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F-O

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STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES

EIGHTH EDITION

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F

FA [*Year*]. Since 2005 it has become common for the annual Finance Acts, and other enactments about taxation, to include a definition along the lines of " 'FA', followed by a year, means the Finance Act of that year". The result is that it is now common to find statutory references in the form "FA 2005" and so on, helpfully reflecting the practice that has been prevalent among tax practitioners for some time.

F.C.S. "Free of capture and seizure" (1 Maude & P. 449). See hereon 5 Encyc. 324; CAPTURE.

F.G.A. "Free of general average" (1 Maude & P. 449).

F.O.B. "Free on board": This expression throughout the whole of England, means that the seller is to put the goods on board at his own expense, but on account of, and thenceforward at the risk and as the property of, the purchaser; and this is so whether the goods are specific or only a proportion of a quantity (*Cowasjee v Thompson*, 5 Moore, P.C. 173; *Brown v Hare*, 27 L.J. Ex. 372; *Inglis v Stock*, 10 App. Cas. 263; Benj. 315; Blackb. 362). "In the absence of special agreement the property and risk in goods does not in the case of an F.O.B. contract pass from the seller to the buyer till the goods are actually put on board" (per McCardie J., in *Colley v Overseas Exporters (1919) Ltd* [1921] 3 K.B. 302); and this is the case even though the buyers contract to provide a ship for the goods and fail to do so, and consequently it is through their fault that the seller is unable to deliver the goods on board (*Colley*). See further *Cunningham Ltd v Munroe & Co*, 28 Com. Cas. 42. In *Ex p. Rosevear Co, Re Cock* (11 Ch. D. 565), Bacon C.J., in bankruptcy said: "delivery 'free on board' only means, 'the price shall be that which we stipulate for, and you shall not have to pay for the wagons or carts necessary to carry (to the ship); we will bear all those charges and put it free on board the ship, the name of which you furnish' ". Accordingly, the seller has to pay an export duty on the goods, even though imposed subsequently to the contract (*Bowhill Coal Co v Tobias*, 40 S.L.R. 234).

As to whether "free on board" indicates that the transitus is at an end as soon as the goods are on the purchaser's ship, see *Berndtson v Strang*, L.R. 4 Eq. 488.

A contract for PIG IRON made at Glasgow and deliverable "F.O.B." may, by a mercantile usage, be shown to mean a particular kind of iron made in the neighbourhood of Glasgow (*Mackenzie v Dunlop*, 1 Paterson, 669).

As to the difference between "free on board" and "free alongside", see *Glengarnock Iron Co v Cooper*, 32 S.L.R. 546, and especially judgment of Macdonald L., L.J.C.

F.O.W. "First open water": the phrase is "used in charterparties, with reference to ports in the Baltic, to mean 'immediately after the ice breaks up' " (5 Encyc. 471). See "open water", under OPEN.

F.P.A. "Free of particular average" (1 Maude & P. 449).

"Where, in the memorandum, the words 'warranted free from particular average' are used, these words are not confined to losses arising from injury to the goods themselves, but amount to a warranty against any loss other than a total loss, or general average; and therefore under a marine policy in the ordinary form on goods, the underwriters are not liable for expenses incurred in relation to the goods unless such expenses are paid to avert a general average loss, and are therefore recoverable under the suing and labouring clause" (1 Maude & P. 493, citing *Meyer v Ralli*, 1 C.P.D. 372, 373; *Great Indian Peninsular Railway v Saunders*, 30 L.J.Q.B. 218). See hereon *Hendriks v Australasian Insurance*, L.R. 9 C.P. 461; *Stewart v Merchants Marine Insurance*, 16 Q.B.D. 619.

FABRIC LANDS. " 'Fabrick-lands' are lands given to the rebuilding, repair, or maintenance, of cathedrals or other churches"—as in Commonwealth Act 1660 (c.11) (Cowel). See 5 Encyc. 284, 285; Tudor, Char. Trusts, 436.

FABRICATE. See FALSELY ASSUMING TO ACT.

FACE. The words "upon its face" in s.110(1) of the Representation of the People Act 1983 (c.2) mean, in respect of a double sided election poster designed to be displayed in a house window, on the side facing the public (*Cook v Trist*, *The Times*, July 15, 1983).

See IN THE FACE OF THE COURT.

FACE-VALUE VOUCHER. Stat. Def., Value Added Tax Act 1994 (c.23) Sch.10A inserted by Finance Act 2003 (c.14) Sch.1.

FACILITATE. "Calculated to facilitate . . . the discharge of . . . their functions" (Local Government Act 1972 (c.70) s.111(1)).

