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11:45 am

8 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
9 **ADJUDICATION COMMISSION**

10 In re Determination of Navigability of  
11 the San Pedro San Pedro

No. 03-004-NAV

**SAN CARLOS APACHE TRIBE'S  
RESPONSE TO THE DEFENDERS  
OF WILDLIFE'S OPENING POST-  
HEARING MEMORANDUM &  
NOTICE THAT THE TRIBE JOINS  
IN THE SALT RIVER PROJECT  
AND FREEPORT-MCMORAN  
CORPORATION'S PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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17 The San Carlos Apache Tribe submits its response to Defenders of Wildlife  
18 (collectively "Defenders") opening post-hearing memorandum on the navigability of the San  
19 Pedro River. ("San Pedro").

20 In addition the Tribe joins in the Salt River Project and Freeport-McMoRan  
21 Corporation's proposed findings of fact and conclusions of law filed with their respective  
22 responses to the opening pose-hearing memorandum, findings of fact and conclusions of law  
23 filed by the Defenders of Wildlife.

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1 As the proponents of navigability in this proceeding, the Defenders have the burden of  
2 proving by a preponderance<sup>1</sup> of the evidence that on February 14, 1912 the San Pedro was  
3 “used or susceptible of being used, its ordinary and natural condition, as a highway of  
4 commerce, over which trade and travel were or could have been conducted in the customary  
5 modes of trade and travel on water.” A.R.S. § 37-1101(5). “If the preponderance of the  
6 evidence fails to establish that the watercourse was navigable, the Commission shall issue its  
7 determination confirming that the watercourse was nonnavigable.” A.R.S. § 37-1128(A).

8 Defenders have not met their burden of proving by a preponderance of the evidence  
9 that the San Pedro was used or was susceptible of being used as a “highway of commerce” on  
10 or before the date of Arizona’s statehood, February 14, 1912. The Defenders have not  
11 offered any evidence to support their position that the San Pedro was navigable in fact, but  
12 instead Defenders have saturated the record with speculation. Speculation does not begin to  
13 support Arizona’s considerably broad definition of what is in fact “navigable” or “navigable  
14 watercourse.” A.R.S. § 37-1101(5). *See also* Blacks Law Dictionary 806 (2<sup>nd</sup> ed. 1910)  
15 (stating that the legal definition of ‘navigable’ is “generally understood in a more restricted  
16 sense, viz., subject to the ebb and flow of the tide.”). Speculation does not rise to the  
17 evidentiary requirements for proponents of navigability. Speculation does not outweigh  
18 evidence presented by the opposing party. The Commission cannot find that the San Pedro  
19 was navigable in fact on February 14, 1912 based upon speculation by Defenders.

20 Conversely, the Opening Post-Hearing Memorandum, Findings of Fact and  
21 Conclusions of Law filed by the Salt River Project (“SRP”) as supplemented by SRP and  
22 Freeport McMoRan Corporation’s Proposed Findings of Fact and Conclusions of Law filed  
23

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24 <sup>1</sup> The Definition of ‘preponderance’ as it was defined around the time of Arizona statehood was  
25 provided in the 1910 edition of The Black’s Law Dictionary, where it states that the legal term  
26 preponderance “denotes a superiority of weight, or outweighing. The words are not synonymous, but  
27 substantially different. There is generally a “weight” on each side of contested facts. But juries [the  
Commission] cannot properly act upon the weight of the evidence, in favor of one having *onus*,  
unless it overbear, in some degree, the weight upon the other side.” Black’s Law Dictionary 932 (2<sup>nd</sup>  
ed. 1910). Limited excerpts from the Black’s Law Dictionary (2<sup>nd</sup> ed. 1910) are attached.

1 on September 27, 2013 present a concise review of the evidence in the record and presents an  
2 accurate representation of the San Pedro before and on the date of Arizona's statehood,  
3 February 14, 1912. Without reiterating that overview in this Response, the San Carlos  
4 Apache Tribe respectfully requests that the Commission take into consideration only the  
5 evidence included and referenced by citation to the record, and give no weight to speculation  
6 offered by the Defenders in the absence of evidence with specific citation to the record. The  
7 Defenders have simply not met their burden of proof, and the Commission must therefore  
8 determine that the San Pedro was not Navigable on February 14, 1912.

9 **A. Defenders Have No Evidence to Support Their Claims of the Hydrologic**  
10 **Characteristics of the San Pedro**

11 The Defenders offer no evidence to support their findings of fact regarding the  
12 predevelopment characteristics of the San Pedro. In Defender's Memorandum Regarding the  
13 Navigability of the San Pedro ("Def.'s Memo."), Defenders list eight "important hydrologic  
14 characteristics" of the San Pedro since the predevelopment era. (Def.'s Memo. 2-3). In total  
15 seven of these eight characteristics are supported solely by an "Executive Summary" report  
16 written by Mr. Hjalmarson. See Navigability of the Natural Channel of the San Pedro  
17 (August 20, 2013) ("Summary"). Because the Summary was submitted to the Commission  
18 after the hearings had concluded, none of the other parties had an opportunity to ask Mr.  
19 Hjalmarson questions about the Summaries conclusions<sup>2</sup>. Additionally, the Summary itself  
20 does not correctly follow its own citation index, making it almost impossible for the reader to  
21 follow the Defender's argument to any logical origin to the original source of the statement.  
22

