ledge of the witness' handwriting. He was then asked, whether he believed the signature of the attesting witness in the will to be written by him? This question was overruled. 3. He was finally asked, whether, on looking at the signature in the will, he believed it to be a genuine or an imitative character of handwriting; he replied, that according to his belief it was an imitation. This evidence was received.

"The state of the facts, with reference to the second question, on which the evidence was rejected, is as follows:—an attesting witness to a will, called on the part of the defendant to prove the execution of the will, stated one of the signatures to be his handwriting; he also stated, in his cross-examination, other signatures (produced by the plaintiff's counsel) to be his handwriting;—on the part of the defendant, a witness was called, who had before the trial inspected those other signatures, as to which the attesting witness had been cross-examined, and had been able, as he stated, by means of his inspection, to acquire a knowledge of the character of the handwriting; the counsel for the plaintiff then proposed to ask the witness whether he believed the signature of the attesting witness in the will, to be the handwriting of the witness who had proved the execution of the will. This was not allowed by the judge.

"The evidence first proposed in this case, namely, the witness' answer to the question whether he believed the signature on the will, and the signature on the depositions, and the other detached signatures, to be the same handwriting, and written by the same person,—which question he was to resolve by having those signatures laid before him, for his inspection, and for his comparing them together,—was clearly nothing more than proof by direct comparison, made by means of juxta-position of the documents, and, therefore, properly rejected in conformity with cases before decided. The evidence, last offered, namely, the opinion of the witness (who was experienced in the examination of handwriting, and employed more especially for ascertaining the genuineness or falseness of written instruments), upon the question whether the signature on the will was written in a disguised, feigned, or imitative style of writing, or was of a genuine and natural character, was received in conformity with some former decisions. The question which underwent so much discussion, and upon which finally the judges differed in opinion, was this, whether a witness who had, before his appearance on the trial, seen the signatures on the depositions, and the detached signatures, and who had thus, as he said, acquired a knowledge of the character of the handwriting, might be asked, whether he believed the signature on the will to be the handwriting of the person who wrote the other signatures which he had seen. The following summary of the arguments on each side of the question may, perhaps, assist the reader to form an opinion for himself upon this subject.

"Against the reception of the evidence it was argued: that this is a new mode of proof, not sanctioned by any decisions, and that the extension of the existing rule would be attended with inconvenience, possibly with danger to the administration of justice. The knowledge of a witness, called to prove or disprove handwriting, must be acquired by one or other of the following modes,—either by seeing the party write, or by seeing letters or other written documents which purport to be the handwriting of the party, and on which he has acted, or respecting which he has had some communication with the party, such as would, in the ordinary transactions of life, induce a reasonable presumption, that the letters or documents were the handwriting of the party. The knowledge, so acquired, is usually, acquired incidentally and unintentionally, under no circumstances of bias or suspicion, and without reference to any particular object, person or document. But this is very different from the means of knowledge here supplied to the witness, who has formed his opinion, as to the character of handwriting, from the inspection of documents put into his hand by the attorney of one of the litigating parties, with reference to a trial immediately about to commence: the knowledge of the witness was acquired only by the inspection of certain signatures, which were selected by the party contesting the genuineness of the signature on the will, and shown to the witness for one particular object and purpose: in all such cases, where such means are resorted to, there must be great danger of a selection unfairly made, such as would not exhibit a fair specimen of the general character of handwriting. The mode of proof, now proposed, is, in effect, a comparison of handwriting; and direct comparison by a witness, (except in the single case of ancient writings), has been uniformly rejected. The rule of law, which excludes direct comparison by a witness, while it admits the opinion of another witness who has formed a standard or impression in his mind (by one of the recognized modes before mentioned) as to the general character of the handwriting and who compares with that standard the writing in dispute, must be founded on this principle, that proof by such direct comparison would in most cases be unsatisfactory and fallacious. The comparison even of a fair specimen with a disputed writing is generally unsatisfactory, and may be expected to lead to fanciful and unsound conclusions. The knowledge of the general character of handwriting, which a witness has acquired incidentally and unintentionally, or naturally, and without bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by the one side or the other with a view to a particular object. By the reception of the proposed evidence, serious inconveniences and great embarrassment to juries would be occasioned by the number of collateral issues, to which the evidence might give rise. Perhaps the genuineness of the specimens or documents, from which the witness has acquired his know-