The grant of a franchise by the Legal Services Commission was sufficient to amount, for the purposes of race discrimination, to facilitation of a person's continuing in legal practice in an area of social deprivation (*Patterson v Legal Services Commission* [2003] I.R.L.R. 742, E.A.T). See FUNCTIONS.

FACILITATING. "Facilitating the commission of any offence" (Powers of Criminal Courts Act 1973 (c.62) s.43(1)(a)). A car used by a burglar can be said to be "facilitating" the commission of his offence and could therefore properly be the subject of a forfeiture order under this section (*R. v Stratton*, *The Times*, January 15, 1988).

A car which was driven by the defendant in such a way to block the passage of the victim's car, forcing it to stop immediately prior to the assault

committed by the defendant was "facilitating the commission of an offence" (*R. v Patel (Rajesh)* [1995] R.T.R. 421).

"Facilitating the entry into the United Kingdom of . . . illegal entrant" (Immigration Act 1971 (c.77) s.25(1)). The provision of false documents to those wishing to travel to the United Kingdom , where the documents were not used as the recipients sought political asylum instead, did not constitute the offence of facilitating the entry of illegal immigrants (*R. v Naillie*; *R. v Kanesarajah* [1993] 2 W.L.R. 927).

FACILITIES. By Railway and Canal Traffic Act 1854 (c.31) s.2, railway and canal companies "shall, according to their respective powers, afford all reasonable facilities" for receiving, forwarding, and delivering traffic. The word "facilities", here, did not mean merely facilities afforded by the management of traffic, e.g. through booking (*Didcot, etc., Railway v Great Western Railway* [1897] 1 Q.B. 33); but a company violated the Act "if (having sufficient powers) it keeps its platforms, booking-office, and other structures, at any station, in such a condition as to space and other arrangements as to cause dangerous or obstructive confusion, delay or other impediment to the proper reception, transmission, or delivery, of the ordinary traffic of that station, whether consisting of passengers or of goods" (per Selborne C., *South Eastern Railway v Railway Commissioners*, 6 Q.B.D. 586). But refreshment-rooms, and covered platforms and carriage yards, even at places where invalids resorted, were not "facilities" within the section (*South Eastern Railway*), nor were free water-closets (*West Ham v Great Eastern Railway*, 64 L.J.Q.B. 340). But see *Metropolitan Water Board v London, Brighton & South Coast Railway* [1910] 2 K.B. 890, cited DOMESTIC.

"When you speak of giving 'reasonable facilities' you imply that the thing with regard to which you order a facility is an existing thing" (per Esher M.R., *Darlaston v London & North Western Railway* [1894] 2 Q.B. 694); therefore, there was no power, under the section, to order the opening of a new station or the re-opening of one that had been closed (*South Eastern Railway v Railway Commissioners*, above; *Darlaston v London & North Western Railway*, above), nor the making or continuing of a private SIDING (*Cowan v North British Railway*, 38 S.L.R. 514).

The section included facilities for passengers (*Winsford Local Board v Cheshire Lines Committee*, 24 Q.B.D. 456; *Re Willesden Local Board and Midland Railway*, 37 S.J. 176), e.g. a cloak room (*Singer Co v London & South Western Railway* [1894] 1 Q.B. 833). See RAILWAY.

See further *Great Western Railway v Railway Commissioners*, 7 Q.B.D. 182; *Brown v Great Western Railway*, 9 Q.B.D. 744; *R. v Railway Commissioners*, 22 Q.B.D. 642; *Nichol v North Eastern Railway*, 4 T.L.R. 464; *Barry Railway v Taff Vale Railway* [1895] 1 Ch. 128; *Newington v North Eastern Railways*, 3 Ry. & Can. Traffic Cas. 306; *Watkinson v Wrexham, etc., Railway, ibid.* 446; *Tharsis Co v London & North Western Railway, ibid.* 455; *James v Taff Vale Railway, ibid.* 540; *Beeston Brewery Co v Midland Railway*, 5 *ibid.*

53; *Distington Iron Co v London & North Western Railway*, 6 *ibid.* 123; *Highland Railway v Great North of Scotland Railway*, 7 *ibid.* 94; *Rothschild v Grand Junction Canal Co*, 91 L.T. 386; *Spillers and Bakers v Great Western Railway* [1911] 1 K.B. 386; *Charrington v Southern Railway*, 42 T.L.R. 758.