23 \_\_\_\_\_  
24 <sup>2</sup> The Commission held hearings in June and August of 2013 ("2013 Hearing"). The 2013 Hearing  
25 was held on June 7, 2013, in Bisbee, Arizona and on August 1-2, 2013 in Phoenix, Arizona. Various  
26 individuals submitted oral testimony in connection with the hearing, including Mr. Hjalmarson who  
27 also presented a Power Point presentation and associated exhibits entitled "Navigability along the  
Natural Channel of the San Pedro River, AZ, from Mexico to the Mouth at the Gila River at  
Winkelman, AZ," dated 2013. The oral testimony and accompanying Power Point slides were  
divided into three parts: referenced here as the Bisbee Testimony ("Bisbee [slide #]"); the Appendix  
to the Bisbee Testimony ("App. [slide #]") and the Phoenix Testimony ("Phoenix [slide #]")

1 See Summary at 1 (stating that the 279 Power Point slides would be referred to as the  
2 following Bisbee I slides would include slides 1-169, Bisbee II slides would include slides  
3 170-231, and Phoenix slides would consist slides 232-279), *Compare* Summary at 2 (citations  
4 for the section "History of the San Pedro" refer the reader to Bisbee I slides 17-37, Bisbee II  
5 slides 2-22, and 25-30, and Phoenix slides 12-32).

6           Regardless of the organization of these citations, when the reader does refer to the  
7 Summary as referenced in the Def.'s Memo. they find only a litany of Mr. Hjalmarson's prose  
8 which he supports by citing to his own slides, in no discernible order as to which slide  
9 supports which claim.

10           To meet the burden of proof required to demonstrate navigability, Defenders must  
11 show specific evidence in the record to support each of their proposed findings of fact. The  
12 findings of fact listed in the Def.'s Memo, are supported by reference to the Hjalmarson  
13 Summary, which are references to statements unsupported by any identifiable evidence  
14 specifically cited in the record. The statements provide no to meet Defenders burden to prove  
15 navigability by a preponderance of the evidence.

16           There is one predevelopment hydrologic characteristic listed on page 3 of the  
17 Def.'s Memo. which references slide 55 from Mr. Hjalmarson's Power Point presentation  
18 presented to the Commission at the Bisbee hearing in July 2013 . Mr. Hjalmarson used what  
19 he calls a "modified" except from page 43 of a 2010 report by Kennedy, J.R., and Gungle,  
20 Bruce, titled, Quantity and Sources of Base Flow in the San Pedro River near Tombstone,  
21 Arizona: U.S. Geological Survey Scientific Investigations Report 2010-5200 ("Gungle ").  
22 Unfortunately, the 'modification' made by Mr. Hjalmarson was really a manipulation of the  
23 report's findings so as to support his position on predevelopment characteristics. (Gungle at  
24 1). Mr. Hjalmarson took a full paragraph from the report and 'modified' it for his  
25 presentation by replacing 'present tense' language with the 'past tense' language. He  
26 "modified" the report's study area from reference to one location on the San Pedro to include  
27 the entire San Pedro River.

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The direct comparison with modifications highlighted is set out as follows:

<b>The Actual Quote from the Report</b> Found on Page 1 of the report	<b>Mr. Hjalmarson's Modification</b> He Cites the Report Page 43
<p>Base flow in the upper San Pedro River is derived from groundwater discharge to the river from the regional and alluvial aquifer. The regional aquifer is defined as having recharge zones away from the river, primarily at mountain fronts and along ephemeral channels. The alluvial aquifer is recharged mainly from storm flow. Based on environmental isotope data, the composition of base flow in the upper San Pedro River at the gaging station near Tombstone is 74±10 percent regional groundwater and 26±10 percent summer storm runoff stored as alluvial groundwater for the 2000 to 2009 period.</p>	<p>Base runoff in the upper San Pedro River was derived from groundwater discharge to the river from the regional and alluvial aquifer. The regional aquifer is defined as having recharge zones away from the river, primarily at mountain fronts and along ephemeral channels. The alluvial aquifer was recharged from the regional aquifer and from storm flow (direct runoff). Based on recent environmental isotope data, the composition of base flow was mostly from regional groundwater and also from summer storm runoff that may have been stored as alluvial groundwater for several years.</p>

**B. Defenders Have No Evidence to Support Their Claim that Cattle Grazing Impacted the Ordinary and Natural Characteristics of San Pedro River**

There is no evidence in the record that shows Cattle in the vicinity of the San Pedro had a significant impact on the natural and ordinary characteristics of the San Pedro River. Defenders offer support for their claims using generalized accounts, with no exact detail or