ledge of the handwritiug, may be disputed: in that case, an issue would arise, on each of the documents, whether the writer of the disputed signature wrote those documents. Or, if the genuineness of the signatures or documents were undisputed, a question might arise, whether they were fairly or partially selected, and whether they exhibit a true standard as to the general character of the handwriting: in that case a complication of issues still more perplexing, must be the consequence. If evidence of the kind proposed is to be admitted for disproving, it must be equally admissible for proving handwriting; if admissible for proving or disproving the handwriting of a witness, it must be equally admissible for proving or disproving the handwriting of a party to the suit, or to prove or disprove the handwriting of a prisoner tried for forgery. Thus, 'a conviction of forgery might pass on the opinion which a single witness might form, founded solely on the examination of signatures, or of a single signature, presented to him the night before by a prosecutor, who need not be called as a witness on the trial, to explain when and where such specimen had been procured, or from how many selected;—the prisoner, on the other hand, being wholly unprepared to enter into any explanation. It is no answer to this to say, that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once. That is an extreme case, upon a principle not objectionable in itself;—for no one can deny, that seeing a party write is at least one correct mode of acquiring a knowledge of his handwriting. Here, the danger is in the principle itself, namely, that selected specimens may be made the standard from which the witness is to judge.'

For the reception of the proposed evidence, it was argued: There is no rule of law which declares that the knowledge of handwriting, requisite for enabling a witness to form his opinion as to the general character, shall be acquired only by one or other of the modes specified—namely, from seeing a person write, or by means of correspondence,—and by no other mode. It is true, those are the ordinary and recognized modes; but they are not the only modes, nor exclusive of all others,—if other media of proof can be suggested which appear reasonable and satisfactory, and which are not contrary to decided cases. No case has yet been decided, which excludes the proposed evidence. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Instances may be supposed in prosecutions for forgery, when information may not be attainable by the ordinary modes, and in which evidence of the kind here proposed, might be completely satisfactory, and at once lead to an acquittal. A case has, indeed, been put, in which, it is supposed, such evidence would operate unjustly, and to the prisoner's prejudice. Such a thing is possible, but not probable; and it is to be remembered, evidence tending to convic-

tion is always more scrupulously weighed by the judge, and more likely to be distrusted by the jury, than evidence tending to acquittal. Besides, there are ample securities against danger of injustice in such cases, and against all undue operation of this, as of any other kind of evidence; the counsel sifts it, the judge weighs it, and the jury give the full benefit of doubt: in all such cases, the result need not be feared. Much stress has been laid on the inconvenience of collateral issues, which, it is supposed, might result from the admission of the proposed evidence,—but which would probably occur in very few cases. Under the existing rules for the proving or disproving of handwriting, collateral issues may arise on the evidence of witnesses in various instances that might be suggested; but this has never been allowed to be a good reason for excluding their testimony. Such an objection does not relate to the *quality* or *sufficiency* of the evidence, and ought not to be allowed to exclude in any case. If the evidence is right in its quality, and adequate for the purpose for which it is intended, it should be received; if it is not such, it should be rejected—but not rejected from any apprehension of collateral issues. To admit such a principle, in the present case, would be to introduce into the law of evidence a new rule of exclusion. It has been objected, that the proof offered was in effect only comparison of handwriting. That it was not *comparison*, in point of *fact*, according to the true meaning of that term, is quite clear: whether it was *equivalent* only, is another question, on which nothing need be said, the point under discussion being as to the reception or rejection of the evidence, not as to its weight. The witness acquired his knowledge of the character of the handwriting, in this case, from seeing specimens before the trial; and the question, proposed to him, was with reference to that knowledge, and that only. If such evidence is to be rejected as unsatisfactory or insufficient, what is to be said, when the means of knowledge are derived from a by gone correspondence of considerable standing? Suppose a person to have seen another sign or write one or more papers, or to have received one or more letters from him, but that, from length of time, his general recollection has become so faint and indistinct as to render him unable to form an opinion,—he would still be allowed, at any time before the trial, even shortly before his examination, to peruse and study such papers and letters, for the purposes of reviving his memory, and may afterwards give evidence for proving or disproving the disputed writing. Those papers and letters may come from the possession of the attorney in the cause, and he may have selected them as the best materials for serving his purpose; still the witness may revive his memory from these sources, and will not be excluded from giving evidence. This leads to the only remaining objection, which is, that the documents, from which the witness acquired his knowledge, were selected by one of the