"Facilities for the common use of all the occupants" (Wireless Telegraphy (Broadcast Licence Charges and Exemptions) Regulations 1984 (SI 1984/1053) Sch.2, para.1(b)). The provision of a housing steward responsible for the welfare of the occupants of "accommodation for residential care" provided by the local authority was a "facility" shared by all the occupants for the purposes of this regulation (*R. v Secretary of State for the Home Department, Ex p. Kirklees BC, The Times*, June 24, 1987).

"Facilities and advantages" (Value Added Taxes Act 1983 (c.55) s.47). "Facilities" were means, resources or conveniences, which made its easier to achieve a purpose, while "advantages" were benefits or gains (*Customs and Excise Commissioners v British Field Sports Society* [1998] S.T.C. 315).

"41. I agree that the judge adopted too restrictive an approach to the meaning of the word 'facilities' where it appears in s.3(1)(e) [of the National Health Service Act 1977]. As the case law suggests—and [Counsel] added *R v Secretary of State ex p Kirklees BC* (*The Times*, January 24, 1971), where Taylor J proceeded on the basis that the provision of the services of a housing steward was the provision of a 'facility' for the occupants of the relevant housing)—its meaning will be derived from the context in which the word is used. It means 'that which facilitates'. Sometimes the word refers to tools, or accommodation, or plant, which facilitate the provision of a service. Sometimes it refers to an entire service provision, like a laundry service, or the provision of a day centre, which facilitates the prevention of illness, or the care of persons suffering from illness, or the after-care of persons who have suffered from illness. . . . 42. Of course it is true, as the judge observed, that in other parts of the 1977 Act, the meaning of the word 'facilities' is more narrowly focused, but that is only what one would expect when the draftsman uses a chameleon-like word like 'facilities' which takes its colour from its context." (*R. (Keating) v Cardiff Local Health Board* [2005] EWCA Civ 847 per Brooke L.J.)

"Of course it is true, as the judge observed, that in other parts of the 1977 Act, the meaning of the word 'facilities' is more narrowly focused, but that is only what one would expect when the draftsman uses a chameleon-like word like 'facilities' which takes its colour from its context. [Counsel], for his part, was constrained to accept that the word 'facilities' might embrace 'services' as well in other statutory contexts . . . " (*R (on the application of Keating) v Cardiff Local Health Board (Secretary of State for Health, intervening)* [2005] EWCA Civ 847).

"Services, accommodation or facilities" (Trade Description Act 1968 (c.29) s.14(1)(b)). A closing down sale is not a facility within the meaning of this section. The word "facilities" has to be read ejusdem generis with the previous two words. A facility would have to be something ancillary to the

sale and not the sale itself (*Westminster City Council v Ray Alan (Manshops)* [1982] 1 W.L.R. 383). See also PROVISION.

Stat. Def., National Health Service (Private Finance) Act 1997 (c.56) s.1(5).

Stat. Def., "includes the provision of (or of the use of) premises, goods, materials, vehicles, plant or apparatus" (s.11 of the Education Act 2002 (c.32)).

Stat. Def., "includes the provision of (or the use of) premises, goods, materials, vehicles, plant or apparatus" (National Health Service Act 2006 s.275(1)).

"Provision . . . of . . . facilities . . . to the public": see PROVISION.

See also SERVICES.

FACT. "Facts" do not cover statements made in a broadcast or in the press (*Astaire v Campling* [1966] 1 W.L.R. 34).

"Facts relevant to [the] cause of action" (Limitation Act 1980 (c.58) s.32A). "Facts relevant to the cause of action" in s.32A of the 1980 Act referred to the relevant facts which a plaintiff had to prove to establish a prima facie cause of action and did not extend to facts which might rebut any possible defence (*C. v Mirror Group Newspapers* [1997] 1 W.L.R. 131).

In s.34(1)(a) of the Criminal Justice and Public Order Act 1994 the expression "fact relied on in his defence" should be given a broad meaning to include an alleged fact in issue (*R. v Webber* [2004] 1 W.L.R. 404, HL).

"False statement of fact": see FALSE STATEMENT.

See MATERIAL FACT; PERJURY.

See NEW OR NEWLY DISCOVERED FACT.

FACTO. See DE JURE.

FACTOR. "A factor is an agent entrusted with the possession of goods for the purpose of selling them for his principal" (per Cotton L.J., *Stevens v Biller*, below). See POSSESSION.

