Gompers, 33 App. Cas. D. C. 574, cited anent the maxim Ut res. Restatement. The attitude of the crown (state) dictates this construction (Alterum), and this canon is applied on down at all stages to and including Res Adjudicata and estoppel and on Collateral Attack when the record is offered to prove title to property. At all stages this canon is the same without augmentation or diminution. Any other view would make of the law a snarl as dreadful and as hateful as the tangle of a thousand snakes. Such being the law why did he not so state? (See what has happened the discussions of Verba fortius; Baker v. Warner; Goldham v. Edwards; Clark v. Dillon and its cognate cases.)

"When its philosophy is lost the law is lost."

What is presumed for a record to uphold it is a question of Evidence. (See Presumptions.) Tidd can be cited to the point that the law is an entirety for in his passage on Prac-
mining works of the generation lead
the student from the mire of bewilder-
ment! Look at the Form books, the
Horn books, the Quizzers, the Cylc, the
notes on select reports and the
Digests and the conflicting cases and
see if the meaning of the Trilogy of
Procedure and of Story’s section re-
ferred to can be clearly taught from
their much esteemed works. Look at
both the Trilogy and the quotation
from Tidd and see if the maxims are
not far more instructive. Do not they
surpass any matter that can be defined
from the High Court of Chancery, and
the rules, and ordinances of any court
or legislature?

The well instructed student is
taught that the general demurrer can-
not be waived. He is taught this from
the organic maxims; also from Story.
(§§ 1–13, Restatement; Nalle v.
Oyster.) He is taught that a juris-
dictional pleading must be sufficient
upon its face, and that it cannot be
aided from other documents and other
records. Mondel v. Steel, L. C. 77, 3
Gr. & Rud. See Aider; Jackson v.
Peaked.

But Sergeant Williams in a note to
Stemell v. Hogg said that substance
could be waived. Of course a general
demurrer has no application to formal
matter, nor has the special demurrer
any relation to substance. (See Jack-
son v. Peaked, cited by the common-
law authors.) They are different
things and one cannot be waived while
the other can be waived. The special
demurrer is waived like any other
formal objection by the operation of
Consensus tollit errorem. But this
maxim has nothing to do with sub-
stance and therefore with the general
demurrer. But it does have something
to do with the special demurrer. What
we next observe is most important:
The rule that “filing an answer to the
merits waives the demurrer” is strictly
correct so far as the special demurrer
is concerned; but this rule has no ap-
lication to the general demurrer for
the very plain reason that a pleading
vulnerable to the general demurrer has
no merits. It is offensive to the at-
titude of the state. Alterum; Quod ab
initio. (§§ 1–13, Restatement.) A
pleading without any merits can have
no answer to it filed. (See Henry v.
Billiard, cited with Guiling; also
Rushion.) The Code well places
the law of the general de-
murrer as above stated. Story, the
Code and the Criminal practice are

in accord. It is the case at law that
is in discord. (See Garrett.) But
not in all cases (see Rushion.) More
cases can be found in all jurisdictions
upholding the true rule than can be
found opposing it. Nalle v. Oyster;
Palmer v. Humiston; Milbra. It is
the minority case which holds that if
there is an omission of a material al-
legation that it is supplied by a pre-
sumption that “it was proved and that
the verdict cured it.” See Aider.

Tidd informs us that nothing can be
proved that is not alleged. 2 Tidd
Prac. 919, 920; also Greenleaf, § 63;
and so we see that Frustra probatur
quod probatum non relevat is to be
respected; Garrett. Here we ask what
room is there for presuming that an
allegation of substance was proved
when it was not alleged? Must not
allegata correspond with the probata
and vice versa? To be clear, we con-
cede that if secondary facts are omit-
ted but are included within major or
controlling facts as in Dobson v.
Campbell, that then the lesser facts
may be presumed to have been
proved. But even then the lesser
facts are really disposed of by the
maxim Utile per inutil non visitur.
In other words the facts that are pre-
sumed are not in the last analysis ma-
terial facts at all; for they were in-
cluded within the major facts that
are alleged. Omne majus continent is
se minus. Now this is the way of
the case, Dobson v. Campbell, L. C.
232a, 3 Gr. & Rud. This case was de-
cided by Story and he also wrote the
sections which we so often cite with
approval. And he also introduced and
correctly said something of Res Adjudi-
cata. (§§ 790–794.) But Tidd and his
followers omitted all reference to Col-
lateral Attack, Res Adjudicata; and
Due Process of Law. Now what kind
of a time would arise if we sought to
prove a fact adjudicated (Cromwell v.
County of Sac, L. C. 26, 3 Gr. & Rud.),
under the loose and equivocal rules of
Tidd and his followers? (See Mondel
v. Steel, L. C. 77, 3 Gr. & Rud.); and
what would be the clash with the rules
of Res Adjudicata when it was sought
to prove by presumptions what the al-
llegations were? The dreadful con-
dition shown from the Duchess of
Kingston’s case, L. C. 78, 3 Gr. & Rud. will
illustrate. All must admit that the
law of Collateral Attack, Res Adjudi-
cata, and Due Process of Law is ju-
dicial anarchy. See how the latest
Literature.—

books instruct us how to prove the identity of causes, 1 C. J. Cyc, 66, 100; 
Gulling.

The facts show that the rule is taught that the general demurrer cannot be waived, while at the same time it is taught that the motion in arrest is governed by far more liberal or loose rules than is the test of the pleading at earlier stages. The case of Baker v. Warner may be cited to sustain the last proposition. Now it is quite common for a court to say your objection that the pleading is insufficient comes too late for had you made your objection earlier the pleader could have amended; we concede the pleading would be bad on general demurrer but the defect is cured by the failure to object. Now this is one way of waiving the general demurrer.

It seems well to quote some of the decisions that have come showing how the old rules are still over with erring reasons, which seem to emanate from the views of Serjeant Williams in a note to Stennell v. Hogg. Tidd quotes this language with approval at pages 919, 920, 1 Practice of Chitty and Stephen follow Tidd.

In Baker v. Warner it seems to have been admitted that defects vulnerable to a general demurrer must be raised thereby if one would escape the more liberal rules of the motion in arrest. More plainly still is Ruston v. Rudd, 41 App. Cas. D. C. 353, 357. This case is decided on Schultz v. Rees, 2 App. Cas. D. C. 440, 447, which cites Stennell v. Hogg (substance can be waived); also quotes Serjeant Williams. Schultz cites Merrick v. Trustees, 8 Gill, 59, 75 (after verdict a defective allegation in the declaration cannot be taken advantage of though it might have furnished good cause of demurrer. Vandersmith v. Waehrmene, 1 Har. & John. 4).

"Whatever might have been relied upon to defeat the action must be intended to have been raised at trial and as verdict." 7 Smedes & Marsh. 49; 8 Id. 582; 2 Gilman (III.) 307.

The petition would have been clearly bad on demurrer, but it was cured by the verdict. Warren v. Harris, 2 Gill. (III.) 307, 311, cited in 8 Gill, 75.

The practice in Illinois is peculiarly local and flat. It is a practice constituted of statutes and of cases. (See Title, Illinois in Equity In Procedure.) In that state it has been held that if a general demurrer has been overruled, that it cannot be renewed in any other form in the same court. This fact well illustrates that the general demurrer and its jurisdictional functions are not well comprehended in that state.

If at the stage of the general demurrer we have one test and at the stage of the motion in Arrest we have another test to determine whether or not a "cause of action" is stated then what becomes of the rules of certainty of which the Feudal authors discussed?

Supposing that one is examining a record to determine its sufficiency to support a judicial or execution sale or a plea of estoppel of record, how could he determine which set of rules to apply? A rule of Res Adjudicata is that the allegations shall be certain and that nothing shall be taken by intention; now, would not the pleading at the stage of Res Adjudicata be judged exactly as at the stage of general demurrer? Now what shall be said of the logic and the philosophy of procedure where at the various stages it allows different sets of rules of Construction? And would this fluctuation satisfy the Universal, Constitutional rule of Verba fortis? See Rushon.

In the Restatement for the logic and the philosophy of Procedure we invite entirely different views to Serjeant Williams, Tidd and their followers.

Such are the Antinomies. The student must look and judge for himself. Verba fortis and its cognates give the tests of the general demurrer and its Correlatives. (See Restatement.) These tests often involve Aider and its phases which are elsewhere introduced and the keys thereto stated. Among these are Rushon, Dobson v. Campbell, and Goldham v. Edwards. The latter case holds that the same tests apply at the motion non obstante verdicto (Arrest), as do on general demurrer. This view is philosophical and is dictated from the attitude of the state in Procedure which was never comprehended by imperialism and its successor Feudalism. Alterum. All must concede that the same tests govern at the stage of Res Adjudicata (see Res Adjudicata and its rules, 4 Gr. & Rud.) as do on general demurrer. Here let us ask where between the general demurrer and Res Adjudicata that it is that the liberal rule (Ut res magis) is minimum and
where maximum! Goldham v. Edwards (1856), 18 C. B. 139, 139 Eng. Reprint, 1420, shows the struggle, of the Feudal courts to vindicate Verba fortius. This was done but as it was done in Clark v. Dillon and its cognate cases. It was a paraphrase that was stated and applied. Had it been stated in the language of all nations much would have been done for the logic and the philosophy of the law. Then the principle could be seen as a gift from the Roman and not from "Com. Dig. Pledger, E. 6" which the court cited in Buxton. It also held that formality was not essential on general demurrer, thereat, only substance would be consulted; that the substance must be perceivable and clearly enough stated. Had the court said: He must construe this plea as it will be finally construed at the stage of Res Adjudicata whereat the rule is a paraphrase of Verba fortius then it would have been a case to which the editors of Tidd and his followers would have come when it was much needed for the facts show that they have wobbled all around the vital, major, organic rule involved. At it has been in America so it was in England where there was too much parroting of Tidd and his followers. (See Nalle; Baker v. Warner.)

Goldham is a cognate of Rushon (by Mansfield) L. C. 5, et seq., 3 Gr. & Rud.; also Dobson (by Story) and Campbell v. Consalus (N. Y.). These cases if connectedly read will be very instructive. The Feudal followers were not partial to Mansfield and hence they preferred Serjeant Williams, Tidd, Chitty and their followers. The cases preferred by these were Jackson v. Pesked; Sternell v. Hogg; Spieres v. Parker and other cases that would permit of a bewildering Construction. The Feudal motto that "Parliament is omnipotent" must not be circumscribed by cases that would lead to that end if the major-organic maxims were cited. That motto depends upon courts and authors who ignore and denounce the Trilogy of Procedure. (See observations under the title Nalle v. Oyster.) While Procedure was founded upon such still these were never cited nor explained as the higher law of Procedure. Plainly to do so would not have been pleasing to Imperialism, Feudalism and other forms of absolute power. Hence from Feudalism there have gradually come various theories that have misled and dragged the legal profession down into bewilderment and all of the sloth and confusion that now holds it back. To illustrate we shall refer to Goldham.

Suppose that the court in Goldham had said that it is axiomatic that the general demurrer cannot be waived. This is a rule for protection from usurpation and abuse of power for the limitations of jurisdiction are to be found in the Pleadings. Campbell v. Consalus. The record must show what a court acquired jurisdiction of and that it entered a judgment in conformity to the Pleadings. (Munday v. Vail, L. C. 79, et seq., 3 Gr. & Rud.; Vicksburg v. Benson; Story; Rush- ton). If a court had no record, then an ignorant or a mischievous court might from caprice or whim become a devilish court. (See Gulling and its cluster of cases. Judge Talbot in Gullings spoke for protection from records; and so did justice Field in Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.) Knickerbocker.

Protection in judicial operations depends upon a few fundamental maxims well comprehended and worked out. One of these is the maxim Verba fortius. Upon this maxim the rules of the general demurrer depend. The King (Crown or State) has interests in Procedure and these interests are vindicated by the general demurrer; and these interests are the same at all stages and therefore the rules, the tests of the general demurrer are the same at all times, places and stages. Altrum; Res inter alios acta; Interest reipublicae ut sit finis litium. Therefore the footing of the general demurrer is the same at all stages. It does not fluctuate. The rules of the general demurrer are strict for substance at the beginning and they are strict at the end and these rules are the tests of Res Adjudicata. These do not involve form. The quest for Due Process of Law are the same tests. From antiquity the maxim comes that Pleadings are construed most strongly against the Pleader. Bacon's Ordinances respected this maxim which is reaffirmed in the rules of Pleading in Comyn's Digest. The harmony, symmetry, and congruity of Procedure depend upon respect for that maxim and its cognates. (§§ 1-13, Restatement.) Should we depart from it after the stage of the general demurrer
and apply still more liberal rules at
the stage of Arrest and another test
at the stage of Appellate Procedure
(State Bank, 53 L.R.A.(N.S.) 120,
126-127) and still another at the
stage of Collateral Attack and then at
the stage of Res Adjudicata return to
the tests of the general demurrer we
would destroy the logic and the phi-
losophy of the law and make of Pro-
cedure nothing more than a mass of
conflicting statutes and cases. It
would be nothing less than absurd to
apply different rules of protection of
the states' interests at each of the
stages where the Crown's interests
should be sua sponte looked for and
safeguarded.

Ubi cadem ratio ibi idem jus.
For identically the same reasons the
mandatory record is construed
throughout alike by the major, organ-
ic maxims of Procedure. High laws,
the Prescriptive Constitution require
this record; it exists from necessity
and it is above local and flat laws. It
exists, inter alia for the purposes of
Res Adjudicata (1 Gr. & Rud. §§ 83-
123), and the Removal of Causes. It
cannot be expressly carried away.
Campbell v. Consaulus. E converso it
cannot be impliedly consented away.
To hold otherwise would be as a Juc-
gernaut of chaos driven into the heart
and vitals of Procedure. (See the
titles New York, Illinois, and Mis-
souri in Equity In Procedure.)

The conclusion of law cannot pass
the general demurrer. Rushton v. As-
pinall, L. C. 5, et seq., 3 Gr. & Rud.
Now how can it pass the motion in Ar-
rest? Or the requirements of Appel-
late Procedure? Or objections on
Collateral Attack? It cannot pass the
rules of Res Adjudicata. (See these
rules, 4 Gr. & Rud.)

The above views are dictated from
the Trilogy of Procedure (§§ 1-13, Re-
statement); from Mansfield's and
Story's decisions, inter alia.

The student should be familiar with
Rushton v. Aspinall, L. C. 5, et seq.,
3 Gr. & Rud.; Dobson v. Campbell, L.
232a, 3 Gr. & Rud.; Jackson v. Pek-
ed, Stennell v. Hogg, Spieras v. Park-
er and note the preference of the fol-
lowers of Tidd and Chitty for the
Jackson, Stennell and Spieres Cases.
These cases can be reasoned out right
but after conceding this only note how
the "theory-of-the-case" doctrine took
root and has developed as is shown in
Gulling and its cluster of cases
alongside Tidd and his followers.
The various works on Pleading
may be judged by their citation and
Tidd and his followers.

The various works on Pleading
may be judged by their citation and
treatment of these cases. Also note
treatment of these cases. Also note
the preference shown these cases over
the maxims.

If these cases were comprehensible
why have not the great authors of a
 generation comprehended them? (See
Story.) The facts certainly stand out
that these cases were at least lazy
and confused to the "theory-of-the-
case" authors and courts. And who
can deny that Sergeant Williams
showed his ignorance of the logic and
the philosophy of the law when he
wrote that substance could be waived.
And was not Tidd and his followers
equally befogged? And did not all
of these authors show a preference for
local and Feudal authorities? Did
not they write the law from cases,
statutes, Digests and Abridgments,
the Cysc of another generation—in-
stead of from the maxims? Compare
their efforts with what is shown in
the Restatement.

Compare the above observations
Warner; Vicksburg v. Henson; Walle
v. Oyster; Burnon v. Rudd, 41 App.
Cas. D. C. 333, 337; Garrett.

Also note that Sergeant Williams
is quoted numberless times to Story's
once. Story certainly wrote great sec-
tions, but did Tidd? There is a world
of difference between Story, Tidd
and Thompson and certainly every lawyer
should know what that difference is.

We can look and see how the max-
ims express the rules of the general
demurrer and how paraphrases of
these maxims are the fundamental
rules of Collateral Attack and Res Ad-
judicata; also how Story stated these
rules at the beginning and how Tidd
stated them at the stage of Arrest:
what he said we have quoted. Also
how Mansfield stated these rules in
Rushton; and how the statutes, the
Codes express the same rules in legis-
lative language. (Cockrell, 50 L.R.A.
(N.S.) 1-32.) The code language is
clear and peremptory in reaffirming
Quis, quid, coram quo. (See Resta-
tement.) Here let us ask if the
Gulling cluster of cases accord
with any of the above expressions
or requirements? The test for the
"cause of action" ("title or cause of
action," Tidd calls it) is, will
the statement pass the general de-
murrer. Leading the way of this
Literature.—

test is *Verba fortius*. Construction of the Pleading at the stage of the general demurrer for certainty and for Jurisdiction is as broad and as deep at that stage as it is at any other. *Goldham v. Edwards.* *Ut res magis valeat quam pereat* is the rule on general demurrer and this rule never varies as Tidd and his school teach. For he certainly stands for the idea that it is at the stage of Arrest that the court will do every thing that it can to uphold the proceedings. The struggle over this question is simply bewildering in the late cases. *Slocum v. Ins. Co.; Baker v. Warner; State Bank*, 53 L.R.A.(N.S.) 126-127. Why did Tidd reserve his broad liberal rules for the stage of Arrest when the same rules apply on general demurrer? *Rushton L. C. 5, et al v. Gr. Co.,* and *The Rules he attempted to lay down for this stage equally apply at all stages where the Pleadings are opened. Nalle v. Oyster.* But the facts now stand out showing that Tidd, has impressed the courts in each generation to the contrary and the late cases are nothing less than savage attacks upon the logic and the philosophy of the law, 53 L.R.A. (N.S.) 120, 126-127; *Gulling; And the popular and prominent authors of this generation occupy extremely advanced grounds in these attacks. (See Story.)*

*Ut res magis valeat* is the rule of liberal Construction (Equity In Procedure, 101, 283-293). Its cognates are *Consensus totis illicit erorem and Omnia praesumuntur rite.* This trio of maxims is all that Tidd discussed at pages 919, 920, and might not he have said so to have cleared his hazy pages? But instead he cited statutes and cases and as to these did he not wabble and stumble over great principles without clearly perceiving them. He discussed the rule of the general demurrer at the stage of Arrest and thought that the rules at these respective stages were individualistic and singularly different. His manner of reasoning is like that in the cases above cited. He did not cite and explain the maxims which are the beacon lights of all ages and are the great and everlasting principles that constitute the higher law and should be so taught.

Would Story or Mansfield or Kent

have construed away from the clear and positive language of the Code? Look from their cases and sections and judge. (See Story; *Rushton.*) Look from *Gulling* and its cluster of cases and see what has come to pass. And did not Bacon prophesy what Feudalism would demonstrate?

"Remove not the landmarks which thy fathers have set."

Looking from the lawyer's literature the call for "revolution" is warranted. Fifty years ago possibly there was some service for directing a student to study the statutes and reports of his state to prepare himself for practice. But that advice could not be defended to-day. Look at the condition indicated from *Gulling* and its cases; also the "Theory of the Case." From such matter no lawyer can arise. Look from the maxims in the Restatement to the sections of Thompson and the "new" school mentioned under the title Story. Look at the pages of Tidd and his followers. Look at the fundamentals stated in the Restatement and see how these are treated by the Feudal authors. Now the students are studying decisions from judges who arise at banquets, who express confidence in the ship of state holding together until they are gone, and then they say that "after us the deluge," also of authors who denounce Story, Greenleaf, Bishop and Carter. Those who have been misled and deeply injured by the writings and the teachings of a generation may find words from another epoch which we quote:

"So I returned and considered all the oppressions that are done under the sun; and behold the tears of such as are oppressed, and they had no comforter; and on the side of their oppressor *there was power*, but they had no comforter." *Ecclesiastes*, IV. 1.

"Woe unto you lawyers! For you have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered." *St. Luke*, XXI. 52.

The restless suffering masses have vainly looked to the lawyer for guidance and uplifting. Now they have come to be viewed as sleeping sentinels in the watchtowers of liberty.

National life and progress depend upon the lawyer and his establish-
Literature.—

What has he done and what is he doing?

Can he defend his literature?

Multitudo imperitorum perdit curiam.


Logic and Philosophy of the Law. If the law has a logic and philosophy then it has a thread that leads through the labyrinth. See Sects. 1-26, Restatement. And if it has such then is the thing to seek and to hold. If it has such, then this is a fact of first importance. It seems fair to say that the law has such, for the idea that it is only a lot of statute and cases is neither inviting nor satisfactory. We assume the contrary and the onus of demonstrating the fact. To do this we have to begin and make a clearing and choose salients from which the fact can be perceived. For the argument it seems best to ally ourselves with the views of others if possible. We therefore choose that view, that procedure lies at the base of the law. (See Preface Gould’s Pleading.) Procedure is diffused throughout all parts of the law. It arises at the fountains of the law — at its great maxims. To indicate this fact attention is invited to what is observed anent Alterum non ladeere. This is a part of the maxim from which it has been long said that the entire body of the law can be articulated. So far, we are allying ourselves with the views of antiquity. And here we properly observe that the ancient did more for the law than the Feudal author. Bacon did far more for jurisprudence than did Coke and his followers. Those who viewed the law as a local and flat institution could not grasp nor understand its philosophy. The great central ideas from which the logic and the philosophy of the law must be discovered and traced are not Feudal but they are Roman. We have mentioned one of these, and reference is made to it to illustrate the question in hand.

Melius est petere fontes quam sec- tari rivulos.

Non in tabulis est jus.

Having estimated the importance of Procedure we naturally select it as the central or leading subject upon which to make the demonstration and also seek the few fundamental principles that underlie that subject.

It has long been said that the entire body of the law rests upon a few fundamental principles well worked out and comprehended, and if so, then Procedure can have for its demonstration not many but only a few. To demonstrate its fundamental lines we shall employ not more than ten. And these will be related to and introduced from the greatest maxim of jurisprudence—the lawyer’s “Golden Rule” — Alterum non ladeere. From this grand old principle we shall seek the thread referred to.

By reference to this maxim we are introduced to other maxims of wide sweep and of such utility in mastering the law. And chief among these are the Trilogy of Procedure: 1. De non apparentibus; 2. Frustra probatur quod probatum non relevat and 3. Verba fortius accipiantur contra proferentes. From this trio of maxims arise and flow on down innumerable rules of Pleading, Evidence and Practice. The operation of these principles depends upon certainty and for this there must be a record and hereat for such certainty and for the operation of great principles we introduce the mandatory record — the record of substance. This is the record that the State requires to evince the Coram judice proceeding, which is so important in tests of Res Adjudicata also “Due Process of Law.” At one end of this essential record we have the general demurrer, the motion in Arrest, Non obstante veredicto, orders of Repleader, Appellate Procedure and Collateral Attack. We often refer to all of these as the general demurrer and its Correlatives. In each succeeding stage the matters of the general demurrer so to speak, telescope. So we have the General demurrer in Res Adjudicata, Collateral Attack and “Due Process of Law” and this fact must be admitted, or on the other hand it must be maintained that the general demurrer cannot be waived. But the rule of all protecting systems is that the general demurrer cannot be waived. That the general demurrer searches the entire record (essential Pleadings) and attaches to the first fault. It does not attach to the second fault. The rule calls for and attaches to the first fault. If the indictment is lacking in substance—if it lacks
Logie, etc.—
any one allegation of substance then the inquiry ends right then and there. And generally this is conceded in the criminal case. *U. S. v. Cruikshank*, L. C. 232, 3 Gr. & Rud. To this fault *Quod ab initio* is applied with strictness. But the logic and the philosophy applies with equal strictness in Equity. (See Story.) Also to Codes for these provide what a Complaint or statement of the “cause of action” shall contain. Nor does the Code end there for it is further provided that filing an answer waives everything except that the statement is defective,—“that it does not state facts sufficient.” Here is a reaffirmation of the maxim *De non apparentibus*. The Code also provides that all relief must be within the facts stated (thus *Munday v. Vail, Ficksburg v. Henson*, (13 S.) and their cognates are reaffirmed). Herefrom we perceive that Pleadings are jurisdictional and that: Pleadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it. Sec. 47 Hughes’ Equity.

The thread referred to begins with the attitude of the state and its demands for the *coram judice* proceeding and that this be evidenced by the first rule of Evidence which is that: “What ought to be of record must be proved by record and by the right record.” In other words, this thread begins at the stage of the general demurrer and depends for support at all the stages where the defects can be called in question upon substance. Nullities, void things will not support that thread. *Debile fundamentum fallit opus.*

*Substance* is required by the state and therefore it cannot be waived. Two cannot affect what affects a third by waiver or consent. *Alterum non lude; Res inter alios acta.*

A judgment is a contract; and the state is so far a party to this contract that it demands that the proceedings be *coram judice* in order to support the contract. Otherwise the contract is to the state *In pari delicto*. The state does not assent to the *coram non judice* proceeding. To this the state in effect says *Non habe in jurerca veni* (I did not come into this compact).

The attitude of the state is also supported by the maxim *Interest reipublicae ut sit finem litium*. To support this view we have picked a Code case from New York. *Campbell v. Consalus*, which we so often cite in order to keep the arguments in line with the Code; also to present the Code in the lights of fundamental law and to place it solidly and harmoniously upon first principles. This case cited, quoted and followed *Guest v. Warren* (Eng.). Both cases are in accord with *Mondel v. Steel*, L. C. 77, 3 Gr. & Rud. which is reaffirmed in the late case of *Palmer v. Humiston* (O.); also in *Mibra v. Steel Co.* (Ala.), which may be cited to sustain *Rushton v. Aspinall, Bristow v. Wright* and *Dovaston v. Payne* all in Smith’s Lead. Cases 8th Ed. L. C. 5, 135 and 217, 3 Gr. & Rud.

*Rushton, Bristow and Dovaston* are a case nomenclature for the Trilog of Procedure. These are cognate cases to *Campbell v. Consalus, Clark v. Dillen* and *Tooker v. Arnoz* all New York Code cases which we have picked and elsewhere discussed to show that the Code brought nothing new in substance and that it merely reaffirmed the old law—the maxims—the law of antiquity—the Prescriptive Constitution. Elsewhere we cite these code cases and show what fundamental principles they reaffirmed and also to sustain the proposition that there is a logic and a philosophy in all systems of Procedure that can sustain and carry forward the requirements of a Constitutionalism.

The logic and the philosophy of Procedure are its “Datum Postea” by which all Codes and Practice Acts must be construed. (See Codes; Construction.) The harmony, symmetry and the philosophy of law depends upon well settled Procedure and this depends upon right Construction. (Sec. 182, End. Stat.; *Lex non exacte.*)

*Cujus est institutius ejus est abrogare.*

The law is a delicate fabric and this depends upon congruity, reason and logic. If one part of the essentials is disregarded and distorted this determines the entire institution. If the Construction of the general demurrer is either enlarged or diminished at any of its stages then it ill fits the other parts and these are no longer symmetrical and harmonious. In other words we must construe for the attitude of the state by the same rules and theories at all stages of the general
Logic, etc.—

Demurrer. Ubi eadem ratio ibi idem jus. Construction makes or mars. Uno absurdo dato infinita sequuntur. We have introduced the statute and its attitude also its demands for the mandatory record and that this be tested by the general demurrer and its correlative from the beginning to the end inclusive—to Res Adjudicata and "Due Process of Law" and that herein the general demurrer is sought and argued under multitudinous and variant titles and often in Constitutional relations. Herefrom appears the reason why the general demurrer cannot be waived.

A pleader states his "cause of action" or of defense at his peril. To him is applied a universal canon of law—Ignorantia legis neminem exculpat. Palmer v. Humiston (O.); Nalle v. Oyster (U. S.); U. S. v. Daskiel; Milbra v. Steel Co. (Ala.); Garrett. The strength of this proposition must be perceived from the Roman maxims which are reaffirmed in the Code cases we cite and tie to and work from as "Datum Posts" and which are Campbell v. Consalua, Clark v. Dillon and Tooker v. Arnoux, all New York, Code cases. In connection with these we cite English U. S., Massachusetts, Illinois, Missouri, California, Wisconsin, Minnesota, Ohio, Texas, Alabama, Virginia, Indiana and other cases. Upon this plan we call to the support of our arguments the Roman, English, Federal, Code State and Common Law Practice States. All are marshaled and gathered and set around the "Datum Posts" selected and made prominent. Upon this plan we demonstrate that the law is founded upon a few fundamental principles well worked out and comprehended. It is this proposition that the Feudal lawyer set himself against as its establishment would be against his theory and his fallacious dogma that "Parliament is omnipotent," and the calls of this for local and flat law. Herefrom appears the reason why we vainly seek from Feudal authors and their followers connected and clear mention of the foregoing matters. They did not cite and explain the state's attitude and the thread of philosophy that begins there—at Alterum non sedere—the great high maxim and its cognates. Test these omissions and see. Look at anything that Coke, or Tidd, or Blackstone, or

Logic, etc.—

Chitty or Gould or Glanvil, or Bracton, or Littleton, or Bentham or Hale, or Edward III. has given us. Also Secs. 1-46. Restatement.

By the power of advertising and the glimmers held out by publishers supported by the compliments of supposed great judges (L. C. 159, 3 Gr. & Rud.) authors with no other assets beside audacity and presumption and the return compliments of the judges above referred to for a full generation became illumined authors, editors and reviewers. They were held out as the authority. Their glittering positions attracted foreign essayists whose glowing contributions and eloquent appreciations made impressive additions to prefaces and press notices. Panoplied with such power and overpowering grandeur they were gilded with gold and were placed in a position to hoax and mislead the lawyer and his establishments or in other words undermine the latter. The lawyer of the period looked on and saw the corruption of his literature and by this means the submergence of his profession by ignorance and commercialism which for first principles and philosophical works has imposed by clamor and harrah vast digests and Cycles and rows of annotated cases picked from the jargon of a hundred Babels. To support these conclusions we refer to the facts set forth in the Restatement.

Only note the high positions given to dictionaries, digests, Cycles, quizzes, form books and machine-made books notwithstanding the fact that from endless rows of these works there cannot be found a true definition of Pleadings, of the Mandatory Record, of the Statutory Record, ofJurisdiction, of Aider, of the General Demurrer and its functions, before the trial, at the trial and after the trial. (Quod ab initio.) Look at Story on the one hand and Thompson on the other hand. In connection with the latter consider Gulling and its cluster of cases; also the rise and development of the "Theory of the Case." See also Literature; Chitty; Stephen; Pomery; Feudal Lawyer.

Whoever can read and compare can see there is something the matter as he will see by comparing Section 10 Story's Equity Pirading, quoted section 47 Hughes' Equity, with sections 2310, 2311, 2 Thompson's Trials, quot.
Logic, etc.—
ed, under title Variance, 4 Gr. & Rud.;
as to cases compare Campbell v. Cons-
salus (N. Y.); Nalle v. Oyster (U. S.);
Palmer v. Humiston (O.); with Gull-
ing v. Bank (Nev.); S. v. Fasse (Mo.);
and Baily v. Hornthal (N. Y.). And
if he will look further, then view from
Campbell v. Consalus and cases and
texts there cited. The Prefaces of the
various authors also reveal the be-
wildermint that is laid before the stu-
dent. Carefully read those of Profes-
sor Pomeroy and of Judge Nash and
note that they are widely apart. It
seems impossible that any one can
look from a general survey of legal
literature and justify what is done to
5,000 young minds starting out, each
year to learn their country’s laws. Is
it possible to do so from the warri-
ning and hostile texts and decisions we
refer to? Elsewhere we refer to this
wrong as a crime (Restating the Law;
Unfair Trade). No student can learn
the logic and the philosophy of the
laws from judicial anarchy and its jarg-
on. 3 Am. Law School Review 602-
617. It is chaos whether we look
from texts or from decisions or sup-
posed educational Journals. By the
sheer force of clamorous advertising
new elements are driven into the law;
to illustrate see how a “Key Number”
plan (founded on American cases)
has been made a legal factor. Also
how a Cyc by showing how Lawrence
v. Fox was cited 260 times in N. Y.
Cases made that case so prominent
that it was parroted by every student
in New York and was caught up by
the students of almost every college
who wanted to talk of that case in
preference to all its cognates. (See
Hendrick v. Lindsay, L. C. 319, 3 Gr.
& Rud.; or Dutton v. Poole.) Else-
where we refer to the prudence of
the legal profession to parrot.
Lord Mansfield said in Robinson v.
Bulcy, L. C. 45, 3 Gr. & Rud. that
Pleadings were “founded in a strong
sense and the closest logic.” And
this view accords with the view that
the law is reason and may always be
judged by its tests and its contin-
tuity. Mansfield gave no loose expres-
sions as to aider and waiver that was
not consistent with the philosophy of
Concursus tollit errores. He uni-
formly held that the general demurrer
cannot be waived. Rushton v. Aspin-
all, L. C. 5, 3 Gr. & Rud.; R. v.
Wheatley, L. C. 19, 3 Gr. & Rud. In
each of these cases he arrested the
judgments because of the omission of
a material allegation. And such is
the Code rule. Bouc v. Emmerson;
Palmer v. Humiston (O.); Campbell
v. Consalus (N. Y.); also in Federal
Cruikshank, L. C. 232, 3 Gr. & Rud.
In the English courts the tests of
the pleadings are the same at the
stage of the general demurrer and at
the stage of motion in Arrest. (Gold-
ham v. Edwards.) But in the “theory-
of-the-case” courts it is otherwise.
(See Baker v. Warner (U. S.); Gulf-
ing v. Bank, 29 Nev. 200–290; State
Bank, 53 L.R.A.(N.S.) 120.)
The “strong sense and the closest
logic” mean one and the same thing.
These include the Trilogy of Procedure
the three organic maxims of Proced-
ure we elsewhere define and discuss.
(Secs. 1–13, Restatement. See Hughes’
Equity In Procedure.) The organic
maxims are canons of logic and they
are the beacon lights that illuminate
the “Appian way.” Mansfield was a
Civil lawyer and he knew these canons
and at the same time the prejudice of
the Feudal Lawyer at the Roman law
and especially at the Universal, Con-
stitutional maxims which lighted up
and led the way to a great unified and
centralized system of Procedure which
was the genius of the Roman Gov-
ernment. The Feudal Lawyer would
tolerate the citation of the minor
maxims but not of the major ones
which have never been gathered and
cited to show the deeper meanings of
Pleading and its related subjects.
Story alone as elsewhere observed re-
ferred to them; but so vaguely as not
to impress them. Mansfield’s deci-
sions are pervaded with them but he
never cited them; his decisions were
very obnoxious to the Feudal school
without citation of the major maxims
of the Prescriptive Constitution,—
those that were above the omnipotency
of Parliament. These major maxims
are organic. They unified, simplified
but they centralized. They were for
all ages and all climes and provinces.
They were not created by Parliament
and their operations were limitations
upon the Feudal motto that “Parlia-
ment is omnipotent”. We shall next
set out and outline two of these ma-
jor maxims which have given the Feu-
dal Lawyer and his followers so much
trouble and which have greatly taxed
Logic, etc.—

his ingenuity to obscure and immolate these maxims in a jungle of "Shelley" Cases. (See JEROX.) In such cases the first principles of the law have been lost to many courts and they have become a mine and a bewildermment to the student and to practitioners as well. See Gulling and its cluster of cases.

"When its philosophy is lost the law is lost."

Every lawyer should know the "strong sense and the closest logic" that lights up the leading subject of the law in the "legal jungle." Pleading has its beacon lights and among these none import more food for thought and reflection than two which we will next set out and translate:

1. De non apparentibus et non existentibus cadem est ratio: What is not juridically presented cannot be judicially considered, decided or adjudged.

2. Verba forti successor contra prof. errores: The words of an instrument are construed against the composer; or every presumption is against a pleader. (See Hughes' Equity in Procedure.)

These maxims have many and variant expressions. (See Pleadings; Garrett's Lawman, 42 App. Cas. D. C. 202.)

They are, of the maxims of "strong sense and closest logic." Herefrom the attitude of the state is perceivable also its requirements for the record and its test by the general demurrer and its corollaries. These maxims are always expressive the same and always mean the same in the Latin. And accordingly they can be accurately indexed. But the case nomenclature of these principles is very changeable and generally the cases burdened with a discussion of these principles are changed in each decade. Each court and province has come to have its own set or gathering. In Mansfield's day Rushton v. Aspinall and Brettow v. Wright, L. C. 5, 135, 3 Gr. & Rud. were given and these have come on down in Smith's Lead. Cases to the eighth edition from which they are omitted, to the great injury of that invaluable work. But new schools have come and these are shifted around by every wind of doctrine. Indeed cases are selected for each province and each school from time to time. Those who hated Mansfield chose Jackson v. Peaked, Stennell v. Hogg and Spieres v. Parker. In Federal courts, Cockett v. Lee, Blacum v. Pomery, and Dobson v. Campbell, L. C. 232a are generally preferred. (See Nalle v. Oyster.)

When the Codes came a new series of cases became prominent. Bower v. Emerson is burdened with the above maxims. In New York three notable and most instructive cases present the "sense and logic" of those maxims and these are Campbell v. Consulius, Clark v. Dillon and Tooker v. Arnot, which are a good presentation of the major maxims from which Procedure can be articulated. In relation to these Code cases those major maxims are stated all through the English, the Federal, the Code and the Practice Act cases. And in the last analysis those we have selected are all the same in meaning and in effect. This presentation explodes the claims of certain authors, and courts and schools and publishing houses and their famous editorial staffs that the law is local and flat and that "the law is the last interpretation of the law by the last judge;" also that editorial staffs have selected "key number" cases to stand for the major maxims referred to. If so which is the "key number" for either of the organic maxims above presented? As to these facts we invite a consideration of Campbell v. Consulius and of its annotation. We submit this elaboration to sustain our contentions.

But there are other very instructive cases which well present these major maxims that all of the authors on Pleading have avoided or have silted over. Coke-like, with "Shelley" Cases which are a veritable jungle. Among these worthy cases are S. v. Muensch (Mo.), Fish v. Cleland, L. C. 12c, 3 Gr. & Rud.; C. & A. R. R. v. Clausen (III.); Thomas v. P.; Wright v. Dodge, all Illinois Cases; Milbra v. Steel Co. (Ala.); Palmer v. Humiston (O.), and their cognate cases. All of these cases may be cited to support the major maxims cited. And so we could pick and cite cases by the thousands to imitate the various schools and publishers who try to make these their pickings of cases to stand for the roots and the heartwood of the leading subject of the law. And here let us ask if it has been taught by cases? If so, where? (Knickertooker.)

For Codes we have picked New York cases because these are a tolerably clear presentation of the major maxims that authors and courts and pub-
Logic, etc.—

House avoiding and generally de-
nounce. Besides it seems well to
choose New York, the first Code state,
to lead the way. Mélisus est feter
fontes quam sectari rivulos. These
cases reaffirming the major maxims—
the organic principles from of old
ought to be impressed upon the Code
practitioner. Mélisus est, and that the
Code brought nothing new.

Campbell v. Consalieu, Clark v. Dill-
on and Tooker v. Arnoux; we pick
and discuss to illustrate the Code and
its genius. Also to show that this
trio of cases simply reaffirm the old
organic principles—the fundamentals
of the law the sections of Story al-
ready referred to. These sections are
among the greatest of Code sections.
There are no greater. Here let us
ask if Code authors should not have
plainly stated the roots?

Each decade gives the struggling
student a new list of cases which in
the last analysis can add nothing to
the organic, the fundamental prin-
ciples. These at best are but illus-
trations of the major maxims above
referred to but more often they are
hazy and misleading. But this fact
the courts and the authors and the
editorial staffs overlook and ramble
and wabble round and round and seek
far and wide for statutes and be-
nighted decisions to lead and to light-
en the way. (See Nalle v. Oyster and
Vicksburg v. Henson, also observa-
tions upon Tidd under the title Lit-
erature.)

Now let the student judge, and for
this present him a few of the major-
organic principles and let him look
at and study these along with the var-
ious lists of cases and compare the
results. Also call his attention to
the warning authors mentioned in the
Restatement. Let him judge if the
major maxims, neglected and omitted
by these authors, do not start him
thinking while the Cases simply give
him a world of matter to read and
guess and speculate over. To illus-
trate: Which gathering of cases will
Teach him whether the organic max-
ims are the Universal, Constitutional
principles of all ages climes and coun-
tries? See if a study of first prin-
ciples lead into the mire of bewilder-
ment. (See Gulling v. Bank; also the
“Theory of the Case.”) Which gather-
jng of cases teaches the exact precise

Logic, etc.—

idea that is expressed by the organic
maxims? This is important to know.

The organic maxims must be correct-
ly picked, impressively set and well
taught and that they mean exactly
what they say at all times, and places,
and stages, and in all relations, and
that when a pleading is opened and
inspected for substance it is tested
by these major maxims and their cog-
nates as rules of strict construction
which at no stage or place or time
fluctuates. They mean exactly the
same thing at the stage of the general
demurrer and at all of its correlatives
at the motion in Arrest. (Non obstante
veredito; Goldham v. Edwards. See
Baker v. Warner, U. S.; Penn. 1;
Knickerbocker. R. R. v. Ellett, (Ill.).
Should not any good dictionary plain-
ly state the above rules?

Where these maxims are well taught
there are no departures, no “Theory
of the Case,” nor are pleadings Func-
tus officio when the judgment is en-
tered. Nalle v. Oyster; Garrett. See
Story on the one hand and Thompson
on the other hand. Frustra probatur
quod probatum non relevat; the evi-
dence must correspond with the al-
legations and be confined to the point
in issue. But this rule is denied in
every “theory-of-the-case” state.

The above maxims are the thread
which leads through the labyrinth.
They are the beacon lights in the
“jungle.” As the Greek knew the
dominant initial from which the Par-
thenon was drafted so the Roman
gathered and established the “Datum
Poste” from which Constitutional Pro-
cedure is unfolded. (See Introduc-
tory chapter, Restatement.) He fixed
the north star and its pointers and as
the mariner understands and respects
these, so the Roman respected his ma-
jor-organic maxims. For these he did
not substitute from time to time a
gathering of late cases. This was left
to after ages and for other hemi-
spheres. The gatherings of cases have
been well tried in the American juris-
dictions and for results they have
changed the channels of legal reason
and philosophy; or rather they have
clogged the channels.

We know of no court or author by
whom these maxims have been cited
and vindicated. Most all of these can
be cited to the point that after pass-
ing the general demurrer the rules of
construction become more liberal to
uphold the Pleading at the motion of
Arrest; and still more so on Appeal;
and still more so on Collateral Attack.
But Story denies these fluctuating
rules; also Judge Barclay in Davis
v. Jacksonville Line (Mo.) wherein he
paraphrased Story in a most instruc-
tive and clearing way.

Courts that disregard these maxims
have given nothing more than hodge-
podge with which to fill supreme court
reports. So to speak it is this hodge-
podge that has furnished the matter
to fill the vast and unending rows of
digests. Cries and the jejune outputs
of commercialism whose ways of ad-
vertising surpass the efforts of all the
howling dervishes of earth. It has
hoaxed the lawyer and his establish-
ments. See Maxims, Multi utilitas;
Monday.

The tests of a plea of Res Adjudi-
cata are the same as at the stage of the
general demurrer, which can never
ever be waived. But it could be if we sup-
plied omitted allegations at the stages
of the motion in Arrest, or in Appel-
late Procedure or at Collateral At-
tack. Relating to such liberal con-
struction the statutes of most all of
the states have contributed to the
mine of bewilderment.

Most all of the statutes of Amend-
ments and Jeofails have been drawn
from the assumption that "Parlia-
ment is omnipotent," and that the
Prescriptive Constitution, the major
maxims referred to can be estirpated
by arbitrary edicts. But all courts
have not upheld this view. See
Clark v. Dillon; C. & A. R. v. Clausen
(Ill.); Ross v. Milne (Va.); Lawman,
42 App. C. D. 202. (Verba fortius.) The discussions of these stat-
utes are a jungle of "Shelley" Cases.
(See Dovaston v. Payne, L. C. 217, 3
Gr. & Rud. Fedal Lawyer.)

The Renaissance called from ant-
iquity literature and art. But it did
not call the law; it was left behind
as was observed by Bacon. He gath-
ered the organic-major maxims one of
which was Verba fortius from which so
much can be deduced as we have
shown. It was the policies and the-
tories of Feudalism that barred the
way of the law; it could not come
abreast with literature and art. Mot-
toes like this: namely, "Parliament is
omnipotent" would be eaten away by
the logic and the philosophy of the
Roman maxima. Coke saw this and

opposed Equity because it would "eat
out the heart of the law." His in-
fluence assigned for Equity the sec-
ondary maxims for the exercise of its
jurisdiction. He did not understand
the major maxims. The Universal,
Constitutional Maxims of Procedure
the Feudal Lawyer never understood.
He could not from principle ex-
plain why the general demurrer
could not be waived. As to Res Adju-
dicata he could not develop its rules
and apply them consistently with or-
gle maxims. And the consequence
is that the law became and now is a
mass of high imperial statutes and of
cases. As to what the latter amounts
to see the discussions of Clark v. Dil-
on in New York also by Code authors;
look at Gulling v. Bank, 29 Nev. 266-
280 and cases it cites. The pervers-
ions and the distortions by statutes
and cases have destroyed all certainty
in the administration of the laws.
These have ignored the attitude of the
state in Procedure. (See Alterum non
ledere; Interest Reipublica ut sit
finis litium; Campbell v. Consalus and
its annotations.) Pleadings have been
legislated to be formal and waivable
and most of the courts have decided
them to be. Story denies this and
Thompson affirms it. And the stat-
utes of Amendments and Jeofails are
construed according to the latter au-
thor. Generally these statutes are op-
posed to the logic and the philosophy
of the law.

For generations the restatement of
the law has been called for (See title
page Wigmore's Code on Evidence).
The restatement of the law will be the
restoration of the organic principles
for beacon lights and not statutes and
cases. The organic-major maxims
are the roots from which the state-
ment must proceed. We have tried to
indicate this fact herein also in many
other relations. (See Alterum non
ledere; Restatement of the Law.)

In conclusion it seems well to sum
up by stating, that the most important
subject of the law, Pleadings (which
is inseparable from evidence) has been
reasoned from at least three leading
viewpoints, and 1. From feudal the-
tories and such as Coke's three de-
grees of certainty ("a jargon of
words," Buller J. in Dovaston v.
Payne), and 2. From the Roman (Res
Adjudicata which is founded on In-
terest reipublica ut sit finis litium,
Logic, etc.—
and that herefrom the attitude of the
state begins, which calls for the general
demurrer and its correlates and the evincing of the matter anent these
by the mandatory record as is in
dicated under the titles Alterum non
ludere and Mandatory record, and
which the Roman alone comprehend-
ed); and 3. by the local and flat school
which have tried to institute Pro-
cedure from the letter of Codes and
Practice Acts. Ita lex scripta est;
Biddle v. Boyce, Eno v. Woodworth;
See these cases discussed in Equity In
Procedure). The Federal law has
followed Coke’s theories and has wan-
dered and tried to straddle all views.
The struggle over Ruathon v. Aspinall,
L. C. 5, et seq., and Munday v. Vail,
L. C. 79, et seq., will show. Code
authors have generally sought light
from Coke and Blackstone (See § 15, 1
Gr. & Rud.). Pomeroy the most gen-
erally approved Code author wrote
with vacillation and contradiction.
Not understanding Res Adjudicata he
was a blend of the 1. and 2. classes.
(See Pomeroy; Literature.) These
authors never explained why the general
demurrer cannot be waived; they did
not have fixed and settled views of
the mandatory record; they did cite
and explain the trilogy of Procedure. (§ 1,
the Law Restated.) They paved the
way for such discussions as is rela-
ted to Bouce v. Emmerson and Gul-
ing and its cluster of cases. In
these cases we see Story on the one hand
and Thompson on the other. Story
wrote from the Roman—the Trilogy of
Procedure and Thompson from the
Feudal and local and flat view. (See
Story; Literature: authors classified.)
What has happened the logic and the
philosophy of the law may be judged
the foregoing titles, also Maxims and
Modern Law. Restatement of the law;
“theory-of-the-case.”

In praesentia majoris cessat potentia
minoris.

LOOMIS v. TERRY, 3 A. D. 306. Dogs;
defense of property with by dangerous
instruments. Hooker v. Miller; Bird v.

Loomis, etc.—
Halbrook, 2 Gr. & Rud. Nuisance: 53
L.R.A.(N.S.) 601.

LORD CAMBERO’S ACT: Actio per
sonalis; 2 Br. R. C. 694.

LORD’S DAY: Dies non: Sunday.

LOS ANGELES R. R. v. DAVIS. Corre-
porate existence presumed; Ut res: judicial
notice; De non Harris, L. C. 229, 3 Gr.
& Rud.

LOSEE v. BUCHANAN, 10 A. R. 623, L.
C. 210, 3 Gr. & Rud. Actus Dei, denies
Fletcher v. Rylands.

LOUISVILLE & N. R. R. v. LOUISVILLE,
160 U. S. 709, Federal question how it
must appear. Furman, L. C. 147a, 3 Gr.
& Rud. North Carolina R. R.

LOST DOCUMENTS: 4 Gr. & Rud.

LOST PROPERTY: Rights of Finder, 129
A. S. 390–411, ext. n.; Armory v. Dela-
mirre, L. C. 180, 3 Gr. & Rud.

LOUGH v. OUTERBRIDGE, 143 N. Y.
271, 42 A. S. 714–724, ext. n. 1 L.R.A.
(N.S.) 674, L. C. 293, 3 Gr. & Rud. Ade-
quate remedy at law may be waived; but
not allegations, Dodge v. Wright, 48 Ill.
392. Consensus, L. C. 2908–2909, 3 Gr. &
Rud.

Lough should be compared with Bailey v.
Hornthal where oral statements of coun-
sel were accepted as sufficient allega-
tions. See Monds v. Sted, L. C. 77,
3 Gr. & Rud. Kneeblocker.

LOVEJOY v. MURRAY, 3 Wall. 18, L. C.
259, 3 Gr. & Rud. Res adjudicata: War-
rantor bound by after notice. Cited, 4

LOWE v. FEERS, 4 Burr. 2225, 98 Eng.
Reprint, 160, Promise not to marry.
In pari; Scott v. Tyler, 4 Gr. & Rud.
Contracts in restraint of marriage, Scott v.
Carrolius, (1013), Vict. L. R. 1, 4 B. R. C. 1–221, ext. n. citing Lowe
v. Feers, at pp. 57, 59.

LOWSDALE v. PORTLAND, 1 Gr. 381.
Res Adjudicata; one department of
state is conclusive of all others.

LOWRY v. MOORE, 10 Wash. 476, L. C.
104, 3 Gr. & Rud. False and sham plead-
ings allow judgment by default. Nihil
postuumus; Gruter, L. C. 102, 3 Gr. &
Rud.

LUMLEY v. GYE, 17 Rut. Cases, 285, 2
Gr. & Rud.; also Equity. Contract; en-
ticling to break; Elements of liability.
Quinn v. Leathem: Cases.

LUMLEY v. WAGNER, 6 Rut. C. 652.
Contract; Breach of Injunction to pre-
vent.

LUNATICS: See Insane; Molton v. Cau-
rous L. C. 413, 3 Gr. & Rud. Are liable
for their torts. Krom v. Schoonmaker,
3 Barb. 647.

LYNCH v. KNIGHT, 9 H. L. Cas. 577.
In sue; Delegation when too remote;
Alienation of affections of spouse. See
Lumley.

LYNCH v. NURDIN, 9 Q. B. 29 sub. Scott,
4 Gr. & Rud. Children; negligence to-
wards. Brit. R. C. 130–182. McDermit;
Turnable Cases, 50 L.R.A.(N.S.) 1147,
1148.
M

MANDATORY, etc.—Lincroft, in Missouri; at such legislation as the Municipal Court Act for Chicago.

The literature of Procedure in the American states is the jargon of judicial anarchy. To sustain this view look at and consider the Trilogy of Procedure. What set of books have clearly and comprehensibly set these maxims out and explained them?

The mandatory record is confused and shrouded in discussions of the statute of Amendments and Justices; of high and imperial statutes from Parliaments that are supposed to be omnipotent. See Aider; Statutory Record; Distinctions; Milling Co. v. St. Louis; Planing Mill Co. v. Chicago, L. C. 2d, 3 Gr. & Rud.

This record is called by nearly a score of names. In a late case Nelle v. Opter it is called the "strict" record. In another its importance is quite clearly indicated. Gray v. P. 261 Ill. 140, 49 L.R.A.(N.S.) 1215.

It is the record the state peremptorily requires to evince the coram judice proceeding for all of its varied purposes, Windsor; Wilson v. Lowenthal; for this it must be tested by the general demurrer and its correlates to and including Collateral Attack, Res Adjudicata, and Due Process of Law. At all of these stages the construction of the record is the same. Windsor. The state's demands do not fluctuate. Goldham v. Edwards. Alterum. The view that new rules have come and that these fluctuate is prevalent but it is untenable. Garrett. This view is destructive of the logic and the philosophy of the law. It is this view that denies the Trilogy of Procedure and makes of Procedure a mass of conflicting cases and statutes.

This record depends upon the rule that "What ought to be of record must be proved by record and by the right record." This rule arises from Contra scriptum; and Fiat enim; Ex pessimo unius. From these maxims and the Trilogy of Procedure arise numberless rules of Evidence, Pleading and Practice—Procedure. Herein are the heart and vitals of Procedure. Procedure rests upon the Prescriptive Constitution. See 4 Gr. & Rud.; also
Mandatory, etc.—

Equity In Procedure. (Introductory Chapter.)

The mandatory record is the essential, jurisdictional record arising from the Prescriptive Constitution and protected by Universal Organic law. Windsor; Wilkerson; P. v. Gray.

The statutory record is a different record and is for different purposes. Milling Co. v. St. Louis, § 13. Restatement; North Carolina R. R.

Imperialism, its arbitrariness and their ally and successor Feudalism, never defined the Mandatory Record, nor Pleadings as a limitation of authority for the exercise of jurisdiction. The rule that a court was bound by its record practically meant nothing with those lawgivers. They inclined to the view that a court could exercise arbitrary power if only it chose. Along with this view have come cases like Gulliver and its cluster. These are the fruits of the “theory-of-the-case” doctrine. (See Story.)

The definitions given the above matters, so dear and important in a constitutionalism, have been and is one of the scandals of the law and is one of the drags upon the student. (See Literature.) In relation to the Feudal Lawyer we specified several short comings. To these we might have added the observations we now make. The Feudal Lawyer never defined Pleadings except from the angle of “raising an issue.” Of course this was but an incident in “Due Process of Law,” while investing the court with authority to proceed and to adjudicate was the main and leading thing.

But the Feudal Lawyer was not open, full and impressive as to Pleadings being jurisdictional, at least in civil cases. With equivocal expressions and writings and arguments as to the functions of Pleadings came authors who openly advocated their abolition and treatment of the Pleadings as merely formal accessories. (See Story; Rushton; Campbell v. Consaltus discussed ante. Codes, Restatement.) These authors saw Pleadings from the Feudal definitions, from the ideas that gave the Common Counts, the general allegation, the general issue, the general denial, the “Aider by verdict.” (See Rushton; Quod ab initio), and the importance due to a study of “forms of action” and forms of Pleading. These ideas sought to give to Equity a “straight jacket,” and to bind it by a lot of senseless maxims and forms of jargon at which its nature and origin rebelled. And so began that struggle in the Earl of Oxford’s Case which has raged in Feudal courts for three centuries. The Feudal Lawyer reasoned from his imperial statutes and his local cases and his motto that the “King in his Parliament is omnipotent.” Such mottoes, statutes and cases were the foundations of Feudal lawyerhip. While on the other hand the Equity lawyer was more familiar with principles and studied these more than he did forms of actions and forms in books gathered and compiled as educational and philosophical matter. The difference of the two types of lawyers was incalculable. They no more saw and reasoned alike than did Bacon and Coke. The former could see the fundamental principles of Procedure arising from the necessity of Res Adjudicata and its correlatives while the latter could only see the rules in type on paper,—the commands of his uncontrollable statutes and what his court had said. Here began the importance of digests and of Cycs. The class of lawyers who must practice by these saw no sense, or logic or philosophy in the maxims. Their literature will show to what extent they have cited and employed those we gather and set forth in The Law Restated. All of these have been denied by Feudal lawyers. They have not encouraged students to study them and the result is judicial anarchy among the states of the Union. (See Gulliver and its citations in the Law Restated.) Look at the question as to whether or not the general demurrer can be waived. Also at the origin and development of the Municipal Court Act for Chicago. Also as to the question as to whether or not the Pleadings are opened at the stage of Collateral Attack. (Nalle v. Oyster, and cases cited in it.) It is idle to contend that the Feudal Lawyer has ever rightly conceived Res Adjudicata and its necessities for the matter of the mandatory record.