1 proof of legitimacy. Defenders never cite evidence showing how many wild or roaming cattle  
2 were grazing in the vicinity of San Pedro. The Defenders cite to no evidence that the cattle  
3 were even located near the San Pedro. There is no evidence in the record to show how  
4 permanent the cattle presence was, and no evidence supports Defenders statement that “cattle  
5 typically concentrate within 3 miles of natural waters...” inferring that cattle in the area were  
6 not only close to the San Pedro but would concentrate at or near the San Pedro River. Def.’s  
7 Memo. at 6. There is no evidence to support Defenders ultimate conclusion that the general  
8 reports of cattle were within three miles of the San Pedro and had in fact trampled the channel  
9 banks and caused “considerable degradation” of the natural riparian environment and  
10 changing the condition of the San Pedro. Def.’s Memo. at 6. Additionally, Defenders site the  
11 Stromberg & Tellman report “Ecology and Conservation of the San Pedro San Pedro”  
12 (“Stromberg”) as evidence that cattle will cause an impact on a river channel. However,  
13 Stromberg states clearly that while it is possible, it is not for certain that cattle have any effect  
14 on the river channel and that a “cause-and-effect relationships between grazing and  
15 geomorphic processes” is too complex for an absolute conclusion, like the ones inferred by  
16 the Defenders. *See* Stromberg 265.

17 C. Extermination of Beavers and Draining of the San Pedro

18 Defender cite to no evidence in the record that shows beavers played a significant role  
19 in changing the natural and ordinary condition of the San Pedro. Defenders state that “some  
20 believe” beaver removal on the San Pedro played a significant role in the entrenchment of the  
21 flood plains. *See* Def.’s Memo. at 7. Defenders do not provide any to support this ‘belief,’ no  
22 evidence in the record states specifically how many beavers were on San Pedro at a given  
23 time. There is no evidence to support Defender’s augment that there was a mass  
24 extermination of beavers and beaver dams. There is no evidence to show that the result of  
25 beaver removal would significantly impact entrenchment of floodplains along the San Pedro.  
26 Defender’s cite Stromberg at 266, to support the claim that beaver removal inevitably played  
27 a major role in the entrenchment of flood plains. *See* Def’s Memo at 7. Unfortunately

1 Defender's elected to include only one of the four sentences they reference as supporting their  
2 beaver theory. Immediately following the statement referenced by Defenders, Stromberg  
3 makes it clear that those "believers" are speculating and that a beaver dams ability to slow,  
4 stop or influence the fluctuation of a river like the San Pedro is not only questionable but that  
5 "unfortunately, quantitative data demonstrating the hydraulic effects of beaver dams along  
6 arid streams are lacking" making it difficult to determine the possibilities of any geomorphic  
7 response to beaver removal on a river, if at all. *See Id.* Defenders are referencing speculation  
8 found in the Stromberg report to support their finding of fact, without acknowledging that  
9 Stromberg is referencing a theory for the purpose of identifying that theory as speculation. *Id.*

10 There is no evidence in the record to show or even support the beaver theories  
11 presented by the Defenders.

12 **D. Boats or Vessels Used in the Ordinary Course of Business Have Never**  
13 **Traversed The San Pedro River**

14 Defenders have no evidence to show that any boat of the type commonly used in the  
15 course of trade or commerce ever traversed the San Pedro. Defenders have also failed to  
16 prove that the San Pedro was susceptible to boating at the time of Arizona statehood,  
17 February 14, 1912. Defenders do not have enough evidence of modern day recreational  
18 boating on the San Pedro for the Commission to assume that similar boating happened on  
19 February 14, 1912. Defenders site a survey conducted for the state, of recreational boaters  
20 who report boating the entire length of the San Pedro, including the Upper San Pedro. *Id.*,  
21 citing State Report at 8-5. The survey cited by the Defenders was not representative of how  
22 the San Pedro is used by the average recreational modern boater. To be clear, the survey was  
23 offered to one exclusive Arizona recreational boaters club (the Central Arizona Paddlers  
24 Club, 1992) and only 20% of those club members participated in the survey. *Id.* Further, not  
25 all 20% of those who took the survey had successfully boated the San Pedro and even fewer  
26 of those who had boated the San Pedro took part in the additional interview, geared at  
27 understanding the characteristics of the San Pedro at the time it was traversable. *Id.*

1 Additionally, those surveyed described waiting for the monsoon season to come anticipating a  
2 thrill ride down the San Pedro when the river surges with the resulting rain water. *Id.* These  
3 accounts are not “significant evidence” of modern recreational boating as the Defenders claim  
4 and do not serve as a probable indication that the San Pedro was susceptible to boating at the  
5 time of Statehood. *See* Def.’s Memo. at 10, *and* State Report at 8-5.

6 The Defenders Opening Post-Hearing Memorandum is almost completely made up of  
7 speculation and unfounded assumptions. The evidence Defenders present that does hold  
8 weight has been discounted or refuted three fold by evidence in the record opposing  
9 navigability. Witnesses and testimony in support of the San Pedro River being navigable has  
10 been meticulously covered by multiple witnesses and testimony to the contrary. Defenders do  
11 not meet their burden to prove by a preponderance of the evidence that the San Pedro River  
12 was navigability at the date of Arizona statehood, February 14, 1912. For the reasons  
13 enumerated above, and the Defenders failure to meet the statutory burden, the Commission  
14 must find that the San Pedro River was not navigable in fact or susceptible to navigation on  
15 February 14, 1912.