parties, for a particular object; and that they may have been unfairly selected, and in that case would exhibit an unfair standard, by which the witness might be misled. But this argument will not justify the absolute exclusion of the proposed evidence. In almost all cases, where the genuineness of handwriting is disputed, there is a selection of witnesses, and selection of evidence, and for a particular object,—but this has never been considered a good reason for the exclusion of evidence. Whether the documents were selected unfairly, partially, and with intent to mislead or deceive,—or, on the other hand, whether they were fairly selected, and brought forward *bonâ fide*, for the purpose of affording correct information.—are questions, fit to be considered in estimating the value and weight of the evidence when admitted; but it ought not to be presumed, that there was such contrivance in the selection, as would justify exclusion.

"A few additional remarks are submitted for the consideration of the reader. The objections, founded on the supposed inconveniences likely to arise from collateral issues, or from the selection of papers, appear to have been fully answered, and may properly, as it is conceived, be laid out of the case. The single question which will then remain, is whether the proposed evidence can be admitted, consistently with the principle of the established rules. Now, the principle is, that all evidence of handwriting is founded on the belief which a witness entertains, upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge of the handwriting of the person whose writing is disputed. According to this principle, a witness, called to give evidence of handwriting, is supposed to have seen some writing which has been written by that individual whose writing is in question; there must be, therefore, some proof from which the jury, or the judge (when he has to decide without a jury) may reasonably presume that the writings, on which the witness has formed the exemplar in his mind, were written by that individual; and any mode of proof, by which the jury may reasonably be satisfied on that head, appears to be admissible within the plain meaning of the principle above mentioned. The thing wanted, to enable the witness to give evidence of handwriting, is an exemplar formed by him upon the sight of some genuine writing; but the proof of the genuineness of the writing from which the exemplar is formed, need not be confined exclusively to that witness alone; any other person, who can prove the writing to be genuine, is competent, and equally admissible. One witness may prove certain papers to have been written by the person whose writing is in dispute; and another witness, who, from having seen those papers, has formed an exemplar in his mind, may declare his opinion whether the same person who wrote those papers wrote also the writing in question. Here two witnesses are employed instead of one; but there can be no ob-

jection to this,—the facts proved by them severally being independent of each, and unconnected in their nature. The proofs altogether are complete, and perfectly legitimate within the principle. It will be useful to bear in mind these remarks, as the difference of opinion among the judges arose from the different construction put by them on the principle of the rule. Patteson, J., after laying down the principle in the words before cited, proceeds thus : 'That knowledge' (namely, the witness' previous knowledge of the person's handwriting) 'may have been acquired either by seeing the party write, or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents, &c.—or by any other mode *of communication between the party and the witness*, which in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party.' Here a limitation is imposed on the mode of proving the genuineness of the documents; and the proof is confined to the witness who is called to give evidence as to the writing in dispute. This restrictive limitation is objected to; the judges who considered the proposed evidence admissible, would lay down the rule in more general terms, and to this effect,—that the previous knowledge, requisite to enable the witness to form an exemplar in his mind, may be derived from any writing which can be shown, *either by him or by any other witness*, to have been the handwriting of the person whose writing is in question. The modes of proof pointed out by the learned judge are the ordinary modes; but they are not the only modes by which the fact may satisfactorily be proved; there is no injunction in the law of evidence against the use of any other mode whatever, which may be adequate for the purpose; and this is the first case in which such a restrictive rule has been laid down. The ordinary modes may be sufficient in ordinary cases. But it may happen, as Lord Denman observed, that the means of obtaining such previous requisite knowledge from any one who has either seen the person write, or held correspondence with him, may be unattainable; if all other modes of proof are therefore to be excluded, injustice may be the consequence. Suppose an action were brought against an executor on a written instrument, alleged to have been made by the testator, which the defendant contests as a forgery, and that no witness who ever saw the testator write or ever had correspondence or communication with him, can be brought forward on the part of the defendant to speak to the handwriting in question; but suppose writings can be produced, which were found among the testator's papers, and which are admitted by the plaintiff himself to have been written by the testator,—can there be any objection, in principle, against receiving evidence of the belief of a person who has inspected those writings, and who