Freedom cannot exist in a court that has no mandatory record and this record protected by the Trilogy of Procedure and its cognate maxims. We have sought to demonstrate this fact in sections 5–13, Restatement of the Law. All of these matters go together, they are mutually dependent and interact. The attacks upon these matters comes from a school of barbarous
Mandatory, etc.—

Lawyers by whatever name they may be known. These have assailed the mandatory record here and the maxims yonder and by this means have dismembered the law, its logic and its philosophy. They have failed to respect the maxims or to define the mandatory record or to define the pleadings from their broader and deeper sense. Generally all they see in pleadings are the juridical means of “appraising the opposite party of what he must meet at the trial.” And this notice they inform us like any other “notice” can be waived. This is the doctrine of the “new” and the “modern” school. (See Story.) No Feudal author has seen pleading from the angle of Res Adjudicata, Collateral Attack, Due Process of Law, and the Comity of Courts. The removal of causes from one court to another and from one system to another is an additional reason why there must be pleadings. (See §§ 83–123, 1 Gr. & Rud.) The attacks upon the Mandatory Record and the maxims referred to is also an attack upon the first rule of Procedure which is “What ought to be of record must be proved by record and by the right record.” (Flintenim; Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Milbra, 46 L.R.A. (N.S.) 274, 277, 278.) Now what have the Feudal lawyers done for these matters and many incidents inseparably connected with them? Look from these matters and see why the Feudal Lawyer is a destroyer.

The mandatory record, the maxims guarding it and that first rule of Evidence—Procedure are a net work of principles. They have interactions and they all may be deduced from the leading maxim of the law—Alterum non laedere. Herefrom the interests of the state may be traced in Procedure; also why the parties cannot dispense with the pleadings. (Campbell v. Consala; Codes); also why the study of Procedure is a study of government. (See Introductory Chapter.) The attitude of the state in Procedure is protected by the mandatory record (Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.). To test the pleadings as a part of that record stands the rule that the general demurrer cannot be waived. According ly we see a deeper and a broader meaning for the trite and commonplace rules of pleadings than has been given them by the Feudal authors whose fol-

lowing contend that the general demurrer can be abolished either by rule of court or by statute. (But see Vyle v. Oyster.) We must leave it to the student to contemplate cases like Vicksburg v. Henson, along with the notion that the general demurrer can be waived. If a judgment is construed and limited by the pleadings then what becomes of a judgment that has no pleadings by which it may be construed? (Garrett; Monday v. Vail, L. C. 70, et seq., 3 Gr. & Rud.; also cited in Equity in Procedure.) Look from these propositions to Mondel v. Steel above cited and its cognate cases and see if the Feudal Lawyer has any footing whatever for his theories of abolishing the general demurrer and by this securing “plain and speedy justice.” The prominent and brilliant orators who see so much in the Municipal Court Act for Chicago ought explain themselves in the light of the above matters; we will be instructed to learn where, exactly where, they ever explained one of these matters.

The Prescriptive Constitution is the fundamental by which all other laws are attested.

Alongside every written Constitution lies the Prescriptive Constitution. The principles of the latter are the fundamental law which expand and contract the former. And so it is that written constitutions yield to fundamental law or the Prescriptive Constitution. In Oakley v. Aspinwall, L. C. 222, 3 Gr. & Rud.; also in 8. ex rel. Henson v. Sheppard the last proposition is well illustrated. These cases show that written Constitutions and statutes yield to immutable principles of all ages. (2 Kent, 8, 12; Riggs v. Palmer; In praesentia majora cessat potestas minoris; Lee non exspecta definit.) Deeply and broadly, the Prescriptive Constitution is the organic law that controls all other laws. This is most ably argued in the Oakley Case. The Prescriptive Constitution brings with it the old fundamental law that is the Universal law of all ages. Among its principles are Verba fortius, Nemo debet esse judex; et idem agens et patiens esse non potest. Those who think that the maxims are too general to be of any practical utility ought examine the discussions of these maxims in the cases above cited. (See also §§ 509–522, Equity in Procedure.)
Mandatory, etc.—

The Prescriptive Constitution brings with it the Trilogy of Procedure and its cognate maxims (§§ 5–13, Restatement). These call for the mandatory record and therefore it is a Constitutional Implication. (Expressio corum qua tacite nihil insunt operatur.) There are no greater constitutional principles of protection than is the Trilogy of Procedure. (§§ 1–7, Restatement.) Denouncement of and minimizing these maxims beclouds the way and bars the progress of the student. Now as to this he should examine, pause and consider.

America was discovered and there came those close to the Reformation and its Inquisition, the English and the French Revolutions and the arbitrariness of absolutism. The Planters, the Cavaliers, the Catholics, the Quakers, the Dutch, the Dissenters the Fishermen and the Shopkeepers, all came determined to have and to respect only such laws and religions as might be locally agreed upon. Each tribe could have its own laws and customs and its own religion. Here from arose State Rights and the sovereignty of each little capital and its own court. And those selected to preside and to decide the law knew more of Coke and his Shelley’s Case than they did of Alterum non leadere or of the Trilogy of Procedure. To look at the latter in its ancient expression caused them to shudder and to fear the approach of Rome. Blackstone fed the belief that the law was local and flat that Shelley’s Case was the corner-stone of a legal education. And this was so well taught that very few students have learned what Kent said of that supposed indispensible for sound lawyering. Apart from the Blue Laws, and the knowledge of witchcraft the evidence is ample that the legal profession was just emerging from barbarism when the Code came. And now something "new" had come. (See Pomeroy; Chitty; Feudal Lawyer; 3 Am. Law School Review 602–609.) The Feudal grasp of the Roman gift is indicated in the first Code cases—Biddle v. Boyce; Eno v. Woodworth and Allen v. Patterson. It really took an intrepid court to decide Clark v. Dillon, wherein there is hinted a higher law than senseless and arbitrary edicts. This case and its cognates lead the way to the "legal jungle" over the question as to whether or not Verba

Mandatory, etc.—

fortius is the law of all countries. The discussion of Verba fortius in American jurisdictions, without more, shows that our conclusions from the historical data above referred to are not overdrawn. But to this may be added the fact that no Code author or Court has pointed out that the Code merely reaffirmed the maxims of antiquity. (Quis, quid, coram quo); also that the general demurrer cannot be waived. (See Alterum.) Had the rule of the general demurrer been taught away from imperial statutes and Coke’s case system there would have been something to moor to. But it was not and instead came the teaching that permits cases like Gulling and its cluster. Had Res Adjudicata, —interest repubicae ut sit finis litium been understood and that for these there must be the mandatory record then Procedure would be something else than judicial anarchy. But the Feudal literature shows that the general demurrer and its Correlatives including Collateral Attack and Res Adjudicata were not understood. Turn to the Works on Pleading and the facts referred to will appear. As to the Code it was perverted and distorted into a Feudal graft upon a Roman stump by the Feudal Lawyer. He could not yield his forms of action and forms of Pleading as great logical and philosophical gatherings of matter. (See the facts referred to and Chitty.) Look and see if any of these works explained why it is that the general demurrer cannot be waived; also why Verba fortius could not be extirpated by legislation and the decisions of courts. Also if the reasons involved are not rules that are great, Universal, Constitutional rules equally applicable to every system of Pleading that can serve a Constitutionalism. See these facts and then judge of literature that instructs that the maxims are obsolete and worn. (See 2 Bouv. Dict. title Maxims, Rawle, Revision.)

Pleadings lie at the base of sound lawyering. This was so well observed that even Coke and his school of parrots have quoted it from generation to generation. It is quoted in the Preface in Gould’s Pleading. As the nonsense of Serjeant Williams has been parroted, so has been many truly excellent things which the Feudal Lawyer has never and can never rightly comprehend until he renounces his
Mandatory, etc.—motto that "Parliament is omnipotent;" also his attacks upon the maxims. (See 2 Bouv. DiC. Rawle V.'sion, title maxims.) To illustrate: See how Res Adjudicata necessities dictate the rules of Evidence and of Pleading and then note the fact that the Feudal Lawyer never had any comprehension of the breadth and depth of Res Adjudicata and its complex interactions with most all branches of the law. To justify this assertion we call attention to the failure to properly define either Pleading or the mandatory record. Feudal literature will show that the harmony, logic and philosophy of the law has been dismembered by Imperialism and Feudalism. This fact can be traced from Gulling and its cluster of cases. Another line of supporting facts will appear from the opinion that exculpating views as to the necessity of a sufficient indictment from start to finish while as to the initial Pleading conferring jurisdiction in civil cases wholly different theories prevail. Short and terse statements by Greenleaf that there are no distinctions (1 Gr. Ev. § 65) have not impressed the profession. (See Story; Theory of the Case.) We can offer nothing stronger to enforce our views than the above matters referred to. On every hand it is apparent that the lawyer is groping around after cases and statutes exactly as would be a seaman who was ignorant of star, sextant and compass and who sailed only from headland to headland. Like the latter are the little, local, statutory and "late case" devolutes; and such is he who cannot define Pleadings and the mandatory record.

The mandatory record is the web that clothes the demands of the state for Constitutional Procedure,—for Due Process of Law. The great tree of the grove is Res Adjudicata and it is of concern to the state. (Interest republica ut sit finis litium.) And this demand is the same in all systems and in all cases. The idea is the same at law in Equity and in Crime—Former jeopardy. And Greenleaf and Story should have stated this fact so broadly and extendedly as to have impressed the profession. Like the tree, Res Adjudicata has its roots, its trunk and its limbs and branches. Its roots are the Trilogy of Procedure. (§§ 1–13, Restatement.) Its trunk is the Prescriptive Constitution which includes Due Process of Law. Its

Mandatory, etc.—limbs branch out into all subjects of the law. Its rules are paraphrases of Fundamental rules of Evidence and of Pleading. (4 Gr. & Rud.) It is founded on the Coram judice proceeding. Its first rule is that the proceedings must be Coram judice. The Coram judice proceeding can only be evinced by the mandatory record and according to the rule in Mondel v. Steel, L. C. 77, 3 Gr. & Rud. To this record there is applied Expressio unius est exclusio alterius. The view that it may be supplanted by matters that belong to the statutory record is destructive of the logic and the philosophy of the law. This is the contest on one of the "theory-of-the-case" sect; it is the only record to prove the identity of the issues,—of the subject matter that was presented for adjudication. The claim that for this the statutory record, the evidence, the instructions, the arguments, the bill of particulars, the agreed statement of facts, the admission of irrelevant evidence without objection and, the stipulations of the parties are opposed to the demands of the state. Alternum non laderetur; Knickerbocker.

The last proposition is in disaccord with the supposed "new" and "modern" school. This fact will appear by looking at Gulling and its cluster of cases. (See also 1 C. J. Cyc 66, 103; 3 Am. Law School Review 603–809.) Under the title Story, we give the clews that will lead to the respective sides of contention. See Feudal Lawyer; Collateral Attack. The stipulations of the parties will not vary or affect the Pleadings. Campbell v. Consolus discussed amenable Codes.

What we have written is in the light of Story; Greenleaf, Ruachton, Aspinall, L. C. 5, 3 Gr. & Rud.; Bristow v. Wright, L. C. 135, 3 Gr. & Rud.; Doaston v. Payne, L. C. 217, 3 Gr. & Rud.; Campbell v. Consolus; Clark v. Dillon and Tooker v. Arnous, which cases are extensively reviewed amenable the title Codes; Nallé v. Oyster; Vicksburg v. Henson; Windsor v. Moorth, L. C. 1, et seq., 3 Gr. & Rud.; Pennoyer v. Neff, L. C. 58, 3 Gr. & Rud.; also Milbra, 46 L.R.A.(N.S.) 274, 277, 278; Palmer v. Humiston, 45 L.R.A.(N.S.) 640; Atlantic, 52 Fla. 165. Let the student compare this cluster of cases with Gulling and its cluster and then he will see some of the causes of judicial anarchy. Here-
THE LAW RESTATED

Mandatory, etc.—

from he will see the necessity for the
restatement of the law. In §§ 1-26,
Restatement he can perceive the neces-
sity for the mandatory record.

The mandatory record, its functions
and operations are the basis of many
rules of Appellate Procedure. Win-
dor v. McVeigh, L. C. 1, et seq., 3 Gr.
& Rud.; North Carolina.

Jurisdiction of substance and vindica-
tion of the mandatory record outline
the functions of the amicus curiae.

A defect of jurisdiction shown by
the mandatory record is sua sponte
noticed. The court will not open the
statutory record in such cases.

Windsor v. McVeigh, L. C. 1, 3 Gr.
& Rud. But see North Carolina.

MANDATORY RECORD: This record has
never been defined by Feudal authors.

See COLLATERAL ACTS, Notes, 8th Ed.,
Dissertations. Res Adjudicata and its correlatives de-
pend upon §§ 10, 11. See COLLATERAL
ACTS, Notes, 8th Ed., Dissertations.

It is a necessity for the higher law. § 11.
Restatement. It is a constitutional im-
plication. §§ 12, Restatement: also Plead-
ing; Codes; Introductory Chapter.

What ought to be of record must be pro-
ven by record and by the right record.
§ 12. Restatement. Mandev v. Steel, L. C. 77,
3 Gr. & Rud. It cannot be waived. § 12,
Restatement. The statutory record; Dis-
tinctions. § 13, Restatement.

MANDATORY STATUTES: 4 Gr. & Rud.

MANIFESTA PROBATIONE NON IN-
digent: Manifest things require no proof.
See Judicial notice; Probatoria.

MANNER OF THE ROMANS: See Tril-
yory of Procedure; Mandatory record;
C. 500.

MANSLAUGHTER: 4 Gr. & Rud.; R. v.
May; 4 Gr. & Rud.

MARLBOROUGH v. MADISON, 1 March 137, L.
C. 142, 3 Gr. & Rud. Jurisdiction vested
by a constitution is exclusive. The Judici-
ary is supreme. Cujus est institutum.

MARLTON v. HAMPTON, Sm. L. C. 4; Gr. &
Rud. Res Adjudicata; Recovery at law after
litigation. Nemo debet bis reperi.

MARKETABLE TITLE: 132 A. 8. 986;
Woolwich & Gr. 32.

MARRIAGE: See Husband and Wife, 4
Gr. & Rud.; Equity: Divorce; Contract
not to marry illegal. In part. Lowe;
Turner v. Tyler, 6 Rud. C. L. 174. Re-
straint of, in will. 49 L.R.A. (N.S.) 605-
657; Cadwall (1013) Vict. L. R. 1, 4
Brii R. C. 1-221.

Recision of contract for incompetency
of spouse. Van Houten: Wightman (re-
session for fraud).

MARRIED WOMEN: 4 Gr. & Rud.; Hus-
band and wife. Contracts of. Manby;
Sears v. Seabourne; Gough & Tucker.

MARSHALLING OF ASSETS: Aldrich v.
Cooper; Silk v. Prime, Wh. & Tud. L. C.
Equity.

MARSH v. LEE, Wh. & Tud. L. C. Eq.
Tackling; Doctrines of.

MARSH v. FIER, 4 Rawle 288, 26 A. D.
132. 4 Gr. Ev. 351, cited 2 Sm. L. C.
Notes Kingston's case. Res Adjudicata
essentials. Pleadings must juridically pre-
sent what was adjudicated. De novo.

MARSH, etc.—

Martin v. Evans; Vicksburg v. Henson,
Interest republican.

MARTIN'S LAW: Milligan's Case; Luth-
ier v. Bordens.

Martin v. Evans, 85 Md. 8, 60 A. 2.
318. Dicta: Limited by the ma-
tandatory record. Vicksburg v. Hen-
son; Verba fortius. Verba generalia:
Collateral Attack. marsh v. Fier; Gul-
in.

Martin v. Hunter's Lessee, 1 Wheat.
304. Supremacy of the Federal govern-
ment. In presentia: McCulloch v. Mary-
land; Cohens v. Virginia.

Martin v. Borden, 5 M. & W. 351.
A trespasser takes no benefit from his
trespass. Nullus comodum: Bull v. Gris-
wold, 19 Ill. 651. 2 Gr. & Rud.

L. C. 126, 3 Gr. & Rud. Name of tax-
payer must be certain. Lawrence v. Fast.
Quis, quid; Weibold, L. C. 98, 3 Gr. &
Rud.

Marzetti v. Williams, 1 B. & A. 415.
Bank not liable on check before accepting it.
There is no privity. Hendrick.

Masters v. Servant: Master when
liable for the acts of the servant. Mc-
Manus, 4 Gr. & Rud. See Agency; La-
batt, 22 Syr. 342.

Masters v. Miller, Sm. L. C. 4;
Gr. & Rud.; L.R.A.(N.S.) 383. Alteration
of documents: additional C. R. Aldon
v. Cornwall, Woodworth v. Bank, all
cited in 4 Gr. & Rud. Barton, VT, 51
L.R.A.(N.S.) 346.

MATERIALLY OF FALSE OATH: Must be
shown in perjury from the right record;
from the pleadings. Contra scrip-
tum: P. v. Tcal, 190 N. Y. 372, 25 L.R.A.
(N.S.) 946.

MAXIMA ITA DICTA QUA MAXIMA
est ejudicatique et certissima auctoribus,
ad quaemadmodum omnibus probatur: A
maxim is so called because its dignity is
chleast, and its authority is most certain
and because universal and universally approved by all.

Juris praecepta; Regula; See Equity in
Procedure. Multi inutilis est.

MAXIM: In the Restatement we refer
to major and organic maxims. We
made these the nucleus of the per-
formance. It is evolved from a few
maxims. Now let this be judged by
any other effort and see if the ends
can be reached by citing cases and
statutes. And were it so developed
still would it be so well done as is it in
the expressions of antiquity—the roots
of the languages of all civilized govern-
ments. Can International law be
taught from cases and statutes?
Is it not embedded in the maxims of
the Roman law? It comes from the
law of Rome, also Equity, also Con-
tract. (McMullen v. Hoffman.)
Now is it not equally so of Crime,
Tort and Construction? Is not Verba
fortius a Universal, Constitutional
canon of construction, of Pleading,
Evidence, of Res Adjudicata, of
logic and of sense? Now why object
to it because it is in the language of
all nations? Look from it when ex-
tended discussed (§§ 183-189, Equity
In Procedure) and then compare this
Maxims.—
demonstration with the attacks upon
the maxims. (Bouv. Dict. title max-
imis, Rawle Edition; Ram on Facts, §
40; § 546 Pum. Code Remedies.) In
the face of this demonstration let us
ask why the legal profession have al-
lowed commercialism and its allies to
denounce and degrade the organic
and most enlightening matter of the
law? (See Story; Logic and Phil-
osophy of the law.) What matter of
the law has lived so long and worn so
well as its major maxims (§§ 1–26,
Restatement)?

There are pure maxims and there
are modified and indigenous mottoes
that often detract from the major,
organic and pure maxims. Imperial-
ism and Feudalism for two thousand
years have sought to detract from the
few maxims that constitute the heart
and vitals of the Prescriptive Consti-
tution. Caesar, Justinian and the
Feudal Deities all assailed the great
protecting maxims and sought to over-
ride all Gibraltars of light and pro-
tection for the operations of the King
can do no wrong and that “Parliament
is omnipotent.” Elsewhere we show
that the maxims given by Coke’s su-
premacy for the functions and opera-
tions of Equity were minor maxims
and have proved stumbling blocks
(see Equity). And as with Equity
so it has been with all branches of
the law. And no part of the law has
suffered more than the law of Pro-
cedure—Evidence—Pleading and Prac-
tice for the want of the “Beacon
lights” of logic and of sense to lead
and to guide the way. These are the
true “key numbers” needed and not
the outputs of commercialism with its
“5,000 new principles” stated and de-
developed each year. (See Literature;
Feudal Lawyer; Finding the Law.)

Objections to the maxims because
there are too many exceptions to them
should be faced by the facts relating to
Verba fortius: and its cognate maxims—the Trilogy of Procedure.
(§§ 1–13, Restatement.) Look at the
demonstration and then the objections
and see why Ulpian, Bacon, Mans-
field, Story, Kent, Shaw, Bishop, Ham-
ilton and James C. Carter are right.
Which denunciation of maxims has
stated one rule from cases and stat-
utes that has not far more exceptions
to it than has Verba fortius? Look at
the Restatement and see if maxims
are not the only fixed, true and solid
matter for the jurisprudence of a great
empire to rest upon? And must not a
great empire give to its subjects the
Twelve Tables, and engrave and well
teach therefrom twelve organic max-
imis? Teach and impress twelve or-
ganic maxims and judicial anarchy
will cease its gnawings into the heart
and vitals of a constitutionalism.
Can intellects understanding the Tril-
ogy of Procedure ever agree to
Gulling and its cluster? Would not all
of the masters above mentioned have
decided with Judge Talbot without ar-
gument? Think of great arguments
over such matters and then hear the
advocates for “Plain and speedy jus-
tice” who keep away, speak away
and lead away as far as they can from
worthy and enlightening principles of
jurisprudence? And one of these
principles is Verba fortius: This the
“new” and a “modern” and “enlight-
ened” school refers to as a “dogma.”
(See Story.)

Here let us ask if any author on
Pleading and Evidence and related sub-
jects ought overlook the doctrine of
the “Theory of the Case” as this is ad-
vocated by the “new” school. (See §§
2310, 2311 Thompsons’ Trials, quoted,
under the title Variance, 4 Gr. & Rud.;
see the title Story and references to
matter thereunder.) This “new dis-
ensation” affects almost all of the
American courts. Now works on these
subjects ought fully and roundly deal
with it. The student will do well to
get light on the doctrine last men-
tioned. (See Gulling and cases cited
with it.)

For the lack of maxim instruction
see what has happened in New York
ament the discussions of Clark v. Dil-
ton. And so it is in Missouri and in
Illinois. (See “Theory of the Case,”
4 Gr. & Rud.)

Where great principles are not clear-
ly stated and taught there the way for
judicial anarchy is paved also the
dreadful consequences of this to a good
and protecting government.

Nothing can be of more consequence
to a student than to know the foun-
tains of the law. He ought to know
this at the beginning for a right start.
Therefore he should carefully examine
claims as to whether the law arises
from Parliament, or from cases or the
maxims. Of course we mean the fun-
damental law—the law of substance.
What this is we have sought to set
forth in sections 1—3, Restatement. It
seems clear that the prevailing view
Maxims.—

is, that it arises from Acts of Parliament and from cases. Upon the latter view depends the "case system." (See 2 Gr. & Rud.; also Meltus est petere fontes quam sectari rivulos: 4 Gr. & Rud.) Of course we limit these remarks to the American states. The literature of a generation will show. (See Literature.) In some quarters it is loudly proclaimed and indeed advertised that the old theories, the old law and the old authors are a thing of the past, and that a "new dispensation" has come. (See Codes.) We are often told that Story, Greenleaf and Bishop have had their day. The authors last mentioned often cited the maxims and wrote in their light; it was Story who cited Quis, quid, coram quo. (See this maxim and what it means. Secs. 4–7, Restatement.) And now it is up to the student to look and see and judge if the "new," the "modern" and the "American law" theorists have written better than did the authors mentioned. Elsewhere we have stated that they have not written comprehensibly at all (see Codes; Literature).

We have something to pointedly submit and for this we will ask if the discussion of Idem agens et patiencie esse non potest in sections 509–522, Equity In Procedure can be as well presented by cases as it can be by maxims? Or can the case advocates and the opponents of the maxims (See Literature) make the demonstration as well upon their plan and kind of matter as well as is done in sections 1–26, Restatement of the Law. Look at the Trilogy of Procedure in sections 1–7, Id. and see if the same ideas can be so well expressed in cases and in the flowing and eloquent sections of Thompson and of Pomeroy and their followers (See Literature). Look at the maxim Quis, quid: and see what it impressively and most instructively suggests and then turn to the texts referred to and see how these present such important matter.

Let us suppose that Professor Pomeroy had quoted and explained the maxims above referred to, introductory of his sections 506–608, Code Remedies could he have left us groping for light through those sections? (See Pomeroy; also Chitty, and matter referred to under those titles.)

The Prescriptive Constitution is the law of all climes and countries. It has no greater principle than Verba fortius. It is a Universal Constitutional principle of Construction and as such applies to all documents, to every collocation of words. (Secs. 163–189, Equity In Procedure.) It is the canon of Evidence, of pleadings, of Practice, of sense, of logic and of philosophy. But how stands this maxim in most of the American courts? Where has it been cited and vindicated in one Code state except to make it a see-saw as it is in Clark v. Dillon and its cognate cases. (See Codes.) This maxim is the law and it arises from no case or cases. It was applied in Doaston v. Payne, L. C. 217, 3 Gr. & Rud.; also in Antidel v. R. R. (Code-Wis.). It is this maxim that is the salient of discussion in the statutes of Amendments and Jeofails in all of the states. The discussion of Clark v. Dillon in New York will indicate. And the Federal courts are treating the same way. See Baker v. Warner.

If the "new" and "modern" and "American" way of teaching fundamental law is progressive and above all, then let us ask how have these "new" ways taught such fundamentals as Verba fortius? In Res Adjudicata discussions has it anywhere been shown that the paraphrases of this maxim become rules of that subject? On general demurrer it seems admitted that Verba fortius is the rule (3 Bouv. Dev. 3, Rawle Ed. (1914), title Pleading), but it is denied that this rule contributes to the rule of Construction after the entry of judgment. (See Collateral Attack; Goldham v. Edwards.) Now how stands this view with the rule that the general demurrer is never waived. (Nalle v. Oyster.) Also that the judgment is construed by the pleadings? (See Vickburg v. Henson.) Look at these facts and contemplate what must result from such inconsistencies.

Why should each school, each capitals, each court and each set of books have its own individualistic and local selection of cases to teach an ancient archaic principle? Herefrom arises the reason why it is if the lawyer leaves his state he leaves his cluster of cases, his statutes and his tribal profession behind. Here let us ask where has Verba been well and thoroughly taught by cases? Which are the cases? Did Chitty or Professor Pomeroy know? (See §§ 533, and 546 Pom. Code; Literature.)
Maxims.

Let the student examine the Equity In Procedure and the sections of the Restatement of the Law and from these determine whether or not the fundamentalis of the law have not been best expressed in its ancient form? Now can they be found in the Elementary books prepared by commercialism for the schools and which are founded on overtopping bulks of unwieldy digesta and Cyes? The sections from the slums of quackery teach anything except the ways that lead from judicial anarchy. (See Story; Rushdon; Codes: Literature; Gulling.)

A restatement of the law "along scientific lines" is promised. It is also stated that Juris precepts sunt hinc is a fundamental maxim from which the entire law can be unfolded. (P. 1295, Anent, Alterum, 2 C. J. Cyc. page 1295.) To what extent this great maxim will be integrated in the forthcoming "restatement" remains to be seen. From the definition of "Allegation," Id. it does not seem that Pleadings will be related to the organic maxims. Many have long parroted what was handed down by antiquity relating to this maxim but no one has related the leading maxims of the law with it. Until this is correctly done a true restatement of the law must be awaited.

It is too common an assumption that there are different systems of Procedure as to matters of substance in effect denies that the Universal, Constitutional maxims bottom all procedures.—All systems of Pleading except Judicial anarchy. Compare sections 1–13, Restatement with Garrett; Gulling; 3 Am. Law School Review, 603–609 (Common Law and Modern Codes). Generally the maxims are denounced to make way for quackery and its ally Commercialism. Few books of this day intelligently present the maxims. They are not intelligently presented by supposed journals of education that teach that Alterum non legare arose from Davies v. Mann. Instead of teaching Universal Principles, Feudal Deities and oratory are impressed. 3 Am. Law School Review, 609–618. We know of no works or pages that present the Trilogies of the leading subjects (§§ 1–26, Restatement); and that paraphrases of these are spun out and employed to confuse and as we demonstrate anent Equity. One end of commercialism takes one view and its other end an exactly opposite view (see Story; also §§ 16, 17, Restatement). The old maxims are given a new explication by the "new" school (see Story). On the other hand we are instructed that the maxims are in all of the books and that they are "trite and common-place and are known to us all." (See §§ 16, 17, Restatement.) That they are elemental and fundamental and found and formulate the law of the leading subjects. (See 1 C. J. Cyc. 958; the writers of Cyc. speak each way. See Story; also the page last cited.)

Assuming that Maxims are elemental then why do the great writers on elementary law, and who have led brilliant careers as writers omit the maxims as they have or have given "new" explications of them as we point to? Why, exactly why, do the famous elementary works prepared for schools omit them! or lead away from them to overtopping bulks of hodge-podge and defenseless observations of Feudal Deities and their jargon?

Even the Feudal lawyer outgrew the Year Books and turned away from them. He demanded something more progressive than the matter and gatherings of supposed legal literature that filled those rows with Feudal hodge-podge. The discovery of America came and the minds of men called for religions, reforms, also of politics and of the law as well. (See Chapter I, 1 Gr. & Rud). Reforms came for everything except the law. This was left behind exactly as Bacon contended. The complete collapse of the Year Books in 1536 opened the way for the conflict of Bacon and of Coke. The latter, a past grand master, of the ways of the politician, got ahead of Bacon and foisted upon England his "Case System" and the idea that the law arose from cases and that he would give the reporter, that, would settle the law. Now what has he settled? (See Feudal Law; Litt): From Coke's Ideas blazed out the ambition of perpetuating the name of the reporter, which was carried on down, until from necessity as well as convenience the names of reporters have come to be dropped. The American jurisdictions carried out the Feudal notion until in the last few years. It needs no argument to convince the student that it is better to cite U. S. than the name of the reporter. Look at the forty feet of the English Re-print (8 sets), and at the bottom labels of these reports note the names Aley, Acton, Bellew, Benloe, Colles, Dyer, etc., etc., and consider that authors and courts have persisted in citing cases under the name of the reporter supposing that the student would know from the name the set of books and the court he reported for. This style of citing the Kings, and
Maxims.—

the Common Bench is very trying on
the memory of the ablest. Of course many students will no longer try to master the system.

Here let us ask if it would not be better to drill into the student, the major,—organic maxims set forth in the Law Restated than to fill his mem-
ory with the necessities of Feudal plans of legal literature? Is it any
wonder that the ways of the lawyer have brought reproach upon the pro-
fession? Are not these ways cum-
brous, slothful, and beyond human
capacity? Look at the discussions of
not a right introduction and brief
elucidation of *Verba fortius* be more
worth the student than the endless
array of conflicting cases? (See Feu-

dal Lawyer.)

Now let us ask if the maxims are not the old law and if they and they alone have not best stood the tests of time. In what case can be compared to
*Verba fortius*?

Are not paraphrases of the maxims
leading rules of Evidence, Pleading,
Practice, *Res Judicata*, Collateral
Attack, Appellate Procedure and of
logic and philosophy? (§§ 1, 2, Re-
statement.)

Works on Procedure omit the max-
ims, § 13. Contract founded on §§ 16,
17. Crimes, also § 17. Tort, also §

Finally let us ask if by employing the
maxims we cannot write the law
from a few great principles (*Aliterum*) and from these best trace the rivulets.
Is not *Mellius est petere;* true?

*McAllister v. Kuhn*, 96 U. S. 376, 9 Q. B. 1014, 4 Gr. &
Rud. Animas liability for keeping
B. R. C. 1-93, stating Flescher v.
Rylands.

*McAllister v. Kuhn*, 96 U. S. 376, 9 Q. B. 1014, 4 Gr. &
Rud. Omission of substance is never waived. *Rushon.* De non. This case supports
the rule that the general demurrer cannot be
Gr. & Rud. The point in *McAllister* is
decided each term of the court, *Garrett.* And still the cry is for more cases and
statutes. If *De non* was clearly taught
and impressed the mangles of courts
and authors would end. See *McPail*.

The proneness of the legal profession
to parrot what some judge or court said
is one of its peculiar characteristics. See
how authors have tried to imitate Coke
and others. See also *McAllister*; there
is *Grain v. Lovell*; also *McNutt v. Smith* (See Literature); he was attorney in
*Docast v. Payne*, which is one of the
best cases to illustrate the principle, which fact no author or court has dis-
covered. We cite it and try to familiar-

New York, 1905. Reprinted in 1 Units
& Rud. 242: reaffirmed in *Cragin v. Loret*,
109 U. S. 124, also in *U. S. v. Cruikshank*,
L. C. 232, 3 Gr. & Rud. Also in *Nalle v.
Oyster* and cases cited; *Vicksburg v.
Graham* and *Garrett*. These cases attest
the struggle over *Slucau v. Pomeroy* which is a most worthy
case; and so it *McAllister v. Kahn*, L. C.
4, 3 Gr. & Rud. The *Adamar* Units &
Rud. 242: reaffirmed in *Cragin v. Loret*,
109 U. S. 184, also in *U. S. v. Cruikshank*,
L. C. 232, 3 Gr. & Rud. Also in *Nalle v.
Oyster* and cases cited; *Vicksburg v.
Graham* and *Garrett*. These cases attest
the struggle over *Slucau v. Pomeroy* which is a most worthy
case; and so it *McAllister v. Kahn*, L. C.
4, 3 Gr. & Rud. The *Adamar* Units &
Rud. 242: reaffirmed in *Cragin v. Loret*,
109 U. S. 184, also in *U. S. v. Cruikshank*,
L. C. 232, 3 Gr. & Rud. Also in *Nalle v.
Oyster* and cases cited; *Vicksburg v.
Graham* and *Garrett*. These cases attest
the struggle over *Slucau v. Pomeroy* which is a most worthy
case; and so it *McAllister v. Kahn*, L. C.
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MILLER v. RACE, Sm. L., 4 Gr. & Rud., Money-cash passes on delivery; but it must be received bona fide. Nullo com-
modum. But generally a thief gives no title to stolen property. Bently, 2 Gr. & Rud. See bona fide Purchaser (Statt).
MILLET v. P., 57 L. A. 903. Legislative au-
tority to regulate contract; 122 E. 899-914 n.
MILLIGAN'S CASE, 4 Wall. 2. Territorial juris-
diction of courts. Must sit at the right place. Quis, quid. Coram judice inexcusably necessary to support a sen-
tence. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud. In Mandatory Record. Venue of crime is jurisdictional. 49 L.R.A. (N.S.)
1215. See Terms of Court. Venue. 45 Idaho (N.S.) 10. Be Martial law. Su-
MITCHELL v. R., 26 Mo. 308. The mandatory and the statutory records.
cites Pennocksky. "What ought to be of the
Court (Disc.).
MILLS v. AURIOL, Sm. L. C. Implied
covenants do not bind the assignment of the lease. Mills v. Wyman, 7 Cranch, 481, L. C. 57, 3 Gr. & Rud. Full faith and credit
McElmoe. Also Mills v. McElmoe.
MILLS v. DURRIDGE, 7 Cranch, 481, L. C. 57, 3 Gr. & Rud. See Lempleigh. Ex nudo.
MILLS v. LAMPELIEY, 7 Cranch, 481, L. C. 57, 3 Gr. & Rud. See Lempleigh v. Butter.
MINES v. MING CO., L.R.A. 897, L. C. 38, 3 Gr. & Rud. De-
nials upon information and belief.
MINER v. MINUTIA SUNT QUÆ CÉR-
TIBUNUM: Renuntium: Things which have a certain interpretation are
to be altered as little as possible. Ubri jus
Expellere: Stare decet.
MINNESOTA RATE CASES. See Com-

MINNESOTA v. NORTHERN SECURI-
ties Co. 194 U. S. 48-73. The general de
eral cannot be waived; the omission
sponsa notice. De non apparentibus re-
MISERIA EST SERVITUS, UBI JUS ES
vagum aut incertum: It is a miserable
slavery where the law is vague or un-
certain. Ubri jus incertum. Nemo debet.
MISERICORDIA: 4 Gr. & Rud.; Equity.
MISNONER v. KIRK, 4 Gr. & Rud.
CAVATUS EMPORIUM, L. C. 374-384, Id.
MISSOURI: Its procedure outlined. 4
Gr. & Rud. also Equity. Pennosekcy.
MITCHELL v. RINGMAN, 5 Pick. 451, L.
C. 415, 3 Gr. & Rud. Lunatic: Con-
tacts voidable. Molton.
MITCHELL v. REYNOLDS, 1 Sm. L. C.
Murev. v. Jonath. — N. J. —, 54 L.R.A.
(N.S.) 206; Restraint of trade: In
part contract; L. C. 372, 3 Gr. & Rud.
MITCHELL v. MILTON, To fix prices by vendor to vendee. Fish, v. Wash. —, 51 L.R.A.
(N.S.) 202, n. Anderson, 66 Neb. 995,
52 L.R.A. (N.S.) 503 (entering into the
service of another).
MITIGATION: 4 Gr. & Rud.

MODERN LAW: The claims are widely
made that "new" and "modern," law has come as a "new dispensation." Commercialism has seized the idea and to make way for their out-
puts of hodge-podge have assailed the maxims, the old cases and the authors of other generations who advocated the maxims and the old law.
It seeks and hurrahs for authors whose sole career is writing wherein cannot be found one fundamental clearly stated and consistently vindicated. The
supreme court of the United States has spoken both ways. It too straddles as do the Federal authors and their fol-
lowers. It has denounced the Code. (McPaul v. Ramsey) as something new; but it has never plainly stated and vindicated one of the vital princi-
pies upon which Codes are founded. (See Quis, quid, coram quo:;) nor its pre
dilection for either of the warring sects. (See Story, Rushion.) On the
other hand it has declared that "new" and "reformed" rules have come. (Baker v. Warner.) It has never de
defined "Due Process of Law;" it as-
sumes that something new and dif
derent to the "Manner of the Romans" has come. The court over emphasizes that in some states a recovery must be Secundum allegata et probata. As if this fundamental idea was not the law under all skies of protection. Of
course Commercialism gathers up and makes the most it can few and dif
ferent from such a straddle, and tidiness of expressions.
The courts have spoken so lightly and carelessly about fundamental law that it cannot be found in the prevailing literature. In one case they will state that the law is old and organic as in
McMullen v. Hoffman, 174 U. S. 639, 654; Riggs v. Palmer, 4 Gr. & Rud.;
Oakley v. Aspinwall, and in the next they will assume that a "new dispensa-
tion" is at hand. Gullion v. Bank,
If maxims are the organic law of Contract (McMullen) are they not also of the other leading subjects of the law? Can we separate Contract from Procedure? Is not a Judgment a Contract? (Equity In Procedure, p. 470.)

Whether or not there is a body of organic law from antiquity above and beyond all other laws and which necessarily governs, is one of the most important questions before the Ameri-
can student. Views relating to this are presented in §§ 508-522, Equity In
Modern Law.—
Procedure. Thereat we cite James C. Carter, Kent and the decisions of the several courts in the affirmative. It is most ably maintained in Oakley v. Aspinwall, L. C. 222, 3 Gr. & Rud.; also in S. v. Homer, 4 Gr. & Rud. Further supporting the affirmative, see also §§ 1-26, Restatement. Whether or not there is a law of substance that cannot be dispensed with by local and flat laws is of leading consequence to the student. Glimpses of the question arise in the law of self-defense, which arises from the law of necessity. Also from discussions of International Law as will be seen in England's response to the protest of the Washington government objecting to the use of a neutral flag to protect life and property. The response recited the law and usages of an imperiled ship and its crew to save itself and its passengers. One familiar with the law of self-defense can perceive that the bottom of Earl Grey's argument was Necesitas inducti privilege quod jura privata. In other words that one may go to any extent to save his life or the life of another assaulted by a menacing offender. And the law is that anyone may interfere to protect another who is in the protection of the law. Protection is due from one good citizen or nation to another. For protection a bystander may interfere to preserve the public peace or to protect those assailed by a public and lawless malefactor. In the International decisions no new law was involved; simply the old organic law arose for respect and application. And this law is evolved from the old law which bears upon its face the expression antiquity gave it, in the language for all nations and ages. It is expressed in the language of the major-organic maxims and in this language expresses the good sense of nations. For lawful self-defense all other laws give way. A man has the right to change his name or his clothes whenever he pleases. A fortiori he may do so to defend himself. Accordingly we see the submarine, governed by the old law; and likewise the automobile is governed by the law of the road. New inventions do not bring new laws into existence. This fact ought be known to every student; and also that to gain this knowledge he must study the old fundamental law of all ages. Therefore the necessity for knowing and citing the old law which if done would fully answer the claims of commercialism that "5,000 new principles are stated and developed each year;" also that the law is "the last decision by the last judge."
The late cases which assume that new rules have come into being (such as Clark v. West and Warner v. Baker, and Gulling v. Bank) give countenance to the vicious claims of commercialism above referred to. (See Morningstar.)
Elsewhere we refer to the mandatory record and the judicial blindness and anarchy that surround the functions and operations of that record. This record like the maxims of old comes from antiquity and it is protected by its maxims exactly as is the law of self-defense which is the same for the ship and for the individual. The principles are the same. And so is the mandatory record and tremendous maxim that shelters and protect it. But this is not understood by authors who think that the rule that one count in a pleading can be referred to, to aid another count in the same pleading is "new" and "modern" law. This rule was applied in Bogardus, 101 N. Y. 328 and is viewed as "new" law (Bradbury's Rules of Pleading, § 6.) But this rule is an old one and is found in Criminal Pleadings wherein the rules are generally conceded to be quite strict (See R. v. Waters, L. C. 71, 3 Gr. & Rud.; also Story; Ruchton; Abatement).
MODICA CIRCUMSTANTIA FACTI JUS mutat: A small circumstance attending an act may change the law.
MODUS ET CONVENTIO VINCENT legem: The form of the agreement and the convention overrule (or override) the law. See Consensus tollit errorem; Consensus facti legem; Quilibet renunciare.
Competent parties have the right to make any contract they choose if only they occupy and maintain clear ground between each other. Of course their contracts must not invade the rights of the state (Alterum; In pari delicto; Crimen omnia; Pactis privatorum). A lawful contract passes at once into the protection of the law and it is the duty and the obligation of a good government to respect and to enforce such contracts. The tremendous discretion that in American law over the "Impairing of Contracts," are founded on the maxims above cited. These are the fundamental law. Sec. 17, Restatement.
Retrospective laws are not allowed to impair the obligation of Contract.
Modus Et, etc.—

But a contract must be lawful. In pari: Salus populi: It must not derive from the interests, the welfare of the state. To illustrate: The state's attitude in a proceeding must be respectfully. No stipulation opposed to the state's attitude will be respected. Altemum non ladicere; Res inter alios. It is for this reason that the parties cannot stipulate away the Pleadings. (Interest repugnare.) Herein lies the soundness of Campbell v. Conatus the Code case we so often cite. On its face it wholly rests on Guest v. Warran (Eng.), but deeper down it is founded on the Prescriptive Constitution, § 17, Restatement. (Mondel v. Steel, L. C. 77, 3 Gr. & Rud.) Formal law is subject to the compacts that the parties make but not the law of substance. The latter is protected by the higher law and cannot be derogated from by contract nor by legislation. Huntmen v. S. But matters that concern the parties only, they may contract about as they please. See Modus, 4 Gr. & Rud.


Mondel is in accord with Aristotle v. Wright, Bartlett v. A. Aspahi, and Dutton v. Payne. Also with Campbell v. Conatus; Clark v. Dillon, and Tosker v. Arna. It is an excellent Code case.

It stands for the mandatory record. It holds that the allegations and denials must appear from the right record. It is opposed to the "Theory of the Case." It denies cases like Gullion; and Bartlett v. U. S. 227 U. S. 435.

Oral evidence is inadmissible to alter or vary the case presented by the pleadings. Campbell v. Conatus; Guest v. Warran. The principle in Mondel is cognate to the Priority of Procedure. It should be studied along with the Code cases above cited; also Nolle v. Quiver, also Marsh v. Pier and Martin v. Evans; Kneechbcker.

could or might have worked injury. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud. But generally substantial prejudice must be affirmatively shown by the appellant. De non. Unless he is injured he cannot complain. The learned court quoted Von Ihring's Struggle For Law. We think the quotation would be applicable in a case like Windsor but not to Morningstar.

It is sufficient if the substance of the issue be proved. To illustrate: An indictment for selling one pint of whisky will be sustained although more is shown where the selling is the gist of the offense. Or, if one asked for a divorce on the ground of adultery and this were proved also cruelty and other causes which were not alleged the irrelevant causes ought not vitiate. Or, if one sued upon a note for $25.00 and proved this case but over and beyond other notes were given in evidence over objections such irrelevancy ought not vitiate what is good and sufficient, unless judgment was entered for more than what the allegations and the proofs called for. Or, if one were sued for a trespass to Blackacre and the proofs showed a trespass to more than to Blackacre should not the judgment be entered for the trespass alleged and proved? Or, if one were indicted for a crime and irrelevant evidence were admitted of the commission of collateral crimes would the verdict of guilt of the crime alleged and proved be set aside?

Should a recovery resting upon allegata et probata be set aside for irrelevant matters? If the allegata et probata were plenary in Morningstar and the verdict and the findings were against both the allegations and the proofs ought not the court set aside such findings and in a civil case peremptorily order judgment? Bonnell v. Wilder, L. C. 181, 3 Gr. & Rud.

Irrelevant evidence, though cumulative, is material error. R. v. Gibson.

Should new trials be ordered where no other or different conclusions could be reached? In any trial would not the defense to Morningstar's Case be a bar to his recovery? Interest reipublica ut sit finis litium. Lex non cogit ad vaca.

Where a judgment is supported by its record then it can only be overturned for prejudicial error assigned and shown from the statutory record.

Ut res majis valeat quam pereat. Interest reipublica ut sit finis litium. Lex non cogit ad vaca.

Error without prejudice will not vitiate. To illustrate if a judge were sued for defamation, for words spoken in the course of a trial before him, and he pleaded his justification clearly and unequivocally, and beyond this defense the plaintiff's general reputation was proved over his objection simply because it was not pleaded and he was defeated could this plaintiff reverse the judgment only that further matter might be pleaded and proved or that the irrelevant matter might not be referred to?

General principles of review for error. If the mandatory record is opened it shows that the judgment is coram judice (See Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.; Collateral Attack, Rez Adjudicata), then the judgment will be affirmed unless, and except, that the statutory record (the bill of exceptions) attends the mandatory record and an Assignment of Errors upon the matter of the statutory record enumerating and defining errors shown thereupon properly objected and excepted to and nowhere waived or condoned (Consensum tolit errorem), and properly argued and counted upon and affirmatively showing therefrom that prejudicial error to the appellant resulted. Error upon the statutory record is not presumed prejudicial unless it affirmatively appears to be so. It is otherwise with error appearing from the mandatory record. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud. Minnesota, 194 U. S. 43.

A recovery will be upheld if possible. Ut res majis valeat quam pereat. Interest reipublica ut sit finis litium. A court will sua sponte reverse a judgment for error appearing from the Mandatory record but not from the statutory record. (See Assignment of Error, 2 Gr. & Rud.) The mandatory record concerns the state but the statutory record does not concern the state. From these deductions arise many important rules.

There are inherent differences between matter of substance and matter of form. To present these respective matters are the respective functions of the two records above mentioned. If these records are jumbled and confused chaos results to the law of Procedure. These records are governed by the logic and the philosophy of law and not by statutes and decisions. (§$ 12-14, Restatement.) Lawman. 42 App. Cas. D. C. 202.

Suppose that the court had entered
Morningstar, etc.—

judgment for Morningstar upon the allegations and admitted facts of the case ought not a court of review to set aside such a judgment? At a second trial what can Morningstar gain over the admitted facts of the case? Will he not have to meet the same defense already pleaded? Also another that he is a chronic fault finder at regular dishes and seeker of dishes to suit his whims and caprice?

And must not he plead a tender of something for the extra services he sought? Now can he gain anything from a new trial? Lex non cogit ad vana sua minus peraganda.

Compare Morningstar with Malone v. Jones, 91 Ks. 815, 53 L.R.A. (N.S.) 328 [error without prejudice is no ground for reversal].

MORTGAGE: "Once a mortgage always a mortgage," Howard v. Harris, Wh. & T. L. C. Eq.; See Oral Evidence, 4 Gr. & Rud.

MOSS v. GALLIMORE, Sm. L. C.: Landlord and Tenant; Attachment by the tenant upon sale by the lessee.

MOSTYN v. FABRIGAS, Sm. L. C., L. C. 274, 3 Gr. & Rud. Jurisdiction; Venue; Local and transitory actions. Liability of soldiers and militiamen. 53 L.R.A. (N.S.) 1141-1179, n. ext. n.

MOTIONS: 4 Gr. & Rud. Equity.


MULTIFARIOUSNESS: 4 Gr. & Rud.


MULTIUDO IMPERATOR PERDIT curiam: A multitude of ignorant counsellors will destroy a court. Cited, sec. 23, Restatement. This maxim will bear a far more liberal construction and like this: A court made up of ignorant and bad lawyers will destroy a government. All history attests what a multitude of the administration of justice will do. And great judges have fully admonished. 2 Kent 8-12; Marshall spoke most plainly. Lange v. Benedict, L. C. 159, 3 Gr. & Rud. n.

Upon the lawyer, his judiciary, his literature and his teaching depend the moral interests, the education and progress of society. Courts are the most powerful of instructors; also protectors. But they are failing in their functions when their time is consumed in wallowing through the mire of the jargon of judicial anarchy. See the conflict indicated in Guiling, and in Jansen v. Hyde; Story on the one hand and Thompson on the other hand and the opinions upon Clark v. Dillon in New York. Inquiry of

Multitude, etc.—

students will disclose how these matters are taught in the schools. Ask if the general demurrer can be waived and in most cases you will be told that its technicalities are now abolished by statute or by rule of court, or by the "late" case. See Baker v. Warner, U.S.; Henry v. Hilliard, 49 L.R.A. (N.S.) 1; Vennera v. McKeen, 44 L.R.A. (N.S.) 737, n (a valid judgment may rest on an in pari delicto statement); Merchant's, 42 L.R.A. (N.S.) 996, 998 (a departure is demarable but it may be waived, i.e., the statement may call for dollars and the judgment may give acres—Frustra probatur quod probatum non relevat is denied). See observations and Abatement; Feudal Lawyer; Literature.

Vainly orators in Bar Associations cry out. They proclaim truly that the "ignorance of the young Bar is appalling." "That it is too late to talk reform that revolution is demanded; that we must return to the fundamentals." And it is these fundamentals that are openly denounced in much of the literature and in the schools. The literature of the generation leads away from the fundamentals not to them. See Alterum non tardare; In praesentia majoris. Take Campbell v. Con salus, Clark v. Dillon, Tokeer v. Armou, Mondell v. Steele, to students and ask for the principles involved and what the responses are. Name those principles in the language of all nations and see if these have been familiarized? Ask for the fundamental principles of the Code and note and compare the responses.

MULTI UTILIUM EST PUA IDONEA effundere quam multis inutilibus homines gravari: It is much more useful to pour forth a few useful things than to oppress men with many useless things. Maxims. The truth of this maxim is well illustrated by considering the Trilogy of Procedure and then comparing results with the efforts of the Feudal Lawyer and his followers to found and to vindicate the law of Procedure upon, and with cases. Look at the discussions around Jackson v. Peaked also those cases that assail Verba fortius. Here let us ask if a comprehension of the Trilogy of Procedure is not more clearing and helpful than are great rows of Digesta and Cyca that either ignore or lead away from the fundamentals. Maxime l. dioct.

MUNDAY v. VAIL, 34 N. J. L. 418, L. C. 79, 8 Gr. & Rud. Cited, secs. 1, 9, 25, Restatement. Pleadings are jurisdictional. A court gets its authority to adjudge from the pleadings and De non apparentibus. A judgment is construed by and is limited by the Pleadings; if not authorized by the Pleadings, it is
Monday, etc.


Compare Monday with Gullion v. Bank and its cognate cases; also "Theory of the Case." Munt.

Anent Monday it seems well to call attention to the fact that a right appreciation of this case should be had. It is the foundation of Reynolds v. Stockton, L. C. 79a, 3 Gr. & Rud., which became the foundation of Vicksburg v. Henson, Nolle v. Oyster, 3 Gr. & Rud.; Minnesota, 184 U. S. 43, ante, is consistent with these cases. Elsewhere we observe of them and give them the attention they deserve. These fundamentals for the Trilogy of Procedure, §§ 1-13, Restatement. They should be read in the light of the practice of the courts.

A right impression is most helpful, and important in relation to Pleading, judicial recursion. No other jurisprudence. In this impression lay all of the above cases open before you, also Knickerbocker, Campbell v. Consulus, Clark v. Dillon, Palm v. Humiston, Rushon v. Aspinall, L. C. 5, et seq., 3 Gr. & Rud.; Dovaston v. Rutter, L. C. 77, 3 Gr. & Rud.; Dunlop v. Edwards stated under the title Literature, also Mondel v. Steal, L. C. 77, 3 Gr. & Rud.; and Dunlop v. Brumba, S. v. Muensch, Sache v. Wallace, and draw your own conclusions as to your mental condition. Carefully read Dovaston v. Payne, L. C. 217, 3 Gr. & Rud., in Smith's Leading cases, and Judge Sergeant Williams by his brief, to instruct the court of Verba fortis, and Ery J., by his equinoctial views and the broader and deeper views of Bulter J., who criticized the brief of Sergeant Williams, and who characterized Coke's three degrees of certainty as a "jargon of words." See where the Code does not go the idea, or plainly the Code. We have tried to illustrate this fact under the title Literature, also Logic.

Is it not apparent that Pleadings unfolded from the Trilogy of Procedure would be quite unlike those unfolded from Coke's three degrees of certainty? (See §§ 1-13, Restatement.) From Monday much can be said to indicate the superficial and empirical writing and teaching of the law during the 1st generation. This fact will appear by inspecting the authors on Pleading, Evidence, Practice, Jurisdiction and Constitutional law who have written. Of course teaching has not been higher than the literature. The writing, the teaching and the standard of the profession are all on a level. What has been taught will appear from the sections of the law Restated; also the titles Rushon, Story; literature; Logic; Gullion, Henry v. Hil- liard and Federal law. A fundamental, a Constitutional and an organic principle is involved in Monday. (See De non apparentibus.) It is a case for all systems; it is an excellent Code and Practice Act case. It reaffirms Story's sections and the Trilogy of Procedure. The objection of the Trilogy to accord with Stalum v. Pomery, which is one of the best Federal cases. Monday was quoted and followed in Reymolde v. Stockton, L. C. 79a, 3 Gr. & Rud. When this case came it became
the beginning of a new series, as will appear from Vicksburg v. Henson. In Nalle v. Oyster Judge Pitney cited Slaeum. The principle in Monday is ably set out and vindicated in Palmer v. Humiston (O.) and in Milbra (Ala.); the struggle over this principle is extensively discussed in S. v. Muench by Judge Lamm in Missouri. In Sache v. Gonne (Minn.) Judge Brown stated and argued the principle with ability. Every Code practitioner should look at the Trilogy of Procedure and its cognate maxim Quis, quid, and these cases and consider how the maxims of antiquity have been paraphrased in the modern Codes. Anent these maxims, we point out how necessary facts and training have been neglected. Instead of grasping the major, organic maxims and comments on them they have been denounced and led away from. (See the titles, Maxims; Modern law.)

It is a strange fact that lawyers trained to understand the importance of the Division of state power in a Constitutionalism should have been quiet and viewed with complacent se-

Munday, etc.— serenity the advocacy of the "Theory of the case." (See Story; Thompson.) It is done as will be seen by looking at the title Story; Gulling. This euphemism introduced and taught the student gets error into his head that must be got out before he can make real progress. (See Trilogies; Wind-
sor v. McVeigh.) Procedure lies at the base of a right understanding of every branch of the law. To deny this and to teach the "Theory of the case" is to set and to drive the wedge of judicial anarchy into the heart and vitals of the logic and the philosophy of the law. Students misled and so affected must start and learn all over again before they can go forward. To support these conclusions we ask that the sections of the law restated be carefully considered. Therein Monday is cited in important relations.

Great lawyers have long said that the law consists of but a few fundamentals well understood and worked out. Hamilton said as much and so have others whom we cite. Whether or not this be so may be judged from the sections last cited. These sections present phases of the Division of state power by limiting the power of courts by their record. And so it is that the greatest principle in a Constitutional-

Munday, etc.—

Municipal Corporation: Records of the record is bound by its record is a rule of Constitutional law. (See In Präsentia majoris.) Now why have courts and authors overlooked this most important and instructive fact? Such is the teaching of the Federal lawyer to make way for the operation of his motto that "Parliament is omnipotent." In accordance with this he has insisted that the necessities for the operation of the judicial department depends upon the letter of the statute or of the local and state Constitution. Herefrom look and judge of the "Theory of the case." Herefrom consider the consequences of choosing Thompson instead of Story. Look at the fundamental principles in § 1 in the Restatement of the Law and then at Gulling and its cluster of cases. From the sections cited is it not true that a few maxims from antiquity lie at the base of a Constitutional Procedure? Now have cases taught this very important lesson? What cases can be picked to stand for those maxims?