"There are two extensive classes of mercantile agents, namely: factors, who are entrusted with the possession as well as the disposal of property; and brokers, who are employed to contract about it without being put in possession" (Smith, Mercantile Law, 9th edn, 106, cited with approval by Brett L.J., *Ex p. Dixon*, 4 Ch. D. 133, and by Chitty J., *Stevens v Biller*, 25 Ch. D. 31. See further, as to "factor", *Att-Gen v Trueman*, 13 L.J. Ex. 70; and as to distinction between "factor" and "broker", *Baring v Corrie*, 2 B. & Ald. 143). See hereon Bowstead on Agency; 5 Encyc. 286–288; cp. BROKER.

"Factor" (Income Tax Act 1842 (c.35) ss.41, 44) "is used in its strict legal sense as meaning a person who is in possession of the goods of his principal" (per Esher M.R., *Grainger v Gough* [1895] 1 Q.B. 71; see as to that case in House of Lords [1896] A.C. 325).

"Factors, servants, or assigns", in the suing and labouring clause of a marine insurance: see *Uzielli v Boston Marine Insurance*, 15 Q.B.D. 11.

A quaint use of "factor" occurs as 2 INST. 15, where it is said that Ranulph, Chaplain to William Rufus, "a man *subacto ingenio* and *profunda nequitia*, was a factor for the King in making merchandize of church livings".

FACTORY. An electricity generating station where boilers were being installed was not a "factory" as regards the workmen installing the boilers (*Street v British Electricity Authority* [1952] 2 Q.B. 399). A factory restaurant was held not to be a "factory" (*Thomas v British Thomson-Houston Co* [1953] 1 W.L.R. 67). A canteen was a "factory" (*Luttman v Imperial Chemical Industries* [1955] 1 W.L.R. 980). See also *Griffith v Ferrier*, 1952 S.L.T. 248 (place where one person employed was a "factory"); *Bowman v Ellerman Lines* (O.H.), 1953 S.L.T. 271 (public wet dock not a "factory"). An omnibus depot where buses are cleaned and washed was not a "factory" (*Jones v Crosville Motor Services* [1956] 1 W.L.R. 1425). A prison workshop is not a "factory" because neither the relationship of master and servant nor employment for wages exist there (*Pullin v Prison Commissioners* [1957] 1 W.L.R. 1186). "Factory includes a pumphouse within the curtilage of a factory used for pumping water for the purpose of a process carried on at the factory (*Newton v John Shanning & Son* [1962] 1 W.L.R. 30). But, where the water in a pumphouse is filtered outside the pumphouse and piped to consumers or reservoirs from the pumphouse, the pumphouse is not a "factory" (*Longhurst v Guildford, Godalming and District Water Board* [1963] A.C. 265, HL). The premises of a photographic agency where photographs are actually manufactured on the premises in a darkroom and a glazing room are a "factory" (*Paul Popper Ltd v Grimsey* [1963] 1 Q.B. 44). A place can be a "factory" although it has no boundary wall or fence (*Barry v Cleveland Bridge & Engineering Co* [1963] 1 All E.R. 192). "Factory" includes any yard or dry dock in which ships are repaired (*Gardiner v Admiralty*, 1963 S.L.T. 226).

The concrete apron of a hangar is not part of the hangar if inaccessible to aircraft, and is not therefore part of a "factory" (*Walsh v Allweather Mechanical Grouting Co* [1959] 2 Q.B. 300). The administrative block of an aircraft factory is part of the "factory" (*Powley v Bristol Siddeley Engines* [1966] 1 W.L.R. 729).

"Factory" (Factories Act 1961 (c.34) ss.124, 175). A prison workshop was held not to be a "factory" for the purposes of this Act (*Macdonald v Secretary of State for Scotland*, 1979 S.L.T. (Sh. Ct.) 8). But a hospital workshop was held to be a "factory" in a case where an employee was injured by a grinding machine installed therein (*Bromwich v National Ear, Nose and Throat Hospital* [1980] 2 All E.R. 663). A film studio where commercial films were produced was held to be a "factory" within the meaning of s.175(1)(a) (*Dunsby v British Broadcasting Corp, The Times*, July 25, 1983).

"Factories" (Rating Surcharge (Exemption) Regulations 1974 (SI 1974/1563) reg.3). Garage premises which included a showroom repair shops, a petrol filling area and offices were held to have been built for commercial and not industrial use, and were not, therefore, similar in character

to a "factory" within the meaning of this regulation (*Post Office v Oxford City Council* [1980] 2 All E.R. 439).

"Factory or other similar premises" (Capital Allowances Act 1968 (c.3) s.7(1)(a)). Buildings in which a plant hire operator stored, cleaned, serviced and repaired the equipment were not "factories or other similar premises" within the meaning of this section (*Vibroplant v Holland* [1982] 1 All E.R. 792). See also PROCESS.