16 DATED this 27th day of September, 2013.

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2 hand-delivered for filing this 27th day of September,  
3 2013 to:

4 Arizona Navigable Stream Adjudication Commission  
5 1700 West Washington, Room B-54  
6 Phoenix, AZ 85007

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8 version of same, mailed this 13th day of September,  
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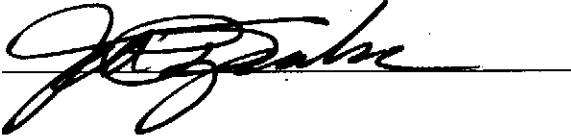
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Attached

Limited Excerpts From Black's Law Dictionary (2<sup>nd</sup> ed. 1910)

# A LAW DICTIONARY

CONTAINING

DEFINITIONS OF THE TERMS AND PHRASES,  
OF AMERICAN AND ENGLISH JURISPRU-  
DENCE, ANCIENT AND MODERN

AND INCLUDING

THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, ECCLESIASTICAL  
AND COMMERCIAL LAW, AND MEDICAL JURISPRUDENCE, WITH A COLLEC-  
TION OF LEGAL MAXIMS, NUMEROUS SELECT TITLES FROM THE  
ROMAN, MODERN CIVIL, SCOTCH, FRENCH, SPANISH, AND  
MEXICAN LAW, AND OTHER FOREIGN SYSTEMS,  
AND A TABLE OF ABBREVIATIONS

BY

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AUTHOR OF TREATISES ON JUDGMENTS, TAX TITLES, INTOXICATING LIQUORS,  
BANKRUPTCY, MORTGAGES, CONSTITUTIONAL LAW,  
INTERPRETATION OF LAWS, ETC.

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of aldermen," "board of health," "board of directors," "board of works."

Also lodging, food, entertainment, furnished to a guest at an inn or boarding-house.

**—Board of aldermen.** The governing body of a municipal corporation. *Oliver v. Jersey City*, 63 N. J. Law, 96, 42 Atl. 782. See **ALDERMEN.**—**Board of audit.** A tribunal provided by statute in some states, to adjust and settle the accounts of municipal corporations. *Osterhoudt v. Rigney*, 98 N. Y. 222.—**Board of civil authority.** In Vermont, in the case of a city this term includes the mayor and aldermen and justices residing therein; in the case of a town, the selectmen and town clerk and the justices residing therein; in the case of a village, the trustees or bailiffs and the justices residing therein. *Vt. St. 1894*, 19, 59.—**Board of directors.** The governing body of a private corporation, generally selected from among the stockholders and constituting in effect a committee of their number or board of trustees for their interests.—**Board of equalization.** See **EQUALIZATION.**—**Board of fire underwriters.** As these exist in many cities, they are unincorporated voluntary associations composed exclusively of persons engaged in the business of fire insurance, having for their object consolidation and co-operation in matters affecting the business, such as the writing of uniform policies and the maintenance of uniform rates. *Childs v. Insurance Co.*, 66 Minn. 393, 69 N. W. 141, 35 L. R. A. 99.—**Board of health.** A board or commission created by the sovereign authority or by municipalities, invested with certain powers and charged with certain duties in relation to the preservation and improvement of the public health. General boards of health are usually charged with general and advisory duties, with the collection of vital statistics, the investigation of sanitary conditions, and the methods of dealing with epidemic and other diseases, the quarantine laws, etc. Such are the national board of health, created by act of congress of March 3, 1879, (20 St. at Large, 484.) and the state boards of health created by the legislatures of most of the states. Local boards of health are charged with more direct and immediate means of securing the public health, and exercise inquisitorial and executive powers in relation to sanitary regulations, offensive nuisances, markets, adulteration of food, slaughterhouses, drains and sewers, and similar subjects. Such boards are constituted in most American cities either by general law, by their charters, or by municipal ordinance, and in England by the statutes, 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98, and other acts amending the same. See *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353.—**Board of pardons.** A board created by law in some states, whose function is to investigate all applications for executive clemency and to make reports and recommendations thereon to the governor.—**Board of supervisors.** Under the system obtaining in some of the northern states, this name is given to an organized committee, or body of officials, composed of delegates from the several townships in a county, constituting part of the county government, and having special charge of the revenues of the county.—**Board of trade.** An organization of the principal merchants, manufacturers, tradesmen, etc., of a city, for the purpose of furthering its commercial interests, encouraging the establishment of manufactures, promoting trade, securing or improving shipping facilities, and generally advancing the prosperity of the place as an industrial and commercial community. In England, one of the administrative departments of government, being a committee of the privy council which is appointed for the consideration of matters relating to trade and foreign plantations.—**Board of works.** The name of a board of officers appointed for

the better local management of the English metropolis. They have the care and management of all grounds and gardens dedicated to the use of the inhabitants in the metropolis; also the superintendence of the drainage; also the regulation of the street traffic, and, generally, of the buildings of the metropolis. *Brown*.