Melius est petere fontes quam sec-


Municipal Court Act of Chicago: Its Procedure must conform to funda-

Munn v. Illinois, 94 U. S. 113;


Mutualities: Easement: Both sides must be bound or neither. Cooke.

Mutual: 118. Inns. Co. v. Dingley. 100 F. 408, 40 L.R.A. 132. A general denial is limited by a particular state-

Mutual Promises: Cooke, L. C. 321, 3 Gr. & Rud.

Myers v. Erwin, 2 O. 382, L. C. 150, 3 Gr. & Rud. Abatement plea; technical rules.

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Mutual Promises: Cooke, L. C. 321, 3 Gr. & Rud.

Myers v. Erwin, 2 O. 382, L. C. 150, 3 Gr. & Rud. Abatement plea; technical rules.
Nalle, etc.—
relatives cannot be considered for any purpose. The sprout sows the root of the and grows the same way. Pustulatus butur quod probatum non relevant. Garrett. Herefrom appears the best footing for the prosecution. And a motion to sever or at the stage of Collateral Attack the evidence will not be considered. Hot Springs, 82 Va., 217. Irrelevant evidence ought not be afterward declared relevant and a sufficient foundation a judgment. Elocution. Debole fundamentum.

There can only be a review in the court at acquiescence there was a real bona fide view in the court a quo, but it is obvious that there was no view where the court took for its authority and direction a void record, a record that is cause for arrest. A record that will not pass the general demurrer is offensive to the state and its interests cannot be waived. [See later alias. Such a record is no authority.]

The principles laid down in Nalle are from the Prescriptive Constitution and not above local and flat law. [See Chapters I. & II. Codes.]

NAMES: Of plaintiff and of defendant must appear with certainty. Quia, quid, coram quo. This maxim requires that the wrong should be described to himself. Fabula: also the defendant, the wrong he did and the amount of the damages. See Ad Expressum. McMonnigall v. Garrett. One may adopt any name he pleases. Moore v. C. Middle initial is no part of a name. Supreme, 3 Pet. 1. See Wibold, L. C. 98, 3 Gr. & Rud.; Parties, 4 id., also in Equity. Nihil error facti nominis; Praetorius de corpore; Idem nonas.

NASHVILLE TRUST CO. v. SMYTHE, 94 Tenn. 355, 31 So. 749. Transfer of the debt carries the security. Expressus coram
coronam.

NATIONAL, 196 Mass. 458, 14 L.R.A. (N.S.) 561. Foreign corporation may validate its contract by filing its papers and the statute upon the contract. § 13,293 Equity.

NATURA FIDE JUSSIONIS SUMMERTISIAM JURIS ET NON DURAT VEL EXTENDITUR DE RE AD REM DE PERSONA AD PERSONAM, DE TEMPORET AD TEMPOS: The nature of the contract of suretyship is strictissimi juris, and cannot endure nor be extended from thing to thing, from person to person or from time to time. This maxim is incorporated in the present law. Rees, L. C. 354a, 3 Gr. & Rud. NATURA NON FACIT VACUUM, NEX lex supervacuam: Nature makes no vacuum, the law nothing purposeless. Lex non copit ad vana.


NECESSITAS OBLICIT PRIVILEGII quod Jura privata: With respect to private acts necessity privileges a person acting under its influence; or in other words, in the domain of ius privatum
Necessitas, etc.—
necessity imports a privilege. Lee non
casum (1297). Ex isto coram
Neces-
sity knows no law. Constitutions
and statutes yield to it. In praesentia ma-
ti, S. ex rel. Henson v. Hapgood, 4
Gr. & Rud. Oakley v. Aspinwall, L. C.
222, 3 Gr. & Rud. See Equity.

The operation of the Trilogy of Pro-
cedure is from necessity in a constitu-
tionalism. See Prescriptive Constitu-
tion.

NECESSITY: This is the basis of the law of
Self-defense. 4 Gr. & Rud. As
defense it is strictly limited. See Bo-
um necessarium.

The basis of many rules of evi-
dence: 4 Gr. & Rud. Equity. Omnia
prasumuntur contra spoliatores.

NEGLECT: See Tort: Trespass. Vo-
cienti; Res ipsa loquitur. In jure, 4 Gr.
& Rud. See Negligence and Compensa-
tion Cases Annotated.

NEGLECTA ET PROBATA: That he
leave not the realm. See Equity.

NEGATIVE ALLEGATION: Who must pro-
moves. Donnell v. Wider, L. C. 185, 3
Gr. & Rud.

NEGATIVE PREGNANT PLEADING.

NEGLECT: See Tort: Trespass.

NEGLECT: See Negligence. See Negligence and
Compensation Cases Annotated.

— N. C. —, L.R.A.1915A, 528, is a
poor litigant. Burks v. Bosso, 3 Gr. &
Rud.

NEMO ALLEGANS SUAM TURPIUD-
inem audirendus est: No one alleging
his own turpitude is to be heard as a wit-
ness. See Allegans, Falso.

NEMO DAT QUI (OR QUOD) NON
have. No one can give what he does
not possess. A thief can give no title. Ben-
ley, 2 Gr. & Rud. Nol Dat.

NEMO DEBIT ESSE JUDEX IN PRO-
pria sua causa: No one should be judge
of his own cause, sec. 11, 14.

Restatement. This maxim is a part of
Idem agent and patiens causa non potest
qui juris est. It is extended and discussed in Hugh's Equity, §§ 509-522. It is held to be the
first principle in the administration of
justice in New York and in one of the
most instructive decisions of that state. It is the best discussion on Nemo debet
case judge. It surpasses the Dimes Case, L. C. 68, 3 Gr. & Rud. Oakley v. As-
pinwall, 3 N. Y. 547, L. C. 222, 3 Gr. &
Rud.

Rest est miserum ubi jux est egum et in-
certum: It is a miserable state where
the laws are vague and uncertain.

Nemo debet, etc.—
Multitudo imperatorum perdit carum: A
multitude of ignorant lawyers will des-
Nec

From these roots there come luxuri-
ant sprouts when the prominent and
popular orators of New York address
Bar Associations. These orators bold-
ly orate and proclaim that "revolution
is demanded," and that the "adminis-
tration of justice is degenerate and is
left to an ignorant and incompetent
Bar, both on, and off the Bench." In
other relations we quote these orators,
and we think ministers of truth. They
point to the fact that "the ignorance
If the Bar is appalling" and is not
fitted to stay the rising tide of judicial
anarchy; nor to go forth as scholars
teachers and leaders.

In other ages the Jews resented
attacks upon their laws and the cus-
toms of their courts by indicting the
greater of the Apostles for being "a
preacher of sedition" and "a sedition
fellow." It was this indictment that
the Roman denounced by telling the
rabid prosecutors that such charges
would not pass the general demurrer
(see Aterum). That it described no
offense known to the laws of Rome (R.
v. Wheatley, L. C. 19, 3 Gr. & Rud.;
U. S. v. Cruikshank, L. C. 222, 3 Gr.
& Rud.; in the civil case the rule is
the same, Rushton v. Aspinall, which
Kent quoted and followed in Bartlett
v. Crozier, L. C. 5, 6, 3 Gr. & Rud.;
which cites McCAllister v. Kuna,
L. C. 3, 3 Gr. & Rud.; § 242, 1 Gr.
& Rud.; Corbin v. Lowell, 100 U. S. 190).
And that they "must prove the charge
as laid."

From the above authorities the Tri-
ology of Procedure ($ 1 Restatement)
can be picked. This is 1. De non
apparentibus; 2. Frustra probatur;
3. Verba fortius. In the Restatement
sections we show that from this trio
of maxims the logic and philosophy of
Procedure can be picked.

If cases make the law, then why
are not the above trio of maxims, the
law in every state; for decisions, from
all states have vindicated these max-
ims, not consistently to be sure, but
they have been upheld in fragments
here and there. And Codes have re-
affirmed them. (Cockerell, 50 L.R.A.
(N.S.) 1-32.) They are the law in
England. (Rushton, Doavost v.
Payne, R. v. Wheatley, L. C. 3, 217,
19, 3 Gr. & Rud.; Briatow v. Wright,
L. C. 135, 3 Gr. & Rud. (Allegata et
probata must agree). And generally
Nemo debet, etc.—
the Federal court has respected these cases and principles. (McAllister v. Kuhn, and U. S. v. Cruikshank.) Also in New York as in Bartlett and Van Leuven v. Lyke, L. C. 14, 3 Gr. & Rud. will show. In Van Leuven, the scienter was not alleged for trespass done by a hog and the judgment was arrested as it was in the case cited in Rush ton where the damage was done by a bull. The defect in these cases was not supplied by proof, nor aider by verdict. Nor should it be. Garrett, Knickerbocker.

Now are there greater principles of the law than those above referred to? And let us ask if greater Code cases can be cited than are the above? And are not these principles great Universal, Constitutional principles necessary and indispensable for the operations of the judicial department in every Constitutionalism? (See §§ 1–26, The Law Restated.) Now why have not New York authors and courts cited the above data for authority and as broadly as a great principle was discussed in Oakley v. Aspinwall? Why did not Professor Pomerooy cite and explain this data? (See Pomerooy.) To-day it seems that New York an notators are awaiting decisions to determine whether or not the Allegata et probata must agree. (40 L.R.A. (N.S.) 1087, 1088;) under the title Maxima we refer to Coke and his system of citing the cases to determine the law. (See Maxima.) His ideas were followed by New York until the reports of the lower and intermediate courts are discarded for something late. No longer are Abbott, Barbour and Howard cited and especially out of New York. The citation of the lower courts in New York are of but little consequence except in New York. They are a mass of confusion as to the above principles. Not one of these are settled in that state. Elsewhere we discuss them in reference to Campbell v. Conalac, Clark v. Dillon and Tooker v. Arnox. (See Codes Restatement.) They are introduced in §§ 1–26, Restatement.

There are Feudal lawyers in New York as well as Roman Prretors. The latter class do not do all the orating nor directing of the courts. For let us observe that in Tyler's Preface to Stephen's Pleading two opposing types are mentioned and one is Charles O'Connor and the other is David Dud-ley Field. Also that there are supposed great judges in New York, who, cannot find anything in organic law that forbids that one sit in his own cause. (See Feudal Lawyer §§ 509–522, Equity In Procedure). Also that there are other orators in New York who address Bar Associations and proclaim that the highest equipment that a lawyer can have in order to be a cosmopolitan lawyer is a thorough knowledge of the New York Procedure. These optimists fail to see that all of the above principles are shrouded in mist and chaos; also that the Code has failed and that one sect construe it so "every man can be his own lawyer." Baylies Code Pleading, 1–4; while others are struggling over Clark v. Dillon (Bradbury's Rules of Pleading pp. 9–16; 1564–1570). The attempts of other states to follow New York are reflected from Gulling and its cluster of cases; and the observations of an able judge in Atlantic Coast Line R. R., 52 Fla. 165. (Cited in Equity In Procedure.) In relation to the title Literature, we refer to New York authors and their peculiarities. From the cases, the lawyers, the authors and the orators of New York it seems fair to say that not one of them have so presented any of the above principles that it was comprehensible for a needy and awaiting profession both at home and abroad. Late cases from New York show that the court is much perturbed. (See Clark v. West which is mentioned in another connection.)

In brief we believe that almost all we observe of the Feudal Lawyer and of his literature is very applicable to the lawyer and his establishments in New York. (See Feudal Lawyer; Literature.)

In the light of the above observations how can it be said that cases have settled the law in New York? If so which of the above have been settled? Where is there a greater Code case than Bartlett; now where has it been accepted and explained as a Code case? Where has one of the maxims we herein cite been cited and explained in New York?

If cases make the law, then, is not Nemo debet esse iudex in propria sua causa (No man shall be judge of his own dispute), well made? Only look at the cases that can be cited to make it the law such as Dimes v. Grand Junction Canal, L. C. 176, 3 Gr. & Rud.
**Nemo debet, etc.**

and *Oakley v. Aspinwall* L. C. 222, 3 Gr. & Rud. If cases make the law, then these cases ought to stand for something. Now note that each of these cases plainly recognize a higher law than local and flat edicts; that each of these cases can be cited to support the Prescriptive Constitution which is above all other laws. The maxim last cited is a part of the sermon on the Mount, wherein we are instructed that "Ye cannot serve God and Mammon." Of this there are many parts ramifying the various branches of the law and as is shown in §§ 509-522, Equity In Procedure. To attempt to elucidate that great principle by cases narrows and befogs the vision and the necessary impression which must be given for the right and sound instruction of a fundamental of the law.

If cases make the law then the rule in question was as well made as any rule can be. It was made by the greatest of cases and it was eloquently and impressively stated and defended as a rule of public policy essential for the intelligent and patriotic administration of justice; that respect for it was necessary to win the respect and confidence of the public, the loyalty and devotion of the citizen and thus the perpetuity of government.

Both the *Dimes Case* and the *Oakley Case* can be cited to sustain the view that there is a Prescriptive Constitution and that this must be considered in the construction and the operation of all other laws. *Lax non exacte definit sed arbitrio bono viral permittet.*

*In praeentia majoris cessat potentia minoris.* It is these cases and these principles that the Feudal Lawyer rejects and turns from. In relation to the title Feudal Lawyer, we specify peculiarities and facts relating to the Feudal Lawyer that throw needed light over his training and development, also his ways which are the ways of judicial anarchy.

The application of fundamentals in New York is neither consistent nor encouraging to those who advocate organic and primary law. In notable trials in that state the Feudal lawyers shift the channels of fundamental law and as we shall see not only declarations of the Prescriptive Constitution (2 Kent, 8-12), but these reaffirmed by the courts of first importance in New York. The Code simply reaffirmed the Trilogy of maxims above cited which are parts of the old archaic law referred to by James C. Carter—the law of substance, which has not been and cannot be changed. To this point we cite the greatest lawyers and jurists of New York. Still these fundamental principles have not been so presented and impressed in New York as to shake the dominancy of Feudalism in that state. A thousand cases can be picked from the reports of that state that support *Bartlett v. Crozier* L. C. 6, 3 Gr. & Rud. Now what author or court in that state has plainly and impressively stated this fact to the New York student? Can it be said that Professor Pomroy and the other Code authors of that state have cited that case as a *Code case*? And which one has pointed out that *Clark v. Dillon* is exactly like *Dowston v. Payne* each reaffirming *Verba fortius.* A multitude of cases can be picked from the reports discussing that principle and not one of them any better than *Clark v. Dillon* of which we make extended mention under the title Codes. And the same may be said of *Campbell v. Comanius* also of *Tooker v. Arnoux.* These cases are upheld on the one hand and are denied on the other hand. And so it is with *Oakley v. Aspinwall,* as we shall illustrate by referring to the Impeachment trial of Governor Sulzer in 1913. In his trial it seems that what was declared to be "the first principle in the administration of justice" in *Oakley* was denounced and ignored. This fact and the denial of all of the maxims of the Prescriptive Constitution above mentioned is enough to justify the charge that chaos reigns in that state. The decisions of this state have led the way for cases like *Gullion* and its cluster; also *S. v. Fasse,* 189 Mo. 537, *Henry v. Hilliard,* stated and discussed *anent Lester v. Foxcroft.*

*Oakley* is quoted and followed in *Newcomb v. Light,* 68 Tex. 141, 17 A. R. 604. The principle in *Oakley* is a part of *Idem aegna,* a part of which is discussed and applied in *S. ex rel. Henson v. Sheppard* (Mo.) wherein the Prescriptive Constitution is plainly recognized as it was in *Oakley.* These cases vindicate the higher law. *In praeentia majoria cessat potentia minoria.* Every student should at least turn to these cases and glance at them for the impression that he will gain from them. A good impression
Nemo debet, etc.—
of a great principle prepares the mind
for the reception of further instruc-
tion.

The record data of the impeachment
of Governor Sulzer has been largely

gained by the public discussions and
what passed as the admitted facts of
the proceedings. However the facts
seem to be quite well authenticated.
The High Court of Impeachment is

provided for by the state Constitution

and is composed of state senators and
the judges of the Appellate Court and
not of the Supreme Court. Three of
the latter were acting pro tempore as
Appellate judges and upon this author-
ity became triers of the High Court.

Supreme Judges in New York are very

unlike Judges of the Court of Ap-
peals, for among other things they are

ex officio generals of the army. P. ex


It seems that the constitutional quali-

fication of the latter judges must find

warrant in a statute which provided

that the Governor of the state may

nominate Supreme Judges to act as

Judges of the Court of Appeals. In

the foregoing observations are im-

portant considerations surrounding the

eligibility of Supreme Judges to act.

Generally what a Constitution requires

is governed by the maxim expressio

unius est exclusio alterius. Out of the

foregoing considerations questions

have arisen as to whether or not the

proceedings were coram judice. (The

judicial function cannot be delegated,

Vansyke v. Trempealeau Ins. Co., 39

Wis. 360, 20 A. R. 50, L. C. 177, 3

Gr. & Rud.)

Delegata potestas non potest dele-
gari.

How the court was convened and sat;
its procedure in violation of funda-
mental law:—"An extraordinary ses-

sion of the legislature" was called by
the Governor to consider other matters
than what related to a High Court of

Impeachment. He specified a Primary

Election law, and considerations of ap-

propriations and not the impeachment
of any one much less himself. The

latter by no construction could be in-
cluded in the call. The spirit of Mag-

na Carta was breathed into the law
of New York. P. ex rel. Tieded, 60

N. Y. 559, cited in Knickerbocker.

For the latter also safeguarded, de-

fined and confined the Governor's acts
as above stated. The law
of New York provided that at "the

extraordinary session no subject shall

be acted upon except such as the Gov-
ernor may recommend for considera-
tion." We repeat that the matter of

impeaching any one was not enumer-
ated; it was not specified in a Consi-
titution where the rule is to such pro-
visions expressio unius est exclusio
alterius. What was to be considered
and acted on was perfectly certain
and could be made certain. As to this we
quote "Id certum est quod certum
reddi potest," Turner, 201 N. Y. 96.

This old universal rule of Construc-
tion was lately reaffirmed but in a

variant language in Baker v. Warner,

231 U. S. 588, 592. The maxim last

cited is often a rule of pleading.

The call did not authorize the "As-
sembly" to do any and all things
in every way, for everybody upon
any method either civil or crim-

nal. To safeguard against such

things the Prescriptive Constitution

reaffirmed in the State Constitution

and its Statutes and the decisions of
the Court of Appeals there stood out
f

damental law and stare decisis to

light up and to show the way. The

State constitution and the call was

enough for any little, local statutory
devolute; this class of lawyers would

care to look beyond. But above

the state Constitution, a jurist and

statesman and we may add, that, a

historian as well had spoken and had

given to the world its greatest case

upon a fundamental and organic prin-

ciple in operating a court in a Con-

stitutionalism; this case is Oakley v.

Aspinwall, L. C. 222, 3 Gr. & Rud.

Here is one of the great and not-

able cases of the law which sheds
its radiant luster, as an illumined

guide, like a pillar of cloud by
day and a pillar of fire by night.

Cases like Oakley are a treasure to

the greatest asset of government—its

jurisprudence. The legal profession

is the guardian of this most prized

and glorious treasure. For if they

may always rise and speak, even, at

the bar to vindicate fundamental law

as where the amicus curiae may rise

and speak and advise the court as its

friend, and adviser touching, the great

principles we are naming in this con-
nexion:

In Oakley a great Universal, Con-
stitutional principle an element of
"Due Process of Law"—the "first prin-
ciple in the administration of jus-
tice" was perceived and the next great
principle is discoverable in Campbell
Nemo debet, etc.—

v. Consalus, also in Knickerbocker Trust Co. These cases are cognates of Vicksburg v. Henson and cases therein cited. In this case the injustice of extravagant and blind construction are indicated. New rabid, vicious and organized injustice that amounts to a condemnation worse than death cannot pass for “Due Process of Law” wherever “The manner of the Romans,” the maxim above cited are comprehended and reasoned from. Oakley is enough but add to this case the trio of maxims we shall next set out and there will plainly appear barriers of protection before which audacity, rancorous hate and treasonable usurpation would not attempt to over-ride before a patriotic and well-instructed bar in Constitutional law and a vigilant and independent press. (2 Kent, 8-12.)

Civil law, organic law is always with us. It is not changed in substance—not derogated from because local and flat law reaffirms that old high law. In presentia majoria. As is stated in Oakley, statutes and Constitutions make no changes in the old law of substance—that law of sense and logic and of protection which is essential for the operations of a good government; this law is from antiquity and it is supreme. If it is reaffirmed in local law by provincial edicts and these are recalled still the old and high law remains and is still operative. “Ye cannot serve God and Mammon.”

The impeachment articles were a limitation of Jurisdiction. The court had Jurisdiction of no matter not specified in the presentment. And of this only material and relevant charges could be tried and determined. Matters in nowise relating to the administration of his office could rightfully come before the court. Neither outlawed nor Ex post facto charges could be rightfully presented and heard. In the very nature of things and out of the fundamentals of Procedure and under requirements of “Due Process of Law” only offenses committed while in office and relating to the same could be presented and tried, and considered. Only in a barbaric and inquisitorial government could a contrary Procedure be upheld. § 11, Restatement.

In an accusatory government respectfull of the elements of “Due Process of Law” a condemnation or a sequestrating presentment must be founded upon fundamental law which in Ju-

dicial Procedure is a few organic principles well thought out and comprehended. Chief among these principles are three and these are:

1. De non apparentibus et non existentibus cadem est ratio.

2. Frustra probatur quod probatum non relevat.


These primary principles are reaffirmed in varying expressions in many cases. Knickerbocker.

Campbell v. Consalus, 25 N. Y. 616 (pleadings are jurisdictional and they must present the case that must be tried, according to this definition of Pleadings—“Pleadings are the Jurisdictional means of investing a court with Jurisdiction of a subject matter to adjudicate it.” And these Pleadings cannot be waived nor dispensed with, nor enlarged by the express stipulations of the parties). Clark v. Dillon, 97 N. Y. 379 (Verba fortius accipiantur). Tooker v. Arnoux, 76 N. Y. 379 (De non apparentibus et non existentibus). Mondel v. Steel (Eng.) L. C. 77, 3 Gr. & Rud. (supports the above N. Y. cases). Guest v. Warren (Eng.) same point as in Campbell v. Consalus where it is cited and quoted. Elues (1906) 2 K. B. 1, 2 Brit. R. C. 198. Hyams v. Stuart King, 2 K. B. 696, (a recovery must be Secundum allegata et probata).


Jurisdiction cannot be acquired retrospectively as by amendments after trial. Holton, 64 Or. 290, 48 L.R.A. (N.S.) 779, 783, L. & N. R. R. — Ky. —, 47 L.R.A.(N.S.) 918 (assuming any other issue than that presented by the Pleadings is abuse of power and vitiating usurpation).

Quod ab initio non valet intraucto tempore non convaleat.

Boni judicis est amplius jurisdictio nem. This is a maxim of Procedure that permits a court to amplify its
Nemo debet, etc.—Jurisdiction in furtherance of fundamental law but not arbitrariness in Procedure. No Constitutional court can usurp jurisdiction in violation of organic law—to Prescriptive Constitution. Principles of this have been enumerated. Next we will observe how jurisdiction is obtained through the pleadings where these are required.

Pleadings are to confer upon a court Jurisdiction of a subject matter to adjudicate it. (Vicksburg v. Henson.) There must be pleadings to limit and to confine the Court's action. (Campbell v. Consul.) Story's Equity Pl. 10; Nalle v. Oyster, 230 U. S. 165; U. S. v. Cruikshank, 92 U. S. 542, L. C. 232, 3 Gr. & Rud. No court can serve a Constitutionalism without a record and respect for it. Every court must be bound by something or by nothing; and so with the "High Court" in New York. This court was bound by the Constitution and the Governor's call already referred to. If the "High Court" was not bound and limited then of what use are records, of Constitutions and decisions?

There is no greater principle in Constitutional law than the Division of State power and the other organic principles we have introduced. Due Process of Law depends upon respect for these principles. If these principles count for naught then what we have left except our histories of Greece and of Rome? Is the Federalist an ignus fatuus? It instructs us that the first principle of a constitutionalism is the division of state power.

New York tribunal in the invisible power is discussed. In Rome it was the Praetorian Guard.

Investing judges with military power as is done in New York is enough to call attention to the apparent violation of first principles.

Cujus est indicium ejus est abogare. One of the functions of Pleadings is to inform the judge and parties whose and which case it is presented. All are interested in knowing. See Trilogy of Procedure.

The higher law forbids that a judge sit in his own case. "Ye cannot serve God and Mammon;" "Lead us not into temptation:" It is rel. Henson v. Shepard, 4 Gr. & Rud. See Prescriptive Constitution.

Nemo, a jurisdictional question; it cannot be waived; consent will not give jurisdiction of subject matter. Oakley.

Nemo est HOKES INVENTIS; No one is an heir to the living; in other words no living man has an heir.

Nemo presumitur Mulus; No one is presumed to be bad. Actio.

Nemo Presumptur, etc.—Innocence is presumed. Coffin v. U. S. 152.


Nephan v. Dodge Knight, 12 M. & W. 394. Death is presumed after absence of seven years. See Presumptions; Equity. Farmington, 62 42 841.


New Trial: See 4 Gr. & Rud.; also Equity.

New York: From the many references to this state the condition of Procedure may be judged. See Campbell v. Consul; Clark v. Dillon and the LawArnoux; Codes. See 2 Gr. & Rud., also Equity.


Next Friday:

Nichols v. Stevens; 123 Mo. 126, 45 A. S. 514. Fraud must be specifically pleaded. John Stuart.


Nil Hil Facit Error Nomini Cum de corpore constat: An error in the name is nothing when there is certainty as to the thing. Ut res presenta: Falsa demonstratio.

Nil Hil Habet Forum Ex Scena: The court has nothing to do with what is not before it. De non; Dictum.

Nil Hil in Lege Intollerabili est cedere divergere jure cujus: Nothing is more intolerable than that the same case should be subjected in different courts to different views of the law. Ubri jus incertum; Comity of courts; Res Adjudicata; Nemo debet bis recedere: Stare decisis. Nemo debet bis judicari.

Nil Hil Possimus Contra Veritatem: We can do nothing against truth. Allegans; Pares; Sham Pleadings; O'Dwyer v. Faurot, L. C. 102, 3 Gr. & Rud.; P. v. McCumber, L. C. 110, 3 Gr. & Rud. (False and sham pleading). Reality of fact must exist. Fabula: Repugnant pleadings are void. Potin ex parte, L. C. 107, 3 Gr. & Rud. Palmer v. Humiston. See 2 Gr. & Rud.; also Equity.

False and sham pleading may pass. See Due Process of Law.

Nil Hil Quod est Inconveniens est Dictum: Nothing inconvenient is lawful. Argumentum ex jubilo as Toxicon Interpretatio: Convenience is a ground and rudiment of law.

Nil Hil Simul Inventum Est et Perfectum: Nothing is invented and perfected at the same moment. This maxim is on the title page of Chitty's pleading. Codes and Practice Acts depend upon a construction consistent with the logic and philosophy of the law. The Interpretation of Procedure.

Nil Hil Tamen Conveniens Est naturalis equitatem quam unum quod quod dissolvit es ligamine quo ligatum est: Nothing is so consonant to natural equity as
Nihil, etc.—

that each thing should be dissolved by the law, the same which it was born that it should be. It takes a deed to make a deed. Authority to make an instrument under seal must be under seal. [Abbreviated: A. B. C. D.]

NOLI DAT QUI NON HABET: He gives nothing who has nothing. See Nemo dat: NOLLE PROMOQUI: See 4 Gr. & Rud. NOLO CONTENDERE: 4 Gr. & Rud.

NOLI DAT QUI NON HABET: He gives nothing who has nothing. See Nemo dat: NOLLE PROMOQUI: See 4 Gr. & Rud.


NO NON IN TABULIS EST JUS: The law is not written. Cited, sec. 25, Restatement. It is not in writing. It is a logic and a philosophy. See Triglogy of Procedure. 2 Kent, 11; Preface Cool. Bl. (the foundation of the law are the maxims). See Maxims. Ito iex scripta


NO POSTER ADDED EXCEPTIO EUSIS SEMI- REI CIVIS PETITOR DUSSOLITO: A plea of the exception is the dissolution of which is sought by the action. The plea should be responsive to the statement of the cause of action and not present the same matter.


Injured employee on Interstate R. R. may sue in Federal court for injury under the Act of 1908. State laws yield to the Federal: In prosinta. Second 225 U. S. 58. State and Federal courts have concurrent jurisdiction in such cases. When the Federal act financial loss of a plaintiff is an element and this must be averred. Garrett, De non. The state law requirement that it must be averred. The pleader sought his footing in the state law. So he averred that the plaintiff has a demand of the general concern operative between Selma and Spencer in N. C. The R. R. took no chances on the application of the rule Verba fortius (2 High, North Carolina R. R., etc.—

Injuries, 1471), but filed a plea of affirma-

tive defenses. A motion was brought to have it, but it was denied. It was averred that the defendant operated beyond Selma and Spencer and into adjacent states. Here and early began the practice of bringing suits in Federal courts. This is renewed by motion for nonsuit also by exceptions to instructions. Continued. A suit was not required upon, so it manifested its intention to claim rights under the Federal law repeatedly so as to prejudice any claim that it consented to the state action.

The practice anent presenting a Fed-

eral question is exceedingly technical and refined as will appear from an examination of the above case. It is not attended with the new and liberal rules hinted in other cases. Baker v. Warner. Cases at law are held to be more strict than in equity. Garret.

The affirmative plea filed was not de-

nied and admitted. The record was ad-

mitted upon the record and as they must be wherever the pleadings are viewed. The result of such a suit is to limit issues and narrow proofs. Under this rule it stood admitted upon the record but the right record is not settled by the record. This was settled upon the record and by the right record, and so it might have been better to settle it upon, Dickson v. Dale, L. C. 34, et seq., 3 Gr. & Rud. The search through the statutory record—the evidence in the record was settled by a fruitless ramble. (See Issues.) Proof of matters admitted upon the record is surpluseage. To concede that surpluseage may detract from what is fixed and settled by the right record in the present place is to charge itiners with responsibilities beyond human capacity. It is a jumbling of the records and of the statutory records of which we elsewhe observe.

To illustrate: Let us suppose that with the admission upon the record the R. R. was a state jurisdiction. A state jurisdiction was entered against it (where there was no allegation of financial loss, Garrett) or what validity would this judgment be? See Nalle v. Oyster. With such admission on the record could the state court enter judgment in any aspect where there were insufficient allegations? See Gar-

rett. The omission of jurisdictional al-

legations (Garrett) ought not sustain any judgment against an Interstate R. R. Would not such a judgment be subject to Collateral Attack? Debile fundamentum fallit opus.

When it was admitted upon the record that the R. R. was a state jurisdiction might not it have quitted the court as in McRae v. McVeigh (L. C. 1, 3 Gr. & Rud.)? Under the allegations and the admission could there be a recovery of damages in any court, state or Federal?

Such being the allegations and the admissions should the statutory record have been opened? See Mandatory Record: Nalle v. Oyster.

The conclusion was that the train was operated from Selma to Spencer in N. C. was not a certain allegation that it did not operate beyond into another state. Verba fortius. This allegation was de-
marrable from this viewpoint. By strict construction what element be a necessary one might have been made a short and inex-

pensive one. The liberal construction of Viewpoints after a great number of cases, in this case it left it to the R. R. to file a plea bringing forth a necessary fact which was omitted.
North Carolina R. R., etc.—

The plea filed changed the nature of the subject matter from a matter of state cognizance to one of Federal cognizance, and even if not denied it was admitted upon the record. The above allegation and the vital fact of the plea being filed on the same day as the record was made to the record would support no judgment for damages not "financial" which fact must be alleged; proving them will not do. Garrett. Such a judgment was subject to a motion non obstante veredicto. It of course would be subject to objections upon Collateral Attack. A judgment not supported by a coram judice record should be set aside. Vickberg v. Henson.

Without proper allegations there was no subject matter present upon which a court could act. Garrett. And this is a jurisdictional question. Garrett. Flori- do Co., 176 U. S. 321, 322.

Due process of law depends upon jurisdictional elements of which none are more important than are the pleading, U. S. v. Cruikshank, L. C. 252, 3 Gr. & Rud. De non. A judgment resting upon the above allegation as an admitted plea could not pass for due process of law. This conclusion finds support in Garrett also Vickberg v. Jure; Mon- day v. Vail, L. C. 76 et seq., 3 Gr. & Rud.

The vesting of jurisdiction with certainty by the right record (see Res Adjudicata) is one of the highest of pleading (§§ 82-125, 1 Gr. & Rud.). This requirement cannot be waived nor consented away. Campbell v. Coleman. Quod ab initio, Fer fortis.

A court has no jurisdiction of a forbidden subject matter. The state court could not enter a valid judgment upon the case made by the allegations and the admission of the vital fact alleged in the plea. Its attempt to do so was coram non judice and the mandatory record plainly showed these facts. In such a case the statutory record should not be opened. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.

The uses of the mandatory record appear in the discussions of Stro- cum v. Ins. Co.; Nolle v. Oyster and in Vickberg v. Henson. Related to that record the logic and the philosophy of the law are the same in all systems. Patmore v. English Quod ab initio, Fer fortis. It should be reasoned from the Trilogy of Procedure.

The importance of the questions involved in North Carolina R. R. Justifies a close and technical statement of the salient facts, also some broad deductions therefrom, and especially as to the character of Pleadings as a jurisdictional element which has come to be broadly de- nied by many courts and by several popular and most prominent authors of the last generation. Their views are flatly opposed to many decisions of this court, among which are Strocum v. Pomer- er, Crain v. Lovell, 109 U. S. 194; U. S. v. Cruikshank, L. C. 252, 3 Gr. & Rud.; Nolle v. Oyster, Vickberg v. Hen- son. Relating to the alleged record and the record the logic and the philosophy of law are the same in all systems. See also the cases of maxims above referred to.) These first principles were the "manner of the Romans" which were stated in Stuart Paul’s Trial in the Acts of the Apostles. Where these are comprehended there is order and certainty and where they are not there is judicial anarchy. (Gullin.) There shall be no departure, in an old rule of leading significance. It calls for Pleading as a jurisdictional element as required by Story; and that a judgment be entered upon the claimant’s admission of his "cause of action." Crain v. Lovell, supra. For his judgment the pleader, in his complaint must put in and describe: (Quis, quid, coram quo) he must allege something with certainty for and on the part of the state, that he has a special Interest reipublicae. He pleads at his peril. Ignorantia levis. When his pleading is that of the Pleader, the Ready and easily. The subject matter is that of the Coram judice, as a subject of Collateral Attack, Res Adjudicata and Due Process of Law, he must show more than jurisdic- tion of the Process (Pennyer v. Kent, L. C. 58, 3 Gr. & Rud., and a judgment in
North Carolina R. R., etc.—sufficient form. (Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.). At these stages the mandatory record is opened and jurisdictional elements inquired after without regard to objections and exceptions. There are limitations of Consentus tollit actum, and what a plaintiff cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to formal matters. And so it is that the general demurrer is never waived. Clark v. Dillon; and why it is that pleadings cannot be contracted away. Campbell v. Consuleo. Herefrom arise rules that apply to form

OAKLEY v. ASPINWALL, 4 N. Y. 514, L. C. 56, 3 Gr. & Rud. Audi alteram partem. This maxim is imported by construction into all statutes and Constitutions. Lex non est ex aequo; in praesentia majoria: Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.

OATH: See 4 Gr. & Rud.

OBSCENE MATTER: 4 Gr. & Rud.

ODIOUSA NON PRESUMUNTE: Odious things are not presumed. See Malus.

OFFER AND ACCEPTANCE: Contract Law. This is the burden of L. C. 301-353, 3 Gr. & Rud. See 4 Gr. & Rud.; 6 R. C. L. 599-620.


OKIE v. SPENCER, 2 Whart. 253. Giving note for antecedent debt is not payment.

OMNIA MAJUS CONTINET IN SE MINUS: The greater contains the less. 2 Gr. & Rud.; Equity.

OMNIA PRESUMUNTUR CONTRA spoliatores: Every presumption is made against a wrongdoer. Armory, L. C. 180, 3 Gr. & Rud.; 42 L.R.A. (N.S.) 388.

OMNIA PRESUMUNTUR VITE ET SOL. omniterr est acta: All things by presumption to have been rightly, legally and regularly done. This is one of the most useful rules of procedure. We classify it as one of the canons of liberal construction. [See Introductory Chapter.] The discussions over it is judicial anarchy as will appear from Cripps v. Durden, L. C. 113, 3 Gr. & Rud.; also Green Co. Ky. Bond Cases. See 4 Gr. & Rud.; also Equity. Rice v. Travia; Biggmy v. P. 79 N. Y. 540. This maxim has been given an operation destructive of De non. See Gulling. Its limitations are illustrated in Dobson v. Campbell; also in Williams v. Peyton.

On general demurrer the construction is liberal; if possible the pleading will be upheld. Ut rea magis. And at no stage or place or time will a court construe the same collocation of words more liberally than it does for the state at the first stage. Goldham v. Edwords. Herein lies the logic and philosophy of the law which has never been congruously presented by the Feudal authors and their followers. For they have treated the general demur.

Omnia, etc.—

rer and its correlatives as irrelutive, portioned and individualized things. They now contend that construction is more liberal at the stage of Arrest of judgment and still more so at the stage of Collateral Attack. As to Res Adjudicata every one of them jump it and its paraphrased rules of the general demurrer. They did not understand estoppel law—Res Adjudicata. As to Due Process of Law some of them think it is something "new" and that it must await a thousand decisions and generations for a definition of the "Manner of the Romans" in the western hemisphere. They talk of it as the Feudal Lawyer discussed his "Sheley" cases, his abaque loco, his "titles defectively stated and his defective statements of a title. See Jackson v. Pesked; Rushton v. Aspinall. They could have no broad vision for they believed that "Parliament was omnipotent."

Ader by verdicts by findings and by entering judgment illustrates applications of this maxim in an extravagant way in some cases. Gulling and its cluster of cases show extreme applications of this maxim. Omitted facts are sometimes supplied by it even to the extent of denying De non apparentibus. (See Nemo debet esse iudex.) To illustrate we will quote from H. v. Fasse, 189 Mo. 532, 537. In this case the question was whether a necessary fact could be importved into the statutory record, which is judged by Verba fortius. For this the court reasoned as follows, p. 537:—

"Appellant further contends that Fasse did not show he was a citizen of the United States and that he qualified after the election by taking the oath of office. The state took this appeal and made up the bill of exceptions. We are satisfied that the only contested issue below was whether Fasse was a taxpayer within the meaning of the statutes and that no point was made about his lacking other qualifications. We are also convinced that he proved he was a citizen and that he was sworn into office in time, which proof was omitted from the bill of exceptions simply because there was no contention that he was disqualified by lack of citizenship or that he failed to take the official oath; in fact, as much
Omnis, etc.—

was stated by the counsel for respondent in his brief and also on argument in this court in the relator’s presence and it was not denied by the latter.

By the above reasoning material facts were imported into the record inconsistent with the rule that “What ought to be of record must be proved by record and by the right record.” Mondel v. Steel, L. C. 77, 3 Gr. & Rud. See Aider. Forensic conduct will not add material facts to a record. De non apparitibus; Expressio unius. A court is bound by its record. Knick-erbocker.

The line of the struggle in American courts is indicated in Harrow v. Gro- gan, 219 Ill. 288, cited in Equity (theory-of-the-case rule) and Bell v. Brink- man, 123 Mo. 270 (De non upheld by a divided court); also in the Green County Bond cases (theory-of-the-case rule); Gulling; This case is much like Henry, 40 L.R.A.(N.S.) 1; Galpin v. Page, L. C. 63, 3 Gr. & Rud.

See Probatio extremis; Ut re magis.

OMNIS INNOVATIO PLUS NOVITATE
perturbat quam utilitatem prodest: nemo intestino discriminis maiore est novitatem quam beneficium. In this maxim lies the truth of the rule that statutes are construed in derogation of the common law as strictly construed, Heydon’s Case. If Code constructionists had known and cited and explained the Trilogy of Proce- dure—prohibit the organic maxims of Procedure and have made the leading provisions of the Code harmonize with the old law which was so plainly re- affirmed then there would have been no theory of the Case. Gulling. But the Federal court assailed the Code and said it was something new and a euphemism and this gave the cue to the line of discussion. McPaul. Consequent- ly, every author concluded that something new had come. See Pomeroy’s Codes; Usage; Convenience.

OMNIS RATIBANTIA RECONTRAHI- titur et mandato equaleparatur: A subsequent ratification has a retrospective ef- fect, and is equivalent to a prior command. In actione: Qui sentit: This is an important rule of agency.


ONE IS PRESUMED TO INTEND THE NAME, DESIGN and probable consequences of his act: Sugg Case; Presumptions; Intent; May v. Burdett (keeping a nu- salia and using animals); Sulliman, 2 L. R. 317, 2 Br. R. C. 130-182 (keeping

One is presumed, etc.—


ONUS AGBANDI: Burden of proof. Ac- tore.

OPENING AND CLOSING A CASE. See 4 Gr. & Rud.

OPERATION OF LAW. 4 Gr. & Rud.

OPINION EVIDENCE. 4 Gr. & Rud.; Ex- perts. 4 Gr. & Rud.

OPINIONS: JUDGMENTS; DICTA; DIS- tinctions. 4 Gr. & Rud.

OPPRESSION: See 4 Gr. & Rud.

OPTIMA INTERPRES REBUS USUI: Usage is the best interpreter of things. Wigglesworth, L. C. 306, 3 Gr. & Rud.; also of law. Contemporane expositio: ORAL EVIDENCE: Contra scriptum: Plant enim: Expressio unius: There are many exceptions to the rule that “oral evidence is inadmissible to alter or add to a writing.” 4 Gr. & Rud. (25 exceptions stated.) 1 Gr. Ev. 275; L. C. 40- 58, 3 Gr. & Rud. 44 L.R.A. 388.

Parties may make their own contracts; and if they agree upon the muniments of evidence no court ought change these and tell the parties that there is some other way. L. C. 63; Iaro, 40 L.R.A.(N.S.) 1; Galpin v. Page, L. C. 63, 3 Gr. & Rud. Morality, convenience and certainty command the rule dictating the rules of oral evidence. Parties must know what they write. Verba fortis: Ignorantia legis: The assaults upon the rule and courts have dismembered the procedure. Only a few courts respect a consistent rule. Campbell v. Consalve, Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Palmer, 46 L.R.A.(N.S.) 641; Mitbra, 45 L.R.A.(N.S.) 274, 277-278 (‘what ought to be of record, etc.’). The latter cases denied. Gulling.

The rule against excluding oral evi- dence to alter or vary a writing has many exceptions. See Oral Evidence, 4 Gr. & Rud., where we enumerate twenty-five. Judicial records are a subject of great change and a subject of the rule that “What ought to be of record must be proved by record and by the right record” will show. This rule is practically eroded away by the “theory-of-the-case” doctrine. See Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Palmer v. Humiston; Mitbra; Nalle v. Oyster. Extreme illustrations of that doctrine are found in reference to Gulling v. Bank and its cluster of cases. These practically deny the efficiency and usefulness of judicial records for certainty and all that depends upon them. Anent this we make observations under the titles Abatement; Aider; Jurisdiction and citations to De non: Frusta; and Verba fortis in the Restatement. The functions and purposes of the two juridical records,
Oral Evidence.—
the Mandatory and the Statutory records involve phases of the above rules.
(See Introductory Chapter, Restatement.)

Deeds are also much affected by these exceptions. A lease against the statute of
Frauds may be shown by oral evidence; Lester, L. C. 341, 3 Gr. & Rud.
(EQUITABLE exceptions to the statute of frauds.)

An absolute deed may be shown to be a mortgage. Howard v. Harris; 4 Gr. &
Rud.; Equity In Procedure.

That it was a conveyance in trust. Dyer v. Dyer; notes. Darte v. Otte; 35 Hun-
vanz, 208, 55 Eng. Reprint. 875; Smith-
sonian Institute v. Meech, 169 U. S. 398;
42 L. ed. 705, 59 L.R.A.(N.S.) 900-930,
ext. n.; Hayne, 97 Calif. 239; Stout, la.
L.R.A.1915A, 711.

Contra: Flint, 13 Mass. 443, 7 A. D. 102
(Plaut enim); McCartney. 11 App. Ca.
D. C. 1.

Written contracts must be respected. Master
v. Miller, quoted 44 L.R.A.(N.S.)
388.

To vary or to supplement minutes of a
public body. 50 L.R.A.(N.S.) 90-106.

The interactions of Evidence, Pleading,
Practice, Equity Contract and of funda-
mental law is reflected from the discus-
sions of Lester v. Foxcroft, L. C.
341, 3 Gr. & Rud. In this class of
cases the burden of the discussion is
how shall the statute of frauds, which
require that contracts relating to real
estate be evidenced by a writing be con-
structed. This is one of the most in-
structive cases for a practitioner. It
is one of the best illustrations of the
dominancy of fundamental law over
statutes and local and flat laws. From
this aspect it is one of the great cases
that can be cited to sustain the exist-
ence of the Prescriptive Constitution.
It shows that statutes yield to funda-
tion: In Praxentia). Ex dollo malo
mental law. (See Prescriptive Consti-
tion oritur actio is one of the funda-
mental canons of the law and to
vindicate it statutes and local laws must
yield. This is what Lester, illustrates.
The rule that Oral evidence is inad-
missible to alter or vary a writing also
that a statute that is in accord with
the letter of the Constitution is im-
perial and calls for a construction ac-
cording to Ista lex scripta lex is to be
considered with cases like Lester. (See
also Oakley v. Aspinwall, L. C. 222,
3 Gr. & Rud. stated and discussed un-
der the title Nemo debet esse iudex.)

The ablest and fullest resume of the
oral evidence rule is found in relation

Oral Evidence.—
to Woollam v. Hearn, L. C. 53, 3 Gr.
& Rud. From Lester and Woollam the
student will get glimpses of the
importance of the oral evidence rule.
These cases will well illustrate the
dominancy of Equity In Procedure. In
Lester it dictates important rules of
both Evidence and of Pleading. In
Equity, rules of Procedure are insepara-
ably interwoven. The facts reflected
show that all of the above subjects
have interactions and that the law is
an entirety. The student is referred to
L. C. 46-53, 3 Gr. & Rud. for a gath-
ering of important and instructive
cases anent the oral evidence rule.
From these the bibliography of the
subject is indicated.

It has long been said that if you
change the law of evidence you remove
the landmarks of the law. The truth
of this saying may well be illustrated
from the oral evidence rule. To
change this affects the attitude of the
state in Procedure, titles to property
and all that depends upon certainty
and stability. The Feudal lawyer
reckoned much from certainty. (Dow-
aston v. Payne). But he did not im-
press it so that it was understood. He
did not set out and plainly teach that
these maxims rightly expressed the
law from old and that any dis-
turbance of these by local and flat laws
was shaking the foundations in judi-
cial operations:

1. Contra scriptum testimonium non
scrittum testimonium non fer-
ter: Against written testimony
unwritten testimony shall not
be received. (§ 53, 1 Gr. &
Rud.)

2. Plaut enim de his contractibus
scrittur, ut quod actu est,
per eas facilior probari poterit:
The ease, facility and certainty
that one stipulates for in writ-
ing should stand as proof. This
is a part of the contract and
too, a most important part. § 51,
1 Gr. & Rud. Master v. Miller;
Barton, 51 L.R.A.(N.S.) 346;
44 Id. 388.

3. De non apparentibus et non ex-
istentibus caelest est ratio: What
is not judicially presented can-
not be judicially considered or
decided. S. L. of the Law Re-
stated. From this maxim Pleadings
ought he defined. § 48 Equity in Procedure.
Mon-
dale v. Stott, L. C. 17, 3 Gr. &
Rud.; Palmer v. Humiston;
Milbro; Vicksburg.

Anent all documents the above can-
Oral Evidence.


In Contract the rule in New York appears to be shaken in Clark v. West stated ante Contract. Generally see L. C. 46–54, 3 Gr. & Rud.

ORDINANCES: BY-LAWS: 4 Gr. & Rud.
ORDINE PLACITANDI SERVATO, SERVATUR ET JUSTUS: The order of pleading being preserved the law is preserved. To illustrate: Formal matters cannot be passed, and afterward returned to. If one is not properly served with process he must apply object to this; he cannot proceed and try the case and then object that the process is not regular. Abatement and dilatory matters must be raised and disposed of in their right order. The logic and the philosophy of the law dictates these observations. L. C. 290a–299, 3 Gr. & Rud.

ORE TENUS: By word of mouth. The general demurrer is never waived and may be raised orally or otherwise. Campbell v. Consaulis; Tooker v. Arrows. The state is never stopped.

ORIGIN OF A THING OUGHT TO BE INQUIRED INTO: A thing is construed from what was the cause thereof.

ORIGINAL ENTRY: Price v. Torrington.

ORIGINAL PACKAGE: Bartemeyer, 2 Gr. & Rud.

OSBORN v. MONCURE, 3 Wend. 170, 4 Gr. & Rud. A “cause of action” must not be commenced before it has accrued. Quod ab initio: It should not be alleged that one is a wrongdoer, when he is not. See SHAM PLEADING.


OUTRAM v. MOREWOOD, 3 East. 346; Cromwell v. County of Sac. L. C. 25, 26, 3 Gr. & Rud.; Res Adjudicata; Retopped by verdict. How pleaded and presented. Doly. 4 N. Y. 74.


OWEN v. WESTON, 56 A. R. 547; 67 L.R.A. 179–195, ext. n. Amendment of records. 3 Gr. & Rud.

PACI SUNT MAXIME CONTRARIA VIS et aura: Force and wrong are especially contrary to peace. The establishment of justice and the due administration of the laws are the corner stones of protection and of good government. See Multitudo.

PACTA CONVENDA QUE NEQUE CONTRA LEGES NEQUE DOLU MAIO MAIO SUNT OMNIMODO OBSERVANDA SUNT: Contracts which are not illegal and do not originate in fraud must in all respects be observed. Modus et conscientia. Cited § 17. Buyers of goods. All contracts not tainted with illegality should be enforced. Hooare v. Rennie: Juris precepta: in pari decerto: ut dicit publicum: Conventus privatorum non potest publico juro derogare: Crimen omnia ex se nata est. 7 Cr. 214, 3 Gr. & Rud.; L. C. 358-374, 3 Gr. & Rud. Privity pactuonibus.

PACTA DANT LEGEM CONTRACTU: Agreements give the law to the contract. But it must not be illegal. Pacta conventa legantur: i.e., the maxim modus et conscientia vincunt legem et communia error facti jus have a wide operation: But the law of public policy must not be infringed: Salus poulis suprema lex. Campbell v. Constables.


PACTIS PRIVATORUM JURI PUBLICO non derogari: Private contracts must not derogate from public law. In pari: Pacta conscientia.


Defences not pleaded are waived. All that could or might have been heard is presumed to have been. Dambmann, 4 Hun. 50. Cases: Ames Cases Pl. 180. More v. Butler, L. C. 35, 3 Gr. & Rud. The evidence must correspond with the allegations and be confined to the point in issue. Praeura probatur quod pro-
Parliament.—
everything, or, as it is now construed in England, not much of anything.

Justinian was called to an accounting upon the charge that he had corrupted the maxims so as to increase his prerogatives. Antiquity jealously guarded its mores of government and hastened to resist any attacks upon these. To corrupt or to change them makes way for confusion and arbitrariness. Rome had an unwritten—a prescriptive constitution—which is the higher law wherever the civil law is adopted and followed.

In Rome and in England a score of maxims are the heart and vitals of the law of substance, and they have not and cannot be changed in a constitutional government. (Page xvii, Hughes’ Equity in Procedure, where James C. Carter is quoted.)

Just as formerly, it was thought that the king was omnipotent, so nowadays a like power is claimed for the “King in Parliament.” The growth of democracy has transferred the seat of power from a single arbitrary figure to a number of more representative figures, in Parliament assembled. But the process involves not only a transfer of the seat of authority, but also a diminution in the extent or arbitrariness of the power itself. The process of democratizing a government necessarily makes against the omnipotence of any branch of that government. This process has been steadily going on. In Blackstone’s day, the theory was that there were three co-ordinate divisions of the government—kings, lords and commons. Since then the powers of the King have passed almost entirely into the hands of the ministry, and still more recently, the commons have shorn the lords of practically all their former power.

So it is that old theories of government which have seemed in their day the very foundations of the state, pass away and give place to new conceptions.

So it is with the theory that Parliament is omnipotent. Parliament has never sought to test its powers in this direction and probably never will. The claim, therefore, that such power exists cannot fairly be said to be established, and there certainly have been judges bold and patriotic enough to baffle Parliament in times more despotic than we live in: witness Coke and Holt. About the middle of the 19th Century courts spoke for constitution-
al law and liberty and informed Parliament that fundamental law was above government and its agencies, and that by this law the Acts of Parliament must be construed. (Stockdale v. Hansard; Dimes v. Grand Junction Canal, Leading Cases 277 and 176, 3 Grounds and Rudiments of Law.) In Milligan’s Case (4 Wall. 2) the Supreme Court of the United States spoke to Lincoln; likewise did the supreme court of Illinois in Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 149. Mansfield, in Mostyn v. Fabregas, informed the Governor of Minorca that there were limitations upon his powers. And so did the dissenting judges think with reference to American governors in Pettibone v. Nichols, 203 U. S. 192, stated in 4 Hughes Grounds and Rudiments of Law.

The distinction between an absolutism and a constitutionalism is that in the latter all official power is limited and defined, while in the former the governor can do as he chooses—just as his whims, caprice and emotions dictate. From this distinction arise definitions which are confounded whenever it is insisted that Parliament or the executive, or the judge, is omnipotent. Omnipotent power is only another name for arbitrary power. Now any department of state invested with omnipotent power, or arbitrary power, is not a constitutional agency, but is the scrvitor of an absolutism. It is a contradiction of terms to say that a constitutional government has agencies invested with omnipotent powers.

Men have certain inalienable rights—rights to life, liberty, property and to abide in the land of their birth, unless transported for crime. Only by arbitrary power can they be despoiled, or denied these absolute inalienable rights. To attempt to alienate these rights is illegal and such a contract is null and void. The government that exacts or imposes such a compact is dangerous and traitorous; it is not a government of protection; it is not a government of laws, but of men. The state agency that attempts to deny the rights of man has not immunity, but it has its crimes doubled.

Coke was most resplendent when he informed “the King in his Parliament” that all their enactments would be construed to harmonize with fundamental law. There was one maxim he well understood. This was:
Parliament.

Lex non exacte definit sed arbitrio bono viri permittit. (The law does not exactly define, but always leaves something to the judgment of a good and wise man.)

This maxim was applied by the Federal Supreme Court in Church of the Holy Trinity v. U. S., 143 U. S. 457, stated 70 L.R.A. 456, 932, 2 Hughes' Ground and Rudiments. It was also most instructively applied in State ex rel. Henson v. Sheppard, 192 Mo. 497; also in P. v. Turner, 55 Ill. 280, 8 Am. Rep. 643; also in Oakley v. Aspinwall, 3 N. Y. 547; End. Stat., 182, 348. See these cases and others cited in Hughes' Grounds and Rudiments of Law. From these cases it will appear that fundamental laws control both written constitutions and statutes.

State ex rel. Henson v. Sheppard clearly stands for the latter proposition. In this case the clerk of the circuit court who was indicted for murder was not allowed to act as clerk of the court while on trial therein, notwithstanding the constitution and statute said he might hold his office until convicted for crime.

And not less instructive is the Oakley Case, where the constitution provided that the court of appeals should consist of eight judges. But in a case where one of the judges was interested it was held that he could not sit, and therefore seven judges might constitute the court in such a case.

We are told that in America the situation differs from that in England. Here, it is said the legislature is omnipotent, except as restrained by express constitutional restrictions. Yet in P. v. Turner it was held that a statute could not take a child from a parent except for good cause shown. The constitution was not involved; the statute was nullified on grounds of natural, or fundamental law.