Stat. Def., Factories Act 1961 (c.34) ss.147, 175.

See also ACTUAL USE OR OCCUPATION; ANCILLARY; CLOSE; CURTILAGE; DOCK; IN OR ABOUT; MACHINERY; MECHANICAL; PLANT; REPAIR; SEPARATE FACTORY; WAREHOUSE; WHARF.

FACTUM. See DEED; FAIT.

FACULTY. " 'Faculty' signifies a priviledge or speciall dispensation, granted unto a man by favour and indulgence to doe that which by the law he cannot doe" (Termes de la Ley).

As regards ecclesiastical matters, see Phil. Ecc. Law; 5 Encyc. 307.

FAIL. "Fails to land and take delivery" (Merchant Shipping Act 1862 (c.63) s.67) need not imply a wilful default in the cargo owner (*Miedbrodt v Fitzsimon*, L.R. 6 P.C. 306).

"Fail or determine": in some contexts it might be truly said that the trusts of a settled share have "determined" when the person entitled has become absolutely entitled and the fund has been paid over to him, but in the majority of cases the common conveyancing phrase "failed or determined" does not extend to a share paid out to somebody absolutely entitled (*Re Huntingdon's Settlement Trusts* [1949] Ch. 414).

If mine shall "fail", in a proviso for cesser in a mining lease, means (probably) if it shall become not workable, and (probably) does not refer to "exhaustion" (*Jervis v Tomkinson*, 26 L.J. Ex 44).

Where, in case of dispute, an agreement has appointed A as arbitrator, or "failing him" then B—there is a "failure" of A if, at the time when a dispute arises, he is abroad on business and not likely to come back at once so as not to be available for the arbitration in a proper business sense (*Re Wilson and Eastern Counties Navigation*, 8 T.L.R. 264).

"Failing the male issue": construed contextually as "if there shall be no son then living" (*Murray v Addenbrook*, 8 L.J.O.S. Ch. 79).

"Failing issue", as regards the vesting of property in Scotland, may mean, (a) "without having issue", or (b) "without having had issue", this latter being the prima facie meaning (*Carleton v Thomson*, 5 Macph. (HL) 151; *Boyd v Cunningham*, 27 S.L.R. 106).

"Failing such issue": see *Re Loughhead* [1918] 1 Ir. R. 227.

As regards disqualification for the parliamentary franchise, a man cannot "fail" to pay rates if he has not had the statutory notice requiring him to pay (*Re Neilson*, 28 S.L.R. 193).

"Fail to produce" ticket: see *Brotherton v Metropolitan District Railway*, 9 T.L.R. 645. Cp. *Hanks v Bridgman* [1896] 1 Q.B. 253, cited DELIVER; *Hunt v Green*, 23 T.L.R. 19.

Jockey "shall fail to procure licence": see *Loates v Maple*, 88 L.T. 288.

As to failure of a testamentary provision, see *Thomson's Trustees v Thomson*, 1946 S.L.T. 339, 342.

"Whom failing": see *Lord Advocate v Hotson*, 31 S.L.R. 915.

"Wrongfully fails": see *Grand Junction Waterworks Co v Rodocanachi* [1904] 2 K.B. 238, cited WASTE.

"Fail to exercise their power" (Criminal Appeal (Amendment) Act 1908 (c.46) s.2): see *R. v Southwark BC*, 124 L.T. 623.

"Failing agreement between the parties" was held to mean if not settled by agreement not that there must have been an unsuccessful attempt to agree (*Hogg v Vickers*, 14 B.W.C.C. 299).

"Failed . . . to discharge the obligation of a parent" (Children Act 1948 (c.43) s.2(1)(b)(v), as substituted by Children Act 1975 (c.72) s.57). The failure must involve culpability of a high degree, and evidence of behaviour over a period which constantly adheres to the pattern of which complaint is made, is required; as, for example, in this case where the parents' extreme lack of enthusiasm about weekend visits to their children in care of the local authority was held to amount to consistent failure to discharge obligations and to justify action under this section (*M. v Wigan Metropolitan BC* [1979] 3 W.L.R. 713). The necessary involvement of a high degree of culpability was confirmed in *O'Dare v South Glamorgan County* (1980) 10 Fam. Law 215, where it was held that the mother had not "failed" within the meaning of this section, notwithstanding that her conduct revealed her inadequacy as a mother, and that she had consistently abrogated her parental obligations.