**BOARDER.** One who, being the inhabitant of a place, makes a special contract with another person for food with or without lodging. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 424.

One who has food and lodging in the house or with the family of another for an agreed price, and usually under a contract intended to continue for a considerable period of time. *Ullman v. State*, 1 Tex. App. 220, 28 Am. Rep. 405; *Ambler v. Skinner*, 7 Rob. (N. Y.) 561.

The distinction between a guest and a boarder is this: The guest comes and remains without any bargain for time, and may go away when he pleases, paying only for the actual entertainment he receives; and the fact that he may have remained a long time in the inn, in this way, does not make him a boarder, instead of a guest. *Stewart v. McCready*, 24 How. Prac. (N. Y.) 62.

**BOARDING-HOUSE.** A boarding-house is not in common parlance, or in legal meaning, every private house where one or more boarders are kept occasionally only and upon special considerations. But it is a quasi public house, where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind. *Cady v. McDowell*, 1 Lans. (N. Y.) 486.

A boarding-house is not an inn, the distinction being that a boarder is received into a house by a voluntary contract, whereas an innkeeper, in the absence of any reasonable or lawful excuse, is bound to receive a guest when he presents himself. 2 El. & Bl. 144.

The distinction between a boarding-house and an inn is that in a boarding-house the guest is under an express contract, at a certain rate for a certain period of time, while in an inn there is no express agreement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract. *Willard v. Reinhardt*, 2 El. D. Smith (N. Y.) 148.

**BOAT.** A small open vessel, or watercraft, usually moved by oars or rowing. It is commonly distinguished in law from a ship or vessel, by being of smaller size and without a deck. *U. S. v. Open Boat*, 5 Mason, 120, 137, Fed. Cas. No. 15,967.

**BOATABLE.** A term applied in some states to minor rivers and streams capable of being navigated in small boats, skiffs, or launches, though not by steam or sailing vessels. *New England Trout, etc., Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

**BOC.** In Saxon law. A book or writing; a deed or charter. *Boc land*, deed or char-



## COMMANDITA

mander," who could not dispose of it, but to the use of the priory, only taking thence his own sustenance, according to his degree. The manors and lands belonging to the priory of St. John of Jerusalem were given to Henry the Eighth by 32 Hen. VIII. c. 20, about the time of the dissolution of abbeys and monasteries; so that the name only of commanderies remains, the power being long since extinct. Wharton.

**COMMANDITAIRES.** Special partners; partners *en commandité*. See **COMMANDITÉ**.

**COMMANDITÉ.** In French law. A special or limited partnership, where the contract is between one or more persons who are general partners, and jointly and severally responsible, and one or more other persons who merely furnish a particular fund or capital stock, and thence are called "*commanditaires*," or "*commanditaires*," or "partners *en commandité*," the business being carried on under the social name or firm of the general partners only, composed of the names of the general or complementary partners, the partners in *commandité* being liable to losses only to the extent of the funds or capital furnished by them. Story, Partn. § 78; 3 Kent, Comm. 34.

**COMMANDMENT.** In practice. An authoritative order of a judge or magisterial officer.

**In criminal law.** The act or offense of one who commands another to transgress the law, or do anything contrary to law, as theft, murder, or the like. Particularly applied to the act of an accessory before the fact, in inciting, procuring, setting on, or stirring up another to do the fact or act. 2 Inst. 182.

**COMMARCHIO.** A boundary; the confines of land.

**COMMENCE.** To commence a suit is to demand something by the institution of process in a court of justice. *Cohens v. Virginia*, 6 Wheat. 408, 5 L. Ed. 257. To "bring" a suit is an equivalent term; an action is "commenced" when it is "brought," and vice versa. *Goldenberg v. Murphy*, 108 U. S. 162, 2 Sup. Ct. 388, 27 L. Ed. 686.

**COMMENDA.** In French law. The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, Rép. Univ.

**In mercantile law.** An association in which the management of the property was intrusted to individuals. Troub. Lim. Partn. c. 3, § 27.

*Commenda est facultas recipiendi et retinendi beneficium contra jus positivum à supremâ potestate.* Moore, 905. A

## COMMERCE

**commendam** is the power of receiving and retaining a benefice contrary to positive law, by supreme authority.

**COMMENDAM.** In ecclesiastical law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch, 236.

**In commercial law.** The limited partnership (or *Société en commandité*) of the French law has been introduced into the Code of Louisiana under the title of "Partnership in *Commendam*." Civil Code La. art. 2810.

**COMMENDATIO.** In the civil law. Commendation, praise, or recommendation, as in the maxim "simplex commendatio non obligat," meaning that mere commendation or praise of an article by the seller of it does not amount to a warranty of its qualities. 2 Kent, Comm. 485.