To the same effect is Riggs v. Palmer, 135 N. Y. 506, 12 Am. St. 819, 5 L.R.A. 340, 349, ext. n., 12 Crim. Law Mag. 119. In this case it was held that no heir could inherit the estate of one murdered by him. A statute giving such heir the estate is nullified. The murderer of his devisor cannot inherit his estate. Nullus commodum capere potest de injuria sua propria.

In all these cases and in many more, fundamental law is held to control all other laws. Generally it is clear that public policy dictates the nullifying construction.

Parliament.

Salus populi suprema lex (That regard to be had for the public welfare is the highest law). This and other maxims are extensively discussed in Broom's Maxims, but the author does not seem quite sure whether the maxims he discusses will or will not override an Act of Parliament. To do this, he thinks there are needed "express words" and a clear intention. Of course the rule is, that the intention controls the letter without regard to the "express word." The discussions by the author will indicate the reluctance of many English writers to renounce an unreasonable, incongruous and even dangerous doctrine. Whether or not "Parliament is omnipotent" calls for a plain statement and definitions and necessary deductions from them. Broom's treatment of the maxims relating to governmental powers is unsatisfactory. He does not reason out his principles. For instance, under the maxim Nova constitutio, etc. (page 34) he lays down the Roman rule that the legislature cannot change the laws retrospectively to the injury of the people. He says: "Every statute which impairs or takes away a vested right, acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective in its operation and opposed to sound principles of jurisprudence." He cites both English and American cases in support of this position, but then proceeds to cite other contrary cases, without attempting to distinguish between them, or to criticize one set or the other, or even to notice that there is a conflict. Such a method is reprehensible. It cannot enlighten the student.

English judges have not all spoken with equivocation, doubt or vacillation, Campbell v. Hall, 1 Cwmp. 204, 98 Eng. Reprint 1045; Day v. Savidge, Hobart, 87, 80 Eng. Reprint 235; London v. Wood, 12 Mod. 669, 88 Eng. Reprint, 1592, 1 Blackst. Comm. 91, compare 1 id. 16. ("True it is that what Parliament doth no authority on earth can undo."). And Broom is uncertain and equivocal. Broom's Maxims 5, 121; likewise Sir Frederick Pollock. 

Nemo debet esse iudex in propria sua causa. (No man can be judge of his own dispute.) Not even an Act of Parliament would prevail against the above maxim. Dimes v. Grand
Parliament.—

Junction Canal; London v. Wood; Oakley v. Aspinwall (N. Y.); S. ex. rel. Henson v. Sheppard (Mo.); Broom's Maxims 121. See cases cited, sec. 511, Hughes' Equity in Procedure.

A careful review of the cases last cited will show that they all place fundamental law above written constitutions and statutes. These cases stand for the proposition that the law of substance is not a local and flat establishment.

We are told that the English courts hold that fraud and corruption will not affect legislative acts, not even of town councils. This does not prove Parliament to be omnipotent. The maxim, Ex dolo mali non oritur actio (Fraud vitiates all into which it enters) has no application to legislative proceedings. This review is the same in both England and America. Lea v. R. R., L. R. 6 C. P. 582; Fletcher v. Peck (U. S.) 2 Grounds and Rudiments. But in executive and judicial proceedings fraud will vitiates. Excepting in legislation, the maxim last cited is of universal application. So it may be conceded that "Parliament is omnipotent" against charges of fraud and corruption.

A score of great principles makes up the heart and vitals of all law of substance. Now substance is that which is essential; that which cannot be waived or abolished. One of these principles is expressed in the words of the Master: "Ye cannot serve God and Mammon." This is paraphrased into Nemo debet esse judex in propria sua causa, above referred to. Thus the unity and the entirety of great principles is perceived. Sec. 511, Hughes' Equity in Procedure.

But the greatest of all these principles is the lawyers' Golden Rule, which is found on the title page of Broom's Maxims, and which is as follows:

Juris praecpta sunt hae: Honeste vivere; alterum non ladere; suum cuique tribuere: These are the precepts of the law: To live honestly; to hurt not one another; and to render to everyone his due.

Here we find in its original setting Alterum non ladere (Hurt not one another); which lies at the base of torts, also Suum cuique tribuere (Render unto everyone his due). Now this great maxim from the Roman lies at the foundation of all laws; from it, it is said, all law can be unfolded. Indeed Blackstone may be cited to sustain this position. Of course a maxim so general and universal applies to government and all its agencies as well as to individuals. Like the Divine injunction, "offend not these little ones," it applies to rulers as well as to companies. We may, therefore, well ask how the governed could invest any agency of government, any department of state, with arbitrary power. Since no man can so much as govern himself, why should he or a collection of men claim from the governed the gift of arbitrary power to govern them? We have shown that the exercise of arbitrary power is a crime, and it being so, then in what light stands any department of state when viewed from the standpoint of the lawyer's Golden Rule or the Divine injunction above quoted?

A part of the lawyers' Golden Rule is the first maxim Mr. Broom presents, which is, Salus populi suprema lex. In relation to this maxim and the succeeding four, Mr. Broom discusses the origin and sources of power exercised by government and its agencies. Of his discussions it seems well to observe that the author should have, boldly and from principle, vindicated the great motives of government, which are the principles he picked from the Roman. But instead of this he wandered into the wilderness of cases and picked from them passages which show that the judges were in haste and doubt. They therefore covered the great canons with the silt of judicial opinion, which no doubt was warped and distorted by the necessity of bending the supple knee. Of this Junius observed of Blackstone. And this is what the governed do in every constitutional government when they concede to government and its agencies arbitrary power, which is a thing no man can give.

Nemo dat qui non habet.

In America practically all concede that arbitrary power is nowhere vested except as a judiciary is vested with sovereign power, as it declared for itself in Marbury v. Madison, and in Martin v. Hunter's Lessee. Of course all must acquiesce in these decisions, but not in an assumption of arbitrary power, by the judiciary, or any other state agency.
Parliament.—

There are powers assumed by four-fifths of the American courts that are far more objectionable than is the arrogant dogma, "Parliament is omnipotent." The Englishman's Parliament is sometimes said to be omnipotent while most of the American judiciary arrogate to themselves the exercise of powers without regard to their records. This "new dispensation" is found in New York cases, from Eno v. Woodworth (1853), to Clark v. West (1908). But among these cases are found others like Clark v. Dillon (97 N. Y. 370) where the essentials of procedure are discussed in accordance with the great maxims above referred to. Here is a case that discussed great principles in a way very unlike many of the cases selected by Mr. Broom and above referred to. Compare Clark v. Dillon with Baily v. Hornthal (N. Y.), also Guilling v. Bank, 29 Nev. 286-290 and cases cited pro and con. And here let us commend Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 118 Am. St. 612; S. v. Muench (Mo.; Am. State).

The injury resulting from the English motto, "Parliament is omnipotent" is insignificant with that resulting from the practice that has grown up in almost all American courts, which is called the "Theory of the Case." This new doctrine may be gathered from New York, Missouri, Minnesota and the states that have been led by the pioneer code states. The doctrine is approved in 2 Thompson's Trials, sections 2310, 2311, also in section 6, pages, 9-16, Bradbury's Rules of Pleading, also Baylies Code, also Wallace's Pattison's Code (Mo.). Under this doctrine courts are not bound by their records; they may enter judgment for an entirely different thing from that described in the pleadings. So while the Englishman imagines his "Parliament omnipotent" the American may possibly be proud of the vast and undefined powers assumed by his judiciary, at least in the theory-of-the-case states. See titles, Theory of the Case and Variance in 4 Hughes' Grounds and Rudiments of Law.

"Due Process of Law" is discussed by most American judges like the English Judges quoted by Broom in reference to the "omnipotence of Parliament." They do not speak as the Roman did, who comprehended the mottoes of government. The Roman spoke for mercy and justice at the Crucifixion; and he demanded "Due Process of Law" for Paul; that is to say, he demanded a certain writing, or notice, and a hearing in accordance with that notice and that the judgment accord with that notice and that hearing. The accused must be given an opportunity to be heard and "you must prove the charge as laid." Here was the command to render unto the accused what was due from a protecting government.

Here in the 20th Century the governed are told by one great government that its "Parliament is omnipotent," while another great empire, the American, claims a like distinction for its judiciary, which informs us, with but few exceptions that it is not bound by its record but may enter judgment for what it pleases, and that its records are a verity and are invulnerable to attacks for fraud.

Such is the result of empirical teaching and construction to which the Englishman's motto has contributed. The Englishman has overtaught and overimpressed his motto. "Parliament is omnipotent," and this has greatly aided in misleading and confusing the American. The result is that the law is not seen to be based on organic principles, but is thought to be a lot of statutes and cases, out of which overtopping bulks of Digests and Cycles and annotated cases have been given out by commercial publishing interests until the profession is lost in bewilderment. The "average lawyer" knows nothing of fundamental law. He believes the law is local and flat; he does not know its philosophy. He cannot tell why the general demurrer cannot be waived; he must study his statutes and cases, burrowing into masses of Digests and Cycles and other ephemeral literature. He does not see that the state is a party to all litigation, and is deeply interested in having a right record of what has been litigated. His schools, his literature, his judiciary and its establishments are a failure; he himself has failed as a scholar, teacher and leader. Our foremost lawyers are saying so all over the country.

The lawyer's ignorance of the law is what is the trouble with the judiciary, the recall of which is demanded in many quarters, and certainly the
Parliament.—
Ignorant lawyers should be recalled. A lawyer who is not better taught than that fundamental law comes from his own little state capital must fail as a useful servitor of a great government. Such is the result of teaching that "Parliament is omnipotent" and of following blindly authors who wrote under such lights as did Blackstone, Tind, Chitty, Stephen, Gould, Heard, Tyler, Freeman, Dillon, Sedgwick, Thompson, Pomeroy and all the theory-of-the-case code authors. Generally it is enough to read the prefaces of Chitty, Stephen, Gould, Pomeroy and of their editors and followers. These "case law constructionists" and annotators have confused the legal profession and its judiciary so that their usefulness is no longer apparent, and now and at last a power is making itself felt that we cannot call law and order; for it is a power that is reaching out after the lawyer, his judiciary and its establishments.
Hon. Elihu Root gives due warning when he says, "It is too late to talk reform. Palliatives will not do; revolution is demanded and it is demanded now." The lawyers of this country are sleeping sentinels on duty. Arbitrary power is alert and has been sapping and mining the bulwark of our rights and liberties. The lawyer and his judiciary is involved in the motto: "Eternal vigilance is the price of liberty."

Arbitrariness is never at rest; it at one time employs an executive, at another time a Parliament and at another time a judiciary. It is the latter that can insidiously inject poison into every vein and artery of government and bring upon a people the greatest scourge of an angry Heaven.

PAROL (ORAL) EVIDENCE: 4 Gr. & Rud. Rationale of the rule, § 53, 1 Gr. & Rud.

PARTICULARS: See Bill of, 2 Gr. & Rud.

PARTIES: There must be parties to a cause of action; they are jurisdictional. Quis, quid, coram quo. And they must state their names with certainty. Wiegold v. Herman, L. C. 98, 3 Gr. & Rud. From the nature of things a wronged party must complain; courts were not created to entertain the allotments of any other class. McCandless, 211 U. S. 437; Williams v. Eggleton, L. C. 94, 3 Gr. & Rud. One who is not a party to the record and the judgment can appeal. Leaf Tobacco Board, 222 U. S. 578.


PARTIES.—
Requires that necessary parties be present. De non. This is not a matter that statutes can dispense with. The absence of proper parties is a ground of the general demurrer and this cannot be waived. However statutory regulation is conceded in those courts that hold that one without capacity can sue. Bulkeley v. Big Muddy Min. Co. 77 Mo. 105. Wilson, 42 L.R.A.(N.S.) 722; statutes are often construed to excuse the absence of a real party in interest. Seven Lakes, 40 Colo. 382, 17 L.R.A.(N.S.) 329.

When a record is pleaded in Res Adjudicata it is obvious that it must present proper parties. Argumentum ab anno monti. A pleading that cannot answer the tests of Res Adjudicata is fatally bad to start with. It is bad on general demurrer and at all of its stages. It offends the state. Alterum. The general demurrer is never waived. "It will keep." Mallincrodt.
The general demurrer tests a record for its uses at the stage of Res Adjudicata. Interest repugnant: The state demands it. Res inter alias acta.

What the state demands cannot be waived nor legislated away. It cannot be contracted away. Campbell v. Consol. The discussions attending the question of parties under statutory regulations are confusing and often absurd.


PART PERFORMANCE: See Lester v. Foxcroft.


PECK v. BROOKS, 1 Exch. 213. L. C. 368. 3 Gr. & Rud. In pari. In jure; Knowledge of seller when too remote.

PECK v. v. Earl of Exch. 213. L. C. 368. 3 Gr. & Rud. In pari. In jure; Knowledge of seller when too remote.

PECK v. BROOM, 1 Exch. 213. L. C. 368. 3 Gr. & Rud. In pari. In jure; Knowledge of seller when too remote.

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PECK v. BROOM, 1 Exch. 213. L. C. 368. 3 Gr. & Rud. In pari. In jure; Knowledge of seller when too remote.
PLEASINGS.—

The student should grapple with and settle the question for himself as to whether substance can be waived. This is a leading question in all systems. It is neither singular nor peculiar to any. Story and his school deny that substance can be waived on the one hand, while on the other hand, Thompson and his followers take the opposite view. (See Story.)

Inseparably connected with the above question is the question as to whether or not the general demurrer can be waived. (See Demurrer.) Those who deny that the general demurrer can be waived (Tooker v. Arnoux) deny that substance can be waived. (Nalle v. Oyster.) These also deny that filing an answer or a response Pleading waives substance. Therefore a limitation must be placed upon the almost axiomatic rule that "filing an answer to the merits waives the demurrer;" for this rule must be made to accord with the rule that the general demurrer is never waived. A pleading that is subject to general demurrer has no merits and therefore there can be no answer to a statement that has no merits. This view will allow the rule that the general demurrer is never waived, to stand. And so it would follow that the rule should read this way: Filing an answer waives a special or a formal demurrer. And to this view the Code provisions can be reconciled which provide that filing an answer to the merits waives all defects except that no cause of action is stated; that nothing is described that jurisdiction can attach to. (Quis quid; De non.) Minnesota.

These views also involve the maxim Verba fortius. Clark v. Dillon and its cognate cases illustrate this maxim. These cases are in accord with the view that the general demurrer can never be waived; also with the Trilogy of Procedure throughout. (§§ 1-13, Restatement.)

The view that a verdict supplies or can supply omitted allegations of substance has led to great confusion. (Rush.) These erroneous views have led to the jumbling of the mandatory and the statutory records.

Herefrom arises the "theory-of-the-case" doctrine.

The much appreciated "law quizzers" in some quarters might well include several questions that will suggest themselves by a glance at the title, Federal Lawyer. And this ques-
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tion has the Feudal law settled one question or rule of Pleading and if so which is it? Also this, has he not constantly fought over and over unceasingly both in his statutes and in his courts the principle Verba fortius accipitur contra proferentem? And does not this canon stand to-day in New York also in Illinois as it always did in Rome and in England except as it was shaken by Sergeant Williams and his followers who have parroted what he said in a note to Stennell v. Hogg? And is not his statement the basis of all of the statutes of Amendments and Jefosals? (See Dovaston v. Payne, L. C. 217, 3 Gr. & Rud. Also Clark v. Dillon quoted in relation to Codes.) Also, where in Feudal literature has that maxim been cited and explained? Have not the most noted Code authors been approved and denied that maxim in almost consecutive sections? (See secs. 533, 546 Pomeroy Code Remedies; Also Thompson’s Denials of that maxim: title Story.)

See the Restatement of Law: The outlines of Pleading, §§ 1–27; Five fundamental principles, § 5; These omitted by Feudal authors § 13; The old law in the basis of, §§ 3, 7; Quis, quid, coram quo is the most instructive maxim, §§ 6, 7; The general demurrer is never waived (See Demurrer; also Collateral Attack; also Res Adjudicata), §§ 2, 16, 22; Pleadings are Jurisdictional, § 22; Cannot be waived: (Campbell v. Consalus, discussed in relation to Codes; also Warren; stipulation cannot dispense with Pleadings. See Literature; Codes; Consensus tollit errorem.)

The following questions are submitted to draw attention to the logic and the philosophy of procedure also to the origin of the causes that have led to the confusion and bewildermend of pleading and its related subjects:

1. Are there not a few fundamental principles that underlie every system of Procedure that can serve a government in carrying forces, which followed Guerat v. Warren; stipulation cannot dispense with Pleadings. See Literature; Codes; Consensus tollit errorem.

2. Name and explain one or more. (See In praecentia.)

3. If there are Universal, Constitutional principles common to all systems then why should each system be studied irrelatively?

4. Are Pleadings immortal or are they junctus officio when the judgment

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is entered? (See Outram v. Morewood, L. C. 25 et seq. 3 Gr. & Rud.)

5. Do Pleadings limit the scope and the operation of a judgment or is a judgment construed from its own four corners as a judgment, and additionally the fact of jurisdiction of the person? (See Vicksburg v. Henson, 231 U. S. 259; Cases cited; Garrett. Monday v. Vail, L. C. 79, 3 Gr. & Rud. cited in Hughes’ Equity In Procedure.)

6. Of what consequence is a judgment for acres where the Pleadings show that a judgment for dollars was commenced? (See Vicksburg v. Henson, supra.)

7. Can variances and Departures be permitted in any system? (See Frutaro. Garrett; North Carolina.)

8. Can the operation and effect of Pleadings be enlarged and controlled by the contracts and stipulations of the parties? (See Campbell v. Consalus, 25 N. Y. 613, 616; Interest res publicae ut sit finis litium; Res inter alios acta.)

9. Are not the elements next enumerated Universal requirements in all systems of civilized government: That a statement of a “cause of action,” must (1) specify the court in which the action is instituted? (2), that the name of the plaintiff—the wronged person must appear? (3), also the name of the defendant—the wrongdoer? (4), also the wrong he did? (5), also the amount of damage he did? Quis, quid. (See Ad Damnum.) Garrett.

10. May we not call these elements the “irreducible minimum,” of a Pleading that will pass the general demurrer and its corollaries?

11. Are not the above elements required by the Roman maxim, Quis, quid, coram quo: (See Hughes’ Equity In Procedure.)

12. Have not Codes reaffirmed the maxim last referred to?

13. Can the omission of a material allegation be supplied by liberal construction? (See Alder; Consensus; Garrett.) Cragin v. Lovell, 109 U. S. 194; citing, Blacum; McAllister v. Kuhn; Ruhton. Minnesota, 104 U. S. 48.

14. Which one of the “irreducible minimum” above specified can be supplied by liberal construction, if omitted?

15. Is not Verba fortius accipitur contra proferentem a Universal, Constitutional canon of the Prescrip-
Pleadings.—

tive Constitution, applicable to all
documents? (See Hughes' Equity, §§
163-168.)

16. An is not “Every presumption
against a Pieser” at all stages—at
the stage of the general demurrer and
all of its Correlatives? Garrett.

17. Has Verba fortius been changed
in any jurisdiction except by disjointed
contradictory cases? Lauan, 42

18. What has been the consequence
of attempting to change Verba fortius
in the various jurisdictions? (See the
discussions of Clark v. Dillon (N. Y.)
; C. & A. R. R. v. Clausen (Ill.) ; Baker
v. Warner (U. S.) ; Ross v. Milne
(Va.)

19. Can the general demurrer be
waived: If so where, exactly where?
(follow Jackson v. Pesked through the
works on common law. See Litera-
ture.)

20. Does not the rule that the gen-
eral demurrer cannot be waived de-
pend upon equal and uniform Construc-
tion and the consistent application of
Verba fortius at all stages? (See
Baker v. Warner ; Goldham v. Ed-
wards; Literature.)

21. Is not the rule of the general
demurrer reckoned from the attitude
of the state in Procedure? (Alter-
um.)

22. And is not the attitude of the
state always the same and dictating
the same logic and philosophy at the
stage of the general demurrer and at
its Correlatives—even unto Collateral
Attack, Res Adjudicata and “Due
Process of Law?” (Literature.)

23. Do not the rules of the general
demurrer depend upon the equal and
uniform application of the maxim
Verba fortius at all stages? (See
Story’s Equity Pleading, quoted § 47
Hughes’ Equity.)

24. Are not Pleadings jurisdiction-
al? (See Story, last cited: Nalle v.
Oyster, 230 U. S. 165) ; Garrett ; 2 C.
J. Cye defining allegations as merely
for trial purposes.

25. Have not authors and courts
generally failed to grasp the attitude
of the state and to unfold the logic
and the philosophy of procedure there-
from? (See Alterum non ledere;
Quod ab initio non valet intraictu
temporis non convallavit §§ 190-295
Equity In Procedure. Eighty v. P.)

26. The distinctions between the
mandatory record and of the statutory
record (bill of exceptions). See Wind-

Pleadings.—
sor v. McVeigh, L. C. 1 et seq., 3 Gr. &
Rud.; Perrinovskj v. Coerer, (Mo.);
Nalle v. Oyster (230 U. S. 165) ; South
Carolina R. R.

The significance of the above ques-
tions cannot be appreciated by one
not introduced to the chaotic condi-
tion of Procedure and of its litera-
ture, which is devoid of all logic and
philosophy. In reference to Jackson v.
Pesked we shall make some observa-
tions and call attention to the fact
that the deed—real estate are not the
only subjects that have, Shelley Cases,
for procedure is made up of their jarg-
on. Nestling around the Federal moti-
to “Parliament is omnipotent” are
many “Shelley” Cases. Kent kicked
“Shelley’s” out of the law and now it
remains for some Judge to speak of
such cases as Jackson v. Pesked and
Stennell v. Hogg and all such cases as
lacked directness and clearness of ex-
pression. (See Consensus.) Dovason
v. Payne.

We are willing to concede that each
of these cases is defensible and that
each requires that substance must ap-
ppear in a Pleading in order to pass the
general demurrer. But after conced-
ing this we then point to the fact that
alongside both of these cases is found
the statement of Sergeant Williams
that substance can be waived. Now,
substance is required by the state and
its interests cannot be waived Alter-
num non ledere; Res inter alios acta;
Campbell v. Consensus (Code). But
along with Jackson and Stennell, Tidd,
Chitty, Stephen and Gould can be
cited to sustain the view of Sergeant
Williams. Now did these authors
gather a right view of those cases?
And did any of them understand the
logic and the philosophy of Procedure?
How could they understand it if they
thought that the interests of the state
could be waived?

We are unable to cite Story only,
as an author who more than intimates
that there are Universal, Constitution-
al principles that arise from the Pre-
scriptive Constitution which is above
the motto that “Parliament is omni-
potent.” He wrote sections above all
and of such are his sections 10, 25, 28.
These are truly great Code sections.
Herein he quotes Quis, quid, coram
quo: which enumerates the “irreduc-
ible minimum” of any and of all state-
ments of a “cause of action” in all
systems. Here is something Universal
and Constitutional. It is reaffirmed
by the Codes. Indeed each of these
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sections is the fundamental law of the Codes. But no Code author has perceived and broadly stated this fact. Look at the § 10 and then see what Coke, Blackstone, Tidd, Chitty, Stephen, Gould, their editors and followers said of the matter of that section. See if it is permissive of the motto last referred to. Story and the courts in Clark v. Dillon and C. & A. R. H. v. Clausen intimate, but not clearly enough for all, that there is a higher law governing Procedure than Parliament. But this was not the doctrine of the authors above referred to. It was not Feudal doctrine. The Code came in 1848 in the days of state rights which were founded on that motto,—on the “letter of the Constitution”—on Iota ices scripta est. Such were the conditions and so the Code came to be viewed as a local and flat creation which each jurisdiction might construe as it chose without regard to fundamental law. It became the settled doctrine, that each jurisdiction must enact its own Code also expound it as a local establishment—as something sui generis. The Prescriptive Constitution, the sections of Story, the light of logic and of philosophy did not lead in the Construction of the Code. With Biddle v. Boyce (Mo.), and Eno v. Woodworth (N. Y.). The struggle began. “Sedley” Cases were soon decided and gathered with avidity, and soon became a menacing cloud darkening the way until to-day the sections of Story, and the maxims reaffirmed by the Code are construed away for the “Theory of the Case.” (See Gulling v. Bank), the struggle over the Code is indicated in the preface to Tyler’s edition to Stephen’s Pleadings which so many have been pleased to quote and follow with approval; also Par. 2 Preface Pomory’s Code Remedies, also his §§ 75, 509–514, 533, 546, 592, et seq.; also The Preface to Nash’s Ohio Code, 1856.

The Feudal authors had their “Sedley” Cases—their Jackson v. Pesked, and Stenwll v. Hogg and the endless jargon surrounding these. But these discussions have been avoided by the Code authors, except as they have resurrected them under cases that arose under the Code.

There are great and instructive Code cases which plainly enough reaffirm Story and the maxims referred to. Among these are Campbell v. Consolid, 26 N. Y. 815, 816. See question 7, 17 (ante); Clark v. Dillon, 97 N. Y. 370 (See question 7 ante); Tooker v. Arnouz, 76 N. Y. 379 (a pleading must be sufficient within its own four corners—an answer will not supply an omitted allegation—limitations of Aider).

Elsewhere we combine these three cases and connectedly annotate them, and so to speak constitute them a “Datum Post,” from which we invite all reckonings relating to the fundamentals of the Code. Of course the fundamental demonstration throws light over all systems. We also seek to demonstrate that the Code brought with it nothing new of substance. Also that Code authors have not understood these notable Code cases, as their citation and discussion of the principles involved show; also that the courts are equally mired in confusion and bewilderment.

And how can it be otherwise when we look and behold all of the antagonisms that are apparent? Look at Story above cited on the one hand and 2 Thompson’s Trials 2310, 2311, quoted under the title Variance, 4 Gr. & Rud, on the other hand. The views of the latter author are generally advocated by Code authors and courts. The “Theory of the Case” has come to be recognized in most all of the states. (See Gulling v. Bank, 29 Nev. 266–280; Cases cited and discussed therein in New York, Missouri and Illinois.) From the various states eight kinds of Aider are discoverable and are introduced to operate against the certainty and stability that flows from the operation of Verba fortius. (See Questions 15, 16, 17 and 18 ante. And now it seems that Baker v. Warner, 231 U. S. 588, 593, adopts the views of Judge Thompson. The latter case like Jackson v. Pesked is defensible but it is a case from which indefensible deductions can be made. It assumes that a “new dispensation” is at hand and that the court will embrace it. Now what is that “new” and “enlightened” way unless it is the way advocated by Judge Thompson whose sections are above cited? (See Gulling v. Bank, supra; E. v. Munch (Mo.).

Feudal followers appear to favor Jackson v. Pesked and Stenwll v. Hogg more than Rushton v. Aspinall by Mansfield, whom they were taught to ignore. They hated the lawyer of...
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the ages. The latter case is reprinted and followed by Kent in Bartlett v. Crosser (N. Y.) L. C. 5 and 6, 3 Gr. & Rud. Here are the greatest of Code cases, but no Code author or court has recognized them. They should be read and studied with Campbell v. Consaulus and the other Code cases referred to. Herefrom the significance of the above questions will appear.


Jackson v. Peaked and Stennell v. Hogg are cases cited along with Sergeant's William's view that substance can be waived. Tidd, Chitty and Stephen and their editors and followers have tried to straddle the antagonism between these cases and that view. And herein is proof sufficient that these authorities did not comprehend the attitude of the state. (See questions 9, 10, 11, 20, 21, 22, 23, 24, 25, 26, ante.) Not one of them comprehended the true definition of Pleadings, which is, "Pleadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudge it." (Section 48 Hughes' Equity In Procedure; See Story; Garrett.)

The above cases as viewed and interpreted by the Feudal authors are nothing less than a snarl of snakes in the way of every student. They are altogether a veritable jungle of incongruity, absurdities and contradictions. We have referred to them as a "Shelley's" Case. Anent the above observations let us be exact and precise for illustration's sake; for we are at the crux of important theories: Therefore let us suppose that either Jackson or Stennell had chosen and set the beacon lights we shall next mention and of these have observed.

For all courts and for all ages the "Manner of the Romans" is the law and this law is imbedded in a trio of maxims which we gather and set as next follows:

1. De non apparentibus et non existentibus eadem est ratio: What is not juridically presented cannot be judicially considered, decided or adjudged.
2. Frustra probatur quod probatum non relevat: It is vain to prove what is not alleged.
3. Verba fortius accipiantur contra proferentem: Every presumption is against a pleader. See questions 15, 16, 17, 18, ante.

The statement of every "cause of action" or ground of defense must be consistent with this Trilogy of maxims, also the logic and the philosophy that is deducible from them. Interest reipublica ut sit finis litium is also an important maxim of the law. For the application of this maxim there must be Pleadings (See Campbell v. Consaulus above cited), and these Pleadings are tested by the above Trilogy at the stage of the general demurrer and at all of its Correlatives. And of course at the stage of the motion in arrest (Goldham v. Edards.) Also at Collateral Attack. There is no fluctuation or variation of the construction for substance at any stage. To hold otherwise would confuse and dismember the logic and the philosophy of the law of Procedure. Thereby we would show that we did not comprehend the attitude of the state in Procedure. Herefrom arises the rule that the general demurrer cannot be waived. This rule exists to protect the attitude of the state in Procedure. (See questions 14 to 26 ante.) Garrett (the Federal test is the understanding of the defendant.)

Illinois has shown conspicuous loyalty to Tidd, Chitty, and Stephen as will appear by reference to Pennsylvania R. R. v. Ellett, 132 Ill. 654, 682-684, whereas Jackson v. Peaked is quoted and approved also the above authors. And still and nevertheless in this case the court holds that at the stage of Collateral Attack more liberal rules prevail to uphold a Pleading than at the stage of its test by general demurrer. In Chicago R. R. v. Hines, 132 Ill. the court holds that after the argument of the general demurrer its grounds cannot be raised at the stage of the motion in Arrest. Consider these cases along with the presupposed opinion in Jackson v. Peaked and the bewildering repugnances in that state will be suggested. Also the fact that Jackson and Stennell, and the Feudal authors have not given the needed light to safely guide the supreme courts which cite and approve them. Elsewhere we cite Baker v. Warner, which holds that more liberal rules prevail at the motion in Arrest than at the general demurrer stage. Garrett.
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Consider this view in the light of what the court might well have decided in Jackson and in Stennett as above digested. Had these cases been so treated, the fundamental principle from the Roman law and the different cases have been plainly stated. The Roman law is then how different would be the law of Procedure?

To sum up we will state that the object of the above questions and observations is to draw attention to the facts that there are certain Universal, Constitutional principles which underlie all systems in common and that the irrelevancy and discussions of these principles under a varied nomenclature is both delaying and bewildering. Also to the condition of the literature of these discussions. Also that the general demurrer and its correlatives rest upon the same texts and canons of construction throughout, and that chief among these is Verba fortius. Also the necessity of grasping these fundamentals and uniformly respecting them and the logic and philosophy that are deducible therefrom if ignored or lost there results the jargon and confusion that attend cases like Jackson v. Peaked by the authors named in relation thereto and who as guides lead courts to full reports with hodge-podge; to make of procedure a mass of local and provincial statutes and decisions. To illustrate these facts we have cited New York, Missouri and Illinois among others. From these states we have cited decisions the most worthy and instructive while alongside these are antitheses from the same court or perjuries and distortions of the logic and philosophy of the law. This could not be if courts saw Verba fortius as a fundamental principle in the sections of Story, in Clark v. Dillon and in C. & A. R. v. Clausen and in every argument of the general demurrer and of its correlatives. See the trio of maxims above cited. We have indicated the importance of Verba fortius also that it applies alike in the Roman, the English, the Federal in New York, in Missouri and in Illinois Verba fortius is a Universal principle. Now which author has plainly said so? (See Pomeroy, Logic).

Here we will submit to the judgment of the student what would have been the result if the court in Jackson v. Peaked had expressly named and vindicated the Trilogy of maxims we have mentioned in connection with that case. Also of what consequence it would have been to the Illinois court quoting Jackson to have set out that Trilogy of maxims and have vindicated them as high Universal and Constitutional law. Also the consequence to any work on Pleading, or any set of reports to set out and explain those maxims.

Whoever will look at these principles will wonder that no American court has quoted and upheld them as organic law. (See Codes.) These maxims if made index topic heads and the principles indexed to them become the most certain and useful of all index topics.

These principles are extensively discussed in Hughes' Equity in Procedure. They are the "Manner of the Romans," Nolde Pleadings as the most prominent and influential exposition of the reformed Procedure. But it is not as good as Blasi, who was more conservative and who gave some splendid sections (138, 141); but he too failed as a constructionist also in dealing with the general demurrer. Relating to this his work lacks depth and breadth. Not one Code author or court has succeeded in explaining why the general demurrer cannot be waived. Nor have they given the needed light to illumine the questions in the cases we shall next cite. They have all failed to cite and to explain the major—the organic maxims of the law. Instead they have ignored and renounced them. This is conspicuous in relation to the general demurrer and in reckoning from and showing the interactions of Procedure with Res Adjudicata, Collateral Attack, and Due Process of Law. They have not illuminated the distinctions between a government that maintains Pleadings as the greatest bulwark of protection and a government that tolerates the means of abuse of power and usurpation. (See De Non.) The Code remedies has all these faults and more. It is cited and followed, 1 C. J. Cyc 138, 1035, 1060. The Code came in 1848. The first case Biddle v. Boyce (Mo.); also Eno
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v. Woodworth, and Allen v. Patterson (N.Y.) show that the judiciary failed. They were like a child in the dark, in a strange room hunting for something. Plainly the courts were added. They had read the sermons of the Federal Supreme court (McPail v. Ramsey), and the outrageous effusions of Charles O'Conor, all of which were gathered up and quoted by Tyler in his Preface to Stephen's Pleading which was to long continue as a great classic to light and to lead the way. (See Chitty.) Who can deny that these works have led the way to cases like Gulling v. Bank and the discussions in New York over Clark v. Dillon; also to Weber v. Lewis, 34 L.R.A. (N.S.) 364–372, n. (commending Pomeroy as the standard author). And after Pomeroy has finished his works, whether or not Dovaston v. Payne (Verba fortius) is the law is a leading question. See Feudal Lawyer; Baker v. Warner, Logic.

The efforts of Pomeroy and of the Federal Supreme court have not settled the status of De non apparetibus in our law. Pomeroy did not cite cases like Slacum v. Pomeroy and Mansfield's cases. He left the way open for orators to declaim for "the high court of Chancery," and the "Rules of the Supreme Court of the United States," for Tidd and his followers, not one of which has so impressed the Trilogy of Procedure, that the great sections of Story have been accepted as applicable to all systems and particularly to the Codes. The Federal Court from Slacum on down has continued to state paraphrases of the rule stated in the maxim as we find it in Slacum, also in U. S. v. Cruikshank, L. C. 232, 3 Gr. & Rud.; McAllister v. Kuhn, L. C. 3, 3 Gr. & Rud., § 292, 1 Gr. & Rud; Cragin v. Lovell, 109 U. S. 194; Minnesota, 194, U. S. 48–73 (Harlan J.). Nalle v. Oyster, Vicksburg v. Henson, and lastly and quite clearly, in Garrett. In a varied language, from many angles, the court has reaffirmed that maxim again and again. It seems that economy would justify that the iterated and reiterated discussion be stereotyped, or if possible rubber stamped. And after all, Thompson is the most prominent and popular author. (See Story.) It looks as if some new treatment is demanded and might it not be well to quote the maxim and clearly state what it meant before the Constitutional Convention of 1789. This maxim is from of old and it is ever new; it has worn long but, then it has worn best. It is inimical to the "theory-of-the-case" doctrine. See Pleading; Literature; Feudal Lawyer; Gulling.

Almost all of our works on Pleading are a straddle of first principles. They do not cite and elucidate them so that the profession can comprehend them. The late cases will show. (See notes to Cockerell, 50 L.R.A. (N.S.) 1–32.)

The courts could not in that day give cases like Palmer v. Humiston or like Mitbra v. Steel Co. Our author did not have cases like these to cite and expound. He wrote in a day shrouded in cloud and fog and he never rose above them. His work is a haze and is the straddle referred to. He tried to please all and that could not be done. To support those conclusions we call attention to his Par. 2, Preface (1876), also his sections 75, 509–514, 533, 546, 592, et seq.

When he wrote his Equity he saw the maxims and he recommended them in his Municipal law. Now why did he not cite the major-organic maxims of Procedure—Pleadings? If maxims are good in some subjects then why not in all? He happened to have before him Equity works that cited the old cases and the maxims but he was not so fortunate as to the Code or Pleadings. For this work he picked and blazed his own way, but like Tidd chose statutes and cases. He never cited a maxim, or cases like Ruskton v. Aspinall, or Briestow v. Wright or Dovaston v. Payne (L. C. 5, 135, 217, 3 Gr. & Rud.) He did cite Antiadel v. R. R. which is like Dovaston v. Payne, approvingly. These cases alike stand for Verba fortius which he denounced in his section 546. In the light of these facts it seems apropos to ask if he understood the Trilogy of Procedure and its Cognates? (§§ 1–13, Restatement.) And of all and generally here let us ask which Code author or Court has plainly told us that the Code simply reaffirmed these maxims; that it reaffirmed Quis, quid, coram quo? Now why did they not? Why have they not explained Jackson v. Peaked and Stennell v. Hogg and have made plain the supposed distinctions between "a defective title and a title defectively stated?" Around this question the
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Feudal lawyer and his followers had their wranglers and their clusters of "Shelley" Cases which have descended to the Code lawyers.

There are Universal, Constitutional principles of procedure which are above local and flat law. Now which one of these did Professor Pomeroy or his followers make prominent and comprehensible? Which one of them cited Broom's Maxims, or Smith's Leading cases or any one of the major organic maxims? So far as Professor Pomeroy is concerned he thought the Code was a "new dispensation" and that he was chosen to expound it. See the pages referred to. He never cited Story nor Greenleaf nor the old English cases like Rush ton, which are among the best of Code cases. Nor did he and his followers explain the interactions of the rules of Pleading with "Due Process of Law," Res Adjudicata, and Collateral Attack. Not one of them impressed pleading as a Jurisdictional element. (See Pleading.) Not one of them saw and vindicated the logic and the philosophy of Procedure referred to by Manheld in Robinson v. Reiley, L. C. 43, 3 Gr. & Rud. On the contrary they viewed the Code as local and flat. The sections referred to will show. They thought something "new" had come and as some of the late cases hold Clark v. West, 193 N. Y. 349; Baker v. Warner (U. S.).
The sections referred to and the Preface to Stephen, Chitty, Gould and Nash will show that the profession has needed a light that has not come. Look at Story (§ 10) on the one hand and Thompson (Trials §§ 2310, 2311) on the other hand. Authors who most openly assailed the old law and who led furthest from it have been most prominent, most sought and most appreciated by the legal profession until now they are assailed by the leading men of the profession and by the proletariat alike. (Multitudo imperi torem perdit curiam.) The lawyer and his establishments are much under discussion in both high and low places.

The late cases tell the story. Look at Gulling v. Bank (Nev.) also Henry v. Hilliard, 44 L.R.A. (N.S.) 1-44 (omission of the allegation that the vendee took possession of the land under and in pursuance of the oral contract was supplied by a failure to plead also to object to the introduction of irrelevant evidence). Also Halligton v. Frey, Id. 112-120. See Lester v. Foxwell, L. C. 341, 3 Gr. & Rud. Look also at Boum v. Emery (Or.) and Weber v. Lewis, 34 L.R.A. (N.S.) 364-372, ext. n. Garrett. It is to these ends that the great authors and courts have led. It is superfluous but, we will add that they have failed. They have made a mystery of the Code. See Rush ton. Of what use are their expositions in discussions of cases like Garrett v. R. R. and North Carolina R. R.? See Logie.

POSSE COMITATUS: 4 Gr. & Rud.; 44 A. S. 127-40; R. v. Sherlock; Robinson v. Street, 44 Gr. & Rud.


POTIO EST CONDITIO DEFENDENTIS (or plaintiffs); See In part; Favor ablores. Actore.


POWER OF ATTORNEY: 4 Gr. & Rud.


PRESENTIA CORPORIS TOLLIT ERE Rorem nominis, et veritas nominis tollit erorem demonstrationis: The presence of the body cures the error of the name. Res ipa loquitur; Manifesta probatone non indigent. See Equity.

PRESUMPTIO PRO JUSTITIA SENTENTIAE. The justice of a sentence should be presumed. See Authority; Res Adjudicata.

PRAYER: See Ad damnum; White, L. C. 140, 3 Gr. & Rud.; 2 Suth. Dam. 415, 18 L.R.A. 524.

PRELIMINARY EXAMINATION: See 4 Gr. & Rud.

PREPONDERANCE OF EVIDENCE: See Benelli v. Wider, L. C. 185, 3 Gr. & Rud.

PRESCRIPTION: 4 Gr. & Rud.

PRESCRIPTIVE CONSTITUTION: That body of organic law that is expressed in the major—the organic maxims of the law. To illustrate: Idea agent: and its cognates are of the higher law that control local and flat law, 500-500 Hughes' Equity. Nemo debet esse iudex in propria sua causa is of the higher law and to it Constitutions and statutes must yield. In presentia majoris.

Another illustration is the Trilogy of Procedure and its cognates. The due administration of the laws depend upon respect for the major—the or-
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Organic maxims of Procedure. It is absurd to think of operating a court in opposition to the maxims we select and present. These should be turned to and comprehended from a Constitutional standpoint. Ancent De non; we made observations that are apropos here.

"Parliament is omnipotent" with the Feudal lawyers and their followers and following this motto of governmental bigotry and arrogance has filled the law with antinomies. Look at the decisions over the statute of Jeofails. Clark v. Dillon and its cognates; at Gulling.

The mystery of the Codes and Practice acts can only be cleared by a right comprehension of the Trilogy of Procedure. Whoever will look from this at the discussions around Jackson v. Pesked; Stennell v. Hogg; Ruahton v. Aspinall; Bristow v. Wright; Doaston v. Payne; Campbell v. Conesulus and its cognates will perceive the hopelessness of waiting for more legislation and more cases. The remedy lies with the lawyer and his establishments. See Multitude imperitorem perdit curiam. The higher law guarantees justice without delay. Nulla vendemus. But look at the sloth and the delay in the courts. The lawyers are mired with questions relating to what constitutes "Due Process of Law" as if something new had come or was coming. Look at the discussions around the general demurrer, and its cognates—its correlatives. Goldham v. Edwards.

The American profession is indebted to David Dudley Field for the draft of the Code reaffirming the major maxims— the organic principles of Procedure. Also Justice Field for Pennoyer v. Neff, L. C. 58, 3 Gr. & Rud. also Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud. But more decisions like these are needed and such as Nalle v. Oyster and Vicksburg v. Henson. These aid to establish fundamental principles. But decisions are needed which expressly state the fundamental law of old also that it will be respected by the court. Decisions like Palmer v. Humiston and Milbra v. Steel Co. state the law in unmistakable terms, and further away from local statutes and home decisions than do most of the Federal cases.

Decisions untrammeled with local and state law are much needed.

Procedure in American courts is terra incognita. Especially of what

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relates to Due Process of Law; also to whether or not the authority of a judgment must affirmatively appear; and whether or not pleadings are jurisdictional. Nalle v. Oyster; Knickerbocker. Pomeroy.

One of the most important questions for the student to grapple with is whether or not pleadings are Jurisdictional; North Carolina. The discussions around Campbell v. Consaulus; Mondel v. Steel and Monday v. Vail, L. C. 77, 79, 3 Gr. & Rud. will lead the way to these discussions. Also see Story; Modus et conventio. Introductory Chapter, Restatement.


The prescriptive Constitution limits and controls all other laws. It dictates lesser laws. §§ 10, 12, 14. Restatement. It dictates the organic law of the leading subjects. §§ 17, 21, 26.

In McMullen v. Hoffman Judge Peckham declared that the law of Contract arose from a few maxims. § 17. Restatement.

Parliament is not omnipotent. § 21, Restatement. See Parliament.

The Prescriptive Constitution is the higher law. § 25, Restatement.


PRESIDENT OF CORPORATION; OF U. S. Presidential Electors. 4 Gr. & Rud.

PRESUMPTIONS: 4 Gr. & Rud. From the Trilogy of Procedure, also of liberal construction, arise many presumptions. De non apparenteribus and Verba fortius are dominating presumptions upon the operation of which devolve the vindication of the substantive rights of the state. See Coram Judice. The authority to enter a judgment is not presumed; it must juridically appear. Clem. L. C. etc., 3 Gr. & Rud. Secs. 124–125, 1 Gr. & Rud. See Mandatory Record.

Effect of presumptions. Bonnell, L. C. 183, 3 Gr. & Rud. Knickerbocker. Consensus tollit errorem is a presumption; for one is presumed to con-
Presumptions.—

sent to error unless he objects. Sec. 53, 1 Gr. & Rud.; L. C. 290a, 299, 3 Gr. & Rud. also secs. 245-269. See Appellate Procedure.

Omnia prae sumuntur rite is the presumption of regularity extended discussed in Crepps v. Durden, L. C. 113, 3 Gr. & Rud., et seq. Secs. 131-133, Equity. See Appellate Procedure; Williams v. Peyton; S. v. Passe.

In relation to the above maxims are extended discussions which involve many cognate maxims and cases, such as Probatio extremis prae sumuntur media; Res ipsa loquitur; Allegas contraria non est audiendus. Those are instructive when considered in connection with Verba fortius accipiantur contra proferentem.

"Every one is presumed to intend the natural, direct and probable consequences of his act" involves phases of presumptions of extended discussions, which often include In jure non remota, of which the Squib Case, 3 Gr. & Rud. is a fine illustration. This case is widely cited in tort; but the principle it expresses is of very general application in all branches.

In Procedure the principle is applied to him who made the first fatal defeat in his pleading. One pleads at his peril. Clark v. Dillon, 97 N. Y. 370; Mallinckrodt.

In equity the principle is, "where one of two equally innocent persons must suffer from a fraud of a third, he who first trusted must first suffer." Lackbarrow, L. C. 394, 3 Gr. & Rud. See Price v. Neal.

Acta Ectoriora indicant interiora secuta: L. C. 165, 3 Gr. & Rud.

In contract, the last rule is applied in agency; also other relations. It has a wide application in commercial paper, wherein it is invoked by the bona fide purchaser. Swift v. Tysen, 4 Gr. & Rud. Green County, 211 U. S. 582.

Assent to a contract is presumed when.

Boston Ice Co. v. Potter, L. C. 320, 3 Gr. & Rud.

Execution and delivery of contracts.

Williams v. Stoll, 4 Gr. & Rud.; Hale, 62 W. Va. 609, 14 L.R.A.(N.S.) 221, n. (that they were read); McCudden v. Logsdon, 92 Mo. 343, 1 Am. St. 721 (bill of lading); Cherry v. R. R., 2 Gr. & Rud. (carrier's ticket); Penna. R. R. v. Loftis, 72 O. St. 288, 106 Am. St. 597, ext. n., 4 Gr. & Rud. (ticket.)


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12 L.R.A. (N.S.) 1000 ext. n. See Non hoc; Necessitas Contra; Smart v. K. C., 208 Mo. 162, 123 Am. St. 415-448; Mohr, 95 Minn. 261, 111 Am. St. 462 (consent to operation on one ear is not consent to operation on the other). Expressio unius.


Every one is presumed to know the law. Ignorantia Legis. Knickerbocker.

Innocence is presumed until the contrary appears. Coffin v. U. S., 156 U. S. 43; Bonnell, L. C. 185, 3 Gr. & Rud.

Burden of proof devolves upon him who affirms, and not on him who denies. Affirmans, etc.; Actore; Semper.

Actore non probante reus absolvitur; Semper malum non presumitur; Nemo prae sumitur malus; Nil hominum est prae sumendum.

Sanity is presumed until the contrary appears. M'Naughten's Case. L. C. 195, 3 Gr. & Rud. S. v. Marler, L. C. 188, 3 Gr. & Rud. Spies v. P., 4 Gr. & Rud.; see Intent; Malice.

Wrongdoer; every presumption is against. Omnia prae sumuntur contra spoliatorem. Armory, L. C. 180, 3 Gr. & Rud.

Every presumption is in favor of one speaking in extenuation. No one is presumed to trifling at the point of death. Nemo prae sumitur tudere in extremis. See Dying Declarations.

Continuity; presumption of. 1 Gr. Ev. 41, 42; Carotti v. S., L. C. 179, 3 Gr. & Rud.; Adams v. Lindseal.


Reasonable doubt. C. v. Webster, 5 Cush. 295, 52 Am. Dec. 711, 739; Bonnell, L. C. 185, 3 Gr. & Rud.


Possession of cash, or of bill or note, is presumed rightful and regular. Bonnell, L. C. 185, 3 Gr. & Rud.; Miller v. Race, 4 Gr. & Rud.; Swift; Bentley.
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Open, notorious, unequivocal, exclusive and continuous possession of real estate; presumptions from. Lester v. Foscroft, L. C. 341, 3 Gr. & Rud. Manifesta.

Possession is indicia of right; sale of chattel by one in possession; effect. Davis, 6 Ind. Terr. 124, 25 L.R.A. (N.S.) 760-706, ext. n.

Consideration prima facie presumed for a bill or note. Rann, L. C. 312, 3 Gr. & Rud.


Letters; Presumptions of reception from mailing; The facts to be proven from which the presumption arises. The fact of writing, addressing, sealing, and properly prepaying the postage when required, and depositing in the office must be stated. Conclusions will not do. Feder, — N. M. —, 49 L.R.A.(N.S.) 458-470. Omnia praesumuntur rite.

Badges of fraud. Twyne's Case, 4 Gr. & Rud.

Fraud is not presumed. See Fraud, 2 Gr. & Rud.; Nemo praesumitur matus. Manifesta prabatione non indigent. Manifest things require no proof. 4 Gr. & Rud. Presence at a prize fight is proof of guilt. Noceitur.

Presumptio corporis tollit errorem nominis. When the body of the thing is present, its name is immaterial. Noceitur a sociis. Common carrier has all presumptions against it, where the freight is lost. Coggis, L. C. 350, 3 Gr. & Rud.; Inman. Alteration of documents; presumptions relating to. Master v. Miller, 4 Gr. & Rud.; Stromberg, 81 Neb. 317, 18

Presumptions.—

L.R.A.(N.S.) 680, n.; Kalteyer, 102 Tex. 390, 132 Am. St. 189 (Grantee must explain).

Commercial paper, conclusively presumed genuine if drafter pays it. Price v. Neal, 10 Wis. 351; Tobeck.

By accepting commercial paper it is presumed one agreed to give notice of its dishonor. See Commercial Paper. Holder of commercial paper has presumed authority to fill blanks left therein. Angle v. Ins. Co. 92 U. S. 320, 2 Gr. & Rud.


Jurisdictional assertions. De non apparentibus; North Carolina. Knickerbocker; Boren v. Emmerson; Quis; quid; Ut rea.

Jurisdiction of the person. See Process; Galtin v. Page, L. C. 63, 3 Gr. & Rud.

Prejudicial error not presumed from matter in the statutory record. It must affirmatively appear. Morningstar.


PRIMA FACIE. See presumptions.

PRINCEPS LEGIBUS SOLUTUS EST: The emperor is free from laws. Res non. In praesentia.

PRINCIPAL AND AGENT. See Agency.

PRIORITY. Qui prior tempore. 4 Gr. & Rud.

PRIOR TEMPORE POTIOR JURE: See Qui prior tempore.


PRIVATIS Factionibus NON DUBIUM est non ledl jus ceterorum: There is no doubt that the rights of others cannot be prejudiced by private agreements. Al- terum. In pari: Campbell v. Consales. Pacta conscit: Res inter alios acta.

PRIVIES. 4 Gr. & Rud.


PRIVILEGED COMMUNICATIONS. 4 Gr. & Rud.

PRIVILEGE OF WITNESSES. 4 Gr. & Rud. See Process.

PRIVITY. 4 Gr. & Rud. Dutton, Lawrence v. Foz, Hendrick v. Lindsey, L. C. 319, 3 Gr. & Rud. In jure:
**PRIZE FIGHT.** Presence at; Presumptions from. R. v. Cony; R. v. Orton; R. v. Summer, 4 Gr. & Rud. Noscitur a sociis.

PROBABLE CAUSE. 4 Gr. & Rd.

PROBATA. Will not supply; allegata; Campbell v. Connelis. See Allegations; Garrett; Knickerbocker; Minnesota.

PROBATUS EXTEMISIS PRAESUMUNTUR media: The extremes being proved the intermediates are presumed. See Presumptions. *Omnia praeumentur rite:* Quinlan, 205 U. S. 504. The limitations of liberal construction. Dobson v. Campbell.

**PROCEDURE:** Its great maxims §§ 1–14, Restatement. Its leading maxims are *De non apparentibus; Frustra probatur;* and *Verba fortius.* The maxims are introduced and discussed in §§ 1–13 along with other matters that are inseparably connected therewith. These maxims we call the Trilogy of Procedure and they are the great trees of the grove. They are most extendedly discussed in the Equity in Procedure. See the title Procedure, 4 Gr. & Rud.; Maxims; Literature; Mandatory Record; Appellate Procedure. It is the handmaid of the entire law. See Introductory Chapter, Restatement and the matters therein mentioned.

**Its importance.** See Preface, Restatement; also Introductory Chapter.

Procedure is the bulwark of all of our rights and liberties. See Introductory Chapter. Prescriptive Constitution.

It is a constitutional implication. See Introductory Chapter. Prescriptive Constitution.

Feudal Lawyer did not comprehend it. See Feudal Lawyer; Literature; Codes; Mandatory Record.

**Appellate Procedure leading principles of a review.** Morningstar.

Process and its service well introduced from the cases of Pennoyer v. Neff, L. C. 58, 3 Gr. & Rud.; also Galpin v. Page, L. C. 63, 3 Gr. & Rud. (3 Saw. 93–128). These cases discuss the necessity of process and of its service. Also presumptions that arise from the record recitals anent process.

The infant (and all persons who are wards of the government) must be served by process. They cannot be held to have appeared by attorney. Galpin v. Page, 3 Saw. 1.

Jurisdiction over the person must be acquired and the record must show this fact. Presumptions of regularity will not do. (Distinctions between superior and inferior courts—Galpin; Crepp v. Burden.) Pleadings also are jurisdictional. Nalle v. Oyster.

Jurisdictional facts must affirmatively appear from the right record. North Carolina. "What ought to be

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of record must be proved by record and by the right record." Jurisdictional facts are not presumed they must affirmatively appear as stated in Galpin; Knickerbocker; Minnesota.

The law hears before it decides—Audi alteram partem. Galpin.

The maxim of regularity—Omnia praeumentur rite—will not supply jurisdictional facts. See Jurisdiction; Presumptions. The authority for entering a judgment affirmatively appears. It is never presumed.

Suppose that to prove title to real estate or other property a record was offered in evidence which showed that a decree had been entered against several defendants one of whom was a married woman under disabilities, another an insane person and still another an infant among other defendants and that for all of the defendants a general appearance had been made by various counsel except one who was a nonresident and upon whom service by publication had been made and that for the infant the court had gained jurisdiction by appointing a guardian ad litem who had appeared and defended the interests of the infant; and likewise the insane person and the married woman had been judicially treated; that the affidavit for an order of publication had been overlooked and neglected; that there were no other facts appearing of record anent the service of process; and further that the court in its decree found and recited that all of the defendants appeared and defended the suit; that upon such record facts and such recitals the decree was entered. Query: Could title to the land or other property be sustained upon this decree?

As to the necessity for the service of process see Pennoyer v. Neff, L. C. 58, 3 Gr. & Rud.; also Galpin v. Page, L. C. 63, 3 Gr. & Rud. (3 Saw. 93–128).

How are infants and other wards of the government served with process? How must they appear? How is jurisdiction over them gained? Of what consequence are the jurisdictional recitals referred to? (Galpin v. Page; Ferguson v. Crawford, L. C. 64, 3 Gr. & Rud.; Vickers v. Henson; Windsor v. McVeigh, L. C. 3, 3 Gr. & Rud.) To what extent do Pleadings enter into the investigation of title? (§ 20 Restatement); Are Pleadings a part of the law of real estate? Need more than a sufficient judgment entry be
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shown? Is the law the same in questions of Res Adjudicata? (See Coram judice.) Must not every essential fact affirmatively appear to sustain service by publication? Also of service upon an infant?