"Fails to provide a specimen when required" (Road Traffic Act 1972 (c.20) s.8(7), as substituted by Transport Act 1981 (c.56) Sch.8; now Road Traffic Act 1988 (c.52) s.7(6)). A person who refuses to provide a second specimen of breath when lawfully required to do so commits an offence under this section notwithstanding that the first specimen he supplied may have been within the prescribed limits and that he could not, therefore, be convicted of the offence of driving with excess alcohol in his blood (*Stepniewski v Commissioner of Police of the Metropolis* [1985] R.T.R. 330). An accused who the justices were satisfied had tried as hard as he could, albeit unsuccessfully, to provide a specimen of breath for analysis was not guilty of failure under this section (*Cotgrove v Cooney* [1987] R.T.R. 124). A motorist who refused to provide a specimen of blood was guilty of failing to provide a specimen under this section, notwithstanding that he had offered to supply a urine sample instead (*Grix v Chief Constable of Kent* [1987] R.T.R. 193). To be guilty of failing to supply specimens under this section a motorist must have been warned of the penal consequences of refusal and to have understood the warning (*Chief Constable of Avon and Somerset Constabulary v Singh* [1988] R.T.R. 107). A motorist who, following a positive roadside breath test, had been taken to a police station, where the breath testing device was

inoperative, and had there refused to provide a blood specimen, was not guilty under this section because the officer concerned had omitted to inform him of the urine sample alternative (*DPP v Gordon* [1990] R.T.R. 29). A defendant who neither refused nor agreed to provide a specimen of breath, but remained silent, was held to have failed to provide a specimen within the meaning of this section (*Campbell v DPP* [1989] R.T.R. 256). The offence of failure to provide a breath specimen without reasonable excuse under s.7(6) of the 1988 Act is a single offence (*Shaw v DPP*; *R. v Bournemouth Crown Court, Ex p. Yates* (1992) 142 New L.J. 1683). Motorists were not guilty of failing to provide specimens for analysis in circumstances where they were not given opportunities to express their own preferences as to which samples, blood or urine, should be taken (*Holding v DPP* [1992] R.T.R. 192; *Renshaw v DPP* [1992] R.T.R. 186). The offence of failing to provide a speciment of breath does not depend upon whether the motorist was driving or attempting to drive with excess alcohol, or being in charge while unfit (*Crampsie v DPP* [1993] R.T.R. 383).

Stat. Def., Charities Act 1960 (c.58) s.14(5); Road Safety Act 1967 (c.30) s.7(1); Road Traffic Act 1972 (c.20) s.12; Transport Act 1981 (c.56) Sch.8 para.12.

FAILS. " 'Fails' is an ambiguous word that may or may not import the notion of fault (see Ingram v Ingram (1938) 38 SR (NSW) 407 at page 410 per Jordan C.J.). In some areas of the law, 'failure' is construed as involving a high degree of culpability (e.g. the failure to discharge the obligation of parenthood: see M v Wigan Metropolitan Borough Council [1978] 3 WLR 713, and O'Dare v South Glamorgan County Council (1980) 10 Fam Law 215). In other contexts, no fault is implied by the word." (*Coventry City Council v Vassell* [2011] EWHC 1542 (Admin).)

FAILURE. "Failure, neglect, or default" to perform an obligation: see *Lewis v Swansea*, 4 T.L.R. 706. See further DEFAULT.

"Failure" applied to a business man or concern means inability, by insolvency, to pay his or its debts (*Boyce v Ewart*, 1 Rice, 140).

"Failure of consideration": see IMPOSSIBLE; *Hermann v Charlesworth* [1905] 2 K.B. 123, and cases there cited.

Where the licence of an ante-1869 beerhouse was refused subject to compensation, a lease of the premises did not thereby determine as for a failure of consideration: see *Grimsdick v Sweetman* [1909] 2 K.B. 740, and cases therein cited.

Leave to appeal if court was "satisfied that a failure of justice will take place if the leave is not granted" (Housing of the Working Classes Act 1890 (c.70) art.26 Sch.2): see *Ex p. Birch* [1894] 2 I.R. 181. See further *Macknight's Trustee v Edinburgh*, 38 S.L.R. 59.

"Failure or determination of the trusts": these words in a will or settlement have been held not to cover the event of the failure of the trusts on the ground of perpetuity (*Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch.

275; *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank* [1964] Ch. 497). But the opposite view was taken in *Re Robinson's Will Trusts, Public Trustee v Gotto* [1963] 1 W.L.R. 628.

A surrender and disclaimer by the holder of a life interest in trust income was held not to be a "determination or failure" of the life interest within the terms of a settlement (*Re Young's Settlement Trusts, Royal Exchange Assurance v Taylor-Young* [1959] 1 W.L.R. 457).