declares that he has made himself acquainted with the character of the handwriting? When the writings, seen by the witness, are admitted by the opposite party to have been written by the person whom he charges with having written the instrument in question, the jury would be satisfied that the writings are genuine, and if upon these genuine writings the exemplar has been formed in the mind of the witness, nothing seems to be wanting, the proof appears complete. This is precisely the kind of evidence which was tendered in the principal case. Surely, the evidence is not defective from the circumstance that the witness has acquired his knowledge of the testator's handwriting, without having had previous personal communication with him. One material part of the requisite proofs is supplied by the witness, (namely, his opinion on comparing the disputed writing with the exemplar which he has formed from the sight of certain papers); the other part of the proofs (namely, the proof of the genuineness of those papers) is supplied, not by the same witness, but from a quarter unimpeachable and conclusive: both together make the proof complete. As to the effect of such evidence, compared with that most commonly given, nothing need be said, the only point to be considered being its admissibility. Some will think this mode of proof superior to the other, as being the result of attention, observation and experience. Others prefer the evidence of a witness who has acquired his knowledge of writing accidentally and unintentionally. Where there is such difference of opinion, the most prudent course might be, not to exclude either kind of evidence, but to admit both, and give to each its due weight. It may be laid down as a first principle, that exclusion is generally an evil, and admission generally safe, right and wise. It is certain, the administration of justice in our Courts has suffered, not from the too free admission of evidence, but from too rigid exclusion."

But in the Fitzwalter peerage case(*t*) this was somewhat shaken:

"The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter, when it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by an ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents, which were admitted to have been executed by the ancestor;—that they were written in a remarkable character; and that his mind was so impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. The Attorney-General having objected to the tes-

(*t*) 10 *Cl. and F.* 193.

timony of this witness, on the ground that he had gained his knowledge of the handwriting, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures for the *express purpose* of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible, the latter noble lord observing, that the cases of *Doe v. Tarver*, and *Sparrow v. Farrant*, if correctly reported, had gone further than the rule was ever carried; that the Lord Chief Justice entertained the same views on this last subject; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised. The family solicitor of the claimant was then called, and having stated that he had acquired a knowledge of the ancestor's handwriting, from having had occasion, at different times, to examine, in *the course of his business*, many deeds and other instruments purporting to have been written or signed by him, the lords considered this witness competent to prove the handwriting of the pedigree. The distinction drawn between these two witnesses is obvious. The former had studied the signatures admitted to be genuine, with the avowed purpose of discovering a similitude between them and the writing in dispute, and might well be supposed to bring to the investigation that bias in favour of the party calling him, which is proverbially displayed by scientific witnesses; the latter had acquired his knowledge incidentally, and unintentionally, under no circumstances of prejudice or suspicion, and, what is especially worthy of remark, without reference to any particular object, person, or document."

§ 558. But a witness might speak to the probable period about which an ancient writing was written, and an *expert* has been permitted to state his belief that a document was in a feigned hand; but in neither of these cases was the belief or opinion the product of direct comparison, but in the one, of antiquarian knowledge; in the other, of general experience of the character of genuine handwriting: which possesses a freedom and boldness distinguishable from feigned character by scientific eyes.

§ 559. It has always been permitted to the jury, when a document admitted to be genuine is in evidence in the cause, to compare with it the disputed document.(v)

§ 560. But there has been a difference of opinion as to the propriety of allowing a comparison, where the document though confessedly genuine has not been put in evidence, and is irrelevant to the issue.

(v) The whole discussion may be advantageously perused in Taylor, § 1343—50. The passage is too long for transcription.

In the case of *Griffits v. Ivory*,(w) Lord Denman rejected such evidence. But in *Young v. Honner*,(x) the Court of Exchequer refused to conform to the Queen's Bench ruling, and permitted the comparison to be made.

§ 561. In the Company's Courts it has been customary to allow the comparison in either case; where the document with which comparison is to be made has been put in evidence; *or* where it is admitted to be genuine, though it is not relevant to the issue.(y)

§ 562. Act II. of 1855, Section XLVIII. has set these questions definitively at rest by the following provision:

"On an enquiry whether a signature, writing or seal is genuine, any undisputed signature, writing or seal of the party, whose signature, writing or seal is under dispute, may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause."