Before entering the "legal jungle" the student will do well to get a right impression of Procedure. Therefore we ask him to connectedly gather and spread open before him Dovaston v. Payne, Rushton v. Aspinall, and Bristow v. Wright, L. C. 217, 5, 135, 3 Gr. & Rud., and see if he cannot pick the maxims above cited out of these cases. Also look at Clark v. Dillon, Antiadel, Knickerbocker, and Bowen v. Emmerson and see if the old law is not still with us. (See Literature; Logic; Restating the Law.) Get an impression by looking at these cases and cases cited with them and then judge of the works on Procedure. (See Pomeroy.) See if Pleadings and Evidence can be irrelatively taught; if the rules of Res Adjudicata do not dominate the fundamentals of these subjects. From this viewpoint carefully gather from Dovaston the kind of matter cited to sustain Verba fortius, the style of Eyre, J., and what Buller J. said of Coke's three degrees of certainty and of Sergeant Williams' special demurrer. See if Quis, quid, is not a maxim that bottoms all systems and ought not be cited and explained by all authors. See how this has been done. Look at the above matter collectively and connectedly and then look at Story on the one hand and Thompson on the other and at the cases supporting the latter, Gulling and its cluster and from these Antinomies judge of the causes of judicial anarchy. From the above data judge of the literature of the subject. Note the various theories upon which Pleading (and its inseparable subject Evidence) is written. (See Feudal lawyer.)

Finally we ask the student to look and judge for himself. If he will look and consider he can find the way that leads to the light. See Literature.


PRODUCTION OF DOCUMENTS. 4 Gr. & Rud.

PROFANITY. When a crime. See Nuisance. 4 Gr. & Rud.

PROFERT. In curia. 4 Gr. & Rud.

PROHIBITION. 4 Gr. & Rud. S. v. Muench.


PROMISSORY NOTES. See Commercial Paper.

PROMOTERS. 4 Gr. & Rud.

PROTECTION DUE FROM GOVERNMENT. Nulla vendemus.

PROVIDENT LIFE INS. CO. v. MERCER. County, 70 U. S. 593. Municipal bonds depend upon a record. Green County.

PROVINCE OF COURT AND JURY. See Ad questionem. S. v. Crotou.

PROVISOS IN STATUTES. 4 Gr. & Rud.

PROVOCATION. 4 Gr. & Rud.


PUBLICATION. Service by. Pennoyer.


PUBLIC CONTRACTS. 4 Gr. & Rud.

PUBLIC POLICY. Juris praecipita; Salus populi; In pari, Pacta conventa.

PUIS DARREIN CONTINUANCE. 4 Gr. & Rud.

PUNCTUATION. 4 Gr. & Rud.

PUNISHMENT. 4 Gr. & Rud. Equity. Cruel; Wilkerson.

PUPILIS PATI POSSE NON INTELLIGITUR: A pupil (infant) is not considered able to do an act which would be prejudicial to him. See Klee v. Sandford.

PURPRESTURES. 4 Gr. & Rud.

PUSEY v. WHITNEY & TUD. L.C. Eq. Specific delivery of chattels; Equitable jurisdiction over chattels of singular value. Somerset.

QUIE AB INITIO INUTILIS FUIT INSTITUTIO ex post facto convalesse non potest: An institution void in the beginning cannot acquire validity from after remission. See Verba fortis.

QUÆLIFET CONCESSIO FORTISSIME contra donatorem interpretanda est: In the case is to be construed against the grantor. See Verba fortis.

QUANDO ALIQUID PROHIBETUR, PROHIBETUR omne per quod deuentur ad Ilium: When anything is prohibited everywhere by which it is reached in prohibited ed. Haly v. Nichols, L. C. 159, 3 Gr. & Rud.

QUANDO ALIQUIS ALIQUID CONCEDEIT, concedere videtur et id sine quo res uti non potest: When a person grants a thing, he is supposed to grant that also without which the thing cannot be used. Accessorium non dicit esse; quodque: Expresso corum: See ways of necessity. Pinnington v. Galland.

QUANDO JUS DOMINI REGIS ET SUBDITI concurrent jus regis preferre debet: When the right of the sovereign and of the subject concur the right of the sovereign ought to be preferred. 4 Gr. & Rud.

QUANTUM MERUIT, 4 Gr. & Rud.

QUARANTINE, 4 Gr. & Rud. Of widow's dower. 4 Kent, 62.


QUASH, 4 Gr. & Rud.

QUASI CONTRACTS See Boston Ice Co. v. Potter, L. C. 363, 3 Gr. & Rud.


QUICQUID PLANTATUR SOLO, SOLO cedcit: Whatever is affixed to the soil belongs to the owner. 4 Gr. & Rud. Fixtures; Bueo v. Mowu. CuJus est solum.

QUICQUID SOLVITUR, SOLVITUR SE-Cundem modum solventis: Whatever is paid is to be applied according to the intention of the payer. 4 Gr. & Rud. Negligent donee; Application of payments. Field v. Holland, L. C. 357, 3 Gr. & Rud.

QUI DAT FINEM MEDIA AD FINEM necessaria: He who gives an end gives the means to that end. The principal thing carries its incidents. Accessorium: Quæsiquad: Expresso corum: Qui conceit.

QUIETING TITLE. 32 Cyc. 1286.

QUI HEREDIT IN LITERA HERBERT in cortice: He who sticks in the letter sticks in the bark. Ibia lex: Non in litteris.

QUI JUSSU JUDICIS ALIQUID FECERIT non videtur dolo malo fecisse, quia parem causam non habet: He who does anything by command of a judge will not be supposed to have acted from an improper motive, because that is the necessity to obey. Requisite process protects an officer moving it. Savannah v. Boughten, L. C. 164.

QUI, etc. — 3 Gr. & Rud. Justification how pleaded. 2 Gr. & Rud. Necessitas. The rule giving immunity to executive officers is a corollary of the absolute exemption of superior judges for anything they may do on the bench, however oppressively and corruptly they may act. Lange v. Benefict, L. C. 159, 3 Gr. & Rud. It is contended that there is no law for a superior judge except impeachment. That if a state judge regularly directed a sheriff to seize and to execute the ambassador of a foreign country that the sheriff would be given immunity for his obedience. See Grace v. Mitchell, 31 Wis. 553, 11 Am. R. 613, 2 Gr. & Rud. (officer must not only have regular process but he must also act bona fide). If a Mexican court had ordered Benton (the British subject killed) without Due Process of Law and this fact appeared no doubt the entire civilized world would approve holding all involved responsible and the rejection of such a justification. A local and flat Due Process of Law not founded on true principle is not the kind that can command international respect. Only that which proceeds upon notice, a hearing upon certain charges and a judgment in accord with that notice and that hearing can satisfy the true judicial sense. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud. Qui Jussu is closely allied with Rex non potest peccare.

To further illustrate: Suppose that a Supreme judge of New York is in a statutory general of the militia were to order out the troops and order them to execute every consul of a foreign country: Would this afford any justification to the militia executing such orders? Necessitas.

See Most v. Military.

QUILIBET POTEST RENUNCIARE JURI pro se introducto: Any one may renounce a law introduced for his own benefit. Pota contra cautelae: Consensus. Of course one cannot renounce what belongs to a third. Alterum: Rex inter alios: And so it is that pleadings cannot be waived. The state demands these. Interest repugnt: Herein we explain the correctness of Campbell v. Consulat. Consensus facit legem: Modus et consensus.

QUINCUNQUE ALIQUID STATUERIT, Parte inaudita altera, sequum ille statu-erit haud seius fecerit: He who decides anything, a party being unheard, though he should decide right does wrong. Bro. Max. 113 T. Hillman, Proc. 4 77; See Audí, etc. 1 Gr. & Rud. 95.
QUINLAN, 205 U. S. 205. See Green County Bonds; Omnia praemunitor rite: Ut res.


QUI NON IMPROBAT, APPROBAT: He who does not disapprove, approves. It legens: Consensum: Qui postit.

QUI NON NEGAT FATEBAT: He who denies, admits. See Admissions; Qui postit. Warfield. North Carolina R. R.

QUI PIETE ALIUM FACIT FACIT PER SE: He who does anything through another is considered as doing it himself. 4 Gr. & Rud Qui sentit: Respondent superior. McManus.

QUI PONIT FATEBEBUS: The points he ad admits. Qui non.

QUI PRIMUM PECCAT ILLE FACIT RIXAM: He who is guilty of the first offense is liable for the crime. Cited. sec. 18, Restatement. Riqui Case. This maxim is the basis of much reasoning in the law of self defense. We have classified it as one of the Trilogy of Crime. It is often associated with In jure.

QUI PRIOR EST TEMPORE POTIOR EST JURE: He who is first in point of time is first in point of right. Bond law purchaser. In Aquell mention.

QUI SEMEL EST MALUS, SEMPER SUMPTUS MALUS: Once malus in odium generae: He who is once had is presumed to be always so in the same degree. See Continuus; 2 Gr. & Rud.

QUI SENTIT COMMODUM, SENTIRE DEBIT ET ONUS: He who derives the benefit from an object is bound to bear the disadvantages attending it; or in other words he who derives the benefit ought to stand the burden. 4 Gr. & Rud. Qui per album: In jure fictione. Lickbrowne v. Mason.

QUIS, QUID, CORAM QUO, QO, JURE DEBIT, ET QUA: Recte compositus quiqve, libellus habebat.

Every statement of a cause of action must show what court is applied to; who seeks relief and what it is that is sought; from whom it is sought and the amount of relief demanded. Story's Equity Pleading, 25. Cited §§ 4, 5, 6, 7, 11, 17, 25, 23, 25, Restatement. Foster's Federal Practice, § 129, 5th ed. See Story.

The Code reaffirmed this maxim. The provision is found in Cockerell, 50 L.R.A. (N.S.) 1.

This maxim is a cognate of De non. It amplifies the Trilogy of Procedure. It ought be studied with De non. These

Quis, etc.— are "Datum Posta" of Procedure. They are Universal, Constitutional axioms pervading Evidence, Pleading and Practice. Each clause of Quis, quid, is a weighty principle of Procedure. To understand this maxim is to fix essentials for the operation of Constitutional tribunals. It equally applies to all systems. It can be quite clearly picked out of Chitty who began with "parties," and after these reached the "statement" of the "cause of action." The latest work on Equity Practice (Whitehouse) follows the same plan of presentation. Code authors often adopt the same plan of presenting the subject of Pleading. The leading Code provision is simply of a reaffirmation of this maxim. It expressly makes this command Jurisdictional by its provision that by filing an answer all formal matters are waived; that afterward only Jurisdictional questions can be raised. Between lines the Code must be read that the general demurrer cannot be waived; that it is only the formal— the special demurrer that can be waived. This should have been the construction of the Code but it was not. State Bank, L.R.A.1015A, 120, 126, 127. (See Demurrer.) Each provision of the Code should be harmoniously construed with all others: also the old law. Statutes in derogation of the common law (fundamental law,—the organic maxims) are strictly construed. Heydon's Case. We widen the narrow expressions of Coke's rules by the parenthesized words. And should not we?


Construction without a knowledge of the old law is "a grope in the dark." The organic maxims are the old law. The adoption of these by the common law does not change the origin and character of the maxims. They can still be picked up and recognized. And so we can pick Quis, quid out of the works and legislation referred to. Construction by little, narrow- visioned intellects has destroyed the harmony, the symmetry and the logic and the philosophy of the law. The thick, black clouds of Feudalism have gathered and lowered without rift or bright spot until the fate of Procedure is seen in the maelstrom of Judicial anarchy from which arises the cry for
Quis, etc.—

revolution. (See Feudal Lawyer; Literature.) What we will next say and refer to will indicate.

1. One must apply to the right court. To illustrate: In the great city more than a score of courts may have jurisdiction of the varied matters which may arise out of the intercourse and the affairs of men. These tribunals begin with that of the Hague and range on down, including the National, the State, the County, the Municipal, the Juvenile, the Taxing and other tribunals organized and invested with widely different and varying powers. The jurisdiction of subject matter is a Constitutional question. Jurisdiction has its roots in Constitutions. It is a Constitutional question. Where it is not so taught and upheld is deepening and widening the darkness referred to. (See Gulling.)

The organization and operations of courts are technical questions and must be studied from the major-organic maxims and such as Quis, quid. In obedience to Quis, quid, one must select the right court and apply to it; and he must designate his selection. Id. (See Placitum, 4 Gr. & Rud.; Planing Mill Co. 2d, 3 Gr. & Rud.; § 229, 1 Id.; Roy v. Horseley, L. C. 228, 3 Gr. & Rud. See Terms of Court; U. S. v. Mayer, 235 U. S. 55.

2. A plaintiff must state his name. L. C. 93-98, 3 Gr. & Rud. A party plaintiff is Jurisdictional. This is a material allegation which cannot be waived. King, 6 Pennw. (Del.) 287. It must appear and be proved according to the rule in Mondel v. Steel. L. C. 77, 3 Gr. & Rud.; Palmer v. Humiston.

3. The name of a defendant is jurisdictional. This must be stated with certainty. Wiebold v. Herman, L. C. 98, 3 Gr. & Rud.; Shields v. Barrow. See Parties, 4 Gr. & Rud. Ut res.

It was held in Bulkley v. Big Muddy Mining Co. 77 Mo. 105, 109, that the capacity of one to sue need not appear. See this case cited in Equity In Procedure. That the statute can authorize the omission of a party. From the letter of the statute, Ita lex scripta lex this conclusion was reached. We have referred to the construction that “filing an answer to the merits” waives the general demurrer; also of the consequences of a construction without regard to the Datum Poste—the organic maxims. See Gulling and its cluster of cases. "Theory of the Case."

Quis, etc.—

4. The description of the wrong complained of is indispensable. A plaintiff, a defendant and the wrong he did must be averred with certainty. And the certainty required is tested by the rules of Res Adjudicata. L. C. 25-30, 3 Gr. & Rud.; 4 Gr. & Rud. The rules in Mondel v. Steel, L. C. 77, 3 Gr. & Rud. and of Campbell v. Consalus and its cognate cases show the necessity for describing the wrong done. This is a jurisdictional question. Nalle v. Oyster; Vicksburg v. Henson; Garrett; North Carolina. This element is argued in a late Equity Practice Work (Whitehouse). Story, Equity Pleading, § 10, quoted § 47, Equity In Procedure; Knickerbocker.

5. The amount of damages claimed. This must appear expressly or by necessary implication. It is often jurisdictional. See Removal of Causes. See Ad Damnum, 2 Gr. & Rud.; McDermott v. Sercere; 2 Gr. Ev. 290. Garrett (that they are implied is immaterial).

The above clauses may be called the "irreducible minimum." More allegations than these may be required, but in all cases those required by Quis, quid, should be looked after. In the Federal courts in many cases other allegations are required. In the court of claims the statement is strictly construed. Verba fortius. It must affirmatively appear that the cause is ex contractu and not ex delicto. In other cases the citizenship of the parties is jurisdictional and must affirmatively appear in the right pleading. Thomas v. Board, L. C. 10a, 3 Gr. & Rud. Quod ob initio.

The promised "restatement of the law upon broad and scientific lines" cannot rest upon the jargon attending Jackson v. Pesked, and the Feudal views of Sergeant Williams, but must be developed from more stable, certain and instructive matter. It must rest upon broad and true definitions of allegations, pleadings, jurisdiction, the mandatory and the statutory records, of the general demurrer, of the functions of Collateral Attack, and of the Rules of Res Adjudicata. In the wake of this statement let us ask what case or cases throw more or a better light under the clouds of chaos and of judicial anarchy than do Quis, quid, and its cognates? See the discussions around Clark v. Dillon and its cognate cases in New York. These involve nothing more than a logical.
application of *Verba fortius*. This maxim is the frit of ignorant and ambitious legislatures and of a judicial despotism. Over it the motto that "Parliament is omnipotent" has met and is meeting the logic and the philosophy involved in the great maxims of Procedure which Imperialism and Feudalism have ignored and denounced. (See Maxims; Logic.)

The Code brought nothing new if only we except the opportunity it has given to commercialism and empiricism to assail and to subvert the logic and the philosophy of the law. (See Maxims.) The facts show that mountebanks and predacious commercialism have led and directed the construction of the Code upon the theory that it was a "new dispensation." Not one of these has shown that the Code reconciles and transformed old and archaic laws. Not one of them has shown that the old law the Prescriptive Constitution is everlasting and ever attending, and that by it all laws must be construed. Instead they assumed that something new had come and that a "new dispensation" was on hand for exposition and application. The preface of Judge Nash, also of Professor Pomroy, also cases like *Clark v. West* (N. Y.), *Gros Coal Co.* 148 Wis. 72; *Biela*, 139 Wis. 150; *Baker v. Warner* (U. S.); *Cockerell*, 50 L.R.A. (N.S.) 1–32 will show. After the assaults on the Code by the Federal Supreme Court (*McPaul v. Ramsey*) it seems that Code authors took their cue from the views of that court. (See Pomroy.) The Code was founded upon Roman maxims and of course these came with them equitable principles and should have been construed by these and not by the hazy and bewildermment of Feudalism and its thousands of "Shelley" Cases. (See Maxims.) The first Code cases show the facts. See *Biddle v. Boyce, Mo.; Eno v. Woodworth* and *Allen v. Patterson* (N. Y.) How to plead a contract is to-day surrounded by the conflict presented in *Boven v. Emmerson* on the one hand and *Weber v. Lewis*, on the other hand. (See Contract; also Pleadings; *Knickerbocker; Pierce Co.*, 236 U. S. 237; *Rush v. Aspinall*; *Campbell v. Consalus; Palmer v. Humiston; Milbra.* The last three are late Code cases that deserve attention.

**Qui Tacet Consentire Videtur:** He who is silent appears to consent *consensus taliit erremem: Alleges; Qui nos.*

**Qui Tax Actions. 4 Gr. & Rud.**

**Quod Ab INITIO NON VALET IN tractu temporis non convalescat:** That which was void in the beginning cannot be validated by lapse of time, or consent or waiver. Cited, secs. 4, 5, 6, 11; 25; Restatement. Hughes' *Equity*, §§ 190–201. *Alterum. Windoor, L. C.* 1, 3 Gr. & Rud.

This is one of the major maxims of the law; it is organic. It is allied with the rules of the general demurrer and especially this one: That the general demurrer searches the entire record (substantial pleadings) and attaches to the first fault.

So to speak this maxim is at war with *Consensus tollit erremem.* It is the latter maxim that the statute of Amendments and Jeofails are designed to enlarge; and this has for results the limiting of the operation of *Quod ab initio.* And against the protection that *Quod ab initio* is designed to afford are to be considered the eight kinds of aider which are insisted upon in the various courts.

This maxim has a wide application. It may apply to a tax. If an assessment roll is void (*Lawrence v. Fast,* L. C. 134, et seq.) it cannot be validated. If the assessor failed to assess by omitting the name of the taxpayer, or the description of his property or its valuation and some other person amended the record this would invalidate the record. *P. v. Hastings,* L. C. 144, 3 Gr. & Rud. A contract providing a consideration as in *Bartholomew v. Jackson,* L. C. 302, 3 Gr. & Rud. cannot be cured. In Procedure there must be a valid foundation to start with or all falls to the ground. *Debile fundamentum fallit opus.* If the initial pleading does not attract jurisdiction this generally is incurable. Story's *Equity Pleading* 10, quoted 47 Hughes' *Equity.* In pari delicto. *Minnesota.*

Statutes are often passed to cure fatal defects but these are generally strictly construed. *P. v. Seymour,* L. C. 256, 3 Gr. & Rud. See *Consensus tollit erremem.*

The statement must confer jurisdiction. Story; *Tooker v. Arnou; Andrews v. Lynch; Mallincrodt; Florida Co.* 176 U. S. 321, 328, 329. See Pleadings; *Knickerbocker.*


If the court a quo had no jurisdiction then a court *ad quem* can gain
Quod, etc.—

none when the cause is removed to it
by appeal or by removal or change of
venue, although the latter might have
had original jurisdiction of the sub-
ject matter. § 10, Story's Equity Pl.;
Ward, 38 Am. Cas. D. C. 145, Lint-
ton, 98 Pa. 457, 459; Felt, 19 Wis.
193; Horan, L. C. 85, 3 Gr. & Rud.;
§ 190 Equity In Procedure.

A party may sometimes assign error
to a ruling in his favor. Horan, L. C.
85, 3 Gr. & Rud. Campbell v. Porter,
L. C. 2, 3 Gr. & Rud. Mercelis v. Wil-
sen, 235 U. S. 579; Capron v. Van
Norden, 2 Cranch 126.

Codes do not extirpate this maxim.
It applies to all systems. It is a juris-
dictional maxim. See Restatement.

Tooker v. Arnoux. An issue must ap-
pear from the right record. Palmer v.
Humiston; Milbra. See Issues; Man-
datory record.

The record must show an arrange-
ment. Grain v. U. S. But this old and
well settled rule is now denied. Gar-
land v. S. 232 U. S. 642. Along with
the latter case there comes a denial of
it in Gray v. P. 261 Ill. 140, 49 L.R.A.
(N.S.) 1215. See Pleadings.

Quod ab initio is presented as a cog-
nate to the Trilogy of Procedure in
the Law Restated, §§ 1–13. It is one
of five great maxims which are 1,
De non; 2, Frustra probatur; 3, Verba
fortius; 4, Quis, quid, and 5, Quod
ab initio. It is our argument that
from these maxims as guides that a
Constitutional Procedure can be un-
folded; that authors and courts have
made a mistake in omitting them
(Thompson; Pomeroy; Maxims). To
judge of this turn to these maxims
collectively and look at them con-
nectedly and see if any one of them
fails to state a true principle of law.
Also see if any court or author has
stated a greater principle. Also if
these maxims have not interactions
with each other and if one fails or
is denied if all are shaken and un-
settled. An examination of §§ 1–13
Restatement will enable the student
to judge. The cases cited to illustrate
these maxims can be followed through
the Text-Index and with these other
cases are cited.

* Codes and Practice Acts reaffirm
these maxims as we show in relation
to Campbell v. Consalve, Clark v.
Dillon, Tooker v. Arnoux and cases
cited with these. (See Codes.) A
right impression of the Code must
be gained and the chances of getting
this from Code authors may be judged
from the title Pomeroy (Biddle;
Vicksburg.) Get the authors before
you and look from the Restatement
sections and see which author has in-
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introduced the fundamentals of Pro-
cedure away from the letter of the
Code; and if any one of them has
plainly stated that the Code re-
 affirmed in legislative language the
above principles.

Examine the Federal cases in the
same way. Begin with Slacum v.
Pomery and see if these canons can-
not be picked from hundreds of Fed-
eral cases. Florida Co. and Minnesota,
194 U. S. 48, illustrate the applica-
tion of Quod, ab initio; also Nalle
v. Oyster, Vicksburg v. Henson,
Garrett v. L. & N. R. R. and Pierce
Co. 236 U. S. 278. From these cases
others can be found and along with
these cases coming from and cases
denying all of these cases and maxims.
See “Theory of the Case.”

To illustrate: Let us suppose that,
Marshall in Slacum (1810) had said
that, the case at bar is exactly like
Rushton, L. C. 5 et seq., 3 Gr. & Rud.
decided by Mansfield and will be de-
cided accordingly. That case is well
founded upon certain principles of
Procedure that cannot be either de-
cided or blown away. These prin-
ciples are maxims, the principal one
being, (De non apparentibus); that
what is not juridically presented can-
not be judicially decided. (Pierce
Co., 236 U. S. 278; Vicksburg v. Hen-
som; Nalle v. Oyster.) This maxim
has cognates amongst which are Ver-
ba fortius; Quis, quid and Quod ab
initio; and that, these maxims must
be respected at all times and places.
That they call for the mandatory
record which cannot be waived nor
derogated from by the consent nor
the contract of the parties. (Camp-
bell v. Consalve.) That these prin-
ciples will guide the court in all
cases and in all records that may
come before it. To vindicate these
principles the court will open the
record and examine for itself. (Nalle
v. Oyster; Pierce Co., 236 U. S. 278;
Minnesota, 194 U. S. 48.) Consent
cannot confer jurisdiction of subject
matter. (Story.) The omission of
a material allegation is fatal defect
that cannot be waived. (Rushton;
Bartlett v. Crozier, 1820.) A court is
bound by its record, which must be
certain; it is a necessity for the exer-
Quod, etc.—
cise of the judicial function. (§§ 83-123, 3 Gr. & Rud.)

The rule that the general demurrer cannot be waived is embedded in the above maxims, (Alterum) also that the Coram judice proceeding must satisfy the tests of "Due process of law." (Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.). Jurisdiction of a court depends upon respect for the above maxims. (See Jurisdiction; Story.) The foregoing rules concern the state and its concerns cannot be waived. (Consensus tollit errorem; Res inter alios Alterum.) The Mandatory record is a Constitutional implication and cannot be waived; it must exist and stand the tests of the above maxims. They are rules of construction by which the state's rights must be determined. They are principles of the Prescriptive constitution which must be respected in every Constitutionalism.

If a "cause of action" does not exist at the time that the statement is filed, this is a jurisdictional defect that can never be cured. Sanborn, L. C. 61, 3 Gr. & Rud. Osborn v. Moncure. Here there was no "cause of action" when the statement was filed and therefore jurisdiction did not attach and it could not be picked up from subsequent proceedings. Quod ab initio. Other illustrations will be found under the title In pari. Quod ad initio is profoundly a jurisdictional maxim. (See Alterum.) It is closely related to the rules of the general demurrer.

The largest resume of this maxim is in Equity in Procedure, §§ 190-205a. Many cases are herein cited to illustrate its ramifications and instructive applications.

Quod ab initio and its cognate maxims above stated are compatible with Ignorantia legis neminem excusat. To the pleader they say: You plead at your peril: If you fail to conform to the requirements of Res Adjudicata—Interest republische ut sit finis

Quod, etc.—

litium, the consequences of your mistake will be visited on you. A court cannot make good pleadings out of bad ones by applying Ut res magis valeat quam pereat. There are imitations of liberal Construction. Dobson v. Campbell; Campbell v. Consalve; Clark v. Dillon; Nalle v. Oyster cited and followed Demerer, 236 U. S. 101, 104.

Pleadings are jurisdictional and if bad on general demurrer they cannot be cured. Quod ab initio; Alterum; Ut res.

Quod constat, non debit verificari: What is clearly apparent need not be proved. Manifesta: Lex non cogit ad vana: Judicial notice.

Quod est inconveniens, aut contra rationem non permissum in est lege: What is inconvenient or contrary to reason is not allowed in law. 4 Gr. & Rud. Argumentum ab inconvenient: Convenience is a ground and rudiment of law. 1 Gr. & Rud.


Quod nullum est, nullum product effectum: That which is null produces no effect. This maxim is denoted by the "theory-of-the-case" advocates who from irrelevant evidence carve out and set up cases and defenses. Fabula: White v. Bluet, L. C. 317, 3 Gr. & Rud. Hearing a matter not juridically presented decides nothing. Campbell v. Consalve; Munday v. Vail, L. C. 79, 3 Gr. & Rud.; Palmer v. Humiston; Milbra. See Gelling, Story.


Quod pure debetur presenti die debetur: That which is due unconditionally is due now. If no time is specified when a debt shall be paid then it is due at once. Ut res: Bowen v. Emerson.

Quod remedio destitutur ipsa re valet at culpa absit: What is without a remedy is by that very fact valid if there be no fault. Counterclaim; Set-off; Retainer.

Quod vanum et inutile est, lex non requirit: The law does not require vain and fruitless things. Lex non cogit ad vana: Quod est inconvenient.

RELIEF. Must be asked. See Ad damnum. Quis, quid: Prayer. U1 res.

REMEDIES. 4 Gr. & Rud. REDEMPTION. See Church 4 Gr. & Rud.

REMEDIES FOR RIGHTS: REMEDIES: Remedium. 4 Gr. & Rud.

REMITTITUR. When trial court may order. 39 L.B.A. (N.S.) 1064, n.


REQUISITION OF CAUSES. This is a right conferred by the Supreme law of the land and it cannot be derogated from by state legislature, nor can a removal there must be pleadings; these cannot be legislated and stipulated away. Campbell v. Condon: Quiet prevails, etc:; Expresso corum. See 1 Gr. & Rud. 83-103. Contra Gulling.

REMEMBREMENT. Only a pleading could one determine what his rights to remove were. For this Quis, quid must be respected. C. B. & Q. R. L. 230. 413. For the removal of causes certainty is required. 4 Gr. & Rud. Verba fortius: Statutes providing for. See 2 Hughes' Procedure.

RENAISSANCE OF THE CIVIL LAW. 4 Gr. & Rud.


REENTICATION. Of contract gives immediate right to sue. Frost v. Knight. L. C. 308. 3 Gr. & Rud.

REPEAL. See Statute. Equity.

REPEITION. Prolifer. Surplusage.

REPLEVIN. When a court may order.

REPLACEMENT. When a court may order.


REPLICA DE INJURIA. 4 Gr. & Rud.

REPLY. SeeReply.


REPUTATION. Better than a repugnant pleading, charging that a crime was committed in "18002" is absurd. It

Repugnancy, etc.—is fatally bad and is not aided by a statute. S. v. Terrell, — Ind. —. 2 L.R.A. (N.S.) 6. This is not aided by a statute providing that on or about is a sufficient pleading. It seems well to observe that such a statute could not uphold that pleading where under the statute of limitations the offense is barred.

Repugnant clause in a deed is void. Wilkin, U1 res.

REPUTATION. Injury to. See Defamation. 4 Gr. & Rud. Eum qua: General reputation admissible to prove character of a disorderly house. 41 L.B.A. (N.S.) 503.


RES ADJUDICATA FACIT EX ALBO nigrom, ex negro album, ex curvo rectum, ex recto curvum: A thing adjudicated makes while black, black, crooked straight, the straight crooked. 4 Gr. & Rud. The doctrine of Res Adjudicata is exceedingly strict. Of course it is limited by strict tests as its rules show.

RES ADJUDICATA: FORMER JURISPRUDENCE. Estoppel of record. In cases of Res Adjudicata dictate many rules of Procedure. Subject rests upon a cognate of the Trilogue of Procedure—Interest republcae ut sit finis litium. This is the reason why Pleadings cannot be stipulated away. Campbell v. Conclusus. Altemum non Liderum. Res inter alios; Pacti privata. See 4 Gr. & Rud.; also Equity. One of the rules is that every presumption is against the Estoppel; Estoppels are strictly taken. These are a paraphrase of Verba fortius, which is the burden of Clark v. Dillon, and its cognates. It is this maxim which are statutes of Amendment and Jofailms are aimed at. So we see these statutes and "the liberal provisions of the Code" are directed at the heart and vitals of Res Adjudicata, and the maxim upon which it rests and has been developed. Herefrom appears the soundness of the rule of liberal construction in Dobson v. Campbell, L. C. 232. 3 Gr. & Rud.; Walter, 250 Ill. 420. The "Theory of the Case" is destructive of the rules of Res Adjudicata. See Gulling.

Nemo debeat bis uxori ei fundamentum principium juris. Marsh v. Peer; 1 Gr. Ev. 531. Local and flat laws must be construed consistently with these fundamental principles. Oakley v. Aspinall, L. C. 222, 3 Gr. & Rud.
Res, etc.—

In praesentia majoris 1 Gr. Ev. 522-540; Sto. Eq. Pl. 790-794; 1 Hughes, Proc. 121-146.

How to plead and prove Res Adjudicata is one of the most unsettled questions of the law. It is not even settled what matter must present the plea. Some hold that it may appear from oralities as in Missouri. Others that it may appear from opinions; others that it may appear from the evidence (See Theory of the Case); others that the matter may be picked from the statutory record; others that it is presumed from a judgment entry as in Gulling and its cluster of cases and as has been held in Illinois. In still others that only the mandatory record is opened and the jurisdictional elements are consulted which of course include the Pleadings (Mondel v. Steel, L. C. 77, 3 Gr. & Rud.; Vicksburg v. Henson; Nalle v. Oyster; Palmer v. Humiston; M'Ilhara, 45 L.R.A. (N.S.) 274, 277-278); stipulations will not do for Pleadings. Campbell v. Consalve and its cluster of cases "What ought to be of record must be proved by record and by the right record," contra scriptum. Fiumi enim: The difficulties are indicated in 4 Gr. & Rud. The Kingston Case, L. C. 76, 3 Gr. & Rud. is of little value.

The true principle is that it must be pleaded. If it is called to a court's attention that the matter is already adjudicated, then no trial should be ordered until the question of quasi abatement is first settled. For this the court should order a replacer and that the former record be produced and compared. This is a question for the court and not for a jury, as the Feudal lawyer has too long contended. With him the general issue, the general allegation, his Common Counts and his Aider by verdict and all the other Aiders that have been countenanced for pleaders who did not understand or respect first principles are incompatible with rules of Res Adjudicata. (See L. C. 25-30, 3 Gr. & Rud.; also 4 Id.; also 1 Id.; also 1 Hughes' Proc. §§ 121-146; These views can be picked out of 1 Gr. Ev. 522-540.

The Feudal Lawyer and his authors have never comprehended the dominancy of this subject in Procedure. (See 1 Gr. & Rud. §§ 83-123; Garrett; Pariaseo v. U. S.) Res est misera ubi jus est vagum et incertum.

Res, etc.—

Every philosophical work on Evidence and Pleading should give a resume of this subject for it dominates almost all rules of Procedure (See Alterum; Interest reipublicae); also the cognates of these maxims; The Feudal Lawyer has not yet shown that he clearly perceives that Verba fortius is simply paraphrased in "Estopells are odious and are strictly taken," that "Every intention is against the estoppel." And that herefrom arises the rules requiring Certainty of pleadings and of records. Around these questions he has given a thousand pages of hodgepodge for every one of correlated principles and even more. The confusion may be judged by the topic Abatement in the latest effort to present the law in the Corpus Juris Cyc, see Abatement.

Only works that correctly define Pleadings, the rules of the general demurrer and its correlatives and the mandatory record can lay just claim to comprehensively present this subject of the other high policies of Procedure. (See 1 Gr. & Rud. §§ 83-123.) Astronomy cannot be learned from an almanac. Untutored savages cannot teach nor understand algebra. How problems of these subjects would fare if given out to intellects not trained in fundamental principles can easily be imagined. Now has the general demurrer and its correlatives including Collateral Attack and Res Adjudicata fared any better under the tutelage and teaching of the Feudal Lawyer? (See Literature; Feudal Lawyer; Mandatory record; Consensuee tollit errorem; Quod ab initio.)

The contributions of the Feudal lawyer for the restoration of Res Adjudicata have not enabled him to define the elements of the Coram judice proceeding; nor whether Pleadings are jurisdictional; (See Gulling and its cluster of cases; also Story) he has been so superficial and empirical as to believe that a mere change of verbal expression makes a difference of substance. To illustrate: for maxims of Equity and as something "new" he accepts paraphrases of such maxims as In pari delicto: (See Equity); the legislative expression of Quisquid coram quo, he calls something "new" and "modern" (Cockerell, 50 L.R.A. (N.S.) 1-32); he dwells long and tiresomely on the law of abatement and

RES EST MISERA UBI JUS EST VAGUM et incertum: It is a miscible state of things where the law is vague or uncertain. Ubi jus incertum: Stare decisis: Mutatis mutandis. Res Adjudicata.


RES INTER ALIOS ACTA ALTERI non debet: A transaction between two ought not to operate to the disadvantage of a third. Cited, secs. 4, 12, 16, 20, 22, 26, Restatement. This maxim is obviously related to Alterius non iudicium: In Pari. And so it is that the state being interested in litigation its interests cannot be waived or disregarded. Campbell v. Consalvo (pleadings cannot be waived for stipulated away). Modus et conventio: Only those who are parties to a record are bound by it. See Res Adjudicata. Mutuality, 1 Gr. Ev. 524. See System: Strong v. S.

RES INTER ALIOS JUDICATUM NUL-lum aliis praeceditum faciunt: Matters adjudicated in one cause do not prejudice those who are not parties to it. 4 Gr. & Rud.; 1 Jones Ev. 173, Res Adjudicata. See Guing. See Restatement.


RESETTING AN OFFICER. 4 Gr. & Rud. See Arrost. Id.

RES PERIT DOMINO SUO: The destruction of the thing is the loss of the owner. Turtling, L. C. 404; Dume, L. C. 308. Id. This is an important maxim where property is destroyed before title passes; or before delivery and acceptance.


RESPONSIO UNIUS NON OMNI AUDITUR: The answer of one witness shall not be heard at all. This rule is often applied in equity. See PAROPONDERANCE or PROOF.

RESTATING THE LAW. Ever since the days of Saint Paul there has been an idea among statesmen and rulers that a restatement of the law should be made. Hamilton in the Federalist suggests the necessity for it. Ulipian attempted it, but the Pratorian Guard cut short his work. Bacon followed and the British government was won away from him by the machinations of Coke. (See Chapter 1, 1 Gr. & Rud.) Many codifiers have attempted it with resultant failure. The legislation in both England and America to simplify the law has not borne the fruit hoped for. The Code in New York is noth-
Restating, etc.—

What his compilations did for a few principles like Juris praecipua sunt juris and other fundamental conceptions have worn best; most of his effort was too vast and confusing. The few great principles were smothered. Had he clearly stated and made prominent a score of the greatest, the organic, the major principles of the law and briefly explained their interactions, and thus their logic and philosophy he would have greatly added to the value of his stupendous output, which has not done for jurisprudence what commercialism has advertised for it. It was a gift to Feudalism during the early stage of its growth and development. From the "Magnum opus" of antiquity nothing could be found or picked out to save the law from that drift that has borne it on down into the condition prophesied by Bacon. As the work of Blackstone and his followers has been obscured and upheld by the blackletter author, so has been Justinian. Lawyers are notorious parrots as is shown in relation to Sergeant Williams and his followers. They believe anything that is pressed by a powerful advertising bureau. This fact is learned from the arts of book agents who turn publishers and audaciously claim that some Digest or Abridgment, or Cyc gotten up by them is a "complete and systematic restatement of the whole body of the law along broad and scientific lines." For this they offer nothing else than a revision of a preceding output but which they claim and advertise as something else entirely. These volumes are introduced by lines of appreciation to the agent for his great, original and individualistic elaboration for which everything is said and claimed. The clamors and pretenses that the preceding Cyc or Digest was wrong but that at last the exactly proper one has come which upon examination is found to be a clumsy revision of the preceding,

which if no "restatement" then its successor—the revision cannot be. (See Observations, Abatement.) The bluff and bluster of costumers hailed the incoming fashion and ridiculing the outgoing are greatly surpassed by the book factories and their advertisements which in a government that protects the law student would refuse the distribution of palpably mendacious and mischievous advertisements and deceptive matter. In other relations we refer to the ways of publishers and the stupidity and apathy of the legal profession. (See Literature; Feudal Lawyer; Story; Unfair Trade.)

If the fundamentals of the law are but few (1 C. J. Cyc. 958–959; 2 Id. 1295—Altemum) then should not these be gathered in the most condensed way and their paraphrases and interactions demonstrated? See the discussion of Idem aegae. §§ 509–522, Equity In Procedure; Altemum; In pari; In jure; Verba fortius; Quis, quid. Now can these principles be impressively set and learned upon a vast alphabetical plan through scores of volumes wherein only a vague hint is made of the fundamental character of the principle? See the Cyc above referred to.

A dictionary may contain the words from which a high philosophy can be written, but, can a dictionary be a high philosophy? The serious, earnest student has many questions to struggle over. See Literature; In pari; Altemum; Abatement; Logic; Procedure.

A Restatement of the Law must gather and present the major, the organic maxims or fundamental principles and impress these and show their interactions with all the branches of the law. It must be something else than a concordance of these principles and a mere parroted reference to these as the primary and great, upon which all laws depend. (See Altemum. 2 C. J. Cyc 1295; Quis, quid.) If the principles of Equity bear the same relation to the old law that the new Testament does to the old, then how stands Blackstone who confesses that he did not understand Equity. If he did not then he did not understand the maxims and therefore the heart and vitals of Justinian's "Magnum opus." Every student should inquire into the worth of Blackstone and his followers. (See §§ 15–20, 1 Gr. & Rud.; Maine's Ancient law, Pollock's Introduction, xvii, xix, inter
Restating, etc.—

alia). Lawyers should not be awed by great reputations and incompetent judges conducting government. They should be something else than parrots and timid followers of the blind, the ambitious and, most mischievous, those who have befogged and misled.

Anent the above observations compare the Restatement offered by the preceding sections supported by this Text-Index. See the above maxims, also In praesentia majoris.


RETAILER. See Quod remedii.


RETROSPECTIVE DECISIONS. 4 Gr. & Rud.


REVERSAL OF JUDGMENT. 4 Gr. & Rud.


REVOCATION. Of offer to contract. Cooke v. Osley, L. C. 321, 3 Gr. & Rud.

REWARD. Offer as a contract. Williams v. Carverdine, L. C. 322, 3 Gr. & Rud.

REX NON DEBET ESSE SUB HOMINE sed sub deo et lege: The King should not be under the authority of man, but of God and the law. See Qui jusse; Judicial officers have absolute immunity for their acts, although out of the law. Pettibone v. Nichols, 4 Gr. & Rud. Lange v. Bennett, L. C. 159, 3 Gr. & Rud. See Rex non potest pecare; Principia.

REX NON POTEST PECCARE: The King can do no wrong. See Rex non debet.


So we see that there is becoming no practical distinction between the judiciary and executives; the division of state power cannot be longer said to exist. The courts have already gone to the limit in upholding executives. See Mostyn, Pettibone v. Nichols, 4 Gr. & Rud. It seems fair to say that all judges have absolute immunity under the law for anything they may do. Only a few judges have spoken firmly to restrain them as Mansfield did in Mostyn v. Fadrigas, L. C. 274, 3 Gr. & Rud.; also in Milligan's Case, 4 Gr. & Rud. Generally the inferior court must keep within its record. But still if it transcends its record and the law it can find justification in the late cases. The discussions around Crepps v. Durden, L. C. 113, 3 Gr. & Rud. are foreboding; and those around Lange, are equally unsatisfactory. See Qui jusse; Generally whatever remedy can be picked out of the condition afforded by the cases costs more than it will come to. Plain talk about these principles are overdue. In relation to Lange we give many hints of the state of the law. Rex est misera ubi jus est vagum et incertum.

The state cannot be sued without its consent, 134 A. S. 88, cases. Hopkins 221 U. S. 636; 35 L.R.A. (N.S.) 243-245; Ground, 227 U. S. 279. See 4 Gr. & Rud.; also Equity. Rex non potest pecare is founded on public policy: Salus populi: It is the basis of exempting municipal and quasi municipal corporations from liability in many relations. Hill v. Boston, 2 Gr. & Rud.; Rochester White Lead v. Yorks v. Rochester. White v. County of Bond; Weet v. Trustees of Brockport. A phase of the principle is involved in cases exempting Water Companies from liability for failing to supply water to extinguish fires. Also allowing an injured person to sue upon a bond given the public for the proper performance of the discharge of duties. See Privy.

To sum up it seems due to say that wherever an argument can be made that plausibly involves the maxims above mentioned that relief becomes precarious. Opposition to the ways of operating a government finds little judicial favor. Bacon learned that. And the impeachment of Governor Sulzer in New York also illustrates. See Nemo debet case juxta.

REX NUMquam MORitur: The King never dies. 4 Gr. & Rud.

R. v. CASES. R. stands for Rex v. Queen—Regina. For brevity we combine these cases. Generally they introduce the same kind of matter.

LEADING ENGLISH CASES NEXT FOLLOW:

Regina and Rex Cases. These cases are epitomized from the Grounds and Rudiments of Law, also Equity in Procedure. In the first work they are amplified together with extended citation of authorities. If further amplification is desired also additional cases from English Case Law should be consulted. These cases will be found in the table in the 16th Volume together with references to the other volumes. Thus the following cases will be a key and a
TEXT-INDEX

B. v. Cases.—
guide to extended gatherings of cases and discussions. Most all of these cases are cited in Bishop's Works.
The references to American cases will likewise aid investigation through table of cases cited.
B. v. ALLEN, 12 Cox, C. C. 193. 4 Gr. & Rud. Intent is no element in statutory
great principle of criminal law. We have
instances it is one of the trio of leading principles. Ignorantia legis: and Qui pro
impe foetus: being the others. The abiet
dinium in P. v. Roby, and 25 L.R.A.(N.S.) 661, above
cited.
Qui primo foetus: is largely involved in the
foreman. When the principal is liable criminally for the acts of the agent. C. v. Sucka, 114 N.L.A.(L. N.) 44, ext. n.
768-787 (general résumé).
R. v. BARNARD, 7 C. P. 784. False Pretenses: Uniform重要内容 to deceive is a false pretense. Means of deception im-
material; the law looks on substance not form. R. v. Broy; Allegance; Posito.
R. v. BISHOP, 14 Cox, C. C. 404, stated 25 L.R.A.(N.S.) 964, cited, sec. 18, Re-
R. v. BOWERMAN, 17 Cox, C. C. 151. Position in crime is sufficient. Res
R. v. BRADLAUGH, 14 Cox 68, reversing 2 Q. B. Div. 669, 3 Am. Cr. Rep. 464, in most cases demands that a "cause of
action" be stated and this demand cannot be stipulated or consented away. Campbell v. Condon. Interest republi-
Actus non facit: if the case is obscene, scandalous, coarse and vulgar. Edgar, 9 Mo. 758. In presentia majestis: See
R. v. BROWN, 1 C. & K. 144. Bigamy. Second marriage may be void. See
Shaffer v. S.
R. v. BRYAN, 7 Cox, C. C. 312, 5 Crim. Def. 153. False pretenses: Vain emp-
tor; Simples commendatio non obligat; R. v. Wheatley.
R. v. BUCHAKER, 16 Cox, C. C. 339, 4 Gr. & Rud. Larceny by trick. De-
fores et c. S. 54 Eliz. 533. R. v. Ryken, 220 U. S. 539. Actus non facit is the first
great principle of criminal law. We have
instances it is one of the trio of leading principles. Ignorantia legis: and Qui pro
impe foetus: being the others. The abiet
dinium in P. v. Roby, and 25 L.R.A.(N.S.) 661, above
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Actus non facit: if the case is obscene, scandalous, coarse and vulgar. Edgar, 9 Mo. 758. In presentia majestis: See


Incompetent evidence though cumulative is inadmissible. Incompetent original documents are the best evidence. Only these can be used to refresh the memory. The best evidence rule allows for refreshment of memory by the use of such documents.


Criminal pleading is not more strict than are civil. (§ 1-3, Restatement.) Rea v. Sturman. Quis quid. De non. The Trilogy of Procedure applies to all pleading. Its rules are universal, constituting a principle and are applicable to this trinity of principles and then the above cases. Also Campbell v. Consulor and Clark v. Dillon. The strict pleading known to the law are the equitable exceptions to the rule of frauds. Lester v. Forsyth, L. C. 341, 3 Gr. & Rud. In criminal law it is perjury. See Garrett.


R. v. KEWANT, 5 R. & A. 27, 9 R. C. 86. Defamation: Truth is no defense in criminal libel. § 313, 1 Gr. & Rud. There is no right to publish everything because it is true. 84 A. 124, 4 Gr. & Rud. (liberty of the press). Bulsa.


Refusal to accept office is indicable. Bro. v. HAGUE, 4 Cox C. C. 412. Personation of voter. Intent is immaterial. Ch. v. Actus non. R. v. HANDS, 16 Cox C. C. 188. Larceny; Stealing from an automaton. The law in witness' not form. Receditur a placitis.


Words are no assault; Cooling time; Heat of passion. C. v. Selfridge, 2 Gr. & Rud.


The contract, the tort and the crime are often closely related. Notes to R. v. Wheatley, L. C. (B. & H.); U. v. Holmes: Waterer v. Oil Co.


R. v. LONGBOTTOM, 3 Cox C. C. 439, 1 Lead C. C. (B. & H.) 56; R. v. Lowe; Bull; Pym; Salmon 33 L.R.A.(N.S.) 403, 45 L.R.A.(N.S.) 403.


R. v. MCGRAITH, 11 Cox, C. C. 347. Larceny; False pretense; larceny. Obtaining property by false pretenses is larceny; if by fright it is robbery.

R. v. MICHEAL, 9 C. & P. 556. Innocent agent not liable for crime. Administering a poison to a nurse does not make her liable. An innocent person is protected by the prescriptive constitution. *In praesentia maioris: Actus non facti.*

Statutes can change this. Juries would refuse to convict.

One importing a contagion not knowing he had it is not liable.


R. v. MILLIS, 10 Clark & F. 534. Marriage contract must be solemnized by the proper ceremony.

R. v. MILLIS, Dears, & Bell, 205. False pretense; Prosecution must be really deserved. R. v. Edwards; Fabula.


Negligence to provide a doctor is no defense in case of homicide. R. v. Fynn.

Necessaries; Medical treatment; Relevant to belief. R. v. Lewis; v. Lewis. 152, I Brit. R. C. 752, 36 L.R.A. (N.S.) 633.


R. v. NEGUS, 4 Crim. Def. 892, 4 Gr. & Rud. Embezzlement as a crime. Elements.

R. v. O'BRIEN, 15 Cox, C. C. 29, L. C. 75, 3 Gr. & Rud. Former jeopardy; Person accused of pilfering stolen wines must afterward be indicted for stealing the same goods. C. v. Robb, 12 Pick. 496, L. C. 74, 3 Gr. & Rud.; Gurdle v. P., 43 Ill. 226, L. C. 74a, 3 Gr. & Rud.

Pleadings essential for protection. 3 Gr. Ex. 32, 36. The above cases indicate why certainty is essential. R. v. Goldsmith.

And the civil cases are equally so. L. C. 23-30, 3 Gr. & Rud. Fickburg v. Henson. See Res Adjudicata. Interest repugnante.


De non apparitu; Verba fortis: Moore v. C.; Garrett.


Ad questionem.

R. v. POUTHON, 9 Cox, C. C. 249. Larceny; What is a taking. Not.


R. v. FYM, 1 Cox, C. C. 339. Death must follow in the year and a day, after the wound. It is immaterial that the wound was carelessly treated. Gross ignorance of a medical man supplies intent. 22 L.R.A. (N.S.) 841. In fere.


R. v. RICE, 10 Cox, C. C. 155, Disorderly house; Public morals. R. v. Crunden.

R. v. RILEY, 16 Cox, C. C. 191, L. C. 2133, 3 Gr. & Rud. Evidence; Answer to question of collateral facts conclusive; Important rule. 5 Gr. Ex. 448-450; 1 Wigm. 200, 308, 621. Res inter alias.


De non, v. O'Brien.

R. v. SALMON, 14 Cox, C. C. 494, Homicide; Criminal negligence supplies malice. R. v. Hutt; Longbottom; Love; Fynn.

R. v. SCHAFF, 17 A. & F. (N. S.) 237, Indisputable deposition may be read if witness is kept away by the defendant. Nullo commodum.


Atting at one and killing another, when murder. Larcefield v. S. 34 Ark. 275, 36 A. R. 8. "The intent goes with the bullet." R. v. Smith. If one was justified in acting then he is excused.

R. v. SHERLOCK, 10 Cox, C. C. 170, Possess concomitans; Duty to John. Robinson v. S.

R. v. SMITH, 3 Gr. Def. 751. No duty to indignant relatives. Brothers and sisters owe no duty to each other; and therefore neither is the duty owed each to the other. R. v. Conde; Hughes; Fulkingham; Meroby. See R. v. Vann, 2 Br. R. C. 69a.

R. v. SMITH, 10 Cox, C. C. 82. Preventing one from protecting himself is a crime. Nullo commodum.
THE LAW RESTATE

R. v. SOLOMONS, 17 Cox. C. C. 90. Lar-
encen: False pretenses; Distinction; Pro-
ten; to be raised by former jeopardy and depends upon
Peres, L. C. 69, et seq. 3 Gr. & Rud.;
Huron v. Co. 231, 4 Gr. & Rud.; 3 Gr. Ex. 35, 36. See Res Adjudicata,
also L. C. 25-30, 3 Gr. & Rud.

The burden of Proof Procedure is the higher law
and it must be respected. It cannot be
stipulated away. Campbell v. Consalus.

Facts priori juris: Aliterum non dederat;
Salus.

R. v. STEEDMAN, Foster's Crown Law
292. Honorable Cooling time; Irresistible

4 Gr. & Rud.

409-432, 5 Crim. Def. 424, 4 Gr. & Rud. Larceny: Finding lost property; Taking
it with the animus furandi. R. v. Homes.
Recent possession of the fruits of crime. R.

v. Partridge, supra.

R. v. THURSDAY, while Cr. C. (B. & H.).
358-362. Larceny; Taking with the con-
sent of an adulteress is. R. v. Feather-
stone. A wife cannot steal from the hus-
band but if she joins with a third person
in the act then it is larceny.

Pass cannot steal from one another. But if they conspire with a third person
then the taking is larceny.

R. v. TOLSON, 16 Cox. C. 629. Cited,
sec. 18, Restatement. Bigamy: Ignorance of
the existence of the "spouse is no de-
fense. One must know. R. v. Prince;
R. v. Allen; F. v. Robey; C. v. Math,
7 Met. 472, 2 Gr. & Rud. Tolson cited P.
660. Actus non facti. Intent is no element in statutory crime. P.

v. Robey; 25 L.R.A.(N.S.) 661. But this
rule meets with much objection and many
exceptions are declared against it. Nei-
ther decisions nor "omnipotent Parlia-
ments" can obliterate the major—the or-
ganic maxims. In praesentia majoris.

R. v. TORPEY, 12 Cox. C. C. 45. 4 Gr.

& Rud. Coerelon; Doctrines ot. u. v.
Foel, 6 A. D. 105, 1 Lead. Cr. C. (B. &
H.) 81-84, 19 L.R.A. 359. See Neces-
tias; Necessity, 4 Gr. & Rud.

R. v. TOWNLEY, 12 Cox. C. C. 59. Lar-
encen: Abandoned property; Animals.

Figures not a subject of larceny. Only
personal property can be stolen. What
are fixtures? Hyes v. Hughes, 2 Gr. &
Rud.

R. v. TOWSE, 14 Cox. C. C. 527, 4 Gr.

& Rud. ex. al. ex. The Trilogy of Procedure
vindicated: For it manifestly the pleadings are
essential for protection from the same
former jeopardy. R. v. O'Brien, ante.
And this is true of all kinds of
cases. Story: Rushion, L. C. 25-30,
also 69 Rud.; also 4 kinds of cases. Story:

R. v. VANTANTILLO, 4 M. & S. 73, 105
Eng. Reprint 762. 16 R. R. 389, stated, 49,
a contagion is a crime.

R. v. VAUX, 1 Lead. Cr. C. (B. & H.)
513, L. C. 72, et seq. 3 Gr. & Rud.; 76 Eng.
Reprint 992. Former Jeopardy: Record
must be pleaded. 2 Blish, Cr. C. 224, 8
Bryan, 343; 913. 2 S. P. R. v. Vandersamb, 4 Gr.

& Rud. and Equity In Procedure, 1 669.
The Trilogy of Procedure vindicated.
The record must be pleaded. This means
the mandatory record not the statutory
record. The latter has nothing to do
with Res Adjudicata or Former Jeopardy.
And so the lawyer should have technical
knowledge of these two rules. Also
Judges declaim or write opinions from
the bench that the Bar is ignorant as
to these distinctions. The

distinctions are indicated in Windsor,
L. & C. et seq., 3 Gr. & Rud. The ma-
datory record is dictated by the Trilogy
of Procedure. Rules of Res Adjudicata,
the Trilogy of Procedure, the mandatory
record of the General Demurrer, also of
"Due Process of Law" all have interactions.
Interactions the names are variant
still they are all closely related. I think
it right: In the criminal field we learn the
class and vice versa. "The law is an
entirely.

What the mandatory record must juridically
present is Gray v. P. 201 Ill. 146, 49
L.R.A.(N.S.) 1215. And this is the
record and the matter that feeds a plea
of estoppel of record. And in Walter,
250 Ill. 420, the court decided that
cause of action," must appear in the
right order of pleading, according to "what ought
to be of record" etc. Fallandingham v.
Ryan; Thomas v. P.; Fisk v. Cledan,
the Trilogy of Procedure.

Works on criminal law introduce form-
er jeopardy in a little, narrow, partitioned,
individualized, and irrelevant way that
but focuses and narrows the vision and feeds the
fallacy that the criminal lawyer may
know his little branch of the law and
nothing of the other branches. That he
may be ignorant of the Trilogy of Procedure
and of its logic and his lack of the
major maxims—the organic
principles of the law. Multitudo imperi-
torem perdit curiam.

We have shown that all the leading
branches of the law involve the
criminal law.