"Failure to comply with the requirements of these rules" (R.S.C. Ord.2 r.1). To commence an action against a deceased person cannot be said to be such a "failure" (*Dawson (Bradford) v Dove* [1971] 1 Q.B. 330).

"Failure of issue": see DIE WITHOUT ISSUE.

FAILURE TO DISCLOSE. In order to be found to have failed to disclose information there must be a breach of a duty to disclose (*Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16).

FAIR. A fair "is a solemn or greater sort of market granted to any town by priviledge for the more speedy and commodious provision of such things as the subject needeth, or the utterance of such things as we abound in above our own uses and occasions" (Cowel). See further Jacob.

"The word 'fair' is a term of art and connotes a concourse of buyers and sellers for the purchase and sale of commodities pursuant to a franchise (i.e. a privilege granted under the Crown prerogative) with an optional addition of provision for amusement" (see Lloyd-Jacobs J., *Wyld v Silver* [1962] 1 Q.B. 169).

Every "fair is a market, but every market is not a fair" (2 INST. 406). But the two franchises of fair and market "are separate and distinct, and of equal dignity", and may co-exist in the same place on the same day (per Farwell J., *Newcastle v Worksop* [1902] 2 Ch. 156, cited FAIR OR MARKET TOLLS).

"Fair or wake" is a fair with the attributes of a wake (*Wyld v Silver* [1963] 1 Ch. 243). See WAKE.

If the place for holding the fair "be not limited by the King's grant, they (the town authority) may keep it where they please, or, rather, where they can most conveniently; and if it be so limited, they may keep it in what part of such place they will" (*Dixon v Robinson*, 3 Mod. 107). Cp. *Gingell v Stepney* [1906] 2 K.B. 468, cited MARKET.

A temperance festival with attendant roundabouts and shows is not a fair within the meaning of the Newcastle Town Moor Acts 1774 (c. cv), and 1870 (c. cxx), nor is a horse race with similar concomitants: see *Walker v Murphy* [1914] 2 Ch. 293; affirmed [1915] 1 Ch. 71.

In a Local Act prohibiting the setting up a "market of fair" without permission of the local authority: Is the setting up of swing-boats, merry-go-rounds and such like, within the word "fair"? The justices said "yes", and therein were upheld by Lawrence J., but Bruce J. said "no", who, however, being the junior judge, withdrew his judgment and the conviction stood

(*Collins v Cooper*, 68 L.T. 450); in that case, Bruce J. said that the selling of goods is a necessary element in a "fair".

Stat. Def., Gambling Act 2005 (c.19) s.286.

"Pleasure fair": Stat. Def., Public Health Act 1961 (c.64) s.75(2).

Grant of a fair "with all liberties": see WITH ALL LIBERTIES.

See FAIR OR MARKET TOLLS.

Stat. Def., "The expression 'fair' is used in this Part as a shorter modern equivalent of the expression 'just and equitable' (and is not therefore intended to exclude the application of any judicial or other practice relating to the construction and application of that expression)." (Banking Act 2009 s.93.)

FAIR AND ACCURATE. In deciding for the purposes of the law of defamation whether a report is fair and accurate, the courts need to consider how much non-privileged material has been mixed with privileged material, whether a reader could distinguish between the two and the degree of connection between the two (*Curistan v Times Newspapers* [2007] EWHC 926 (QB)).

FAIR AND EQUITABLE. "Fair and equitable" in Mining Industry Act 1926 (c.28) s.7: see *Re Denaby & Cadeby Main Collieries Ltd*, 43 T.L.R. 322; *Re Amalgamated Anthracite Collieries Ltd*, 43 T.L.R. 672.

FAIR AND PUBLIC HEARING. For the purposes of the requirement for a fair and public hearing by an independent and impartial tribunal under art.6(1) of the European Convention on Human Rights, a clerk to a court can be sufficiently independent (*Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] 1 All E.R. 1106, PC).

FAIR AND REASONABLE. "Fair and reasonable compensation", under Agricultural Holdings (England) Act 1883 (c.61) para.2 s.5—but see now Agricultural Holdings Act 1948 (c.63) s.41; see Woodf.

"Fair and reasonable supposition" of right (Malicious Damage Act 1861 (c.97) s.52): see *White v Feast*, L.R. 7 Q.B. 353, followed in *Brooks v Hamlyn*, 79 L.T. 734; see also BONA FIDE.