**COMMENDATION.** In feudal law. This was the act by which an owner of allodial land placed himself and his land under the protection of a lord, so as to constitute himself his vassal or feudal tenant.

**COMMENDATORS.** Secular persons upon whom ecclesiastical benefices were bestowed in Scotland; called so because the benefices were commended and intrusted to their supervision.

**COMMENDATORY.** He who holds a church living or preferment *in commendam*.

**COMMENDATORY LETTERS.** In ecclesiastical law. Such as are written by one bishop to another on behalf of any of the clergy, or others of his diocese traveling thither, that they may be received among the faithful, or that the clerk may be promoted, or necessities administered to others, etc. Wharton.

**COMMENDATUS.** In feudal law. One who intrusts himself to the protection of another. Spelman. A person who, by voluntary homage, put himself under the protection of a superior lord. Cowell.

**COMMERCE.** Intercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and the transportation of persons as well as of goods, both by land and by sea. *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Railroad Co. v. Fuller*, 17 Wall. 568, 21 L. Ed. 710; *Winder v. Caldwell*, 14 How. 444, 14 L. Ed. 487; *Cooley v. Board of Wardens*,

**N** supersede the master of the ship with reference to which the inquiry is held, to discharge any of the seamen, to decide questions as to wages, send home offenders for trial, or try certain offenses in a summary manner. **Sweet.—Naval courts-martial.** Tribunals for the trial of offenses arising in the management of public war vessels.—**Naval law.** The system of regulations and principles for the government of the navy.—**Naval officer.** An officer in the navy. Also an important functionary in the United States custom-houses, who estimates duties, signs permits and clearances, certifies the collectors' returns, etc.

**NAVARCHUS.** In the civil law. The master or commander of a ship; the captain of a man-of-war.

**NAVICULARIUS.** In the civil law. The master or captain of a ship. Calvin.

**NAVIGABLE.** Capable of being navigated; that may be navigated or passed over in ships or vessels. But the term is generally understood in a more restricted sense, viz., subject to the ebb and flow of the tide.

"The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all, of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide-water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide-water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers, in law, which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 10 Wall. 503, 19 L. Ed. 999. And see *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819; *The Genesee Chief*, 12 How. 455, 13 L. Ed. 1058; *Illinois Cent. R. Co. v. State*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

It is true that the flow and ebb of the tide is not regarded, in this country, as the usual, or any real, test of navigability; and it only operates to impress, *prima facie*, the character of being public and navigable, and to place the onus of proof on the party affirming the contrary. But the navigability of tide-waters does not materially depend upon past or present actual public use. Such use may establish navigability, but it is not essential to give the character. Otherwise, streams in new and unsettled sections of the country, or where the increase, growth, and development have not been sufficient to call them into public use, would be ex-

cluded, though navigable in fact, thus making the character of being a navigable stream dependent on the occurrence of the necessity of public use. Capability of being used for useful purposes of navigation, of trade and travel, in the usual and ordinary modes, and not the extent and manner of the use, is the test of navigability. *Sullivan v. Spotswood*, 82 Ala. 166, 2 South. 716.

—**Navigable river or stream.** At common law, a river or stream in which the tide ebbs and flows, or as far as the tide ebbs and flows. 3 Kent, Comm. 412, 414, 417, 418; 2 Hill. Real Prop. 90, 91. But as to the definition in American law, see *supra*.—**Navigable waters.** Those waters which afford a channel for useful commerce. *The Montello*, 20 Wall. 430, 22 L. Ed. 391.

**NAVIGATE.** To conduct vessels through navigable waters; to use the waters as a means of communication. *Ryan v. Hook*, 34 Hun (N. Y.) 185.

**NAVIGATION.** The act or the science or the business of traversing the sea or other waters in ships or vessels. *Pollock v. Cleveland Ship Building Co.*, 56 Ohio St. 655, 47 N. E. 582; *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; *Laurie v. Douglass*, 15 Mees. & W. 746.

—**Navigation acts,** in English law, were various enactments passed for the protection of British shipping and commerce as against foreign countries. For a sketch of their history and operation, see 3 Steph. Comm. They are now repealed. See 16 & 17 Vict. c. 107, and 17 & 18 Vict. cc. 5, 120. **Wharton.—Navigation, rules of.** Rules and regulations adopted by commercial nations to govern the steering and management of vessels approaching each other at sea so as to avoid the danger of collision or fouling.—**Regular navigation.** In this phrase, the word "regular" may be used in contradistinction to "occasional," rather than to "unlawful," and refer to vessels that, alone or with others, constitute lines, and not merely to such as are regular in the sense of being properly documented under the laws of the country to which they belong. *The Steamer Smidt*, 16 Op. Attys. Gen. 276.

**NAVIRE.** Fr. In French law. A ship. *Emerig. Traité des Assur.* c. 6, § 1.

**NAVIS.** Lat. A ship; a vessel.

—**Navis bona.** A good ship; one that was staunch and strong, well caulked, and stiffened to bear the sea, obedient to her helm, swift, and not unduly affected by the wind. Calvin.