R. v. WATERS, 2 L. C. C. (B. & H.)
152, L. C. 72, 4 Gr. & Rud. Pleadings are jur-
lisdictions. Vickers v. Henson. The
they are only required by Due Process of Law.
Bland v. Gil Co. v. Mo.; Windsor, L. C.
1, 3 Gr. & Rud. There must be proper
pleadings and they must be tested by the
Trilogy of Procedure at the stage of the
general demurrer and at all of its
correlatives. The tests are the same, at
all stages and times. Rushion; Story;
Perrott. Quis, quid, is the law in all sys-

One count may incorporate from another
to avoid prolixity. Necessity; Conven-
tience and the like: for formal and may
be waived. And they are waiveable for an
instant without apt and precise
objection. Consensus: It is not the ver-
dict that cues such objections. Story,
Rushion; Story: Clark v. West.

R. v. WYNN, 1 Lead. Cr. C. (B. &
H.) 152, 117, E. R. 1396, 3 Gr. &
Rud. Alder by verdict. This case illustrates
the same principle in Waters, supra.
These cases are burdened with the title
of Consensus sollicit storm errorem.
Among all of the American courts may be found
eight kinds of Alder. In other rela-
tions we refer to them. See Rushion.
Alder in the criminal case is the same thing
in the civil case, also in equity. It is common to all systems.

England and its provinces and the Federal courts of each state and each state and each state of procedure has its cluster of cases and these opinions nearly every decade. A decision of Jackson v. Peck and Stennis v. Hogg, bad all attention when Chitty was at the bar. The decision of Williams was authority for the proposition that substance cases could be waived. §§ 117, 118, 273. Equity in Pockdurn. We often cite U. S. v. Crut-
shank, to the point. Story speaks of it correctly. See Story; Garrett.


Skeete, Okla. 50 L.R.A. (N.S.) 536 (denies Rigg).

RIKT TO BEGIN. Acte non probante res absoluutum. Bonnell, L. C. 185, 3 Gr. & Rud.; cited.

RIOT. 4 Gr. & Rud.

RIPARIAN. 4 Gr. & Rud.


Statement of the case: Abatement and dilatory pleadings are strictly construed. Verba fortius. To illustrate: A plea of abatement of misnomer of the defendant beginning "and the said, ...styled by the name of Robert, is bad." For the defendant by introducing the word "said" has admitted himself to be the person sued.

Admissions in a pleading are conclusive. Quot prata factae. Botice vs. Rallines, L. C. 43, 3 Gr. & Rud. The Code re-
affirms this necessary rule to limit the issues as to narrow the proofs. See Issues; Denials; Dickson v. Cole, L. C. 34, 3 Gr. & Rud.

Rules of judicial admissions are evidence. OsgDanny vs. Winchester Arms Co. L. C. 41, 3 Gr. & Rud. See ADMISSIONS.

Every office given is exact to. Expressio unius. See Words; Every.

Roberts v. Moon, should be considered with Rushton and Dovaston.

Code cases are equally strict. Antidote; Bowen v. Emmerson.

A pleader pleads at his peril. Ignorantia

pleads is void. Pain as to

parte, L. C. 107, 3 Gr. & Rud.

Formal matter, waiver of, is favored. Inter-
rest: s 53, 1 Gr. & Rud.; L. C. 296, 3 Gr. & Rud.


ROBINSON in RE, 55 A. 596. Contem-

pleading is void. Expressio corum.


ROBINSON v. R., 97 A. 156. Basta-
turdus: A bastard has no heirs except those born of his body. Remedial statute strictly construed.


ROCHESTER WHITE LEAD CO. v.


ROE v. TRANMARR, 2 Sm. L. C. 524.

Deeds will be upheld if possible not de-

fected as in Shelley's Case. Ut res: Qui

haret.

ROETHM v. HORST, 178 U. S. 1–22. Re-
nunciation of contract gives immediate
Boehm, et al. —

right to sue. Frost v. Knight and Hoche-
storfer v. Lavorre, practically reprinted.
Cited and discussed: LaBatt's Mas. &
Ser. 331.

ROPER v. ROLLER, 107 A. S. 103, 68
L.R.A. 893-895. Parent and child;
the latter cannot sue the parent for as-
saults; torts. Rulius v. E. R. Channce.
ROPER v. CLAY, 18 Mo. 383, 59 A. D.
314, Stated, 273 Equity in Procedure,
After by verdict; the sl. constructed.
"A title defectively stated and a de-
scriptive title." Jackson v. Peck; Stenell v.
Begley. A title not constructed. A title
constructed.
Goldham v. Edwards; Literature, quoting
S. G.

ROBES v. JENNER, 45 Fla. 556, 110
A. S. 79. Sworn answers are evidence as
in Federal Practice. Vigo et al. v. Hopp, 104
664, L. C. 43, 5 Gr. & Rud. All pleadings
in principle are evidence. See Robinson v.
Raley. But the discussions over this
question are like those over Cripss, Green
County Bank, Rushton and most all
other questions of procedure. The object
of pleadings is to limit issues and to
narrow the controversy. The general issue
and the general denial are inimical to a
code. They are like the Conclusion of law.
R Officer v. ICALE. 129 A. S. 588, 593.

ROSE v. HART, Sm. L. C. 8th Ed. Set-
of: Mutualty essential for. Contr: Contra:
Brooke, 71 N. C. 356, Insolvency as an
example. See Set-off: EQUIT.

ROSE v. HIMELEY, 4 Cranch. 269, Stated
in Thomas v. P. III. It reafirms Crockett
v. Lee, 7 Wheat. 522 (alleged et pro-
blematical). Note: The more appropriate
Pomory. It is in accord with Xalle v. Oyster;
Vickburg: Reynolds v. Stockton. The
Trilogy of Procedure vindicated. In no way
these cases sustain the view that the general
demurrer cannot be waived. And it would
seem that Thomas v. P. II in Illinois ought
to have settled something in that state
before the experiments with the Munici-
pal Court for Chicago. This was
finally constructed in Weltei, 250 N. III. 420
(Die non). See Rushon; also Pomory.

ROSE v. HERRICK, 51 N. S. 101, 101 Eng.
Reprint, 773. Nulansse; Remedies for.

ROSE v. MILNE, Cited, § 21, Restate-
ment. See Rose v. Milne.
ROSSEN v. U. S., 161 U. S. 29, L. C. 92,
3 Gr. & Rud, 227 U. S. 427. This case
effects a great change in procedure. The
Federal court is adopting some "new rules.

ROSS v. HAYEKE INS. Co. 34 L.R.A.
406. An appellant cannot change his
base on appeal. Garland v. Whoribough,
21 N. C. 219, 3 Gr. & Rud. Con-
sensus: Allepas: But this applies only
to volwable matter. It does not affect the
stipulation: Res. 289a-290. 3 Gr. & Rud.

Agency. Notice to the agent is notice to
the principal. Qui sentit: Le Neve v. Le
Vere, L. C. 396, 3 Gr. & Rud.

ROSS v. MILNE, 37 W. Va. 204,
37 A. D. 636. Cited as Rose v. Milne,
In 21, Restatement.

ROSE v. ROSSITER, 52 A. D., 2d, 24
Leip. (Va.) 204, 37 A. D. 636. Cited as Rose v. Milne,
In 21, Restatement.

ROSSITER v. ROSSITER, 2d A. D. 62,
A special agent must obey instructions,
Batty, 2 Johns. 48, 1 Am. L. C. 633-699, et
al. (Addendums general and special); Ex-
presso unius: And so inferior courts are
viewed. Williams v. Peayton, L. C. 117,

Rossiter, etc. —

3 Gr. & Rud. See these cases cited in
Rout. 4 Gr. & Rud. Summers.
ROSE v. DAWSON, Wh. & Tud. L. C.
Eq. ASSISTANT JUDGE A. E. CHURCHER;

ROY v. HORSELEY, 25 A. R. 537, L.
C. 288, 3 Gr. & Rud. Terms of court;
statutes providing for. See Willard v. Rud.
"A title defectively stated and a de-
scriptive title." Jackson v. Peck; Stenell
v. Begley. A title not constructed. A title
constructed.
Goldham v. Edwards; Literature, quoting
S. G.

ROYALL EX PARTE, 177 U. S. 241.
L. C. 288, 3 Gr. & Rud. One imprisoned
under an unconstitutional law will be re-
leased by writ of habeas corpus from the
Federal courts. Limits of liberal construction of records. Lit re-
Goldham v. Edwards; Literature, quoting
S. G.

ROSE v. GUGGENHEIM, 8 A. R. 522, 4
Gr. & Rud. Landlord and tenant. Evic-
tion of tenant stops rent. One cannot ap-
portion a contract by his own wrong.
Non bene; Expresso unius; Nullus com-
modum.

ROY L'EST LE PER ASCUN STATUTE,
si nil ne soit expressam nosse, the
King is not bound by any statute, if he
is not expressly named. Barron, L. C.
241, 3 Gr. & Rud. See Emancipation Co. 244
U. S. 152. See Nullium tempus occurrit regi.

RULES OF COURT. Must accord with
the general laws. 129 A. S. 720-727, ext.

RUTLEDGE v. RUTLEDGE, 24 S. 553;
Rutledge v. Rutledge, 24 S. 553.

RUTLEDGE v. RUTLEDGE, 24 S. 553;
Restatement.

RUTLEDGE v. RUTLEDGE, 24 S. 553;
Restatement.

THE LAW RESTATES
Rushton.— see. (See Williams, Sergeant); also Literature; Restating the law.

Feudalism has left many entanglements in our law. Many of them flow from the motto that "Parliament is omnipotent," Rison v. Farr, L. C. 253, 3 Gr. & Rud.; and another is that the law is local and flat and is made by decisions. If either of these propositions were true there has been enough legislation and decisions to well settle the rule in Rushton. But it really seems that the more cases we have the more unsettled the law becomes. See Pomeroy. In New York they range from Campbell v. Consaulus to Baily v. Hornthal and Clark v. West. The contentions in Gulling well illustrate. In Illinois they have been experimenting with the Municipal Court of Chicago until the Feudal legislators have learned that The Trilogy of Procedure is still the law. Walter, 250 Ill. 420. See Equity In Procedure.

It seems well to invite the student to return and look over the Trilogy of Procedure and its cognates and to determine for himself whether these are not a better "Datum Post," than are all the decisions that can be gathered anent the discussions of Jackson v. Peeked, Stemell v. Hogg, Spencer v. Parker, Stalcum v. Pomery, Rose v. Himely, Roper v. Clay and all the cognates of these cases. Along with all of them has come the view that the general demurrer can be waived and that out of irrelevant evidence cases and defenses can be carved and set up. Gulling; Weber v. Lewis.

There is something strange about the law and lawyers as may be gathered from the history of Moses, Lycurgus, Solon, Saint Paul, Justinian, Coke, Bacon, Mansfield and the effort of Codifiers in America. We hinted at some of these facts in other relations. See Pomeroy. Literature. Coke could not understand the Earl of Oxford's Case. (Morris on the development of law, 289-288; Chapter 1, 1 Gr. & Rud. Res Adjudicata.)

Blackstone could not understand the "Equid Case," all of the Feudal lawyers hated both Bacon and Mansfield; and Charles O'Connor and the Supreme Court of the United States did not understand the Code. (McPauL.) See Literature.

Not a single Feudal author has cited and explained the fundamental maxims referred to. Nor have the Code authors done any better. On the contrary they have led away from the maxims or denounced them. Story who did not make mistakes cited Quis, quid, but he wrote so high and terse that he has never been understood. His great sections are splendid Code and Practice Act rules. Nor has one introduced and explained the interactions of the rule in Rushton with the rules of Res Adjudicata, Collateral Attack and Due Process of Law. (See Sccs. 1-26, Restatement.) Nor that Pleadings are jurisdictional and are vital to the force and effect of a judgment. Nalle v. Oyster, Vicksburg v. Hansen; Palmer v. Humiston; and Milbra v. Steel Co. The latter case cites Mendel, L. C. 77, 3 Gr. & Rud. All these cases are excellent Code cases. And they all vindicate the Trilogy of Procedure. (See § 1 ante.) Had these facts been plainly stated then the Code would not have become a mystery shrouded in fog and mystification. Story.

Rushton is a truly great case and marks the limits of liberal construction, 2 Tidd's Pract. 910, 920; Literature. It stands for the proposition that if a "cause of action" can be picked out of the pleading at the stage of the general demurrer that then the demurrer will be overruled. Ut res is the rule on general demurrer; it is absurd to say that a more liberal rule will be applied at the stage of the motion in Arrest, or on Collateral Attack. Goldham v. Edwards. But see Baker v. Warner, 232 U. S. 588, 593, cited and followed Washington Herald, 41 App. Cas. D. C. 338, 3 Bouv. Dis. 3rd, Rawle Revision (1914) ed. title Pleading. And so it is that the general demurrer cannot be waived. North Carolina. "It will keep." Mallincrodt. It is the state's plea to the jurisdiction and any one even the amicus curiae may raise it. Mansfield or Story would sua sponte raise it. Garland v. Davis, 4 How. 431, L. C. 60, 3 Gr. & Rud. (substantial pleadings cannot be waived—they are jurisdictional. But as to dilatory or abatement pleadings these can be waived. Roberts v. Moon, ante; also L. C. 299a-299, 3 Gr. & Rud.; § 53, 1 Gr. & Rud. Formal matter is governed by Consensus tollit errorem, while matter of substance is governed by the Trilogy of Procedure and its cognates. There is a logic and a philosophy anent these matters that the Feudal Lawyer and his followers could
never understand. Penmouwsky v. Coever. They cannot understand the respective functions of the mandatory and of the statutory records. This is proved by cases like Gulling where the decree was carved out of irrelevant evidence, also in Henry v. Hilliard, 49 L.R.A. (N.S.) 1-44. This is the "theory-of-the-case" doctrine. See Thompson. Neither Mansfield nor story, nor Justice Field ever held that the general demurrer can be waived. They confined Consensus tollit errorrem to formal matter. Shuttle. As to matter of substance—the state's concern—Interest republce, they applied Quis quid: and Quod ab initio, Windsor, L. C. 1, 3 Gr. & Rud. There is the contention of those who minimize quod ab initio, and of the "new" school who enlarge Consensus, to crowd the state—Rome out. This is good Feudal doctrine. They never respect the attitude of government. To them the law is local and flat; "parliament is omnipotent." The law is made at the capital of each Lord, or tribe or province. Consequently they never cite the Universal, Constitutional principles in the language of all nations—Rome which they hated and finally overthrow. To cite these maxims would destroy their claims. (See Pomery.)

Pleadings are servitors of justice and ought not be made instruments of chicanery. Robinson v. Raley. Now could they be put to a worse use than appears from Gulling? They are barriers of protection from abuse of power—usurpation and the ways of a judicial hierarchy. But they were not in Rennenberger v. Britton, nor in S. v. Fasse. In S. v. Muench the true functions of Pleadings are set out. A case like this ought end the "Theory of the Case." But that euphemism has become too well entrenched "by our decisions" to be shaken until the Federal Supreme Court sees its way to broadly define and enforce "Due Process of Law." The view that each state can have its own local and provincial kind is good Feudal doctrine. It is not Roman. Who plainly told the Scribes and Pharisees in a Saint Paul's trial what the "manner of the Romans" were? Herefrom can be picked out the Trilogy of Procedure. De non and its cognates. It is these that the Feudal Lawyer and his followers lead away from. For these he has filled the literature of the law with the jargon of judicial anarchy, and of its literature a "legal Jungle." Aider by verdict is the shibboleth with which the "new" school uphold bad pleadings. See Literature. Henry v. Hilliard, supra. In connection with this fallacy which only exists in the minds of those not instructed in the logic and the philosophy of the law the feudal Lawyer gave his vortaries an illustration which Sergeant Williams, Tidd, Chitty, Stephen, Gould and many of the Code authors and courts understand better than they do any Universal, Constitutional principle of Pleading. In Code discussions this supposed rule has been applied. Roper v. Clay, Stated § 273, Equity In Procedure. A verdict cures nothing of substance. (See Consensus; Literature; Aider.) If it can cure one thing, it can cure all of substance and so pleadings would be reckoned from the verdict as in Gulling. From the verdict all that is seen is the Feudal doctrine. Probatis extremis: Omnia praesumptur rite. This denies that Pleadings are jurisdictional.

Mansfield stated that "a verdict will not mend the matter when the gist of the case is not laid in the declaration (or the bill, Story), but it will cure ambiguity (formal matter). And there is a strong case in print of an action for keeping a bull (Busedin v. Sharp, 2 Salk. 662,) 3 Id. 12; 91 Eng. Reprint, 564, 661; also in May v. Burdett where the scien-tor having been omitted was held bad after verdict." Notes Sm. L. C. And the same was held in Van Leusen v. Lyke, 1 N. Y. 515, 49 A. D. 346. L. C. 14, 3 Gr. & Rud. (scientor must be alleged). We also further quote from the notes: "the principle which this case (Rushton) decided and which is commonly cited to establish; viz: that a verdict cures the statement of a title defectively stated (See Tibbita v. Yorke, 4 A. & E. 134), 111 E. R. 738, but not a defective title is learnedly discussed in the notes to Stennell v. Hogg, 1 Wm. Saund. 227 etc." In these notes is found Sergeant Williams' proposition that substance can be waived. He it was who mused Tidd, Chitty, Stephen and all of their followers. See § 117, Equity In Procedure. Not only is the rule about "aider by verdict" a fallacy but more; for this title of jargon is an absurdity as will next be shown. For this demon-
Rushton.—

Illustration we will take a late case which brought great disappointment to good practitioners in North Carolina, it would seem. Henry v. Hilliard, 44 L.R.A. (N.S.) 144.

In Henry specific performance of an oral agreement was sought by the vendee of two separate and distinct tracts of land. The vendee did not allege that he took possession of either tract under and in pursuance of the oral agreement (Lester v. Foxcroft, L. C. 341, 3 Gr. & Rud.). Now here was no "cause of action" stated as to either tract. Here was a defective title. Now on the face of the record no ground for recovery was stated; it is like Gulling and other "theory-of-the-case" cases, wherein the judgment or decree or sentence carries its implications of authority. As to them no longer need an authority be plead as in Res Adjudicata. They are free of the frets of protection—of the tests of Res Adjudicata and of Due Process of Law. Now, in Henry, the bill showed two tracts but it did not show title to either. So far as the allegations went there could be no recovery of either. Halligan v. Frey, 49 L.R.A. (N.S.) 112-120 citing Lester v. Foxcroft. It also appears that the evidence showed that possession was taken as required by law in that class of cases. But of course this evidence relating to the principal equity in such cases was irrelevant for the very plain reason that there were no allegations to which it referred. And accordingly the lower court decided the case for the defendant. But on appeal this decree was reversed for the reason it seems that the evidence showed that possession was taken as required by law of one of the tracts. So we see that here were two titles in question and that one was good and the other was bad. But how let us ask if either was good as far as the allegations went? And would not the verdict apply to both alike? One being a good and the other a bad title can it be said that the good title defectively stated was any better than the defective title? So far as a juridical presentation were they not both equally bad? Each lacking the allegation of possession taken under and in pursuance of the contract was fatally defective. One was no better than the other. And so we say that juridically speaking a defective title is no better than a

Rushton.—

title defectively stated." The titles were defectively stated and each title was defective according to Lester v. Foxcroft.

Aider by verdict is at most a crude expression of a stage of the operation of Consensus toluit errorem. If a pleading has merely a formal defect, this is waived the instant it is passed and then it is gone forever. Rudd, 41 App. Cases, D. C. 358; See Literature. It is not in suspension or abeyance until the verdict or findings are returned. So Aider is exceedingly limited in its operation. It has not the all sweeping curative effect that may be inferred from its quite popular mention by careless courts and authors. It does not have a retroactive effect and import by construction matter of substance that is omitted and for want of which the pleading is subject to general demurrer. Hitchcock v. Haight, L. C. 12, 3 Gr. & Rud.

As used and applied by Sergeant Williams it has an all-curing operation. See secs. 117, 118, Equity In Procedure. His view misled Tindall, Chitty, Stephen, Gould and almost all of the Code authors.

On the other hand, are to be reckoned, the Trilogy of Procedure, Mansfield, Kent, Story and the rules of the general demurrer. From all of these the student can investigate and judge for himself. See Quod ab initio.

If a matter can be waived it is waived if passed without apt objection. Roberts v. Moon; L. C. 290-299; 3 Gr. & Rud.; consensus, §§ 178, 179, Equity In Procedure.

But if it concern the state (Campbell v. Consaulas), then it is substance and then it never can be waived. Altemum: Res inter alios acta: Quod ab initio. It may be raised at all times, places and stages. It may be raised on Collateral Attack, Res Adjudicata and Due Process of Law. Windsor v. McVeigh, L. C. 1, 3 Gr. & Rud.; L. C. 290a, 3 Gr. & Rud. Vadkin v. Soper, 1 Aikens, Vt. 287, 1 Am. Lead. Cas. 142-147, L. C. 11, 3 Gr. & Rud. S. v. Perkins, 88 Vt. 121.

A matter that can be raised by motion in Arrest is substance and this is never waived. The cause for the general demurrer cannot be waived. It may be raised at all times, places and stages. § 10, Story Eq. Pleading, 47, Equity: Campbell v. Consaulas; Clark v. Dillon.

An illustration of a defective title (cause of action), appears in Camp-
Rushoton.—

Bell v. Consalus where the pleadings were stipulated away, also in Van Leuven v. Lyke where the scenter of the hog was not alleged; also in Bowen v. Emmerson, also in Antisdel v. R. R. Co. which is like Dovaston v. Payne. These are cases involving Verba fortis accepipiantur contra proferentem; Clark v. Dillon.


The "defective title" means the defective "cause of action" no more and no less. For plain direct expression confusing and mystifying jargon ought not have been introduced. It brought with it a hundred "Shelley" Cases that are a "legal jungle."

And finally we will add that a pleading that will not pass the general demurrer must also fail at the stage of Collateral Attack, also to satisfy the tests of Res Adjudicata, and Due Process of Law. That the general demurrer cannot be waived is a fundamental rule arising from the Trilogy of Procedure—the major—the organic maxims of the Prescriptive Constitution. And these rules are the same in all systems. Upon respect for them depend the logic and the philosophy of the law. They dictate the lesser rules. In praecentius majoris cessat potestia minora.

Probata will not supply allegata. De non: Garrett. But it is held that an agreed statement of facts will add to and supplement the pleading. D. C. e. Lee, 35 App. D. C. 341.

One of the worst snarls of the law involves Rushoton. Story paraphrased this case in his § 10, Equity Pleading. Also Tidd, 2 Practice, 919, 920, quoted and followed in State Bk. v. W. U. Tel. Co. — N. M. —, L.R.A. 1915A, 120, 126-127 (a general demurrer can be waived). Compare Story and Tidd. Note the difference between authors; the breadth and depth of Story's vision and the narrowness of Tidd who was hobbled by cases. The former wrote from the maxims, while the latter wrote from the cases. Anent Literature we quote Tidd; Chitty, Stephen, Gould and Pomeroy, followed the style and views of Tidd, whom we quote under the title Literature.


Comprehending the Trilogy of Procedure will dispel that illusion. Waiver is just the same in Equity as at law, although there is no "verdict" in Equity procedure to supply the pleadings if there be none. See Rushoton. There is nothing more illogical and unphilosophical in all the law than Chitty's three kinds of Aider. For the fact is that there is just as much aider in an Equity case as there is in a law case. We often cite the Gulling Case as a dreadful example also Henry, 44 L.R.A. (N.S.) 1-44, and here we merely observe that they were Equity cases. Both of them are opposed to Story's sections also the Trilogy of Procedure, also the plain language of the Code. Quis, quid: Cockrell, 50 L.R.A. (N.S.) 1.

Dovaston v. Payne should be studied with Rushoton. We refer to it under the title Feudal Lawyer. It was conducted by Sergeant Williams.

Rush v. Brown, 98 Mo. 480. Variances counted. At the same time the Trilogy of Procedure is upheld. See Rushoton, also Humphreys, 98 Mo. Davis v. Jacksonville Line.

Rusell v. Mann, 22 Cal. 132, L. C. 87, 3 Gr. & Rud. Jurisdictional facts must be pleaded and properly appear from the record in all cases. Statutory facts must be pleaded as in Rushoton, Bartlett and Hingham, L. C. 5, 6, and 7, 3 Gr. & Rud. De non is the rule. It applies to all courts.


SALUS POPULI EST SUPREMA LEX: That regard be had to the public welfare is the highest law. Cited, § 17, Restatement 6 in Ruiz, C. L. 157. This maxim is a part of Juris praecepta: We often cite it with Alterum: See 4 Gr. & Rud. Also Equity in Procedure. The attitude of the state in Equity, Procedure, Contract, crime and construction must be well comprehended. See In pari: Coram judice. Campbell v. Connell.

SANBORN v. SANBORN, 7 Gray, 142, L. C. 61, 3 Gr. & Rud. A cause of action must exist when the suit is instituted. Quod ab initio: 4 Gr. & Rud. Also Equity in Procedure. Osborn.


SANSPORTA v. JENNINGS, 26 A. D. 377, 4 Gr. & Rud. Contract; Fraud and promissory estoppel; In pari:

SATISFACTION. See Accord.


SCHOOL DISTRICT v. MERCER COUNTY, 115 Pa. 559, 4 Gr. & Rud. Contract; Statutory conditions precedent. A school teacher must have a certificate in order to bind the corporation. Ita lex: In pari.

SCHUCHARDT v. ALLENS, 1 Wall. 339, 20 L. 449. Walker cannot tack on additional terms to a completed contract.

Schuchardt, etc.—

Sanderus; Simplicius: Cestat emporio; Ut rea; Ad quaestionem.

SCIENTER. As to vicious animal. Rush- ton: Van Leuren v. Lake (it must be averred to make a "cause of action"), 24 L.R.A.(N.S.) 458, n., what is necessary, Warrick, Neb. 61 L.R.A.(N.S.) 45.

SCINTILL. Of evidences. Bonnel, L. C. 185, 3 Gr. & Rud.

SCIRE FACIAM: To revive a judgment. 122 A. S. 66-113, n.

SCOTT v. AVEY, 8 Exch. 497. Parties may contract how damages may be assessed: Consensus fault iuris.


SCOTT v. REDFORD (Dredd Scott). Cited; § 15. Restatement. A "cause of action" arises from principles of fundamental law which cannot be derogated from by statute. Uteri non judicium. 4 Gr. & Rud. Thomas v. P. (III.)


Carter v. Towson, 98 Mass. 563, 56 A. D. 682, 2 Gr. & Rud. (sale of dangerous instruments to a child; liability of the seller); a tort may arise from a contract. Thomas v. Winchester). 36 A. St. 815.

Dixon v. Bell, 105 English Reprint, 1023, 19 Eng. Rul. Cas. 28, 36 A. S. 814, 2 Gr. & Rud. (one employing a child to bring a gun which is discharged and injures one is liable to the injured party; Squib Case).

Hartnett v. Boston Store, 265 Ill. 331, L.R.A.1915C, 460, n. (sale of firearm in violation of law to a fifteen-year old boy who clumly uses it and injures a third person does not make the seller liable; the boy's negligence is not the proximate cause; see Carter v. Tovence, and Dixon, v. Bell. In jure.


THE LAW RESTATED

SEABURY v. GROSVENOR, 14 Blatch. 282, L. C. 281. 3 Gr. & R. & D. A real and bona fide 'cause of action' is essential to support a judgment. Scott v. McNeal; Fabula. One must come into court with clean hands.

SEAL: SEALED INSTRUMENTS. They import a consideration. Jackson v. Cleverly. 25 L. R. A. (N. S.) 1194. 4 Gr. & R.

SEARCH: SEARCH WARRANTS. 4 Gr. & R. Semayne's Case. Arrest: 2 Gr. & R.

SEATON v. BENEDICT, Sm. L. C. Husband's liability for wife's debts. Manby; Wanamaker v. Weaver.

SECUNDUM ALLEGATA ET PROBATA: A recovery must be. 4 Gr. & R. 1 Whitehouse Eq. Prac. 88, 92. This maxim is a cognate of the Trilogy of Proced- ed. 4 Gr. & R. 1. Whitehouse Eq. Prac. 88, 92. This maxim is a cognate of the Trilogy of Proced-

SECURITY FOR COSTS. 4 Gr. & R. Mace too late after suit commenced. Henry, 43 Minn. 295.


SEPARATION OF WITNESSES. 4 Gr. & R. 1 Gr. Ev. 432.

SERVAGE, 4 Gr. & R. Servant.

SERVANT. Master and Servant. McManus.


SHAM Pleadings. Confer no jurisdiction. Quod nullum est; Fabula. Provisions are jurisdictional. Vickery v. Henson. Not if they are sham they give the court nothing to act upon. Gracer, L. C. 102. et seq.; 3 Gr. & R.

Sham, etc.—


SHIELDS v. CASE, Kent's Adolfinio 1 24, 1 Gr. & R. Also, 4 Gr. & R. The largest resumé of 29 L. R. A. (N. S.) 935-1170.


SHERIFF. 4 Gr. & R. Immunity for serving regular process. Qui juvabo; Sava- cool.


SHOP BOOKS. Price v. Tarrington, L. C. 213, 3 Gr. & R.


SHUTTLE v. THOMPSON, 15 Wall. 151, L. C. 291, 3 Gr. & R. Incompetent, irrelevant, inadmissible, immaterial evidence need not be excepted to. This proposition is deadly to the claims of the "theory-of-the-case" advocates. This case holds that irrelevant evidence is not a juridical element. Thus it stands for the Trilogy of Procedure. Frustration: Compare: Gullion; also the effect of irrelevant evidence in Henry v. Hilliard, stated under Rushton.

Evidence not admissible for want of alleges- gate is surplusage. Utile: Pleadings are jurisdictional. Sawyer; Shields: Qua, quid.

Slack, ter. This doctrine denies Quod ad initio: Equity in Procedure.

SLACUM v. POMERY, 6 Chanc. 221. The Tribunal. The case is strongly sup-
ject matter; this must properly appear.


SIC UTERAE TUO UT ALLIENUM NON lads: So use your own property as not to injure another. See 
no other. Cited, § 19, Restatement. See also § 19, Restatement. The maxim is a part of alterum: also of salus: It is the principle upon which the police power has been developed. See Heaven v. Pender; Indemnity v. Dames; Pletcher v. Rylands; St. Helen's; Shipley: "Quoit 
Gullo v. Swan. It is extensively discussed in 30 A. S. 803-861 where is found the greatest gathering of cases.

This is a great principle of law. It extends to constitutional law. Taylor v. Porter, L. C. 219d, 3 Gr. & Rud. It is a principle of the Preceptive Constitution. See 4 Gr. & Rud.

SIGNATURE. One may adopt any name he pleases. Moore v. C. L. C. 21, 3 Gr. & Rud; Brown v. Bank, 41 A. D. 755, 3 Gr. & Rud. SILENCE SHOWS CONSENT. Qui tacit, assent.

SILENT LEGES INTER ARMA: Laws are silent amid arms.

SIMPLE CONTRACT. Any contract not of record nor under seal is a simple contract. Consideration is essential. Ranon, L. C. 312, 3 Gr. & Rud.


SINGLETARY v. CARTER, 21 A. D. 480. One cannot serve his own process. Iden agens.

SISTER STATE JUDGMENTS. 4 Gr. & Rud. Mills v. Darbee; McEwolpe, L. C. 56, 57, 3 Gr. & Rud. Full faith and credit.

SIX CARPENTER'S CASE, Sm. L. C. 185, 3 Gr. & Rud. Acta externa indicant in-
teriora secreti. 4 Gr. & Rud. To illustrate: The innkeeper is given authority by law, which he abuses he loses the rights which the law gives him. If he should be present in the guest's room and take his money, or things forbidden by law, he can claim no protection under the law.


SLACK, 9 Pick. 62; Alder: Express aider; A subsequent pleading may aid an an-


SLOCUM & N. Y. LIFE INS. CO. 228 U. S. 364-428. Cited, § 19, Restatement. Non obstante veredicto. This is a belated general deliverer and does not impair the statutory record (disalient, opilions). Defenses must be pleaded and thus juridically saved.

SLOMAN v. WALTER, Wh. & Lud. L. eq cases. Damages may be fixed by stipula-

SMART MONEY. See Exemplary Damages: Punitive Damages.


SMITH v. HODSON, Sm. L. C. L. C. 158, 3 Gr. & Rud. Election of remedies waiving tort and suing in assumpsit. 4 Gr. & Rud. Equity in Procedure.

SMITH v. MARRIAGE, 9 Rul. C. 444, L. C. 382, 3 Gr. & Rud. Landlord and Ten-
ant: Implied warranty. Caveat emptor. Furnishings must be fit for occu-
pancy. If infested with bugs the tenant may quit.

SMOUT v. ILBERRY, 10 M. & W. 1. Agency: Death of principal revokes the agency. Mutual mistake avoids a con-

SODERBERG v. KING COUNTY, 56 A. S. 878. Money had and received.

SODOMY. v. Esoy; 43 L.R.A. (N.S.) 473, 46 Id. 266.

SOLO CEDIT QUOD SOLO IMPLAN-
tur: Whatever is built on the soil belongs to the soil. 4 Gr. & Rud. Bright v. Boyd, 2 Noto. 602, 2 Gr. & Rud. Cujus est solum,

SOLUTIO PRETH EMBTORIS LOGO

SOUTH CAROLINA v. U. S., 199 U. S. 437. Fundamental law overrides statutes. Local laws may be repugnent to higher law. In praesentia: The letter yields to the reason. Lex non excels.

SOVEREIGNTY. Cannot be sued without its consent. Res non potest pecorae. Statutes do not apply unless expressly stated. Roy N'est.\n

SOUTH CAROLINA v. U. S., 199 U. S. 437. Fundamental law overrides statutes. Local laws may be repugnent to higher law. In praesentia: The letter yields to the reason. Lex non excels.

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SOUTIO PRETH EMBTORIS LOGO

SOUTH CAROLINA v. U. S., 199 U. S. 437. Fundamental law overrides statutes. Local laws may be repugnent to higher law. In praesentia: The letter yields to the reason. Lex non excels.

SOVEREIGNTY. Cannot be sued without its consent. Res non potest pecorae. Statutes do not apply unless expressly stated. Roy N'est.
Standard Oil Co., etc.—

notice and that hearing. This involves Pennoyer v. Neff, 58, 3 Gr. & Rud. W. Offenbach v. Henslow, 62, 4 Gr. & Rud. W. Macomber v. Pomeroy; W. McVeigh v. L. C. 1, 3 Gr. & Rud. T. P. West v. Henson, 3 Gr. & Rud. Stables v. Oyster. The Court reaffirms the opinion of the Court of 

many cases. But it never in clear cut expressions plainly says it is the law that the Dues Process of Law, and that this is the "Manner o: the Romans." That first principles are not "new" law. The failure of the American court to define "due Process of Law" for cases that arise in state courts has greatly contributed to judicial anarchy in the states. See Rushton; Quis,Jud: Slocum v. N. Y. Ins. Co.; Nolle v. Oyster. Story Deere v. Husen, 34, 4 Gr. & Rud. 


STARBUCK v. STAR, 5 Wend. 148. 21 A. D. 263, 3 Gr. & Rud. due Process of Law; its elements. Jurisdiction depends on realities on not on shams and myths. See Starbuck v. Star, 21 A. D. 263, 4 Gr. & Rud. 


STARE DECISIO. We fully recognize the importance of that precedent; also the attempt to follow these without regard to fundamental law has given a belief. See Rushton, L. C. 5, 3 Gr. & Rud., also ante. The failure of the American courts to be led by first principles rather than by local and flat law has brought judicial anarchy in the law of Procedure and this unsettles the entire body of the law. See Garland v. S. (a plea of not guilty need not appear); Warner v. Baker, 211 U. S. (new rules will supersede hundreds of old cases). See Univ. ins. cert.: Rushton, 73 Am. St. 81-106, n. 


S. EX REL. COLEMAN v. KELLY, 43 L.R.A. 317. An interest res preserved. S. EX REL. COLEMAN v. KELLY, 43 L.R.A. 317. A statute is judgment for non-performance of bonds, and municipal bonds, all depend upon the records from which they emanate. These records are to be used in the office of the Register. See Koechler v. Hill, 60 la. 542-704; Gulling v. Dimes, L. C. 77, 3 Gr. & Rud. Courts are not bound by forms and pre- 


Courts have inherent power to defend the due administration of laws. Oakley; S. v. Townley, L. C. 222; 3 Gr. & Rud. Fundamental laws limit and control all others. In praesenti. The Constitution and Constitutions of States cannot authorize one to be judge of his own cause. Nemo debet esse iudex; Oakley. Nor a clerk to
State, etc.—
act in his own case when tried for murder. 192 Mo. 497.
S. v. BEACH, 36 L. R. A. 179. L. C. 158, 3 Gr. & Rud. Limitations of legislatures to
deliberate non judicium. Scott v. McNeill. Reality of wrong essential. It is juris-
dictional.
S. v. BEACH, 36 L. R. A. 179. L. C. 158, 3 Gr. & Rud. Limitations of legislatures to
deliberate non judicium. Scott v. McNeill. Reality of wrong essential. It is juris-
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dictional.
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deliberate non judicium. Scott v. McNeill. Reality of wrong essential. It is juris-
dictional.
S. v. BEECH, 26 D. 190. 3 Gr. Def. 289, 4 Gr. & Rud. One cannot consent to the
indictment of a crime upon him. 1 Bish. Crim. Def. 287-407. The state is interested. Alterum: Res
inter aliis: What concerns the state cannot
be left to parties. Campbell v. Consalus; S. v. Muench; Quod ab initio. Voluntary
Combat; Each may sue for dam-
non fit injuria has many limitations. See Herg-

Suicide pacta are indiscutible. R. v. Cruse. Enactment, 3 Gr. & Rud.

Contract bare Limitations. In part: Pact-
defence, 4 Gr. & Rud.

S. v. BOARD, 43 L. R. A. (N. S.) 317. Ide
agenas: Dimox, Oakley.

S. v. BLOOD, 90 A. S. 280. L. C. 216, 3 Gr. & Rud. Reason controls statutes. Lex
non casate: Verba intensione: "Par-


S. v. CHERRY. 1 Bailey (S. C.) 4 Gr. & Rud. Champery: Maladministration: Barratt:
Elements. 1 Bish. C. L. 541; 2 Id. 63-60; 2 Gr. & Rud.

S. v. CONKLING, 45 A. S. 270, n. L. C. 108, 3 Gr. & Rud. Dead issues will not be
reviewed for error. S. v. Baughman.

S. v. CONKLING, 45 A. S. 270, n. L. C. 108, 3 Gr. & Rud. Dead issues will not be
reviewed for error. S. v. Baughman.

S. v. CROTEAU, 64 A. D. 90. Province of
court and jury. Sparf v. U. S. Ad ques-
tionem.

S. v. DUNN, 73 Mo. 586. Appellate
procedure. Motion for new trial dispensable
for a matter of necessity in the statutory
record. S. v. McCray.

S. v. FASSE, 158 Mo. 532. Cited, sect. 33.
Injunction. A court of errors may
assert the facts and act upon them as in
GUILTY. A court is not bound by its re-
solution in this case. TRIAL OF PROCEDURE IN A FLAGRANT WAY. Irrelevant
argument not contradicted by a respond-
ent will supply omitted facts. 189 Mo.
537. Urinum processus prunitur rite.

S. v. GARDNER, 2 L. R. A. (N. S.) 49, ext.
94; 4 Gr. & Rud. Soli defense. Refusing
to hang the wall. Necessity must exist
for a defense. Necessitas.

S. v. HARDWICK, 2 Mo. 226. Repug-
nant pleadings are void. Pain, L. C. 107,
3 Gr. & Rud., 20 Mo. 58.

S. v. HARRIS, 26 L. D. 363. Public offi-
cers cannot speculate with public funds.
Keech: idem agens.

S. v. HOLDEN, 37 L. R. A. (N. S.) 108, 169
U. S. 366. Legislative limitation for reg-
ulating the hours of work. Millett; Po-
lice power. 4 Gr. & Rud.

S. v. HOMES, 57 A. D. 269, 3 Crim. Def.
467. I need not take a horse only for a
ride is a trespass but not larceny. R. v.
Thurborn; 2 Bish. C. L. 751, 904. Actus
non nascitur.

S. v. LINKHAW, 12 A. R. 645, 4 Crim.
Def. 445. No intent no crime. Actus
non facit reum.

S. v. MARLER, 36 A. D. 398, L. C. 188, 3
Gr. & Rud. Insanity as a defense must be
proved by clear and convincing testi-

S. v. McCRAY, 74 Mo. 303. The motion for
a new trial is the foundation for the
assignment of errors. S. v. Dunam.

S. v. MCKEE, 84 A. S. 124. Liberty of
speech. Restrictions of, for public morals.
Solus.

S. v. MIZNER, 24 A. R. 769, 5 Crim. Def.
160, n., 3 Gr. & Rud. Teacher and pupil.
The latter may be moderately chastised. Step-
vens v. Myers.

S. v. MOORE, 60 A. D. 354, L. C. 2229, 3
Gr. & Rud. Borrowed statute carries the
home construction with it. 206 U. S. 474.

S. v. MUECHN, (ex rel. McManus v. )
ante, 129 A. S. 536. Cited, sect. 12. Re-
statement. TRIAL OF PROCEDURE UPHOLD IN A VENABLE CONCUPINSION. It denies the
"theory-of-the-case" doctrine. Quis quid?

S. v. MYCHN, (ex rel. McManus v. )
ante, 129 A. S. 536. Cited, sect. 12. Re-
statement. TRIAL OF PROCEDURE UPHOLD IN A VENABLE CONCUPINSION. It denies the
"theory-of-the-case" doctrine. Quis quid?

S. v. O'CAGE, 151 Mo. 67. "Theory of the
Case" upheld. "One is not allowed to
breathe and trip up the heels of his
adversary" See Campbell v. Consalus; S. v.
Muench.

S. v. RYAN, 1 L. R. A. (N. S.) 862. Larceny
by trick. R. v. Thurburn.

S. v. SHUPE, 85 A. D. 485. 4 Gr. & Rud.
Perjury; Proceedings must be coram
judice. Materiality of the oath must be
determined from the pleadings. The is-
ues cannot be proved orally. Cer-
tainty and protection for defendant.

S. v. THOMAS, 36 A. R. 98, L. C. 257, 3
Gr. & Rud. Limitations of legislative power
to declare conclusive rules of evi-

S. v. THURSTON, 58 A. D. 694, L. C. 23,
3 Gr. & Rud. "De non: TRIAL OF PROCEDURE UPHOLD.

S. v. TOWLE, 93 A. S. 636, L. C. 225a,
3 Gr. & Rud. Inherent powers of courts.
Expresio eorum: May provide a court
room. 3 Mo. 140; S. ex rel. Sheppard; S.
re Bower.

S. v. WOODROW, 2 L. R. A. (N. S.) 862, n.
Husband and wife; Competency as wit-
nesses; 22 Id. 240.
STEPHEN'S PLEADINGS QUOTED AND
discussed. §§ 113-118. Equity. See Chitty, Literature.

Stephen's Pleadings: Under the title Literature we made observations and quotations from Tidd's Practice; also under the title Chitty. What was there said relating to these authors equally applies to Stephen. See also §§ 113-117, Hughes' Equity. These feudal and blackletter authors never comprehendedly defined pleading nor the mandatory and the statutory records. They never saw these records related to jurisdiction and its exercise. We also observe of them under the titles Codex, Alterum and Feudal Lawyer. They did not understand the logic and the philosophy of the law for they did not understand the general demurrer and its correlates (See Collateral Attack; Res Adjudicata).

Story wrote one way and Thompson another; now, can we turn to Coke, Blackstone, Williams, Tidd, Chitty, Stephen, Gould, Pomeroy, and their followers and determine which was right, Story or Thompson? Are not §§ 10, 25, 28, Story's Equity Pleading the law, also § 1471, Highs' Injunctions? Now do these feudal authors prepare the mind to comprehend the sections last cited? Did not all of the feudal authors write from statutes, cases, digests, and abridgments of feudal literature? Did not Sergeant Williams cite and rely on form books to vindicate Verba fortius in Dowcaston? In the lights of these supposed standard authorities are we taught to repect cases like Guilling and its cluster of cases? Also to a quite prevalent notion that certainty in the supposed various systems of Procedure varies and fluctuates? (See Garrett.)

Which leading principle of Procedure did any of these feudal authors roundly express and plainly and clearly outline and impress? Have they explained the law of the denial so it can be understood? See Dickson v. Cole, L. C. 34, et seq., 3 Gr. & Rud.; Or the necessity for an issue? See Mendel v. Steel, L. C. 77, 3 Gr. & Rud.; Monday v. Vail, L. C. 79, et seq., 3 Gr. & Rud. Have they so explained the logic and philosophy of pleading a Contract that Code authors can comprehend the right way? See Contract where the conflicting cases are cited. Can we show by these works that the new rule, that the general demurrer can be waived is a fallacy? (See Goldham v. Edwards;
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Stephen's, etc.—

Nolle v. Oyster.) Or that the omission of a material allegation is a fatal defect: Garrett; Verba fortius.


STEWART v. CASE, 39 A. S. 575. Judgment for plaintiff when lien is lost. See 37; 33 Mul. 234; 32 A. R. 690. See Lange, 150. 3 Gr. & Rud.

STILK v. MYRICK, 2 Camp. 317, 49 A. D. 572, L. C. 313, 3 Gr. & Rud. It is no consideration for a man to do what in law he is bound to do. Ex nudo paciore: See Clark v. West, 193 N. Y. 340; Bishop v. Rouse, 69 Ill. 403; 6 Ill. L. 656.


STOCK, 4 Gr. & Rud. Stockholders Id.

STOCKDALE v. HANSARD, A. & E. 12, L. C. 277, 3 Gr. & Rud. "Parliament is omnipotent" denied. The Prescriptive Constitution controls. Les non


STOLEN PROPERTY. A thief gives no title to his property. See 24 Gr. & Rud., 25 L.R.A. (N.S.) 760-796.

STOP, LOOK AND LISTEN. Duty of travelers. Secrecy.

STOPPAGE IN TRANSITU. Lackbarrow v. Mason, L. C. 394, 3 Gr. & Rud.

STOREY v. ASHTON, 10 B. & S. 337. See McManus. Agent deviating from his master's service does not bind the master. 26 A. S. 490.

STORY, JOSEPH. His sections 10, 25, 28 Equity Pleading are often cited by the author. The first he quotes in § 47 Equity In Procedure. In § 25 Story quotes Quot, quid. The latter two are but illustrations of his § 10. From the latter the Trilogy of Procedure can be picked as we can pick important instruction from Shute, Sticca, Nolle, Vickersburg and many other Federal cases. Federal cases often need depth and breadth. And in reality is. Story. He might well have quoted the Trilogy of Procedure and well offended the Federal Lawyer and his followers by thereby stating that these are Universal, Constitutional principles from the e Manner of the Romans," and that obedience to them is a necessity under the local laws adopt them or not. He in effect said as much but he said it so high and tersely that he has not been understood. As he spoke so have many courts. Minnesota, 194 U. S. 48-73 (Harlan, J., omission of a material allegation is fatal). See McPail, Gillogly, et al. v. Parke, Rushon. He never cited Rushon, Jackson v. Peck, Ihnett, et al. and others. Now why not? The principle stated in his great sections accord with those cases. But the style of statement of those cases did not fit Story's style, or what he said was not in a wide and comprehensive vision. Not the widest to be sure, but much broader and deeper than the Federal view. The Rushon accords with Story and he might well have introduced and explained it. Now when the authors assumed that all the so called systems are irrelative, separate and partitioned from each other.

STORY.—

When Story wrote he saw the correlatives of the general demurrer, the Arrest of Judgment, requirements on Appellate Procedure, Collateral Attack, Res Adjudicata, and "Due Process of Law" but we know of no other who did. It is this fact, of omission, that tells of the Feudal and of the Code authors. See Pomeroy, also Chitty, Stephen and Thompson. (See Maxims; Garrett.)

A great judge paraphrased Story's § 10, in a more instructive relation, in Davis v. Jacksonville Line, 126 Mo. 69. It is also paraphrased in Jansen v. Hyde, 8 Colo. App. 40, whereat Munday is also cited, but only to be denied in the next case. ("The law is the last interpretation of the law by the last judge") is the shibboleth of Commercialism and its office hands and empirical aids. (See Literature.)

Now cases like Jansen show how they find and collect material without any regard to the consequences to the student also the busy lawyer not up to the matter found in overtopping bulks of supposed legal literature, but in reality nothing more or less than the jargon of judicial anarchy. Under the title Restating the Law we observe the procleness of authors and courts to parrot the language of others. And they have parroted Story, and thereby improved their pages.

Prominent, widely cited approved and much sought authors flatly contradict Story. Not all of them straddle as does Pomeroy. In Thompson's Trials are found sections that no one has called attention to. These are §§ 2310, 2311, 2 Trials, quoted under Variance, 4 Gr. & Rud. Herein it is asserted that pleadings are not jurisdictional; that they are functus officio when the judgment is entered. That a judgment carries its own authority on its face as in Gulling and in Henry. He advocates the "Theory of the Case" as broadly as can be done; he does not straddle; that from irrelevant evidence a case or a defense may first appear; and of course that from a verdict all can be constructed. Omnium praesepta rite. See PERSUMPTIONS; Knickerbocker.

And like Pomeroy and his followers he avoided the maxims. (See Equity.) The prominent authors of the last generation have inclined to follow Chitty and Stephen who straddled the logic and the philosophy of the major-organic maxims. Not one has cited or explained one of these.
Story.—

In 1896 appeared Smith's Elementary law. This reappeared as Clark's in 1907. It essayed to explicate the maxims of equity. And we will next indicate how one of these was explained to students. "Equity regards as done what ought to be done." If a vendor is seeking specific performance of a contract to sell land he need not allege payment or tender of the purchase price as this allegation or fact will be implied from a statement of the contract. In other words payment need not be alleged according to these authors. They would have a bill for specific performance constituted of nothing more than setting up the contract. From this all else will be implied. (Expressio eorum.) Not even a condition precedent need be alleged as at law and as required in Tooker v. Arnoux. As thus expounded this maxim of Equity is identical with Omnia praesumuntur rite: See Equity. See Procedure.

In Rushton, we laid the facts before the student and submitted them to his judgment. And now, so do we here. (See Maxims.) He can look and judge from Story on the one hand and Thompson and Smith and Clark on the other hand. The latter in other relations advocated attacks upon written contracts (Clark v. West) and the dispensation of pleading conditions precedent that are difficult to reconcile with former views of protection. (44 L.R.A. (N.S.) 388.) Star Bank, N. M. L.R.A. 1915A, 120. The authors last mentioned can be cited to support the "removal of many landmarks which thy fathers have set." But for the late decisions of Illinois, interpolating the Trilogy of Procedure, in the Municipal Court Act of Chicago, the old school would have much cause for despairing.

Elsewhere we have referred to the puzzles presented by such pages as Tyler's Preface to Stephen's Pleading also other Prefaces. (See Chitty.) Now we refer to Story and Thompson and to cases like Rushton and to Gullich.

Socrates was convicted on the general charge that he had corrupted the Athenian youth. Saint Paul was incriminated for being a "pestilent fellow" and "a preacher of sedition," upon conclusions of law. Succeeding ages have condemned such presentations. Had it been specified that either had written a work on Pleading for use in a constitutionalism without any reference to the "Manner of the Romans," certainly succeeding ages might well have accepted the indictments as just and sufficient.

Every student should be taught the difference between Story and Thompson and his followers. See "Theory of the Case." This difference is the rock upon which the logic, the philosophy and the harmony of American law have been wrecked. Those who write and teach that Procedure is a local and flat institution must be classed with the Thompson followers; also those who countenance the notion that "Parliament is omnipotent." And such is the teaching of Blackstone, Tidd, Chitty, Stephen and their followers. The supposed standard Code author is elsewhere mentioned. See Pomeroy.

Any one who will offer a work on Pleading omitting the fundamentals might well be judged by Justinian's Decree. Publishers have not in all ages been allowed to follow Quod lex non vetat permittit. Great courts will sometimes rise and assert laws that protect society and government. Receditur a placitis jura potius quam injuria et delicta manent impune. Appeals in Bar Associations for more than reform, even for "revolution" are justified. (See Maxims.)

Multitudo imperitiorum perdit ou- riam.

A constitutionalism cannot be operated without the due administration of the laws. Upon this depends the lawyer and his establishments, his judiciary, his literature and his schools. or the training of the young. And has not the lawyer failed? Look at all of his establishments, at his "legal jungle," at his labels for every leading topic of the law, at Crepps v. Durden. At the very important question: Are Pleadings jurisdictional? What is a coram judice proceeding? Campbell v. Porter, L. C. 2, 3 Gr. & Rud. Minnesota, 104 U. S. 48, 73.

Mansfield decided Rushton, Kent decided Bartlett, and Story decided Dobson. These cases being respectively L. C. 5, 6 and 232a, 3 Gr. & Rud. These cases are in accord and they mark the extreme limit of liberal construction. Also the line that limits the statutes of Amendments and Jeofails. These judges fixed the law. Statutes may break the law but they cannot make it any different to the logic and the philosophy of the cases last men-
Story.

Hon. See In praesentia. Prescriptive Constitution.

The logic and philosophy referred to is the burden of Clark v. Dillon and its cognates. They are excellent Code cases; also Goldham v. Edwards.

Story is upheld in Garret, 235 U. S. 308. See Quiz, quid.

We have cited Story and Mansfield (Rushton) with frequency. We have burdened them with much and because we think they can bear it. And still we have criticized them because they wrote so high and terse that they have not been understood. But what they did say was clear, direct and positive. § 10, Story, quoted in § 47 Hughes' Equity is the greatest section for the practitioner that we know. If there be one greater it is Quiz, quid.

It might well have been quoted by every work on Evidence, Pleading, Practice, Jurisdiction, Trials, Appellate Procedure, Res Adjudicata and discussions of the general demurrer. Story and Foster alone have cited this maxim, the latter in his § 132, Fifth edition, Foster's Federal Practice. In his § 186, pp. 652-671, 5th Ed. Res Adjudicata is introduced. These pages are an attempt to present the subject by cases without regard to a plain and positive statement of the maxims upon which the subject depends. The student can see how he is instructed as to what record and what matter must be pleaded to present a plea of Res Adjudicata. He can certainly gather that the pleadings must be presented. This places the author on the side of Story and of Mansfield.

The labels on his volumes show that he takes no narrow view of Pleading. But he does state that Equity Pleadings are more liberally construed than are the Common law; by this he denies that Verba fortis and its cognates are Universal, Constitutional canons. Thus he denies the Trilogy of Procedure. Still in his last edition he cites Quiz, quid, and thus distinguishes himself with Story. Each cites "Comyn's Digest Chanery, E. 2." Neither cited the rules of Res Adjudicata as the fountain from which the rules of Pleading are dictated; nor Interest reipublicae ut sit finis litium and its cognate maxims. Of course each leaves the rule that the jurisdiction of a court cannot be waived to be picked out of the cases, and too cases no better than Dowaston v. Payne of which we observe under the title

Story.

Literature, wherein Sergeant Williams cited form books to sustain his argument for Verba fortis. How much better the late authors deal with this maxim is shown in Foster, § 144. He evidently was much impressed with the style of Tidd, Chitty, Stephen and Pomeroys in elucidating fundamental principles. How the important subject Construction is treated will appear by referring to both the body and the indexes of all of these authors. These will show that their minds were not pervaded with the importance of Construction and Fundamental law. All have so neglected the general demurrer and its correlatives, Collateral Attack and Res Adjudicata that the logic and the philosophy of the law is no longer understood. See Alterum; Logic. Nothing is more unsettled than are the limits of liberal construction. Had these authors plainly set out and vindicated the Trilogy of Procedure then students would see and could reason from something else than a lot of cases, statutes, rules of court and a "jargon of words." See In praesentia.

The author has frequently heard the remark that Mansfield, Story, Shaw, Gibson, Bishop and Kent are no longer upheld and taught in schools and in the outputs of commercialism which are making little hard-headed fools of students whose minds are so filled with error as to ruin them. To what extent this national crime and cataclysm is tending may be judged by an examination of students without more. Elsewhere we point out that the literature that is put in their hands is nothing less than criminal. Justification for these observations can be found in sections 1-26, Restatement. The student who says I know the Common Law Pleading only, or likewise the Equity or likewise the Code or likewise the Criminal or the Federal is not well taught. Any student well instructed in one system of Pleading knows the fundamental principles of all. Now if he will read the sections last referred to and all that is referred to under the titles, Rushton, Literature, Logic, and Feudal lawyer he can take a proper measure of himself. Judge of the justice of these observations from the facts shown under the title Codes; also In praesentia; Literature; Logic; Munday.
Story.—

Whoever knows a Code not only knows the child but the mother, the grandmother and the great grandmother and so back into the maxims of antiquity. See Maxima. The old law and judges have been slandered by commercialism and its allies empiricism and quackery until the lawyer and his establishments are beyond reform is the opinion of statesmen who cry out for "revolution." To this pass Coke's three degrees of certainty—"a jargon of words" has been dinned into the ears of students. See Dovaston v. Payne and citations to this case in the Restatement.