I have however entered at this length into the point, because it is only by knowing how the old law stood, that the student can appreciate the new.(z)

§ 563. Attesting witnesses in India are frequently marskmen. The Hindu law rationally enough conveys a caution against the practice.(a) They are nevertheless *competent* witnesses, however unsatisfactory.

See Morley's Digest, N. S. Tit. Ev. c. 48.

"Persons who cannot read and write may be attesting witnesses to a legal instrument. *Gopee Sirdar v. Turiekoollah Sirdar.* 31st Aug. 1847. S. D. A. Decis. Beng. 488.—Tucker."

And case 9.

"The attestation of a bond by persons who can neither read nor write is not on that account to be rejected. *Gopee Sirdar v. Turiekoollah Sirdar.* 31st Aug. 1847. S. D. A. Decis. Beng. 488.—Tucker."

§ 564. Where an attesting witness denies his signature, or refuses

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(w) *A. and E.*, p. 322.

(x) 2 *M. and R.* 536; *S. C.* 1. *C. and K.* 51.

(y) See *Macpherson*, p. 239, and see various cases in Mad. Sud. Ad. Rep.

(z) At the trial of Brophy in the February Sessions of 1856, Sir C. Rawlinson refused to allow a comparison of handwriting. He ruled that the word *cause* confined the operation of the law to *civil* actions; and he declined to extend it to criminal trials.

(a) As the English law of evidence now obtains, I have not thought it worth while to illustrate the text with references to the Hindu law of evidence. Those who wish to study it however will find it well compiled from the Mclachrara in Macnaghten's Hindu law, vol. 1. p. 239—343.

to testify, his attestation may be proved by independent testimony. See *Lowe v. Joliffe*.(b)

"On a trial at bar on an issue out of chancery, *Devisavit vel non*, concerning lands in Worcestershire; three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, and a dozen servants of the testator, all unanimously, swore him to be utterly incapable of making a will, or transacting any other business, at the time of making the supposed will and codicil, or at any intermediate time. To encounter this evidence, the counsel for the plaintiff examined several of the nobility, and principal gentry of the county of Worcester; who frequently and familiarly conversed with Mr. Tolliffe, the testator, during that whole period, and some on the day whereon the will was made; and also two eminent physicians, who occasionally attended him; and who all strongly deposed to his entire sanity, and more than ordinary intellectual vigour. They also read the deposition of the attorney, who drew and witnessed the codicil; who was dead, but his testimony perpetrated in chancery; and who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct, in directing the contents of his codicil. They also offered to examine Mr. Rupert Dovey, an attorney of unblemished reputation, who drew the will; whereby he and another were made executors in trust, to sell part of the estate for payment of debts, with a legacy of 200*l.* each for their trouble.

"Mr. Dovey was accordingly sworn; and upon the whole it appeared to be a very black conspiracy, to set aside this gentleman's will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will, and codicil, after an absence of five minutes.

"The Chief Justice then declared himself fully persuaded, that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to have committed them in Court, but they had withdrawn themselves. However, a prosecution of some of them for perjury, was strongly recommended by the Court. The three testamentary witnesses were afterwards convicted."

§ 565. A document thirty years old, coming from the proper custody, does not require the evidence of an attesting witness to prove it,

(b) 1 *Wm. Blackst.*, p. 365.

(though he may be present) independently of Section XXXVII. of Act II. of 1855. See Morley's Digest, O. S. Tit. Ev. c. 122.

"Where the witnesses to a mortgage bond were dead, but the bond was supported by subsequent possession, the deed, as an old one, was held to prove itself. *Goolabchund Umbaram* v. *Pooshotum Hurjeevun*. 6th Feb. 1823. 2 Borr. 395.—Romer, Sutherland & Ironside."

This rule results from considerations of general convenience. See *Doe v. Wooley*.(c) There Lord Tenterden said:

"As to the first point I am of opinion that the rule of computing the thirty years from the date of a deed is equally applicable to a will. The principle upon which deeds after that period are received in evidence, without proof of the execution, is, that the witnesses may be presumed to have died. But it was urged that when the existence of an attesting witness is proved, he must be called. That, however, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness until the time of the trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant."