**NAVY.** A fleet of ships; the aggregate of vessels of war belonging to an independent nation. In a broader sense, and as equivalent to "naval forces," the entire corps of officers and men enlisted in the naval service and who man the public ships of war, including in this sense, in the United States, the officers and men of the Marine Corps. See *Wilkes v. Dinsman*, 7 How. 124, 12 L. Ed. 618; *U. S. v. Dunn*, 120 U. S. 249, 7 Sup. Ct. 507, 30 L. Ed. 667.

—**Navy bills.** Bills drawn by officers of the English navy for their pay, etc.—**Navy department.** One of the executive departments of the United States, presided over by the secre-

**N**bacher's Estate, 168 Pa. 158, 32 Atl. 30; Cummings v. Dearborn, 56 Vt. 441; State v. French, 120 Ind. 229, 22 N. E. 108.

The word is also used to denote the subject-matter insured in a policy. 4 Campb. 89.

**O** **In equity pleading.** The stating part of a bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains, and the names of the persons by whom done and against whom he seeks redress. Story, Eq. PL § 27.

**P** **PREMIUM.** The sum paid or agreed to be paid by an assured to the underwriter as the consideration for the insurance; being a certain rate per cent. on the amount insured. 1 Phil. Ins. 205; State v. Pittsburg, etc., Ry. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635; Hill v. Insurance Co., 129 Mich. 141, 88 N. W. 392.

A bounty or bonus; a consideration given to invite a loan or a bargain; as the consideration paid to the assignor by the assignee of a lease, or to the transferrer by the transferee of shares of stock, etc. So stock is said to be "at a premium" when its market price exceeds its nominal or face value. Rhode Island Hospital Trust Co. v. Arming-ton, 21 R. I. 33, 41 Atl. 571; White v. Williams, 90 Md. 719, 45 Atl. 1001; Washington, etc., Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; Building Ass'n v. Ekjund, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637. See **PAR.**

In granting a lease, part of the rent is sometimes capitalized and paid in a lump sum at the time the lease is granted. This is called a "premium."

—**Premium note.** A promissory note given by the insured for part or all of the amount of the premium.—**Premium pudicitiae.** The price of chastity. A compensation for the loss of chastity, paid or promised to, or for the benefit of, a seduced female.

**PREMUNIRE.** See **PREMUNIRE.**

**PRENDA.** In Spanish law. Pledge. White, New Recop. b. 2, tit. 7.

**PRENDER, PRENDRE.** L. Fr. To take. The power or right of taking a thing without waiting for it to be offered. See **A PRENDER.**

**PRENDER DE BARON.** L. Fr. In old English law. A taking of husband; marriage. An exception or plea which might be used to disable a woman from pursuing an appeal of murder against the killer of her former husband. Staundef. P. C. lib. 3, c. 59.

**PREPENSE.** Forethought; preconceived; premeditated. See Territory v. Bannigan, 1 Dak. 451, 46 N. W. 597; People v. Clark, 7 N. Y. 385.

**PREPONDERANCE.** This word means something more than "weight;" it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Shinn v. Tucker, 37 Ark. 588. And see Hoffman v. Loud, 111 Mich. 158, 69 N. W. 231; Willcox v. Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; Mortimer v. McMullen, 202 Ill. 413, 67 N. E. 20; Bryan v. Chicago, etc., R. Co., 63 Iowa, 464, 19 N. W. 295.

**PREROGATIVE.** An exclusive or peculiar privilege. The special power, privilege, immunity, or advantage vested in an official person, either generally, or in respect to the things of his office, or in an official body, as a court or legislature. See Attorney General v. Blossom, 1 Wis. 317; Attorney General v. Eau Claire, 37 Wis. 443.

**In English law.** That special pre-eminence which the king (or queen) has over and above all other persons, in right of his (or her) regal dignity. A term used to denote those rights and capacities which the sovereign enjoys alone, in contradistinction to others. 1 Bl. Comm. 239.

—**Prerogative court.** In English law. A court established for the trial of all testamentary causes, where the deceased left *bona notabilia* within two different dioceses; in which case the probate of wills belonged to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons were originally cognizable herein, before a judge appointed by the archbishop, called the "judge of the prerogative court," from whom an appeal lay to the privy council. 3 Bl. Comm. 66; 3 Steph. Comm. 432. In New Jersey the prerogative court is the court of appeal from decrees of the orphans' courts in the several counties of the state. The court is held before the chancellor, under the title of the "ordinary." See *In re Coursen's Will*, 4 N. J. Eq. 413; *Planigan v. Guggenheim Smelting Co.*, 63 N. J. Law. 647, 44 Atl. 762; *Robinson v. Fair*, 129 U. S. 53, 9 Sup. Ct. 30, 32 L. Ed. 415.—**Prerogative law.** That part of the common law of England which is more particularly applicable to the king. Com. Dig. tit. "Ley," A.—**Prerogative writs.** In English law, the name is given to certain judicial writs issued by the courts only upon proper cause shown, never as a mere matter of right, the theory being that they involve a direct interference by the government with the liberty and property of the subject, and therefore are justified only as an exercise of the extraordinary power (prerogative) of the crown. In America, a theory has sometimes been advanced that these writs should issue only in cases *publici juris* and those affecting the sovereignty of the state, or its franchises or prerogatives, or the liberties of the people. But their issuance is now generally regulated by statute, and the use of the term "prerogative," in describing them, amounts only to a reference to their origin and history. These writs are the writs of mandamus, procedendo, prohibition, quo warranto, habeas corpus, and certiorari. See 3 Steph. Comm. 629; Territory

Fleta, as officers of the king's court, who oppressed the people by demanding exorbitant fees. Fleta, lib. 2, c. 38.