There are a few Universal, Constitutional canons that are the law of all ages, of all civilized countries, all climes, all systems and all courts that cannot be departed from. Story came nearer stating this very important (though too often denied and much obscured) fact than any other author. He plainly cited and spoke for Quis, quid, coram quo. This was paraphrased and translated into legislative language for the Code; but no Code author has clearly perceived and stated this fact. So the prevailing idea arose that the Code was a new and revolutionary system. Pomeroy can be cited to this point. His training was with lawyers, and he gained from lawyers enough conservatism to earn for himself with authors and annotators a foremost place as a Code expositor. But it was Judge Thompson who has been given a foremost place with the American profession.

In New York, one sect holds that by legislative and liberal decisions "Every man may be his own lawyer." Baylies Code Pleading, 1–4. Another sect makes the foundation of a decree out of the oral statements of counsel and of irrelevant evidence (Baily v. Hornthal), which does not support the construction of the remedial legislation that has been given to Chicago. (Walter.) Other cases in New York present phases of the greatest strictness as where the defendant was described in his individual capacity in the caption while he was described in a representative capacity—as a trustee in the statement. This was held demurrable by a divided court. (See Ut res; also Trilogies where Leonard v. Pierce is cited.) Pleadings must be certain. First Nat. Bank v. Schueler, 153 N. Y. 163, 60 A. S. 601. These cases are in contrast with Gulling and Story.—

its cluster. In Leonard the maxim Omnia praesumuntur rite was not stretched until it was torn by rude and violent hands.

As to Leonard v. Pierce we think the majority of the court was right; we regret that they did not broadly and plainly state that the necessities of Res Adjudicata must always be respected. That repugnant Pleadings are opposed to the rules of the higher law. (In praesentia.) That if nothing was stated in a caption and this defect was passed until general demurrer that at this stage the court would pick the matter of the caption from the statement if this could be done. (Ut res.) But if one writes matter in the caption repugnant to what is in the statement this is demurrable and is not waived by passing it by. (Verba fortius.) That the general demurrer is never waived. (Van Lewen v. Lyke, L. C. 14, 3 Gr. & Rud.; McAllister v. Kuhn, L. C. 3, 3 Gr. & Rud. § 242, 1 Gr. & Rud.; Minnesota; Garrett; Rushton. That one pleads at his peril. Ignorantia legis.

When the Code was enacted it was turned over to enemies and conflicting views for its construction and operation. (Biddle v. Boyce.) The first case shows that the judiciary were not prepared to grasp its simplicity and genius. Feudal teaching had directed the channels of thought and instruction; the notion that the law was local and flat was then deeply rooted and each state court thought that something new and radical had been enacted. Not one authority has designated and spoken for the maxims more instructively than had Hamilton, Kent and Story; there were the maxims we call the Trilogy of Procedure and their cognates, the sections of Story we quote and Rush ton v. Aspinall; Briarow v. Wright and Dovaston v. Payne, L. C. 5, 135, 217, 3 Gr. & Rud. And the fact is that nowhere and by no one were these most excellent and illuminating matters sought, cited and interjected into the Code expositions and discussions. On the contrary doubt and fog gathered over the Act and into this the Courts plunged and began to cross and to contradict each other. Such was the beginning when the Supreme Court of the United States condemned the Act as appears in McPaul v. Ramsey. This gave the Code and authors and courts then tried to vie each other by construing the Act to
Story.—

make it odious, despised, and a failure. The Preface of Tyler to Stephen's Pleadings will show antagonisms were sought, held out and encouraged. Such was the condition when Pomery wrote his exposition of it. (See Pomery.) After Pomery came Thompson and the teaching that has led to decisions like Gulling and its cluster of cases. Anent Ut res magis we cite cases that show that the Code courts have not reasoned from the above matters and from the rules of Res Adjudicata. Today Code courts are in furious contentions as to whether or not suing one as an individual in the caption and describing him in a representative capacity in the statement is a fatal repugnancy. After centuries of effort to give the profession right instruction on Pleadings great courts cannot settle such questions solidly and clearly upon fundamental law. The condition is also indicated in Slocum v. Ins. Co. 228 U. S. 364-428. In none of these discussions are the matters of first importance above designated ever cited or quoted. Instead it is statutes and cases that are sought. And after all, these have led to the "Theory of the Case." Such is the condition of a subject at the threshold of right instruction of every branch of the law. See Literature; Logic; Federal lawyer; Maxims; Restating the law.

When the Code came in 1848 why did not some author or court plainly state that its most important provision was a paraphrase of an old maxim (De non apparentibus et non existentibus cadem est ratio, and of the amplification of this maxim as found in its cognate Quis, quid, coram quo; §§ 1-13, the Law Restated)? Such being the facts why was it not due the anxious and distressed profession to give some initial, some Datum Post to start and reason from? Had these maxims been held out as respectable (See Story's Equity Pleadings, § 25, where Quis, quid is quoted) would not the needed light have been given? Or suppose it had been stated and impressed that Rusion v. Aspinall, Bristow v. Wright, and Donaston v. Payne were the law and that they ever must remain the law and that they could not be blown and legislated away what would have been the consequences? And are not these maxims and reaffirming cases the law of all protecting governments? Decisions that deny the old law do not make new law; they only break the law. The attacks upon the above principles ought both been resisted by the legal profession before the "Theory of the Case" had been made acceptable to so many, because, so many courts had countenanced it. This juggernaut of Feudalism has rolled over the logic and the philosophy of the law until the conditions have become both repulsive and foreboding to the real serious student. It has afforded empiricism a footing to claim that each state has reared for itself a Procedure singular and peculiar from all others. It claims there is a common law criminal, also civil, an Equity, a Code, a federal, an Admiralty, a Roman, an ecclesiastical, and a Code of Special Proceedings. For all of these supposed systems there are conceived distinctions that are fundamental, we are told. A reference to Pomery's Code will show. (See Pomery.) No author or court has plainly stated the fundamentals of all systems any better than Story has in the sections referred to. Nor have they plainly stated that Procedure rests upon a few maxims that are common to all. (§§ 7-13, Restatement.)

In conclusion we leave it to the student if he should not know the fountains of the old, also of the supposed "new" lights that have come. For this end and purpose we have constantly cited Thompson on the one hand and Story on the other hand. The former is well introduced from Gulling and its cluster of cases; also from the title "Theory of the Case."

And should not every author explain the above facts?

STORY v. L. R. R., 43 A. R. 146. 4 Gr. & Rud. Legislature cannot grant a right to use streets without regard to subtituting owners.

STOUT v. MARTIN, 139 U. S. 151, L. C. 134, 3 Gr. & Rud. Taxation and the deed upon which it depends must conform. Taxation like judicial proceedings has antecedents and consequences and these must conform. Standard Oil Co. See Lawrence, Marz, Tilton, Rustin, 3 Gr. & Rud.


STREATFIELD v. STREATFIELD, Wh. & Td. L. Eq. Cas. Election in equity; Ratification. Allegens.

STRIKING OUT PLEADINGS, McCumber v. Wiltse, 110 L. C. 115. 3 Gr. & Rud.

STRONG v. S., 44 A. R. 292, L. C. 213a, 3 Gr. & Rud. Evidence; Collateral facts; System is admissible to prove. 02 L.R.A. 163-357, 105 A. S. 972.

STUBBINGS v. EVANSTON, 156 Ill. 338, L. C. 49, 3 Gr. & Rud. Placitum must
Stubbings, etc.—
appear in the right record. Planing Mill Co. Quis, quid.

STURDIVANT v. HULL, 8 A. R. 409, L. C. 410, 3 Gr. & Rud. Contracts; Agency; Commercial paper. Agent must sign how. 41 L.R.A.(N.S.) 805-828. 42 Id. 1-84.

STURGES v. BURTON, 72 A. D. 582, L. C. 111, 3 Gr. & Rud. Code; Proximity must be avoided. See COMMON COUNTS. 2 Gr. & Rud. ante.


SUBORNATION OF PERJURY. 4 Gr. & Rud.

SUBSENA. 4 Gr. & Rud. Ducre Tecum. 4 Gr. & Rud. 128 A. S. 749-770.

SUBROGATION. Dering v. Earl of Winchelsea, Wh. Tud. L. Eq. Cas. 2 Gr. & Rud.

SUBSTANCE OF THE ISSUE: It is sufficient if proved. 1 Gr. Ev. 66-72. See Morningstar.


SUBSTANTIAL LAW. 4 Gr. & Rud.

SUGESTIVO FALSI: Suggesting falsehood. 4 Gr. & Rud.


SUMMA RATIO EST QUE PRO RELIGIONE factit: The rule is strongest which determines in favor of religion. Christianity is a part of the law of the land. Church of the Holy Trinity v. U. S., 143 U. S. 457. In praesentia majoria: Lex non exta. 4 Gr. & Rud.


SUNDAY. Dies non: 2 Gr. & Rud. No Sunday without a statute. 20 L.R.A. (N.S.) 86. See 4 Gr. & Rud.

SUPERIOR AND INFERIOR COURTS. See Cropp, L. C. 110, 3 Gr. & Rud.

SUPPLEMENTARY PLEADINGS. 4 Gr. & Rud.

SUPPRESSIO VERI: Suppression of the truth. Nihili posseamus; Sham Pleadings.


SUPREME LAW OF THE LAND. 4 Gr. & Rud.


SURPLUSAGE. Utiile per inutilis: Need not be proved. 1 Gr. & Ev. 61, 63.

SURPLUSAGIUM NON NOCET: Surplusage does no harm. Utiile.

SURVIVAL OF ACTION: SURVIVORSHIP. 4 Gr. & Rud.

SUTTON v. WAUWATOSA, 9 A. R. 534. Traveling on Sunday is no defense for permitting a dangerous road. In jure: Volenti. 36 L.R.A.(N.S.) 547.

SWEARING. Punishment for. 4 Gr. & Rud.


SWIFT v. TYSON, 18 Pet. 1. Bona fide purchaser of commercial paper. One buying before it is overdue in the ordinary course of business, for a valuable consideration and innocently may recover. 4 Gr. & Rud.; also Equity in Procedure. Goodman v. Harvey, 4 A. & E. 870. Lickharme v. Mason, L. C. 394, 3 Gr. & Rud. One cannot clothe another with the indicia of right and ownership and then dispute the consequences that naturally follow. Alterum non ladeere; Allegata; See EQUITABLE ES.

TOWEL. Le Mere, L. C. 396, 3 Gr. & Rud. Note void Quod ob inutilis cannot be recovered. See ELECTION.

TAXATION. This is the exercise of quasi judicial power and thus involves the Trilogy of Procedure. (Audit alteram partem-Londoner, 210 U. S. 373, 60 L.R.A. 520, N.J.;) also the Division of state power. P. v. Hastings, L. C. 144, 3 Gr. & Ru. The power to tax is the power to destroy and thus involves illegal expenditure as well. See L. C. 147, 3 Gr. & Ru. It is a most dangerous power and in a constitutionalism is strictly safeguarded and not wholly unconstitutional. Expresso unius: the rule. There must be a record and this record must speak and speak fully. Contra scriptum: Plant enim: "What ought to be of record must be proved by the record and, not the right record." Iverslie, L. C. 46, 3 Gr. & Ru. Williamson v. Berry. As in judicial matters the same forces are at work, on the one hand the strict constructionists and on the other the so-called liberal. The federal supreme court can be cited either way. Williams v. Peyton, L. C. 116, 3 Gr. & Ru.; also Barlow v. Dashiell, 6 L.R.A. 523, 322. Equitable estoppel will aid the record. (If the owner was in the county and could not have appeared and made objections, this fact may be shown to aid a defective record.) This view is akin to the reasoning of the "theory of the case." Courts. See Thompson. Also Curotta and states must be confined to formal matters. P. v. Seymour, L. C. 258, 3 Gr. & Ru.; and McCall v. U. S. 152. See Loras: Clark v. Dillon. The basic law of is as unsettled as are the courts in Gregory, L. C. 113, 3 Gr. & Ru. Green County Bonds. Williams v. Peyton. Taxation procedure is well introduced in Lawrence, L. C. 132, 3 Gr. & Ru., et seq. Stout, Mars, Tilton, Rastin. Taxation is a dead and a qualified. L. C. 213c-213d, 3 Gr. & Ru. Higham, 213c, 3 Gr. & Ru. Price v. Torrington. Necessity. Taxika v. Starks, cited in Bower v. Miller, 4 Gr. & Ru. Alteration; implied authority. Filling blanks. 1 L.R.A. (N.S.) 391. Hibbert v. McMorris, 4 Gr. & Ru. THELLUSON v. WOODFORD, 4 Ves. 227, 31 Eng. Reprint. 117. Perpetuities; statutes against. Villier (1807), A. C. 139, 1 Br. C. 568.

THOMAS v. DEAN, 42 N. J. 398. 318, 4 N.J. 398. 4 Gr. & Ru. Also Equity. See Rushon; Story; Gil- ling; Thompson, Seymour, D.

THOMAS v. HILL, 190 U. S. 379. 4 Gr. & Ru. Also Equity. See Rushon; Story; Gil- ling; Thompson, Seymour, D.


THEORY OF THE CASE: This ephemer-ism of the "new" and of the "modern" school is well introduced from the titles Story, Rushon, Feudal Lawyer, Literature, Mandatory Record, Verba fortius, and Pleading. It may also be grasped from the sections of the Re- statement. Its most pronounced and prominent advocate is Judge Seymour D. Thompson whom we refer to anent Story. His sections 2510, 2311, quoted under the title Case, 4 Gr. & Ru., will show his theories. This school
Theory, etc.—contends that a judgment entry carries the same authority without reference to the Pleadings. They deny that the latter are a jurisdictional element. They have paved the way for cases like Gullion and its cluster. They constantly intimate that a "new dispensation" has come and that they are its chosen apostles. When called upon for instruction they cite cases like Baker v. Warner, which was correctly decided but was attended with intimations that indicate that the Federal court is going to embrace "new" and "modern" views. See Rushton; also Vickburg v. Henson; Nalle v. Oyster; Garrett v. L. & N. R. R. The contention that Pleadings are functus officio when the judgment is entered is the "new" and "modern" view of the supposed liberal school. Their position depends upon a denial of the rule that the general demurrer cannot be waived; upon the view that the state has no interests in the administration of justice that the parties cannot waive. (See Altemus non leddere.) They deny cases like Campbell v. Consaulus, Clark v. Dillon and Tooker v. Arnow. These cases will show how the "new" school views the Code. A retrospect from this angle will show why the Code has failed. (See Codes; Pomeroy.)

See §§ 1–25 Restatement; advocated by Thompson, 2–4; See Literature. Depends on various kinds of Aider. See Rushton. Opposed to first principles, § 10, Restatement. See Pleading.

This "new" theory has been overlooked by the great works of this generation. The student will vainly turn through the Form books, the Hornbooks, the Quizzers, the Digests and the Cyscs for any express and direct exposition of the this "new" and supposed progressive theory. Mention of it is made as a title for notes to Cockrell, 50 L.R.A.(N.S.) 1–44. But the learned annotator did nothing more than discuss a phase of Ut res magis valcat quam pereat; or a part of Consensus tollit errorem. This is not the "Theory of the Case" which was advocated by Judge Thompson in his work on Trials. See Story; Pomeroy; Sergeant Williams; 1 Jones Ev. 168–173 (evidence must be relevant); Aider. No doubt the student may think he will be introduced at least to this truly new dispensation in the late dictionaries and the much appre-

Theory, etc.—cited "Words and Phrases" but an examination will disappoint him. This doctrine has been made very prominent in Missouri and indeed in every state that denies Verba fortius. See Clark v. Dillon and its cognate cases. Those cases which hold that the failure to answer supplies omitted allegations of substance are "theory-of-the-case" decisions. Of such are Henry v. Hilliard, 49 L.R.A.(N.S.) 1–44, cited under the title Rushton. This is a "theory-of-the-case" doctrine of the most virulent type. Commercialism has no key number for this new doctrine.

Those cases which hold that by answering to the merits the general demurrer is waived are also an illustration. State Bank, N. M. L.R.A. 1915A, 120. See DEMURRER. Also those cases which hold that a verdict supplies omitted allegations of substance. See Rushton. The rules anent the waiving the general demurrer and of a verdict supplying the essential Pleadings have led generations of lawyers far astray. See Gulling and its cluster of cases. These lawyers were never rightly instructed in the maxims of Procedure as they have been of the maxims of Equity. The best written subject of the law is laid upon maxims. The most chaotic subject of the law—Procedure—is written as far away from the maxims as is possible. Examine the literature above referred to and see. See Maxims.

To estimate what has happened, we have only to consider that Pleadings lie at the base of a sound and philosophic knowledge of the law; also that this subject is deduced from a few maxims. (§§ 1–13, Restatement.) Now what has happened to the subject of Pleading by departing from, and denouncing the organic maxims, may be reckoned by and from the "Theory of the Case." Herefrom we see the great authors of a generation floundering in the mire of judicial opinion not founded on the logic and the philosophy of the law. §§ 1–26, Restatement.) We also see dominating courts, through two centuries, trying to state that Pleadings are jurisdictional so as to impress the legal profession with this fact. From a thousand Federal decisions this fact may be deduced. And after all, then it is taught that old rules have passed away and that a "new dispensation" has come and
Theory, etc.—

that at last courts can administer justice without regard or respect for that record required by the state for reasons of public policy. So we see this "new dispensation" is aimed at the very foundations and "Datum posts" of the law. For if Pleadings lie at the base, then, what must result if we eliminate Pleadings from the scheme of a protecting government? Herefrom judge of the logic and the philosophy of the general demurrer. And is not the Trilogy of Procedure the base—the foundation of the law? (See §§ 1–13, Restatement.) Had the Federal Court have stated these maxims and declared them the law of all ages ever to be respected, then, would its effort to teach that Pleadings are jurisdictional be all in vain? (See observations under the title Pomeroy.)

Arbritrariness and freedom are eternally at war. No greater attack can be made upon freedom than to insidiously eat away and erode the barriers of protection. Herefrom consider what has happened by the establishment of the "Theory of the Case."

"Whom the Gods would destroy they first make mad."

"The mills of the Gods grind slowly, but they grind exceedingly fine."

"Vice is a monster of such hideous men That to be hated needs but be seen, But seen too oft; familiar with her face. We first endure, then pity, then embrace."

THINGS ARE CONSTRUED ACCORDING to that which was the cause thereof. 4 Gr. & Rud. Also Equity. Coercion.

THINGS GROUNDED UPON AN ILL AND void beginning cannot have a good per- fection. Quod ab initio.


THOMAS v. R. R., 104 Ill. 464. Statutes are construed according to reason and convenience. If stockholders are entitled to 60 days' notice and they appear and act this waives notice. Ingersoll; Quin. Cessante. Taylor v. Sprinkle.


THOMAS, etc.—

ILL. 420 (Municipal Court Act for Chi- cago).


THOMPSON, SEYMOUR D. His sections 2030–2034, Trials certainly place him at the head of the "theory-of-the-case" school. See Story. We quote §§ 2130, 2131, under Title Variance, 4 Gr. & Rud.


THORLEY v. KERRY, 4 Taunt. 355. De- famation; Written words are more ac- tionable than if spoken. 4 Gr. & Rud.

THORNBROUGH v. BAKER, Wb. & Rud. L. C. Q. Executor of mortgagee entitled to the money secured by mort- gage.

THORNBROUGH v. WHITACKER, 92 Eng. Reprint. 1164, L. C. 353, 3 Gr. & Rud. Contract; Consideration when written system is conspicuous. Relief in equity. 6 R. C. L. 678.


THOU SHALT NOT BEAR FALSE WIT- ness. Nihil positum.

THREATENING LETTERS. See 4 Gr. & Rud.

TREATS. 4 Gr. & Rud.

TIBURON v. HANCOCK, 7 A. D. 57. Enasments. 4 Gr. & Rud.


TIDIB, quoted and reviewed under titles Literature and Ruben. TILDEN v. GREEN, 21 A. S. Casus omnis.


TIMBER, judge of, gives incidental right to en-
Timber.—


TIPS. Servant's right to. 41 L.R.A. (N.S.) 1217, 98.


TITLE INSURANCE. 38 Cyc. 344–355.

TODD v. BARBER. 4 A. D. 326, 2 Am. L.C. 160. Acceptance of a third person is not payment in the absence of an express agreement.

TOFFOLO v. SPYRING, 1 C. R. M. & R. 181. Defamation; Privileged communication.

TOOKER v. ARNOUX. 76 N. Y. 397. Cited. Preface; also §§ 7, 8, 10, 12, 24, 27, 18. Agreement of action must be stated. It cannot be aided by subsequent pleadings filed by the defendant. Florida Co. v. U. S. 328, 329. Quod ab initio. We cite this case along with Campbell v. Consalus and Clark v. Dillon. Their trio of cases should be mastered. They apply to all systems, although they arose under the Code. It is cited by the Code of West.


TORT. We classify this subject as one of the six leads. Also assigning to it Volenti; and In jure. These followed out will lead to a great deal of instruction. Infants may commit. Gillis; married women, see HUSBAND AND WIFE. Intent no element in. Mahan. Accidents cause. Actus Deli Volenti: Darii vis. Mova: Harpuri. In jure: 36 A. S. 808–809; Aquil Case. Fletcher v. Richo. Agents. McManus: Entering one to go a-reaping. Quinn v. Leaheem; cases. 1 Brit. R. C. 1–21. A tort may arise out of a contract. Thomas v. Anchors; Knowlege; Winterbottom. Defamation, see SLANDER AND LIBEL. Animals, Marriage, Negligence; Résumé of. 4 Gr. & Rud. Malicious Acts, Id.

Tracing of. § 10, Restatement.

TRADEMARKS. Equity will protect a trademark. 25 L.R.A. (N.S.) 73–93; also see. 133 A. S. 769, n. See UNFAIR TRADE.

TRADING STAMPS. 34 L.R.A. (N.S.) 433.

TRANSFERS AND LOCAL ACTIONS. Mostyn, L. C. 274, 3 Gr. & Rud. Crimes and penal statutes are local. Whitlow, contra: cases. See VENUE.


TRAVELERS. 4 Gr. & Rud. Must observe care. Secrecy.


TRAVELING ON SUNDAY. Sutton v. Waucoaloua.


TREASON. 4 Gr. & Rud.

TREATY. 4 Gr. & Rud.

TRESPASS. See TREATY.


TRESPASS TO TRY TITLE. 4 Gr. & Rud.

TREVIVAN v. LAWRENCE. Sm. L. C. 723, 3 Gr. & Rud. Res Adjudicata;

The last estoppel binds.

TRIAL. 4 Gr. & Rud.

TRIGONOMETRY OF THE LEADING SUBJECTS.

Equity. Juris præcepta sunt hae: Ubi jure; Regula pro eis. § 14, Restatement.


Crime. Acta non facit iurum; Ignorantia legis, qui primo peccat. § 18, Restatement.

Tort. Alterum non sedere; Volenti non fit injuria; in jure non remota. § 19, Restatement.

Constitution. Verba fortius; Alterum non sedere; Interest reciprocus. § 20, Restatement. See also Lex non extra deum; Necessitas inducit privilegium; Cessante rattonie legii cessat ipsa lex; Expressio unius; Expressio corum; Melius est petere non posse. Construction Equity underlies the entire law. § 20, Restatement. See §§ 1–20, Restatement. See the foregoing maxims in the Grounds and Rudiments.

The student can look and determine for himself whether or not he should give the maxims the attention commended by the. Hahn, Bacon, Mansfield, Hamilton, Story. Kent, Shaw and Story. Field. Indirectly they are commended in McMullen v. Hoffman, of which we observe in § 17, Restatement. Every lawyer must admit that he must construe well. No man can he when he is ignorant of such canons as Verba fortius and its cognates. By turning to this title it must appear to all that every
Trilogies, etc.—

lawyer should know a great Universal, Constitutional principle when he sees it in the language of all nations. The fact that there is such a Universal rule so expressed ought not to make it hard for him to make it and know when he sees it. If he will so learn it then he can easily understand it. From these Trilogies he can look down into the bewildermend in the "jungle" below. (See Ut res.)

The New York case cited upon this principle is the true situation if only he will look at them from the perspective Constitution which the covenants are constantly hinting at. (See Oakley v. Aspinwall: Knickerbocker: P. et al, Inc. v. Seed. 60 N. Y. 559, cited in Knickerbocker. But the maxims are never cited. Instead the student is supposed to take the text from its own four corners—why a statement of the "cause of action" will upon the face of the pleading and will not include the summons. (See note to Leonard v. Haines (N. S.) 161.) If the student will carefully consider this case with First Nat. Bank, 153 N. Y. 165, 60 A. St. 601, he will see that something is lacking. These cases involved the Trilogies of Procedure and the court might for sound instruction have said that the Code had nothing to do with these cases. With ability the court might have added: "The rule of Evidence "What ought to be of record must be proved by record and by the right record." In an introductory paragraph the court might have said that the law from old was before them for them to be guided in. At the end of each of these cases it is the maxim of the law that and that more can be articulated around it than can be the maxim of the law. Whether or not the law can be restated may be deduced from the text.
TRUEMAN v. FENTON, Sm. L. C.; Contract: Promise to pay debt barred by bankruptcy is valid. See notes to Lampleigh v. Brathwaite, Sm. L. C. What is a sufficient promise. 38 L.R.A.(N.S.) 577, n. 8 R. C. L. 669.


TUFT v. WARMAN, 19 Rul. Cases, 194-207, n. Negligence; Comparative. One must minimize risks and avoid injuries if possible. Davies v. Mann; Alterum: Volenti: See Negligence. 4 Gr. & Rud. U. P. R. R. v. Copper. The attempt of statutes to make the employer the insurer and the keeper of the employer, is not meeting general acquiescence.

TURNEY v. BARR, 75 L. 758. 4 Gr. & Rud. Judge may usurp the functions of

Turney, etc.— the jury and this error may be waived. See Coram judice. The division of state power ought to be respected. Cujus est institutus. See Work v. S.


TURPIE EST FARS QUÆ NON CONVENVIT cum suo toto: That part is bad which accords not with the whole. To illustrate: denials that are repugnant to affirmative pleas, are disregarded. Dickens, L. C. 34, 2 Gr. & Rud. Pain, L. C. 107, 3 Gr. & Rud. Allegans: Posito.

TURPIITUDE. 4 Gr. & Rud. Ex dolo malo: In pari.

TWYNE'S CASE. Sm. L. C.; Fraudulent Conveyances; Badges of fraud; Evidence; Presumptions; Effect of possession retained by the vendor. Delivery and acceptance. Shindler.

UBI EADEM RATIO, IBI IDEM JUS: 
Like reason makes like law. 4 Gr. & Rud. This maxim accords with the argument we make for the Trilogy of Procedure. If these principles are applicable to one system of reason then so they are to all. If they can be cited in Equity then so they can be in all other systems. (See Story; Codes).

If parties cannot stipulate away pleadings (Campbell v. Consales), then they cannot by consent and acquiescence do so. Quando aliquid: Isley v. Nichols, L. C. 169, 3 Gr. & Rud.

UBI JUS IBI REMEDIUM: There is no wrong without a remedy. Cited, § 14. Restatement. 4 Gr. & Rud. Ashby v. White, L. C. 273, 3 Gr. & Rud. We classify this as one of the Trilogy of Equity. It expresses far more than several of those maxims usually called maxims of Equity. See equity In Procedure.

UBI JUS INCERTUM, IBI JUS NULSUM: Where the law is uncertain there is no law. Lex est minera: Nihil in lege: Minima mutanda.


UNCERTAINTY. See Ubi jus incertum.


UNFAIR TRADE. Right to enjoin one from entering the employment of a competitor and taking to him the secrets of the employer. 44 L.R.A. (N.S.) 63-68. n. Protection from Rice & Co., 202 F. 155, 44 L.R.A. (N.S.) 1057, n. A competitor has no right to appropriate the symbols and unique designs of another and sell inferior goods under such signs and symbols. Receditur a placitis. Advertising is an important incident in commerce and this incident ought to be protected. No one should be allowed to deceive the public, and certainly not a competitor by copying his designs and ideas. Hamilton Co.; 216 F. 401. To illustrate: If the manufacturer of a razor put upon it a certain figure or brand then no competitor should be allowed to appropriate that same figure or brand and under it advertise and sell a different article and certainly not an inferior or adulterated article. This is deceiving the public and confounding the efforts of the originator of the design and idea. This is an injury. The differences of

Unfair, etc.— the goods call for explanation, arguments and extra labor. Such detractions from ones lawful plans and ideas ought to be restrained. Receditur a placitis: Alterum: Ubi jus ibi remedium. The duty to truthfully advertise should be enforced. It should not be said that advertisements deceive and injure if one believes them. Alterum. To illustrate: It ought not to be advertised that Thompson adopted and followed the rules of Story, Mansfield and Greenleaf and cited and respected them. This would deceive students. Multitudo. Adoption of names and insignia to deceive ought to be actionable. Benevolent, etc., 205 N. Y. 459, L.R.A. 1915B, 1074; Virtue, 123 Minn. 17, 54 L.R.A. (N.S.) 1179. Bomi Judicis.

To the commercial world the right to advertise is a valuable asset the right to which ought not be abused. To illustrate: To advertise "the best shoe in the world" which will not stand wearing in the wet for a single day without the heels and soles falling off is in reality more than a private offense and such an abuse ought to be restrained in all appropriate ways. Also to advertise that a forthcoming work is no revision of any other work when that is all it is, is deception that should be punished. Also to advertise a work as an elementary law book when in truth and reality no fundamental principle can be found in it should be treated as a fraud and deception. Courts should protect commerce. Receditur; Ubi Jus.

In on relation is the right to advertise more abused than in the law book trade. Palpable reprints and revisions of works are heralded as entirely new and different works. Restatements along scientific lines are promised and advertised, which manifestly omit the fundamentals. See Maxims; Literature; Restating the Law.

UNIFORM. The laws should be. 4 Gr. & Rud. If the great underlying principles of the leading subjects were picked out and made prominent and tanglise this would greatly simplify and advance the student. The most important are the most worthy. Immaterial details should be treated as mere incidents. If we would learn the river Rhine, we should first attend to the main stream and its
Uniform.—

few chief tributaries. Its twelve thousand

of the sea should not be made most prominent. And so it is I emphasize the study of the law. See Preface (Datum Posta) 3 Gr. & Rud. Accordingly we regard the Trilogy of Procedure as above all other rules and principles. If it is well grasped and com-

prehend the system of procedure with equal and quite uniform at least all but the "theory-of-the-case" system. It is not uniform as the de-

cision that illustrates this shows.

ubi jus incertum, ibi jus nullum.

UNION PACIFIC R. V. v. CAPPNER, 69 L.R.A. 510. A suit is

owing to trespassers. The law does not make every man his brother's keeper.


UNION PACIFIC R. V. v. DODGE COUNTY, 98 U 8. 541. Contract: Voluntary

payment; Cannot be recovered. Bibble; Scott v. Ford; Ignorance.

UNION TRUST CO. v. PRESTON, 112 A. 370. Statutes; Construction. The

Equity of a bond for purchaser over-

ride a statute. Lex non creator.

Present.

UNITED STATES, 4 Gr. & Rud.

UNITED STATES v. BANK, 6 Okla. 63. A

Judge being a debtor cannot appoint a

receiver for his creditor. § 511. Equity.

Hawkins: Nemo debet esse judex.

U. S. v. BIGGS, 211 U. S. 507. Verba

fortius applies. U. S. v. Linn; Stephens

v. Todd.

U. S. v. BREWING CO., 203 Ill. 306. One

cannot impeach his own witness. Al-

terna: Valueus; 1 Gr. & Rud. 90.

U. S. COURTS, 4 Gr. & Rud. See

FEDERAL PROCEDURE, 1d.

U. S. v. BURTON, 4 Gr. & Rud.

U. S. v. AMISTAD, THE (CINQUE'S


may slay a Negro in self-defense.

Nottigcll and Colman took notice of

the case is a cognate of Rushion. A crime (case)

must necessarily appear. De non

Slavon; Nalle; Quis, quid: Story.

Omission of a material allegation cannot

be waived. A motion to dismiss for failure to state a case

in a full and clear manner. This case

is a cognate of Rushion. A crime (case)

must necessarily appear. De non

Slavon; Nalle; Quis, quid: Story.

U. S. v. CRUIKSHANK, 92 U. S. 542,

L. C. 232, 3 Gr. & Rud. This case in-

volved the right in a Precinct in a

full and clear manner. This case is a
cognate of Rushion. A crime (case)

must necessarily appear. De non

Slavon; Nalle; Quis, quid: Story.

U. S. v. PECK (Peck v. U. S.), 102 U.

S. 64, Contract: Impossibility, Lex non

cogit ad impossibilitatem, Impossibility when a defense to a contract. Paradox.

U. S. v. PEREZ, 9 Wheat. 379, L. C. 69,

Gr. & Rud. Former jeopardy. Ele-

ments. Indictment must be certain.


U. S. v. SMITHEE, 5 Wheat. 76. Penal

statutes are strictly construed.


UNI TESTIS AFFIRMANS PLUS VALET

mile negantis: The testimony of one

who affirms is worth more than ten who
deny. 4 Gr. & Rud. Affirmative testi-

mony is worth more than negative. Bon-

nell, L. C. 185. 3 Gr. & Rud.

UNIUS CUIUSQUE CONTRACTUS INI-

tium spectandum est, et causa: The

beginning and the cause of every contract

must be considered. Contemporanea.

UNLAWFUL DETAINER. 4 Gr. & Rud.,

120 A. 29-31.

UNO ABSURDO DATO INFINITA SE-

quantur. One absurdly being allowed

an infinity follows. Sec. 10. Restate-

ment. Lez non: The claim that the

record-pardons can be waived has led
to all the incongruities of the "Theory


USAGE. Custom and Usage. May

be shown unless it contradicts the contract.

Wigmore, L. C. 399, 3 Gr. & Rud.
Usage.


Use and Occupation. 81 A. S. 439; 4 Gr. & Rud.

Usurpation. Records are to restrain. Windsor, L. C. 1, 3 Gr. & Rud. Coram judice.

Usury. 4 Gr. & Rud.


Utile Per InutilE non vitiatur: Surplusage does not vitiate that which in other respects is good and valid. 4 Gr. & Rud. See Morningstar. If the mandatory record shows error then the statutory record is surplusage so far as that error is concerned. 212 U. S. 445. Anticipating a defense is surplusage and will not avail. 211 U. S. 14.

Ut res Magis Valet Quam Ferriat: The law seeks to conserve rather than to destroy. The thing should have validity rather than be lost. Weber v. Leete. See §§ 283-293 Equirr. We have adopted this maxim as one of liberal construction. See Consensus: Omnibus praesumuntur rite. The Abbey Dodge, 223 U. S. 110 (statute). Objection to a general demurrer this maxim is applied. Rushton. And indeed the limits of liberal construction. Dobson v. Campbell, 232, 3 Gr. & Rud. A phase of this maxim is discussed in Cockrell, 50 L.R.A. (N.S.) 1-52, as a part of the "Theory of the Case."

Ut res magis valet quam perret: If enough can be picked from a pleading to pass the general demurrer this will be done. 1 Gr. Ev. 19, 73. This rule comes from the old law and it applies to all systems alike. The civil and the criminal case are alike as to this rule. R. v. Waters, L. C. 71, 3 Gr. & Rud. If one good count among many can be found to sustain the pleading this will be held sufficient. Gompers, 33 App. Cas. D. C. 574, 575, 575; cases cited; Peake v. Oldham, 1 Copw. 275, 276, stated 33 App. Cas. D. C. 574; Locke v. U. S. 7 Cranch, 339. Literature.

Certum est quod certum redit potest. What can be made certain will be made certain in the rule. But liberal construction is bounded by the rule that "What ought to be of record must be proved by record and by the right record." A cause of action must be in the right pleading. (Story Equity Pleading, sec. 10). It will not be translated from other and different pleadings. Tooker v. Annooz. See Aider. Much less will it be picked from the matter of the statutory record. Rushton v. Aspinall. (See Theory of the Case.) Florida Co. v. Bell; Minnesota, 194 U. S. 48-73.

In appellate procedure a judgment will not be reversed if only its support can be picked out of the mandatory record subject to the above rules. If the judgment can pass as Coram Judice this is sufficient. See Collateral Attack; Res Adjudicata. If a judgment is Coram judice then in Appellate Procedure it will be sustained, unless the mandatory record is attended by the statutory record, and also an Assignment of errors aptly and with certainty defining error shown from the statutory record. See Windsor v. McVeygh, L. C. 1, 3 Gr. & Rud.; also Morningstar. The necessities for the Coram judice proceeding limit the operations of the rules of liberal construction. See Consensus totiit errorem; Omnibus praeuomuntur rite. Rushton: Story.

Discussions of Ut res are inseparably connected with the Trilogy of Procedure and: 1. De non, 2. Frustra, and 3. Verba fortuna. (See Equity in Procedure.) It is a cornerstone of Consensus praesumuntur rite. The discussions of the statutes of Amendments and Jeofalis and the liberal provisions of the Practice Acts constantly present phases of all of these maxim, which the student will do well to look at connectedly and get an impression from their expressions; this will serve him well as a key and a guide to the labyrinths and the thorny paths in the "legal jungle." They are of all systems and they ought to be discussed in all systems alike. This is an instructive fact and therefore we will try and illustrate it:

For this we will take Leonard v. Pierce, 182 N. Y. 431, 1 L.R.A. (N.S.) 161-167, n; herein the defendant was described in the caption as if sued in his individual capacity. In his individual capacity—while in the statement of the "cause of action," below the caption, the averments showed that he was sued as a trustee in a representation capacity. Of course, here was a repugnancy. (Paine, L. C. 107, 3 Gr. & Rud.) This repugnancy was called in question by a general demurrer and whether the question is, was it demurrable? This question was discussed by a divided court (four to three), the majority holding that it was a fatal defect. The minority quoted the "liberal provisions of the Code" and held that under these that the defect was De minimis non curat lex. We think the majority were right and that they might have begun a clearing in the "Jungle" and for this have said:

The provisions of the Code are affirmative of the old law and therefore we view the statement presented in this case from first principles and therefore observe that: A statement of a "cause of action" is dictated by the maxim—Quis, quid, coram quo—from the Roman and which is applicable to all systems of pleading that respect the certainty required by the rules of Res Adjudicata, which dictate the form of the statement, which is to have a caption, a statement and a prayer, or conclusion Ad Damnum (the claim of damages.) (See Quis, quid.) If the caption or the Ad Damnum or the omitted and no formal objection to the omission is aptly made (Consensus totiit
Ut res, etc.—

errorem), then such omission is waived and goes forever. The omission, if waived, makes no difference if only the court can pick out of the statement, what the omitted formal part should have presented. A court will sustain a Pleading, upon general demurrer if possible to do so. Ut res. But it will not overlook the requirements of Res Adjudicata and other high policies of Procedure. (1 Gr. & Rud. 83-123.) Now, let us impress, that the omission of a formal part is one thing, while the employment of a formal part (which may mislead) is quite another thing.

If a party is described in one capacity in the caption and in another and different capacity in the statement here is contradiction,—repugnancy—which the rules of Res Adjudicata forbid. (See Res Adjudicata, 4 Gr. & Rud.) Omitting is one thing and misleading is another. (1 Gr. Evidence, 63; Bristow v. Wight, L. C. 135 et seq., 3 Gr. & Rud.) Here, in a part of the pleading prescribed in all systems (and of course by our Code), it is required that the names of the plaintiff and of the defendant be stated in the caption. The capacity in which a party sues is a jurisdictional question and is the basis of an important rule of Res Adjudicata which requires that the parties appear in the same capacity.

Now, if a party in the individual capacity he cannot recover in a different capacity. (Dec. 42.) Here two different things are juridically presented. It is only a difference in degree, say that the omission.

In the caption C is the party described in the statement. Now, can the statement change the overruling the name of the party described in the caption? May you describe a necessary party one way in one part of the statement and a different party in another part of the complaint, when Res. Adjudicata demands that you be consistent? Omission is not repugnancy. These are different things. The caption is not the place for jurisdictional averments. Jackson v. Ashton, 11 Pet. 93; and if made therein they are surpussage. (Utile per insulile.) But, if one alleged that he was a citizen of New York in the caption and then averred that he was a citizen of Illinois be overlooked where the question of citizenship was material? Courts will go a long way to save a pleading. (See Ather.) But should they permit uncertain pleadings? (See Wing, 15 Mo. 174) cited in Equity in Procedure. The "Hook" Case cited by Chitty and Stephen (a plea of confession and avoidance supplies a statement for the plaintiff) is in violation of first principles. Quod ab initio. Boxen v. Emmerson. Ut res must be respected, also aliamens contrarius; Nihil possumus contra veritatem.

A repugnancy appearing upon the face of the pleading is demurrable. But, we will not look into any other document to sustain it. See note, 1 L.R.A. (N.S.) 161 (Contra.)

Evidence aitunde will not be sought nor considered on general demurrer, where the maxim is De non apparentibus. See Oral Evidence.

Ut res magis gace Tidd and his followers much concern. They have had much trouble in determining the strictness of construction of a pleading upon general demurrer and whether or not the rule applies with equal strictness at all other states. Goldham v. Edwards; Anent literature we quote Tidd and review his statement of the rule. (Dobson v. Campbell, L. C. 19, 3 Gr. & Rud.) Therein we restate Goldham v. Edwards; Jackson v. Pesked, Verba fortius and the rules of general demurrer.

The influence of this maxim is perceived from applications of Couteat Empor as applied in R. c. Whitley, L. C. 19, 3 Gr. & Rud.; Barnard v. Kellogg, 10 Wall. 338 (wool in bales must be inspected by the vendee; the sale will be held valid if possible). Gordon v. Parmelee, 2 Allen, 214 (quantity of land sold by metes and bounds; duty of vendee to examine and estimate for himself). See Caveat Empor. 2 Gr. & Rud.

Statutes are upheld if possible. St. Louis R. R. v. Arkansas, 235 U. S. 350. But they must be reasonable; they cannot command void and absurd things, like a repugnancy.
V

VACATION. 4 Gr. & Rud., see Terms of Court.


VAIN AND FRUITLESS THINGS ARE never required: Les neminem cogit ad
d

VALLENDINGHAM v. RYAN, 17 Ill. 25. Pleadings are Jurisdictional and a neces


ollandingham; Campbell v. Conesus.

VANDEBURGH v. TRIUX, 4 Den. 464, 47 A. D. 288, 36 A. S. 848, 847, S. P. "Qui


VANDIVER v. GOSS, 190 Mo. 239, 222 S. W. 308. Appellants must furnish re

quired abstracts. Verba fortius: Flan

port.


Display of a justifi

VAN LEUVEN v. LYKE, 1 N. Y. 515, 49 A. D. 345, L. C. 14, 3 Gr. & Rud. Omis

sion of a material allegation is fatal. It may be first raised on appeal. Failure to allege the existence of a hog is fatal in a suit for its trespass. S. P. Rusht

on: Cases. Vadakin (substance is not alone a waiver—aider). Animals, in


Rushon v. Conesus.

Failure to allege the severity of a hog is fatal and cannot be supplied by the court. Carter v. Glusker. Failure to allege the severity of a hog is fatal and cannot be supplied by the court. Carter v. Glusker. Failure to allege the severity of a hog is fatal and cannot be supplied by the court. Carter v. Glusker. Failure to allege the severity of a hog is fatal and cannot be supplied by the court. Carter v. Glusker.


VAN WOHRIS v. BRIGHTNAL, 86 N. Y. 18, 40 A. R. 505, 13 C. L. J. 349. Con

tract; Res loci contractus: A. con

tract valid where made is valid every

where. 128 A. S. 48, 58.

VARIANCE: DEFEND: FAILURE of proof. There is no practical distinction be

tween these matters. They all violate praesum probatum et res edict. This is one of the Trilogy of Procedure. Evidence not authorized by the pleadings is admissible. Shute v. Thompson, L. C. 290a, 3 Gr. & Rud. To ask for dollars and get a judgment for four would be void on its face. Aider cannot cure such a proceeding. If the error appears on the face of the manu-

Variance, etc.—
tory record no exception or objection is necessary; nor is a motion for a new trial, nor an assignment of errors. Such a judgment would be subject to collateral attack. Quod ab initio: 4 Gr. & Rud.; also Equity. A judgment must be authorized by its record; it is limited by its record —the Pleadings; these are jurisdic

tional. Munday v. Vail, L. C. 79, 3 Gr. & Rud.; this case is quoted and followed in Reynolds v. Stockton, which in turn is followed in Vick-

sburg v. Henson, which holds that a judgment outside of the Pleadings is void. It sustains Verba generalis re

stringuntur: also Quis: quid: and cites Federal cases exclusively to sup

port these old, great Universal, Constitu

tional principles. Many courts adhere to these canons but they apply them as if they were a local and provin

cial establishment. In Crockett v. Lee, 7 Wheat. 522, the court came very near stating the Trilogy of Pro

cedure in its broadest aspect. Story states it in a partitioned, irrelative way; he left the way open for the Federal Lawyer to say: "Oh that is in Equity; at law it is different; at law we have Aider by verdict." See Rushton; U. S. v. Crutchshank; Minne

sota, 194 U. S. 48-73.

The discussions around the above principles are nothing for the lawyer and his establishments to be proud of; unless per chance he points to the virility of Feudalism and its weird and enduring spell upon the legal pro

cess which still dozes on Shelley's Case, its obscure hocs, its Aider by ver

dict and its supposed luminous illustra

tion of "a title defectively stated and a defective title;" and the manifest hatred of the idea that the state is in Procedure. To exclude the latter they hold that the general demur

rer can be waived, also that substance can be waived; also that if irrelevant evidence is admitted (Shute v. Thomp

son) without objection that out of this surplusage a court can go back and pick from the matter of the Statutory record a case or a defense. See Guil

ling, Thompson, Henry, sub Rushton.

And he has been loyal to Sergeant Williams, who is reincarnated in the prominent and most-sought authors
Variance, etc.—
of the present generation. See Story; Rushton.

Uno ab surdo data infinita sequuntur. Multitudo imperitorem perdit curiorum.


VENDOR AND VENDEE. 4 Gr. & Rud. Marketable title. Id. 4 L.R.A.(N.S.) 1170-1180m. Vendee's lien 137 A. S. 165-208, ext. n. Vendee buys caret emptor. 2 Gr. & Rud.; also U. Tex. ante.


VERBA ACCIPPIENDA SUNT SECUNDUM subjunctum materiam: Words are to be interpreted according to the subject matter. 4 Gr. & Rud. Union Trust Co. 152, 96 S. 948. A widow is not a woman in a seduction statute. Verba intenitio: Noctua. A fifteen year old boy is not an infant. Hartnett cited under Scott v. Shepherd.

VERBA FORTIUS ACCIPPIUNTUR contra proferentem: The words of an instrument are to be taken most strongly against the composer; or otherwise expressed every presumption is against the pleader. In the law of Res Adjudicata it is expressed “Every intention is against the estoppel;” or Every intention is against the plea.” Reference to the following citations in the Restatement will impressively present it. §§ 1, 2, 6, 8, 9, 19, 20, 21, 22, 24, 25, 26. The case system has not presented it any better than in Doxastan v. Payne, L. C. 217, 3 Gr. & Rud.; Clark v. Dillon (N. Y.); Stephens v. Beall (U. S.) U. S. v. Lynn. Its largest résumé is found in §§ 1-8, 16-180. Equity in Procedure wherein it is shown to be inseparable from De non apparentibus, and Frustra probatur. Wing.

Verba fortius is one of the great maxims of the law. We classify it as the third of the Trilogy of Procedure. §§ 1-7, Restatement. Elsewhere we submit it if a greater canon can be named. See Lawrence. It should be connectedly considered with Rushton, Briston, Doxastan and Goldkam v. Educards, and their cognates. It is exactly like Antisdal v. R. R. (Wis. Code); its principle is involved in Clark v. Dillon, which is extensively discussed in relation to the Code which reaffirmed this maxim. Antisdal; Roberts v. Moon.

The obliteration of this canon of

VERBA, etc.—

the Prescriptive Constitution is the effect of the “theory-of-the-case” school. See Story; Rushton; Feudal Lawyer; Literature. The genius of the Feudal Lawyer is reflected from his imperial statutes and cases entitled the “Statutes of Amendments and Jeafoils.” For the effect and operation of these the attack is led under the shibboleth that “Parliament is omnipotent.”

Codes reaffirm this maxim. Antisdal; Campbell v. Consaulus; Palmer v. Humiston, 45 L.R.A.(N.S.) 640: Clark v. Dillon; Tooker v. Arnouz, all N. Y. cases. Kosciusco County v. Decker, L. C. 30, 3 Gr. & Rud. 30 Wis. 624. (“Pleadings cannot be fish, flesh or fowl.”) See Pom. Code, 533, also 546 for contradictory views. It is strictly applied. Garrett (U. S.); B. v. Terrell, Ind. 2 L.R.A.(N.S.) 251 (charging a crime in “15002”). Where Verba fortius is denied there cases like Gilling and its cluster are found; also Weber v. Lewis.

The student will do well to test his works on Evidence, Pleading and Practice,—Procedure by their elucidations of this maxim. He should pause and dwell upon it until he fully comprehends it as a fundamental of logic and of philosophy and its interactions with all of the above mentioned subjects. Then he will see it as a primary, organic maxim of Construction applicable to all subjects, and to all documents. It calls for its cognates in §§ 1-13, Restatement. Perceive this and the wisdom of Bacon will appear for selecting it as one of his 25 maxims.

If a pleader pleaded a plea of alien enemy by averring that the “plaintiff was an alien enemy,” this would be bad for the reason he did not aver that he is an alien enemy. Bell v. Chapman, 10 Johns. 183, Thompson’s Cases Equity Pl. 1. This strict construction is not peculiar to equity Pleading for it applies to all systems. Garrett; North Carolina. Study Doxastan and its cognates and see its universal application. It is related to Verba generalia: next to be mentioned; also to Vicksburg v. Henson, cited in §§ 2, 7, 12, 22, 25, Restatement.

It was lately held that unless a defendant treat a general demurrer as he ought, a special demurrer, that then the omission of substance is
Verba, etc.—


Vesting a court with jurisdiction depends upon the pleadings. *North Carolina; Florida Co.* 176 U. S. 321, 329 (a pleading must be sufficient; a case will not be suspended to await possible aider from subsequent accidents. *Quod ab initio.* *Cragin v. Lovett*, 109 U. S. 194; *Minnesota*, 194 U. S. 48; *Slacom, Rushton*.

Pleadings are jurisdictional: *Garrett; U. S. v. Cruikshank; Slacom; Cragin v. Lovett*, 109 U. S. 194; *Minnesota*, 194 U. S. 48. *Quod ab initio.* The comity of courts and other high policies of procedure require that pleadings exist and that their functions be respected and vindicated by courts. §§ 83-123, 1 Gr. & Rud.

There are limitations of Aider. See *Aider; Altemus; North Carolina*. *Quod ab initio.* Ut res.


In relation to variance we referred to this maxim and its application in construing a judgment or record within the authority investing the court with jurisdiction. This question has gone all over the juridical field and has afforded many of the Federal courts and authors an opportunity to elucidate it comprehensibly. Story takes one side of it and Thompson and the "theory-of-the-case" sect the other side of it. The latter school maintain that the general expressions in a judgment entry carry with them the necessary authority for their existence without regard to the Pleadings. The other school hold that a judgment is limited by its pleadings,—its record. This is well sustained in *Vicksburg v. Henson*, next to be mentioned. No work on Evidence, Pleading, or Practice,—Procedure has forced it upon any court to grapple with this maxim and make it clear. The discussions of Conclusions of law will show. None has surpassed Story and his fine sections are not surpassed. As to the Feudal authors and their followers, after studying them a month one must turn away from them hopelessly befogged; as they straddled *Verba fortius: so they have straddled this maxim. See Pomeroy.*


*VERBA INTENTIO deque DEBENT IN servivere:* Words are to be given effect to the intent. Intent limits and expands words. 45 L.R.A.(N.S.) 858, *Kitchins, 190 N. Y. 170, 70 L.R.A. 742, 42 L.R.A.(N.S.) 503, 42 L.R.A.(N.S.) 503. Where the intention is manifest the letter must yield. And this rule applies to statutes and Constitutions as well as to the compacts of private persons. See 4 Gr. & Rud.; also Equity. Ut res.

Verba ita sunt intelligenda, ut res magis valeat quam percipat: Words are to be so understood, that the subject matter may be preserved rather than destroyed. *Ut res:* 4 Gr. & Rud.

*VERBA NIHIL OPERARI MELIUS EST quam absurdo:* It is better that words have no operation than to operate absurdly. *Ut res:* Uno absurdo.

*VERBA RELATAhoc MAXIME OPERANTur per referentiam ut in eis inesse videtur:* Words to which reference is made in an Instrument have the same effect and operation as if they were inserted in the clause referring to them. 4 Gr. & Rud. *v. Waverly, L. C. 70, 3 Gr. & Rud.* (One count may refer to another.) Exhibits may be incorporated by reference. A ticket includes schedules and time tables. *Le Blanche.*

*VERDICt.* May be directed when, See Ad questionem; Aider by. *See Rushton.*


*VESTED RIGHTS.* 4 Gr. & Rud.

*VEXATIOUS SUIT.* See 4 Gr. & Rud. Malicious Prosecution.

*VIA TRITA, VIA TUTA:* The old way is the safest.


*VICKSBURG v. HENSON,* 231 U. S. 259-274. *Cited, Preface; also secs. 2, 7, 30, 22, 25, Restatement. Cited 232 U. S. 51. *Res Adjudicata* depends on a certain record in 23 U.S. 30. 3 Gr. & Rud; and this record is strictly construed. Every presumption is against the estoppel.—Every presumption is against the *Verba fortius:* And for this strict construction the Pleadings are consulted and are strictly construed. A judgment depends on its pleadings. These are jurisdictional.
Vicksburg, etc.—

Where the pleadings end so does the judgment. The language of the judgment is limited by the pleadings. Verba gestantia non gestantur; Munday v. Falt, 212 C. 79, 3 Gr. & Rud.; Radford, 231 U. S. 725, 50 L.R.A.(N.S.) 10, 21.

Vicksburg supports the Trilogy of Procedure: This fact was borne in mind, throughout the sections of the Restatement. It is cited in the Preface, Id.; also §§ 2, 7, 12, 22, 25, Restatement. It should be considered with Munday v. fall; also Minton v. Helf, L. C. 7, 3 Gr. & Rud. See also Wright v. Giffen, L. C. 28, 3 Gr. & Rud.; Yale, 1961 (N.)

All of the facts are splendid Code cases and they are in accord with Campbell v. Consaulus which we cite so often for the Code development. Equally instructive are Palmer v. Humiston; Milbra; Nalle v. Opster (U. S.); Knickerbocker.

A device is constructed in the light and under the authority of the pleadings. Vicksburg; cases; Munday; Monson; Palmer; Milbra; Walker, 41 App. Cases, D. C. 322 (departsures are not allowed; Frus-

A device must accord with and be responsive to the issues; they must not depart. Minton, 324, 7 App. Cases, D. C. 110. Bil-
gata et probata must correspond. Verdicts do not make nor supply the plead-

Liberal rule of construing a pleading to uphold a judgment is one of the most important questions in Procedure. Ut res magis. It is well expressed in Dobson

cases. See Rushton.

Tidd, Chitty, Stephen, Gould, Thompson, Pomeroy and their followers have been followed in the text on the back of their pages. These have not so in-

structed the profession as to prevent cases like Quilling and its cluster of cases from coming to us as “new” law. See Feudal Lawyer, also Literature. One

case like Vicksburg need be waived. State Bank, L.R.A.1915A., 120, 120-127. This is a

“theory-of-the-case” decision. It cites for authority, 6 Encyc. Pl. & Practice. 384; also 2 Tidd’s Practice, 918. Ancent Lit-
erature extended notice is given Tidd and his followers. He stated Rushton but with confusion and equivocation. He attached much importance to statutes and cases. He did not respect the Trilogy of Procedure. From these observations cases like Vicksburg are much overdue and must be welcomed by every lawyer who knows that Pleadings are Juris-
dictional, and are not supplied from verdicts and judgments.