(Unfair Contract Terms Act 1977 (c.50) s.11(3).) Where a surveyor engaged by a building society to carry out a visual inspection of a property negligently failed to discover a structural defect which he would have discovered had he exercised proper care, it was not "fair and reasonable" to allow him to rely on general disclaimers of liability for negligence contained in his report and in the mortgage application (*Smith v Bush, Eric S. (a firm)*; *Harris v Wyre Forest DC* [1989] 2 W.L.R. 790).

A provision in an option for renewal of a lease that the rent was to be "a fair and reasonable market rent at the time" envisaged the rent at which the

demised premises might reasonably be expected to be let in the open market (*ARC v Schofield* [1990] E.G. 113).

"Fair and reasonable" (Truck Act 1896 (c.14) s.1(1)(d)): see FINE.

See REASONABLE.

FAIR ANNUAL VALUE. See FULL ANNUAL VALUE.

FAIR AVERAGE QUALITY. "If goods coming from a particular port are sold as being of 'a fair average quality', a fair average quality of the various sorts of the article which comes from that port is meant, and not of the sorts which come from all parts of the world" (WOOD, 354, citing *Jones v Clark*, 27 L.J. Ex. 165). See hereon *Couturier v Hastie*, 5 H.L. Cas. 673.

FAIR COMMENT. "Comment is fair comment if the relevant facts stated in the libel and any other facts upon which the comment is built but not stated in the libel are true, and the inferences drawn from them and the comments made upon them in the libel are the honest opinions of the writer and are inferences and comments which a fair man might make upon those facts" (Steph. Cr. (9th edn) 297).

"The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgment of Tenterden C.J. in *Macleod v Wakley* (3 C. & P. 313), where he said: 'Whatever is fair and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; then it will be a "libel" ' (per Bowen L.J., *Merivale v Carson*, 20 Q.B.D. 283). See further *Wason v Walter* (1868), L.R. 4 Q.B. 73; *McQuire v Western Morning News Co* [1903] 2 K.B. 100; *Campbell v Spottiswoode*, 32 L.J.Q.B. 185, followed and applied in *Joynt v Cycle Trade Publishing Co* [1904] 2 K.B. 292; *Dakhyl v Labouchere* [1908] 2 K.B. 325; *Hunt v "Star" Newspaper Co.* [1908] 2 K.B. 309. See further *Aga Khan v The Times Publishing Co* [1924] 1 K.B. 680.

Comment, even on a matter of public interest, is not "fair" if actuated by malice (*Thomas v Bradbury, Agnew & Co* [1906] 2 K.B. 627, which case see as to proof of malice).

"It is for the jury in a proper case to determine what is comment and what is fact; but a prerequisite to their right is that the words are capable of being a statement of a fact or facts. It is for the judge alone to decide whether they are so capable, and whether his ruling is right or wrong is a matter of law for the decision of an appellate tribunal . . . The question is not whether the comment is justified in the eyes of judge or jury, but whether it is the honest expression of the commentator's real view and not mere abuse or invective under the guise of criticism. . . . In alleging unfairness the plaintiff takes on him or herself the onus . . . to prove that the criticism is unfair either from the language used or from some extraneous circumstance" (per Lord Porter in

Turner v Metro-Goldwyn-Mayer-Pictures [1950] 1 All E.R. 449, HL). See also *Gardiner v John Fairfax & Sons Property Ltd* [1942] N.S.W.S.R. 171.

Comment, "however exaggerated, obstinate or prejudiced", is fair if "honestly held by the writer" (per Diplock J. in *Silkin v Beaverbrook Newspapers* [1958] 1 W.L.R. 743).

See hereon PUBLIC INTEREST; QUACK.

FAIR DEALING. "Fair dealing . . . reporting current events" (Copyright Act 1988 (c.48) s.30(2)). The defence of fair dealing under this section is not limited to current events in general news programmes. The 1990 World Cup football finals were "current events" and the showing by one television broadcasting company of film of another broadcasting company's live broadcasts was "fair dealing" (*British Broadcasting Corp v British Satellite Broadcasting* [1991] 3 W.L.R. 174).

FAIR MARKET VALUE. See *Re Chandler's Brewery Co and London CC* [1903] 1 K.B. 569, cited VALUE. Cp. FAIR VALUE.

FAIR-MINDED. "What is meant by 'fair-minded' and 'informed' in this context was explained by Lord Hope of Craighead in Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 WLR 2416 at [1] to [3] of his speech: '1 The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to. 2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.' " (*A v B* [2011] EWHC 2345 (Comm).)

FAIR OPPORTUNITY. See CONSTRUCTIVE; OPPORTUNITY.