**VERIFICATION.** In pleading. A certain formula with which all pleadings containing new affirmative matter must conclude, being in itself an averment that the party pleading is ready to establish the truth of what he has set forth.

**In practice.** The examination of a writing for the purpose of ascertaining its truth; or a certificate or affidavit that it is true.

"Verification" is not identical with "authentication." A notary may verify a mortgagee's written statement of the actual amount of his claim, but need not authenticate the act by his seal. Ashley v. Wright, 19 Ohio St. 291.

Confirmation of the correctness, truth, or authenticity of a pleading, account, or other paper, by an affidavit, oath, or deposition. See McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429; Summerfield v. Phoenix Assur. Co. (C. C.) 65 Fed. 298; Patterson v. Brooklyn, 6 App. Div. 127, 40 N. Y. Supp. 531.

**VERIFY.** To confirm or substantiate by oath; to show to be true. Particularly used of making formal oath to accounts, petitions, pleadings, and other papers.

The word "verify" sometimes means to confirm and substantiate by oath, and sometimes by argument. When used in legal proceedings it is generally employed in the former sense. De Witt v. Hosmer, 3 How. Prac. (N. Y.) 284.

*Veritas, a quocunque dicitur, a Deo est.* 4 Inst. 153. Truth, by whomsoever pronounced, is from God.

*Veritas demonstrationis tollit errorem nominis.* The truth of the description removes an error in the name. 1 Ld. Raym. 303.

*Veritas habenda est in juratore; justitia et judicium in iudice.* Truth is the desideratum in a juror; justice and judgment in a judge. Bract. fol. 185b.

*Veritas nihil veretur nisi abscondi.* Truth fears nothing but to be hid. 9 Coke, 20b.

*Veritas nimium altercando amittitur.* Truth is lost by excessive altercation. Hob. 344.

*Veritas, que minime defensatur opprimitur; et qui non improbat, approbat.* 3 Inst. 27. Truth which is not sufficiently defended is overpowered; and he who does not disapprove, approves.

*Veritatem qui non libere pronunciat proditor est veritatis.* 4 Inst. Epil. He who does not freely speak the truth is a betrayer of truth.

**VERIFY.** Truth; truthfulness; conformity to fact. The records of a court "import uncontrollable verity." 1 Black, Judgm. § 276.

**VERNA.** Lat. In the civil law. A slave born in his master's house.

**VERSARI.** Lat. In the civil law. To be employed; to be conversant. *Versari male in tutela*, to misconduct one's self in a guardianship. Calvin.

**VERSUS.** Lat. Against. In the title of a cause, the name of the plaintiff is put first, followed by the word "versus," then the defendant's name. Thus, "Fletcher versus Peck," or "Fletcher against Peck." The word is commonly abbreviated "vs." or "v."

**VERT.** Everything bearing green leaves in a forest.

Also that power which a man has, by royal grant, to cut green wood in a forest.

Also, in heraldry, green color, called "venus" in the arms of princes, and "emerald" in those of peers, and expressed in engravings by lines in bend. Wharton.

**VERUS.** Lat. True; truthful; genuine; actual; real; just.

**VERY LORD AND VERY TENANT.** They that are immediate lord and tenant one to another. Cowell.

**VESSEL.** A ship, brig, sloop, or other craft used in navigation. The word is more comprehensive than "ship."

The word "vessel" includes every description of water-craft or other artificial contrivances used, or capable of being used, as a means of transportation on water. Rev. St. U. S. § 3 (U. S. Comp. St. 1901, p. 4).

"Vessel," in the provision of the code of Louisiana that commercial partners are those who are engaged in "carrying personal property for hire in ships or other vessels," means any structure which is made to float upon the water, for purposes of commerce or war, whether impelled by wind, steam, or oars. Chaffe v. Ludelling, 27 La. Ann. 607.

—**Foreign vessel.** A vessel owned by residents in, or sailing under the flag of, a foreign nation. "Foreign vessel," under the embargo act of January, 1808, means a vessel under the flag of a foreign power, and not a vessel in which foreigners domiciled in the United States have an interest. The Sally, 1 Gall. 58, Fed. Cas. No. 12,257.—**Public vessel.** One owned and used by a nation or government for its public service, whether in its navy, its revenue service, or otherwise.

**VEST.** To accrue to; to be fixed; to take effect; to give a fixed and indefeasible right. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a