Vicksburg, 231 U. S. 259, reaffirms rules of Res Adjudicata and of the general demurrer but in a variant lan-
guage. And this fact is not perceived by the Coke school of lawyers—that
class of which Bacon prophesied would arise and flourish until the necessities of a great judiciary and government would force it to overwhelm them and their local and tribal teachings. The Feudal Lawyer and his followers have been a case system sect that could not perceive the breadth and depth of Universal Constitutional principles sepa-
rare and apart from local statutes and
cases—local and flat edicts. To illus-

The law rests upon which all systems depend that can serve a Constitutionalism. And to this point Vicksburg can be cited to one who knows the logic and the philosophy of the law—that Pleadings are jurisdictional in all protecting systems.

Cite Vicksburg to the Feudal lawyer and he will immediately respond Oh, that is an Equity case, or show him a criminal case and he will respond, Oh, that is a criminal case! Here let us ask what could be more disrupting and conducive for a crop of lawyers that would menace the welfare of an empire? Look at Greece and look at Rome!

Multitudo imperatorum perdit curiam.

No lawyer who is led by the logic and the philosophy of the law can get along on his merits at such antinomian forums that American jurisdictions
give. Beginning with the fundamen-
tal principle that Pleadings are Juris-
dictional his troubles begin and they never end. The court that denies that it is bound by its record is a dangerous court and at any point can begin a career of tyranny and oppression and such as is indicated in Gulling v. Bank, 5, v. Muensch, and in v. Pasee. See also observations on Sulzer’s trial in relation to Nemo debet esse judex: Such a procedure reduces all of its points to a gathering of statutes and cases.

“When its philosophy is lost the law is lost” and then its literature becomes endless rows of Digesta and Cyes, and the lawyer is made the victim of the greed and graft of commercialism.

To deny the Universal, Constitutional principles, is a Reductio ad absurdum. However this is exactly the “theory-
of-the-case” advocate’s position. He denies the Jurisdictional function of the Pleadings—the rules of the general demurrer and of Res Adjudicata. He insists that Jurisdiction depends on two facts only and: 1. Jurisdiction of the person, and 2. A judgment entry which the court could or might have made without regard to the state of the Pleading. Knickerbocker Trust
Vicksburg, etc.—

Co. v. Gulling v. Bank. He denies Vicksburg, Nale v. Oyster and the cases it cites. The general demurrer can be waived in a "theory-of-the-case" court. Such a Hydra of confusion and bewilderment no logical and philosophical lawyer can endure or make progress with. He is compelled to retire as he would from a tangle of serpents.

The Vicksburg Case cited and followed Reynolds v. Stockton, L. C. 796, which in turn not only cited but practically reprinted Monday v. Vail, L. C. 79, 3 Gr. & Rud. Now the latter was a case at law. Accordingly we conclude that the Federal Courts cannot logically make an exception of cases at law, nor from the underlying principles in the Vicksburg Case.

The struggle over Monday v. Vail, in the various states tells too plainly that the end of Feudal theories and teaching is near at hand. Also that our jurisprudence, the greatest asset of the state-government is dismembered and has drifted into chaos. The call for "Revolution" is timely and ought not to go unheeded by the lawyer, his courts, his literature and his schools. Addresses in Bar Associations justify the foregoing observations. In the Introductory Chapter are set forth facts that demand the attention of the lawyer as a scholar, lawyer and teacher.

In the same volume is the Vicksburg Case also one incompatible with it—the Baker v. Warner, 231 U. S. 588. They are incompatible from the following standpoints: The Vicksburg case necessarily reaffirmed the Trilogy of Procedure which is discussed in Hughes' Equity In Procedure, §§ 101-189. Chief among these principles is Verba fortis acquisiptur contra proferentem, which is a rule of the general demurrer and also of Res Adjudicata—"Due Process of Law," when it is expressed thus: "Estoppels are odious and are strictly taken," or thus "Every intention is against the estoppel."

These are the Rules in the Duchess of Kingston's Case, L. C. 76, 3 Gr. & Rud., also in 4 Gr. & Rud.

These rules are consistent with Vicksburg, also Campbell v. Consalus, Clark v. Dillon and Tooker v. Arnow, all New York cases. While looking from the above maxims, cases and principles and their cognates we are confronted with Baker v. Warner wherein the court informs us that it has renounced the old rules and principles and has embraced the "new" and "modern." (See 2 Thomp. Trials, 2310, 2311, quoted under Title Variance, 4 Gr. & Rud. See also, Bradbury's Rules of Pleading, 9-10; 1564-1570; Baylie's Code, Pleading and Practice, 1-4; Preface Pomeroy's Code, 1876, Par. 2; also his sections 75, 509-514, 533, 546, 592, et seq.; also Preface, Nash's Ohio Code (1858), and his Section 1, where he denies that the old rule can be departed from. Also compare and consider with the above Gulling v. Bank; S. v. Passe (Mo.), Rennsberger v. Britton (Colo.), Janes v. Hyde, 8 Colo. App. 98, 49; also Holman, Id. 283, 288. Look at these warring and hopeless tangles and see if the head and the tail of any one of the vipers can be picked out. And then compare all of this tangle with the "Manner of the Romans," which can be picked out of § 10, Story's Equity Pleading, quoted § 47, Hughes' Equity. Code reaffirmed the "Manner of the Romans" and Story's section above referred to. There is nothing new of substance in the Code. Professor Pomeroy and Judge Nash are mistaken. Judge Nash calls for more legislation but in Baker legislation was not considered, for the court assumes that it can depart from the "old" and embrace the "new" and "modern" from case to case as it sees fit. That it can exclude the tangle as was done in Vicksburg on the one hand while it is embraced in Baker on the other hand; in the latter case Verba fortis is reversed and all presumptions are made in favor of a pleader. And this Judge Nash instructs us cannot be done; Professor Pomeroy holds each way, §§ 533, 546. And so do all of the "theory-of-the-case" states, with which the Federal Supreme Court in view of many of its late cases may now be classed. For if there are fluctuating and enlarged rules at the stage of the Motion in Arrest then the general demurrer can be waived. Where the general demurrer is waived there the Procedure is inquisitorial and not accusatory. There the accused is asked to arise and defend himself against a citation and a conclusion of law such as that he is "a pestilent fellow." Or as Pro- vost Marshal Winder would respond to an inquiry of the prisoner, "you are charged with a very serious offense
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which grazes so close to treason that it includes aspects of that crime. Now how can an accused person do otherwise than demur; and how will failure to demur aid such charges?

Verba fortius like a Gibraltar holds mad storms at bay; The cloud may pass, but not this rock, away. The “Manner of the Romans” is for all ages, all climes and wherever governments are protecting. Now what greater principle of Constitutional law can be pointed to than the old trite and commonplace rule that “the general demurrer cannot be waived.” It can be picked out of Vicksburg; Denver, 236 U. S. 101; Nalle; but it is impugned in Baker.

It is assumed in Baker that there is a “new” dispensation abroad and that it is worthy of adoption and the court informs us that of its own motion and without legislative aid it will adopt the “new.” But the court made a mistake in this way: The supposed “new dispensation” is not new at all but is the old maxim Ut res magis valeat quam perceat which was always the rule at the stage of the general demurrer and of course at all its stages by whatever name known and of course at the stage of the motion in Arrest. The maxim last cited is the canon of construction at the stage of the general demurrer and all of its Correlatives, including Collateral Attack, and Res Adjudicata and Due Process of Law. This maxim has a case nomenclature the most prominent of which is Dobson v. Campbell, L. C. 232a; 3 Gr. & Rud.; also Jackson v. Peaked (Eng.); also Rushton v. Aspinwall, L. C. 5, 3 Gr. & Rud. The rule stated in Baker is not “new” it is from old; it is always the law, and the attempts of legislatures and of courts to make new law have simply broken the law as Judge Nash states in his Ohio Code.

The vice in cases like Baker that it misleads; it sends out an inquisition for that which does not exist—a new rule, Biddle v. Boyce; Wing; Quod ab initio. Judge Nash is right and views like his must be accepted to settle the law. The assumption that new laws are coming is support for the vicious and deceitful advertisements of clamor and hurrah book factories that advertise that “more than 5000 new principles are decided and developed each year” and that their overtopping bulks of Digesta and Cycles are a necessity for the pro-

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gressive lawyer. In truth and in fact there has not come one new principle since the downfall of the Roman Empire. Who can name one? As it goes when the old principle is stated or the old case is cited the “new” and the “late case” and the little local statutory revolutes laughs and jeers at the old fossil and to prove him one he reads Baker, to show that the old law does not apply. And there are too few judges on the Bench like Judge Nash and the court in Oakley v. Aspinwall who can see and recognize old principles through local and flat law and “late case” which more often break the law than they make it. They can rarely discuss a great principle without their finger on the line of the statute that merely reaffirms the principle. If a statute declares that all errors not assigned are waived the courts of to-day really try to enforce such a provision. It is vain to cite to them cases like Clark v. Dillon and C. & A. R. R. v. Clausen (Ill.), or Indianapolis R. R. v. Horst, L. C. 223, 3 Gr. & Rud. Nalle.

And it is very clear that many judges quote law that they do not understand as was done in Jansen v. Hyde. And in Baker law was quoted that was not comprehended. The old rule was correctly quoted but it is not new law. It is the old rule applicable to the general demurrer and all of its correlatives including Collateral Attack and Res Adjudicata as is indicated in Vicksburg.

Fundamental principles vital to our jurisprudence ought to be settled. But we know of none that is beyond dispute. It is certainly too bad to have the same volume filled with contradictions relating to the same matter. Antinomian laws are a menace to commerce, to titles, to property, and to the peace and repose of society and the respectability of the courts. The states are widely variant and are constantly drifting further and further apart. To illustrate: as to what constitutes the Coram Judice proceeding is one of the most unsettled of questions. Relating to this question judicial anarchy reigns after hundreds of discussions of what is “Due Process of Law.” Had the court in In re Egan, 24 S. D. 301, said: We find in this contempt proceeding that the accused is guilty of various crimes by his own confessions and therefore without the formalities of an indictment we shall sentence him for these crimes it is
Vicksburg, etc.—

doubtful if half the lawyers could agree as to how the case would be viewed by the Federal Supreme Court in reviewing the supposed record upon a question of "Due Process of Law." In the logic and the philosophy of the law there is no difference between the civil and the criminal case as to the acquisition of jurisdiction. Still decrees are respected in many of the states without regard to the Pleadings. (See Gulling v. Bank.) But we are informed that "new" rules have come. Baker; 2 Thomp. Trials, 2310, 2311, quoted under the title Variance, 4 Gr. & Rud. A sentence without an indictment or a judgment without a Pleading would not be viewed favorably by a foreign country or government which asked for the protection of its citizens from the ways of spoliation and of barbarity. But the fact is that such cases pass for Due Process of Law in several of the American states.

To support the above conclusions we cite for comparison Vicksburg v. Henson and Gulling v. Bank, 29 Nev. 266; Cases. Also Campbell v. Consalus, 25 N. Y. 613, 616, with S. v. Fasse, 189 Mo. 532, Standard Oil Co. v. Mo. 224 U. S. 270, with Remsberger v. Britton, 31 Colo. 79-82. See Vicksburg in relation to Remsberger.

It is now evident that the identity of causes is proven by the pleading, evidence, opinions and bills of particulars. 1 C. J. Cye 46, 66, 100; also arguments and instructions. Holman, 8 Colo. App. 285, 288; also oralties of counsel. Bailly v. Hornthal. Also agreed statements of fact; that these will supplement and add to the pleading. D. C. v. Lee, 35 App. Cas. D. C. 341. Also that acquiescence will supply pleadings. See Theory of the Case; Alder.

An examination of the above case also of the citations to Story and to Thompson must confess that Judicial anarchy is prevailing in most American jurisdictions and is fast invading the Federal Courts in the way of variances, departures and of supplying the omission of material allegations by the application of the law of aider and of extravagant construction thereof. (See AIDER.) Also that condemnations and sequestrations are carried on by means that violate the Prescriptive Constitution—the "Manner of the Romans"—the maxims of antiquity—the law of all civilized countries. Vicksburg, etc.—

Courts are governmental agencies and as such in a government Republican in form are confined and restrained by the great high law of all ages and of all civilized countries. A governmental agency that can do as caprice or whim dictates—disregard the Division of state power and sit and act as courts do in an absolutism is no loyal servitor of a government Republican in form. If a constitution specifies that Judicial officers shall preside over a court and instead soldiers are permitted to preside over the court then the sentence of judgment of the soldiers would not be Coram Judice—Res Adjudicata—Due Process of Law. A court so constituted could only sit and adjudicate in a barbarous country. The condemnations and sequestrations of such a court could not satisfy the demands of an offended and aroused government at the same time it accorded its citizens. Such proceedings would be characterized as a travesty upon justice and a cause for war. And so if the judges sat and adjudicated their own dispute in violation of Nemo debit esse iudex in propria sua causa. Oakley v. Aspinwall. No traitorous tyrannous barbaric court can sit and administer to the requirements of Due Process of Law. And this conclusion finds support in cases like Vicksburg, Windsor v. McKeigh, L. C. 1, 3 Gr. & Rud.; also in Pemnoyer v. Neff, L. C. 58, 3 Gr. & Rud.


VIGILANTIBUS ET NON DORMIENTIBUS JUS sarcasmus jurisprudentiae: The law calls it the vigilant and not those who sleep on their rights. 4 Gr. & Rud., 33 L.R.A. (N.S.) 306. Laches in Equity. Michaud.

VENDICTIVE DAMAGES. See EXEMPLARY DAMAGES.

VIPERINA EST EXPOSITIO QUÆ corrodit vinculaictum: That is a serious exposition that swallows out the bowels of the text. Maledicta: 4 Gr. & Rud. To Illustrate: The Code reaffirmed the old law Quis, quid in a very plain way. Against the letter of the Code and the old law constructionists construed all away. The old law was reaffirmed and the necessary law too (which should have been preserved—Heydon's Case), but innovating theorists construed the Code away. Gulling. "Theory of the Case."

Virginia, etc.—
VOID IN PART, VOID IN TOTO: 4 Gr. & Rud. See Pigot: Mallin; U. S. v. Linn.
VOID THINGS CANNOT BE WAIVED or alred. Quod ab initio: Quod nullum.
VOID; VOID AND VOIDABLE. 4 Gr. & Rud.
VOIRE DIRE EXAMINATIONS. 4 Gr. & Rud.
VOLENTI NON FIT INJURIA: That to which a person assents is not in law esteemed an injury. Cited, sec. 19, Restatement. One cannot cause or invite his own injury and then charge another with it. This is one of the great maxims of the law. We classify it as one of the Trilogy of Tort in order to impress it. It is of the Prescriptive Constitution. The passing attempts to change it and allow injured persons to recover from employers without regard to contributory negligence of the employee is not meeting universal acceptance. 46 L.R.A.(N.S.) 106, 38 L.R.A.(N.S.) 292 (assumption of risk).

Volenti, etc.—
It is interpreted into statutes. 38 L.R.A. (N.S.) 42, 133. But see, 201 N. Y. 27, 42 L.R.A.(N.S.) 1234.
VIEW OF PREMISES. 4 Gr. & Rud.
VOLUNTARY CONVEYANCES. 4 Gr. & Rud.
VOSBURG v. MOAK, 46 A. D. 615, n. Joint trespassers; who are. All participating in a performance developing into a tort are equally liable. South Case. Kirkwood, 73 A. D. 134-149, n. See Joint TRESPASSERS.


Ward statements and affidavits called to supply, nor enlarge nor vary Pleadings. Mendel v. Steel. L. C. 77, 3 Gr. & Rud.; Were not a sworn statement to be of record must be proved by record and by the right record.


WANA-MAKER v. WEAVER, 176 N. Y. 75, 98 A. S. 621-650, n. 65 L.R.A. 529-533. n. Husband and wife; Contracts of wife when husband liable for. This is the largest résumé of the subject. See Hanby; Sexton v. Benedict. In Wana-maker, Sexton, Mongau, De Remmey, Manby and Jolly are all stated to exist.


WARFIELD v. LINDELL, 30 Mo. 272, 77 A. D. 614. Pleadings as evidence: Admissions in. Body, L. C. 49, 3 Gr. & Rud. The status of pleadings as evidence ought to be one of the best settled branches. But in fact it is one of the most unsettled. Whether an admission in the pleadings is conclusive or cannot be determined from great rows of reports, digest and Cycs. Qui non negot. Roberts v. Moon. The conflict over the status of pleadings as a jurisdictional element is equally unsettled. Indeed doubt and mystification crowd the entire subject. See Literature: Story: Mandatory Record: North Carolina R. R.

WARMAN v. BANK, 150 Ill. 100, 49 S. 412. (only a party can verify a affidavit; his attorney cannot. The language of the statute must be followed. Its text: Exprese usus: Qui hæret: Contra: Young v. McMere.

WARMSTREY v. TANFIELD, Wh. & Td. L. C. E. 252. Assignments with Equity. Protects. Ryall v. Roche. Assignatus utitur: Like a key the work of assignments and of the bond of purchaser has been driven in the Federal law. See Equity in Prop. Acad.


WARREN, 13 Mo. 45. The motion in arrest limits the scope of review on appeal. This in effect denies the first case in Mo., where it is held that the general demurrer cannot be waived. But it is waived unless "it will keep." Maltsekrodt. A statute was followed in Warren. And such a statute was in Massachusetts where it was provided that if no motion in arrest is filed that this closes all jurisdictional defects. See cases sub. In part: If a cause is in part: then the court never got jurisdiction of a lawful subject matter. But the contrary is held. Mckee, sub. in part. And so the general demurrer is waived. See Consensus: Quod ab initio.


WASTE. 4 Gr. & Rud. Garth v. Cotton, Wh. & Td. L. C. Eq. n.

WATER. WATER RIGHTS. 4 Gr. & Rud. Aquarur: 2 Gr. & Rud.


WAUGH v. CARVER, Sm. U. C., 4 Gr. & Rud. Partnership; Participation in profits. Qui sentit.


WEAPON, 4 Gr. & Rud.

What ought to appear from the mandatory record must appear therefrom. See Plaquemine Plating Mill Co. v. Chicago, L. C. 2d, 3 Gr. & Rud.

What ought to appear from the statutory record must appear therefrom. Its matter if put into the mandatory record is supposed to be found. Pennsylvania (vainly the court has sought to instruct a stupid and careless bar).

Appellate Procedure profoundly involves the above rule. Multitude of cases have involved it. See Plaquemine, Qui sentit.

WHATRAN v. OLDS, 20 Wend. 174, L. C. 349, 3 Gr. & Rud. Mistake if mutual avoidance of contract. But not a unilateral mistake. A contract may be rescinded for a mutual mistake but not for a unilateral mistake.

WHERE ONE OF TWO EQUALLY INNOCENT persons must suffer from the fraud of a strict lien must suffer first..client, Lickbarrow, L. C. 394, 3 Gr. & Rud. This great Equity largely rests on Allegros. It is the law that every bona fide purchaser Sells; Young v. Oakes. It is limited by crimine omnia. Atterbury cannot be no consent where In pari: protects.

WHITCOM v. WHITHAM, Sm. U. C.: New York: County Court. Of Limitations. Payment by one joint promisor is a payment by all, and is a new promise by all. Generally, this rule is changed by statute.

WHITON v. WENSLOW, 52 A. D., 711, sub. Bonnell, L. C. 185, 3 Gr. & Rud.

WEIL v. GREENSE COUNTY, 69 Mo. 286.


MERGER of the civil in the criminal remedy. White v. Fort.


WEST v. SMALLWOOD, 3 M. & W. 418.

A prosecutor acting bona fide has immunity, if sued for false imprisonment.

WHARFAGE, 4 Gr. & Rud.

What ought to be of record must be proved by record and by the right hand record. Greatest resumed of this first rule of evidence—is in Equity in Procedure. §§ 218-251. It is the rule in Mondell v. Steel, L. C. 77, 3 Gr. & Rud. Mowatt v. Palmer v. Humiston. It is denied in the "theory-of-the-case" courts. This record rule arises from Contra scriptum and exinp.; e.g. Williams v. Berry.


This rule involves the oral evidence rule. Also the best evidence rule. See 4 Gr. & Rud. also Equity in Procedure.

What, etc.—

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WHATRAN v. OLDS, 20 Wend. 174, L. C. 349, 3 Gr. & Rud. Mistake if mutual avoidance of contract. But not a unilateral mistake. A contract may be rescinded for a mutual mistake but not for a unilateral mistake.

WHERE ONE OF TWO EQUALLY INNOCENT persons must suffer from the fraud of a strict lien must suffer first. Lickbarrow, L. C. 394, 3 Gr. & Rud. This great Equity largely rests on Allegros. It is the law that every bona fide purchaser Sells; Young v. Oakes. It is limited by crimine omnia; Atterbury cannot be no consent where In pari: protects.

WHITCOM v. WHITHAM, Sm. U. C.; New York: County Court. Of Limitations. Payment by one joint promisor is a payment by all, and is a new promise by all. Generally, this rule is changed by statute.

WHITON v. WENSLOW, 52 A. D., 711, sub. Bonnell, L. C. 185, 3 Gr. & Rud.

WEIL v. GREENSE COUNTY, 69 Mo. 286.


MERGER of the civil in the criminal remedy. White v. Fort.

WELTMEYER v. BISHOP, 171 Mo. 110, 65 L.R.A. 554, L. C. 2636, 3 Gr. & Rud. Cited, sec. 15, Restatement. A real bona fide "cause of action" must exist. Sham and peremptory are not contexts of jurisdiction. As to this the state has interests that cannot be stipulated away. Campbe.
Whitney, etc.—  
from necessity as where the pleader is in 35 L.R.A. (N.S.) 168, 4 Gr. & Rud. (Negligence). A carrier is an insurer. U.S. 605, 1 Cr. 287, 575, 19 L. C. 328. 

WIGHTMAN v. MADISON, 4 Mont. 404, 5 L. C. 367, 3 Gr. & Rud. Custom may be shown if it does not contradict the writing. 10 Wall. 391. Oral Evidence. 

WIGHTMAN v. COATES, 8 A. D. 77. Marriage contract may be rescinded for: exception. Van Houten. Mutual promises is a consideration. 

WIGHTMAN v. SCHONMAKER, 77 Tex. 615, 19 A. S. 803. The mandatory record must show jurisdiction. If it fails the record will not be opened. The authority for the judgment must appear in the right record. See 30 L. R. A. (N.S.) 157, 19 A. S. 752. These are important rules in Appellate Procedure. See 30 L. R. A. (N.S.) 755, 19 A. S. 752. 

WILKES v. HALL, 80 U. S. 301, 1 L. C. 322, 3 Gr. & Rud. Cruel and unusual punishment. 217 U. S. 351. 

WILKES v. NORMAN, 11 A. S. 767-777. Deed; Construction. Verba furitas: Re- 
pugnant clauses are void. 118 A. S. 60. 

WILLIAMS, SERGEANT. He was au- 
thority in his day for the proposition that substance can be waived. See Stephen's Pleading, 147, 148, quoted Equity, 117, 118; see also Id., 278. He is gene-

WILLIAMS v. BANKHEAD, 19 Wall. 583, 5 L. C. 93, 5 Gr. & Rud. Cited, sec. 7, Restatement. Parties to a cause are jurisdic- 
tional. Quis, quid; Williams v. Eg- 
pleston. 


WILLIAMS v. CARWARDINE, 4 R. A. 590, 5 R. C. 35. 4 Gr. & Rud. Profit and Property. Alanent, 500; 503, 342. 

WILLIAMS v. EGLESTON, 170 U. S. 304, 5 L. C. 94, 3 Gr. & Rud. A wronged party is jurisdictional. He must appear and give notice and be deter-

WILLIAMS, etc.—  
Quis, quid: Actio non datur: McCandless, 6 L. C. 43. 4 Gr. & Rud. (Negligence). 

WILLIAMS v. HINGHAM TURNPIKE Co. 3 Pick. 341, 5 L. C. 7, 3 Gr. & Rud. De non moritatis; Watkins, 503, 342. 

WILLIAMS v. PEYTON, 4 Wheat. 77, 5 L. C. 116, 5 Gr. & Rud. 4 Gr. & Rud. also Equity. Inferior tribunals are strictly 
judged. They are viewed as a special agency and they must strictly observe their powers and records. They must see to it that their records give them au-


WILLIAMSON v. BERRY, 8 How. 495, 5 L. C. 325, 3 Gr. & Rud. Confirmation of a ju-

dicial sale must appear from the record in order to support a title. What ought to be of record. 

WILLIAMSON v. BROWN, 15 N. Y. 354— 
368, 4 Gr. & Rud. Possession of a legal estate; Notice imparted therefrom. One of the absences, résumé. Another is Le 
Nouvel, 1904, 4 Gr. & Rud.; Niles, 12 L. R. A. (N.S.) 49-140; 131 A. S. 556. 

WILLIAMSON v. WATKINS, 3 Pet. 43. Petition cannot dispute the landlord's title. 


WILSON v. FREEMAN, 223 Mo. 529. A "court is bound by its record." But in Missouri it ought to be added that some-
times it does as it pleases as it did in S. v. Fose. S. v. Muench stands for Wil- 
son and which we often cite. 

WILSON v. LOVENCEAL, 181 Ill. 170. Judgments how proved. Is the judgment entry and nothing more sufficient? See Rie`s Law, 4 Gr. & Rud. The legis-

WILSON v. LOWENTHAL, 181 Ill. 170. Judgments how proved. Is the judgment entry and nothing more sufficient? See Rie`s Law, 4 Gr. & Rud. The legis-

WILSON v. LOWENTHAL, 181 Ill. 170. Judgments how proved. Is the judgment entry and nothing more sufficient? See Rie`s Law, 4 Gr. & Rud. The legis-

WILSON v. LOWENTHAL, 181 Ill. 170. Judgments how proved. Is the judgment entry and nothing more sufficient? See Rie`s Law, 4 Gr. & Rud. The legis-
Wilson, etc.—
cedure directs the true rule. So far as the cases are concerned their nuisance; See Gilling: "Theory of the Case. Story and Thompson.
WILSON v. S. 54 A. S. 303. Venue need not be proved beyond a reasonable doubt. Bannett, L. C. 185, 3 Gr. & Rud. WILSON v. E. 140 U. S. 60. L. C. 154, 3 Gr. & Rud. Appellate courts will protect a litigant from oppression by a trial court in making a bill of exceptions; and will compel it to assist and to do its duty. Nielsen, 224 U. S. 534.
WINDSOR v. MEYER, 93 U. S. 274, L. C. 1, 3 Gr. & Rud. Cited, secs. 12, 15, 16. Restatement. A court in a constitutionalism must have and keep a record, and respect it. Upon respect for this record and fundamental law depends the exercise of lawful authority. Abuse of the latter divests the court of jurisdiction after which it can do no lawful act in that case. It cannot regain its lost jurisdiction. Nor can it be restored by the failure to make objections or take exceptions, or to make and file a bill of exceptions in that court. Where the Mandatory record shows usurpation or abuse of power the Statutory record will not be opened and matter therein sought to cure or to condone the denial of fundamental law such as the right to be heard. Audi alteram partem.

The maxim last cited and "Due Process of Law" mean one and the same thing. Standard Oil Co. v. Moscone.

Pleadings are a necessity in the due administration of the laws. They are essential to confer jurisdiction. There must be jurisdiction of the person, Pennoyer v. Neff, L. C. 58, 3 Gr. & Rud.; also a sufficient judgment entry; also the pleadings judicially presenting a subject matter. Quis, qui? And the latter are not a secondary thing but they are the primary thing. Story. They cannot be stipulated away. Campbell v. Consalus. And it is fundamental that what cannot be done directly cannot be done indirectly. Quaod aliquid.

The idea that a judgment entry proves itself—proves the authority to enter the judgment is opposed to all the rules of Res Judicata. (L. C. 25-30, 3 Gr. & Rud.) This is the "theory-of-the-case" doctrine. Gilling; Thompson. See PRESUMPTIONS.

In other relations we have invited the student to pause and consider. Here we ask for a consideration of Windsor, Standard Oil, Nalle v. Oyster, Vicksburg v. Henson, Slacum, and of the matters cited in connection with these cases and from these judge of the works on Pleading. See Pomroy. Where can we turn in all the works on Pleading and get the instruction above hinted. Which work will give the instruction in Rushton, Story, Bristow, Doaston, Palmer v. Humiston, Mitbra, Campbell v. Consalus, Clark v. Dillon, and Tooker v. Arnowel? See LITERATURE.

Mondel, L. C. 77, teaches a lesson that is law in all systems. But this is denied in Gilling. Munday v. Vasi, L. C. 79, 3 Gr. & Rud is the law; also Sache v. Wallace, but these are often smothered with a multitude of cases to the contrary. From the latter cases is found the authority for the claim that "new" rules have come. And here from the attacks on the Trilogy of Procedure. Look at this Trilogy and see in the conflicting cases and herefrom judge of the maxims.

Titles to property founded on judicial and quasi judicial proceedings depend on more than an official deed and a naked judgment or decree, or order for a tax or sequestration proceeding. Windsor shows that the entire mandatory record is opened without regard to the statutory record, its exceptions and its Assignments of error. It is one of the most instructive cases on Appellate procedure.

Caveat emptor is the rule for one buying property under official proceedings. Windsor; Hoback v. Miller. If pleadings are fatally bad, notice must be taken of this. Hoback. Minnesota, 194 U. S. 48; Slacum; Weil v. Greene Co. The general demurrer cannot be waived. U. S. v. Linn. See Mandatory record. Story. Quod, ab initio. Pleadings are not functus officio when the judgment is entered. Vicksburg v. Henson; Nalle v. Oyster; Mitbra; Knickerbocker. Jurisdiction.

Windsor is consistent with the Trilogy of Procedure. It is the ablest exposition of Audi alteram partem. It recognizes the limits of waiver and the attitude of the state. That there is Substance that cannot be waived. (See Williams, Serjeant, ante.) That the state's demand cannot be waived. Afterum non iure. Everything that is put up with in silence is not condoned. The state has interests that cannot be waived. Campbell v. Consalus. An agreement to be governed by arbitrary power is a void pact, Campbell v. Consalus. Modus.
Windsor, etc.—

Windsor is a most instructive case on the acquisition of Jurisdiction and its exercise. It has important phases that have been quite generally overlooked. It is pervaded with Constitutional law. (§§ 54–70, 1 Hughes' Proc.; Keele, 118 Mo. App. 262–280; it is cited and discussed in Equity in Procedure.) It is a case of Evidence, Pleading and Practice. It shows that the vendor of property under judicial and execution sales buys cæscat emptor (Knickerbocker; Hoback v. Miller; Williams v. Peyton) and therefore that it is a case of Contract and of real estate as well. It is the ablest discussion of Audi alteram partem. Herefrom it presents elements of “Due process of law” that presents the mandatory record in a very instructive light. (See L. C. 1, 3 Gr. & Rud., and following cases, wherefrom the nature and function of the mandatory record is presented from cases; also of very important rules of Appellate Procedure; it stands to show that a court will open the mandatory record without regard to the compacts and wishes of the parties. Minnesota, 194 U. S. 48.) It is a very instructive case to present the operation of Consensus tolit errorem and of Quod ab initio. To illustrate these maxims Windsor is often cited.

Windsor, Pennoyer v. Neff and Galpin v. Page, 3 Sawyer, 93–128, were all decided by Judge Stephen J. Field. Each of these cases made a profound impression upon the American profession. This fact will indicate the short-comings of Tidd and his followers. A few decisions by Story and by Field have done more for the American profession than have all of the Feudal lawyers. (See Feudal Lawyer.)

It can be picked out of Windsor that Pleadings are jurisdictional. That the Trilogy of Procedure (1. De mon apparenibus; 2. Frustra; 3. Verba fortiius) is the law. That a court will open a record and construe in the light of these maxims. (Vickburg v. Henshaw; Nalle v. Oyster; Pierce Co., 236 U. S. 278.) In the light of these cases and these maxims the rule that the general demurrer cannot be waived can be read between lines. So we see the Mandatory Record, Jurisdiction, the Trilogy of Procedure, the attitude of the state (Alternum, Pleading and Judgments and Decrees all inextricably connected. Windsor stands to prove the entirety of the law; also that all systems of Procedure rest upon the same fundamentals; also that Codes have nothing new of substance. The old law is still with us and cannot be long departed from. The few fundamentals that bottom all systems of Procedure can be picked out of Windsor and the maxims that led to this decision. To show this we invite the student to read Windsor in the light of the sections in the Law Restated wherein it is cited. Also to consider whether or not all of the decisions from Slacking, to Pierce Co. would have been necessary if that Trilogy had been gathered and respectfully introduced by a statement that it was the law and that it with all of its implications would be taken for a key and a guide; That “Due process of law” was founded upon and was bottomed upon that Trilogy; and that by it all Codes and Practice Acts must be governed. We leave it to the student what such a decision would have been worth to the American profession instead of McPaul v. Ramsey, and the quite manifest determination to allow Construction to proceed upon Cases and the letter of statutes. In relation to Guilting and its cluster of cases the consequences of courts failing to state the fundamental law will appear. To-day we have the law written and practiced in accordance with Story's sections on the one hand and Thompson's sections on the other hand, while these authors are as widely apart as the antipodes. (See Restatement.)

What has happened the Codes and Practice Acts is indicated anent the title Codes. Therefrom it will appear that Procedure in American States is nothing less than judicial anarchy. What author clearly and pointedly states how a plea of Res Adjudicata must be pleaded? (See Foster's Federal Practice); or why it is that the general demurrer cannot be waived? or what are the consequences of omitting a material allegation from the statement. (See Quia, quid, Ut res; Wing; or whence comes the fundamental provisions of the Code? or whether or not Verba fortiius is still the law? (See the discussions of Clark v. Dillon in New York.) All of these questions are closely related to the principles involved in Windsor. Anent the restatement sections it should be studied.
WING, 15 Mo. 174. Allegation that the consideration for a third person will be upheld by presuming that it was for the infant of the defendant. Ut res: Moore v. C. These cases mark the extreme limits of liberal construction. Dobson. See Contract. Weber v. Losith.

Wing v. Campbell (1851), is older than Biddle (1853) the first Code case. It too, offends the organic maxims § 1 Restatement), which paraphrases are rules of Res Adjudicata. See De son, and Verba fortius. Had the court stated these facts then the court in McPaul v. Ramsey and Pomery might not have concluded that something new had come (see Pomery). Then the courts in Biddle, Eno and Allen v. Paterson would not have added so much to the babel.

The condition of pleading a contract may be judged from the title Contract. Also the cases of Boucen v. Emmerson, Robinson, L. C. 16, 3 Gr. & Rud. and Gramp stated in Equity In Procedure, § 463, et seq., along with Carson v. Ely. The court reversed itself at the same sitting in these two cases. In Wing an account was filed charging W. with board and for laying out a corpse (Presley) without any fact that would make W. liable for anything done for a third person. (Peters; Craig.) Had these facts been stated they would not have been surpluse. We quote.

"1. A petition on an account, for services rendered a third person, charging an original liability on the defendant, is sufficient."

Who must bury the dead, R. v. Morby; R. v. Smith. Omission of material facts a fatal defect. Rushion L. C. 3, 5 et seq., 3 Gr. & Rud.; Boucen; Robinson Co.; S. v. Muench; Minnesota; U. S. v. Cruikshank; Verba fortius. See Demurrer. Omnia praesumuntur rite and Ut res held to supply omitted facts. Wing; S. v. Fasse, 180 Mo. 537; Gulling. Pleading of Contract: Boucen; Eno; Weber

Wing.—

v. Lewis; Clark v. West; Tooker; Lamplight v. Braithwait, L. C. 301, 3 Gr. & Rud.


WITHDRAWING A JUROR. 4 Gr. & Rud. 75. 48 L.R.A. 432.


Words. Each word is to be given effect if possible. Roberts v. Moon (pleading); U. S. v. Rollinger, 33 App. Can. D. C. 211. See Expressio unim. Id est: Verba etc. Every.


WEIGHT v. TASHMIRE, 1 A. & E. 3, L. C. 201, 3 Gr. & Rud. The right to cross examine a witness is a principle of the Prescription and Constitution. 3 Gr. & Rud. 445. Paul was guaranteed this right by Pears. 2 Kent, 8-12.

WRITING. What is a sufficient. 4 Gr. & Rud. Brown, 41 A. D. 775, L. C. 546, 3 Gr. & Rud.
Y


YE CANNOT SERVE GOD AND MAMMON. See Idem agens.


YOUNG v. MELEMORE, 3 Ala. 285. The right to be heard arises from the Prescriptive Constitution. Audi alteram partem. Windsor.

An agent may verify a pleading. Les non: Contra: Warman.

YOUNG v. RAINCOCK, 7 C. B. 310. Es-toppel by deed; Recitals in a deed are conclusive. See Christmas v. Oliver, Sm. L. C., also 2 Gr. & Rud.


Z


LETTERS OF COMMENDATION.

The Hon. William A. Gardner in an address upon the subject of the lost Rules and Decisions of Bacon, before the Missouri Bar Association in 1915 spoke of the efforts of the author as follows:

"We wonder at the brilliant genius in jurisprudence of John Marshall. The explanation of it is, that he had learned the genius of Rome in jurisprudence and went to the fountain head for inspiration. We would have learned this had Bacon's Rules and Decisions come to us in the place of the system of Coke and Blackstone. We have been led to believe by the law schools that we are in debt, for the law we have, to Coke and Blackstone, whereas, as a matter of fact, scarcely anything of Coke and Blackstone is taught in them at the present time.

"Following these cues, Mr. William T. Hughes has worked out a system of Rules and Decisions, with so profound a knowledge of the maxims and their relationships, and so careful a study of cases both American and English, that it would seem that the spirit of his great Ideal and Master, Bacon, had guided and inspired his efforts. Mr. Hughes has drunk deeply of the history of the world, and the philosophy thereof, knows the great epochs and what they portend, and thereby is prepared, as only a great master can be prepared, to proclaim the unity and inviolability of fundamental law. He has accordingly shown us that the great fundamental maxims of the civil law are practically the same as those of Christianity, and of our own law." (See §§ 509-522, Equity In Procedure.)

Again, the speaker said:

"Up to this time few writers in America have called to our attention the legal distinctions which emphasize the greater ability and learning of Bacon as compared with Coke and Blackstone. Although no bench nor bar nor law school learned this, yet Mr. W. T. Hughes has done this with marked ability. Next to Hughes, Kent is, in the opinion of the writer, the greatest of American writers, but Kent will be more appreciated when the merits of William T. Hughes are recognized. Kent saw the great difference between Bacon and Coke. As Buller, J., in Dovaston v. Payne reflected upon Coke so did Kent in reference to the value of Shelley's Case." (See 1 Gr. & Rud. § 24.)

"Our Federal government needs the simplification of its procedure in just such a way as is proposed by Mr. Hughes, who but sets forth the Baconian idea. Every scholar will be interested to know that it has now been shown with certainty by Mr. Hughes what it was that Bacon wished to leave to posterity." (See THE LAW RESTATE.)

In conclusion the speaker quoted from Tennyson:

"I doubt not through the ages one increasing purpose runs,
And the thoughts of men are widened with the process of the suns."

48 Chicago Legal News, 94-95.

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Mr. W. T. Hughes:

Two fundamental reasons demand a restatement of the law along logical and philosophical lines. One is found in the great mass of law publications and the still greater mass of judicial decisions on the one hand, and the haste and crudity manifest in these publications and decisions on the other. To catalogue these multitudinous sources of the law, without any attempt to peruse their limitless pages, would be the work of a lifetime for any careful student.

The difficulty in entering upon the study of the law would not be insurmountable if the writers of these books and the authors of these decisions had refused to state a principle of law without themselves understanding its application to the particular subject presented or to the case decided. These principles, being comparatively few, the student and the practitioner would find accuracy of presentation by reading a few leading text-books and mastering the leading English and American cases disposing of the proposition under consideration. But how are they to discriminate among so many? The skill requisite to separate the good from the bad involves discretion far beyond the experience of the average lawyer, much less that of the law student. Has the text book yet been found to point the way through this legal jungle? This situation is nothing short of appalling when it is considered that the more unsatisfactory the text-book the more successfully its circulation is pushed by the publishers and all powerful advertising facilities of our great law book concerns. It is lamentably true that many of these text writers are concerned chiefly in finding a case to support the text and they not infrequently ignore the fact that there are many thousands of cases, increasing with alarming rapidity in the English and American reports overruled, discredited or limited in their application, and, too often, an examination of the authorities in support of the text, so far from supporting the proposition stated, actually refutes it. Cases merely of reiteration and repetition are given equal prominence with such landmarks of learning as Scott v. Shepherd and Bright v. Boyd.

Commercialism takes advantage of the situation boldly claiming that there are diverse systems of jurisprudence with their attending procedures and that among them are the Roman law, the civil, and criminal common law, and equity, to which are added the Code and Federal systems. It follows, naturally, that there are a multitude of text-books telling the student that there is one system of law in the Federal courts, another in the law courts, another in the Equity courts, another in the common law courts and another system of law pertaining to those jurisdictions which have adopted the Roman or civil law practically unimpaired.

The foregoing systems with their consequent confusion cannot be said to be of modern origin. The contest between Catholic and Protestant for the mastery of Europe, which became acute in the reign of Elizabeth in the 16th century, will ever remain one of the great contributing causes. When it is recalled that the Roman law was introduced or sought to be introduced in England largely through the ecclesiastical courts at a time when the struggle between Catholicism and Protestantism was most violent, the reason becomes at once apparent why the common law judges were slow in lending their influences to the adoption of a system of jurisprudence, that to their minds made for the overthrow of Protestantism. So violent was the passion engendered by this controversy that Lord Coke reproached the Duke of Suffolk for endeavoring to bring in the civil law and the same accusation was made one of the articles of impeachment against Cardinal Wolsey. It is certain that this controversy retarded for centuries the development of the common law as a science. A more liberal spirit, however, later manifested itself and the opinion expressed by Lord Holt in the case of Lane v. Cotton, namely, that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system, has become the judgment of mankind. The Law Restated demonstrates that the civil law is the source of those legal principles, which, wherever adopted, have elevated and adorned jurisprudence.

The necessity of a restatement of the law showing that all of these
so-called classifications of jurisprudence and procedure are founded on the same principles and that the fundamentals available in one system are paraphrased and thus made available in all is apparent.

Then, there are those, who, with as little foundation, claim that statutes, cases and rules of courts either abolish or add to these fundamental principles. The work that goes to the root of these propositions, gathers and states the fundamentals and clearly demonstrates that they are immutable and necessary alike for the protection of society and good government is what the Anglo-Saxon lawyer demands.

Lord Bacon in De Augmentis Scientiarum speaks of the necessity of a revision and digest of the law in order to restore it to a sound and profitable state, whenever there has arisen a vast accumulation of volumes throwing the system into confusion and uncertainty and to this end, he made a proposition to King James, “touching the compiling and amendment of the laws of England,” offering his services to compile a condensation of the fundamentals of the law.

Chancellor Kent as far back as 1826 calls attention to the fact that to encounter the whole mass of law publications in succession, if practicable, would be a melancholy waste or misapplication of strength and time, and further says in his chapter on “Sources of Municipal Law” that the period anticipated by Lord Bacon had arrived even in his day, adding that, “the spirit of the present age in the cause of truth and justice requires more simplicity in the system and that the text authorities should be reduced within manageable limits,” and concluding that such a digest would be an immense public blessing.

THE LAW RESTATEs, by William T. Hughes, proceeds upon the theory that legal principles are not arbitrary nor yet born of the expediency of the hour but rather that they are as eternal as the hills and as self-evident as the axioms of mathematics. Such principles whether enunciated by the prophet or the law-giver become the priceless possessions of humanity—“those unerring principles of truth, in accordance with which all laws are now and hereafter to be made and interpreted.”

It has so happened that the manuscript of the author, in its process of development, has been constantly brought to my attention, during which period I have taken the opportunity of giving it critical examination. Both the subject matter and the scheme of presentation meet my cordial approbation and I have no hesitancy in saying that the more widely the book is adopted as a text book in our law schools the more efficient will be the training of the young lawyer in the rudiments of the law and the more certainly will the standards and efficiency of the profession be raised.

E. HILTON JACKSON.

(Author of Law Latin, Washington, D. C.)

I have carefully examined the manuscript of “THE LAW RESTATED,” and have in every way in my power encouraged its publication.

For some months, I have owned and used all of Mr. Hughes’ works. They are unique among law books. One who has become familiar with them can never again be satisfied with a hunt for the “late case,” but comes to understand with the author, that “when its philosophy is lost, the law is lost.”

The new little book presents in simple and attractive form the concentrates of the earlier and larger works. It is truly a key to the body of the law. In briefest compass, it sets out the fundamental principles and shows how they underlie and unite the leading subjects. All of Broom’s Maxims, all of Smith’s Leading Cases, and all of White & Tudor’s Leading Cases in Equity are made immediately available. The great cases of the Supreme Court of the United States and of our State Courts, as well as the more important notes in L.R.A. and other annotated series, are aligned with the fundamentals which they illustrate.

The study of this book cannot fail to prove an inspiration to the student and its constant use the greatest convenience to the practitioner. It unfolds the law in its unity and harmony; and leads immediately to the sources of the law and to the great cases.

JOSEPH W. OOX.

Washington, D. C.
W. T. Hughes:

I have examined with great care and equal interest your works, which you were good enough to submit to me, and find myself somewhat at a loss to express my estimate of them.

Even the comparatively inexpert in the law cannot examine your product, however casually, without being impressed by the diligence, patience and thoroughness which it evidences, but only the student and practitioner of years of experience can hope to appreciate the extent to which you have mastered the principles of the law and found its precipitate: my fear is that you have done this so well as, unintentionally of course, very greatly to reduce the audience to which you would appeal. And I am impressed by the enthusiasm manifested in your task—which to many would seem hopeless—of supplanting the enormous mass of statutory declarations and judicial expressions by articulation of the science, if such it may be called, of the subject with which you deal. Certain it is that you show a very clear apprehension of the path by which the wilderness of the existing legal forest may be penetrated and traversed.

I heartily wish for such a work as you have done a reception commensurate with its character and purpose and the clearness of your conception in undertaking it. I long since learned that the last thing to be attained in any science is adequate definition, and my only apprehension is that in these days of hurried and inadequate preparation in our profession, and of readiness to be content with the latest approximately sufficient expression in adjudicated cases of what suits the instant object of the practitioner, you may fail to realize the hope, so earnestly apparent, of bringing deserved attention to the restatement, re-exposition and illustration of principles, as against the prevailing proneness and readiness to be content with "modern instances." As a former law school instructor for fifteen years, and an active practitioner for more than twice that length of time, I feel that I may claim to realize quite as fully as another what you have undertaken, what you have done, and what you ought to accomplish in the direction of your end; and I venture the hope that the optimism of your aspiration may be equalled by its achievement.

Of the merit of your work it is unnecessary to speak—of that, it is its own declarant; and no genuine student of the law can fail to thank you for the extent to which you have paid that debt which every lawyer is properly said to owe his profession.

HENRY E. DAVIS.

Washington, D. C.

So complex has become the law that the human mind is able to grasp it only by reducing its study to the certainty and precision of a regular science. Unfortunately, for the student and practitioner alike, very few modern writers on legal subjects supply a weapon, either for offense or defense, more formidable than a blunderbuss. Mr. Hughes, however, in his "Equity in Procedure" and "Grounds and Rudiments of Law," places in the hands of the possessor of this admirable set of books, a thoroughly modern high-power, repeating rifle, so delicately adjusted with unique range finder and sights that a legal bull's-eye is possible at every shot. No lawyer, old or young, can afford to be without this device, for with it he is armed for any legal emergency at a moment's notice.

CLINTON ROBB.

Washington, D. C.

A review of the "Grounds and Rudiments of Law" and of "Equity In Procedure" discloses facts of the greatest consequence to the beginner and practitioner alike. This work is truly an "eye-opener" for getting one's bearings upon any principle of law, as well as finding the leading cases in support thereof. It is the best maxim book, also a condensed history of leading cases. Here is a work of the greatest utility.

RICHARD J. DOWNEY.

Washington, D. C.
Hughes' "Grounds and Rudiments of Law" and "Equity in Procedure" are a legal education and should be in the hands of every student. He should know the foundations of our jurisprudence. These works are the best maxim works and condense statements of the leading cases. I know of none others like them. They were a revelation to me. I regret that such books did not come a generation ago.

SAMUEL D. TRUITT.

Washington, D. C.

Mr. W. T. Hughes:
I have examined your "Grounds and Rudiments" and your "Equity in Procedure."

These books, in my judgment, are the nearest approach to that restatement of the law made inevitable by the conflicting mass of crude and ill considered cases turned out annually by the courts, which, in turn form the basis of digests and encyclopedias prepared without regard to the fundamental principles, upon which every case, rightly decided, must turn.

The treatment of Res Adjudicata, involving rules of evidence, pleading, practice and the mandatory record, with its logic and philosophy, is a forecast and illustration of what follows.

The matter in the "Grounds and Rudiments" enters into the logic and the philosophy in the "Equity in Procedure" which is elaborated from the major and organic maxims of jurisprudence and demonstrates that these maxims underlie equity, procedure, contract, crime, tort and construction. With these maxims as a basis the interrelation of all these subjects is correlative and instructively demonstrated. This elaboration is a near approach to demonstrating that the law has its decalogue which a true restatement of its underlying principles will effectually demonstrate.

It is impressed that the mailed hand of Feudalism dismembered and scattered the logic and the philosophy of the law and was raised to bar its restatement from the fragments set up and by entrenchments in such matters as that "Parliament is omnipotent," that the law is local and flat and not bottomed upon universal constitutional principles. These principles you have at last catalogued and made instantly available to the practitioner.

It now looks as if the law can be articulated from the great maxims, which your works gather and impress beyond all others.

These volumes have been on my desk for several months, during which time I have had frequent occasion to examine them, both as a student and in connection with important litigation. I have not yet been disappointed in finding the law with a clear and concise statement of the principle involved supported by the leading authority in this country and in England.

E. HILTON JACKSON.

(Author of Law Latin, Washington, D. C.)

Dear Mr. Hughes:
The published commendations of your "Grounds and Rudiments of the Law" and your "Equity in Procedure," I endorse; and to these I will add nothing at present, as I wish to speak more particularly of your forthcoming work, THE LAW RESTATEd, which by your kindness has been laid before me from day to day almost as it has been produced. It is entitled to the name you propose to give it. In thirty or forty pages of text you have given us the fundamentals of the law. It is maximus in minimis. Even after your explanation of your preparation and method I still marvel at your accomplishment. It is the fruit of a long life-time of study and reflection, of a wide knowledge of cases and rare skill in the use of them.

From your previous invaluable works, which were in themselves an epitome of the law, you have still further epitomized, and have cast into brief, logical and philosophical form the real substance of the law, the law that survives from age to age and in its essence and reality remains the same. Adapting your own apt figure of the tree, you have shown us the trunk as composed of the organic-major maxims, and proceeding from these you have shown the lesser maxims as the branches; and in your
LETTERS OF COMMENDATION.

Text-Index you have spread before our eyes the cases like the leaves upon the twigs, and pointed out the vital connection between each one and the twig, branch and trunk through which it has received the living sap; or else you have made clear to us that the case had no such real and vital connection but was a detached member, a leaf sooner or later to wither and be blown away. The trunk is of law universal and unchangeable, of all countries and all times. Hence your work is not local or provincial but cosmopolitan. It is for the world, wherever men inhabit or commerce runs. You have wrought upon the model proposed by Francis Bacon three centuries ago, and, with vaster materials to master and arrange, it appears to me that you have performed the task as he would have had it done. Your book is the master key not only to the reason and philosophy of the law but to the library as well. With this small volume in his hand the student can unlock all the stores of legal wisdom, by following the clues you give him, first to the central case and thence to all the others where that case is cited, followed or rejected, and to the text books where it has attracted comment. In my opinion it should be at the hand of every judge, practitioner and student. In compendious form it ought to be the vade mecum of all.

Perhaps the highest service you have rendered is by making plain the "great gulf fixed" by reason and the needs of government between the mandatory and the statutory records. You have been the first to adequately state and defend the grounds upon which that distinction rests and to show that free constitutional government itself is bound up with the essentials of procedure,—that as the law arises out of the facts, the facts must always appear that justify the judgment,—that the interests of the State require it, and that parties cannot bargain it away. This is the great forgotten truth which you have brought to light and have illustrated with a clearness of comprehension and a wealth of learning that entitle you to rank with the greatest of legal authors. It is the cry on all sides that the law must be restated. In my humble opinion you have done it.

WENDELL P. STAFFORD.
Supreme Court Chambers, Washington, D. C.

Mr. W. T. Hughes:

I thank you for bringing "Equity in Procedure" and "Grounds and Rudiments of Law" to my attention and regret that such works could not have come my way years before, for I am sure that they would have reduced my labors very considerably.

In the short time I have had these books I have found them of very great value. They are works of real merit, which is, I am sorry to say, a rather exceptional quality in much of our modern legal literature, and the profession cannot afford to ignore them.

I trust you will soon find some way to get these works widely distributed and in general use by both the bench and the bar.

CLARENCE E. SHUSTER.
Rochester, N. Y.

My dear Mr. Hughes:

Your books, "Equity in Procedure" and the "Grounds and Rudiments," present to the legal profession a work of great practical value. They are an instruction to those who would learn rightly; and a ready reference to him who wishes either a precedent to rely upon, or ideas for developing and giving finish to an argument. I have always found in a limited time a New York Case through them more satisfactorily than by the use of "Cyes" or digests.

The concise and clear manner of stating a proposition is admirable and lends greatly to a proper conception of the principle involved. I gained from the "Grounds and Rudiments," Vol. 1, my first clear knowledge of the relation between everyday practice and governmental foundations.

I thank you for your work and for the aid it has given me.

OSWALD P. BACKUS, JR.
Rochester, N. Y.
LETTERS OF COMMENDATION.

Mr. William T. Hughes:

A careful examination of the "Grounds and Rudiments of Law" and
the "Equity in Procedure" convinces me that the American Lawyer has
made a serious mistake in not vigorously protesting against the manner
in which publishers have commercialized the production of law books,
before these books had accumulated to such alarming extent and spread such
error and confusion among the profession.

The "Grounds and Rudiments of Law" and "Equity in Procedure" have
given me a clearer understanding and wider grasp of the fundamental
principles of law. They irresistibly lead to the conclusion that the student
has been misled, abused and confounded by such doctrines as Shelley's
Case, Coke's three degrees of certainty, that "Parliament is omnipotent"
and that cases make the law. The prescriptive constitution, that under-
lies and controls all law, and which is so instructively treated by Mr.
Hughes in his books, is not defined and scarcely mentioned in the great
mass of text and case books with which the country is deluged. It is
organic and fundamental and should be emphasized and impressed upon
the student as the first great principle of law. An understanding of its
principles is indispensable to a proper knowledge of construction. With-
out it, parliaments and legislatures would indeed be omnipotent and the
fundamental rights of the individual precarious.

These works are profoundly instructive on the subject of pleading. They
show the distinctions between the mandatory and the statutory records in
a manner never touched upon by any other author I have read; and shows
logically and convincingly why matters of substance which ought to be
in the mandatory record cannot be waived. The interactions between
pleadings, evidence, construction, res judicata, collateral attack, etc.,
are admirably discussed and demonstrated.

Volume 3 of the "Grounds and Rudiments of Law" is the clearest and
most instructive book I have ever examined. It is unique and condensed
and one of the most convenient books to the busy practitioner. To the
student it should prove invaluable because of its direct, clear and concise
treatment of the subjects discussed. This entire set of books should be
at the hand of the practitioner, instructor and student.

JOSEPH T. SHERWIN.

Washington, D. C.

Mr. W. T. Hughes:

As a young lawyer I have sought literature that would clear the mysti-
cation in the "jungle." For this I turned from all I had access to in
real disappointment. Then I consulted lawyers, and lawyer Holliday
of this place directed me to your "Grounds and Rudiments." Having
turned to these for the light I sought, now I can only exclaim, Eureka!

Out of a sense of gratitude, I write to tell you that you have done a
great work for the profession, and I think that it is most timely. For
one I profoundly thank you. I do certainly appreciate what you have done.

I have used it in my practice with good success especially in the light
of your arguments that pleadings are jurisdictional and that without
pleadings the court has no jurisdiction. Your statements from the maxims
and deductions therefrom give you a style that is original, unique and
which is to me most comprehensive and instructive. You do certainly go
to the bottom and therefrom and thereupon build up from principle in a
way that most enlightens.

W. H. PATTEN.

Casper, Wyoming.

P. S. I am also reading your "Equity in Procedure" and find it a
mine of information. After consulting it one knows whereof he speaks;
it gives the basic principle to start from.

W. H. P.
The Master Key
Roman
English Text Index Key American
Maxims and General Principles