§ 566. If an attesting witness has become blind or insane, or is dead, or has been kept out of the way, proof of any of these facts would afford good ground for the Court to admit the document by proof *aliunde*.

See Morley's Digest, N. S. Tit. Ev. case 69.

"When the attesting witnesses to a document are dead, the holder of the document is not debarred from proving it by other means, such as, the production of the writer of it, and of persons who were present at the time of its execution. *Ranee Chooramunnee and others v. Sonatun Manjee*. 19th June 1848. S. D. A. Beng. 554.—Tucker."

In any such case, evidence may be given of the signature of the attesting witness, which is sufficient without proving the execution of the document by the party, as the witness is presumed not to have signed his attestation without all having been correctly done: or proof may be offered of the signature of the party under Act II. of 1855, Section XXXVII.

§ 567. Sickness is rather a ground for postponing a trial, unless the sickness is of a permanent character. A blind witness should be called, because though he cannot recognize his signature, he may recollect circumstances connected with the execution.

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(c) 8 *B. and C.*, p. 22.

§ 568. When a document is in the hands of the opposite party, timely notice must be given to him to produce it : but where, from the nature of the proceeding, the party in the possession of the document, necessarily has notice that he is charged with the possession, notice is dispensed with. For *cessante ratione cessat lex.* For instance if A. sues B. for the recovery of a bond or title deed, it would be clearly superfluous to give him notice to produce the instrument, inasmuch as he must know, from the nature of the action, that he is charged with possession : and the object of notice is to prevent the party who ought to produce it from saying that he is taken by surprize, or would have brought it with him, had he known it would be wanted. See *How v. Hall.*(d) There Lord Ellenborough said :—

" The question is whether, where the form of the action gives the defendant notice to be prepared to produce the instrument, if necessary to falsify the plaintiff's evidence it shall be necessary to give him another notice to produce it. Supposing the thing converted had been a book, instead of a bond, could not trover have been maintained without giving the defendant notice to produce it. The plaintiff is to show, as well as he can, what the instrument is that he seeks to recover as his own from the possession of the defendant : and if he give a wrong description of it, the defendant may set it right by producing the thing. What further notice can be necessary to show that the plaintiff means to charge the defendant with having possession of the instrument, than the declaration itself."

And Le Blanc, J. said :

" Where the contents of a written instrument may be proved as evidence in a cause, and it is uncertain beforehand whether or not such evidence will be brought forward at the trial, we see the good sense of the rule which requires previous notice to be given to the adverse party to produce it if it be in his possession, before secondary evidence of its contents can be received, that he may not be taken by surprize ; but where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice ; though a practice has crept in of giving such further notice, in order to prevent any question. The defendant must, from the nature of the thing, be prepared to produce the true instrument, if the evidence given by the plaintiff describe it untruly. If notice to produce the instrument were necessary to be given in a case of this kind, I fear it would extend to every case where a man was charged with stealing a note, that the prosecutor, if he had not gotten it from him again, must give him notice to produce it, before he could give evidence of the felony."

(d) 14 *East* 274.

§ 569. So in all criminal cases, theft for instance, wherein a man is charged with having stolen a document or thing, it is not necessary to give him notice to produce it.

§ 570. On proof that a party has received notice, if he refuse to produce the document, the party calling for it is entitled to give secondary evidence of its contents.

§ 571. Where a document is produced, it is still incumbent on the party calling for it, to prove it; as for instance, by adducing an attesting witness or other proof of the handwriting, unless the party producing it admits the execution. If an assignee of the document produce it, it must still be proved. See *Gordon v. Secretan.*(e)

"Where an instrument is produced at the trial by one of the parties in consequence of notice from the other: which when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it."

See also *Burnett v. Lynch.*(f)

"In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it: Held that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease."

§ 572. But if the party producing the document claim an interest under it, this is tantamount to an admission by him of the genuineness of the document, and supersedes the necessity of further proof: for instance, in an action by a lessee against the assignee of the lease, —*i. e.* the sublessee—for a breach of covenant. See *Pearce v. Hooper.*(g)

"On the other hand, the defendant contended, that since these instruments came out of the hands of the plaintiff, under a notice to produce them, and contained his title to the premises, (if he had any title,) it must be considered that further proof of the execution of them was unnecessary. Graham, B. was inclined to receive the evidence, but, upon the authorities cited, rejected it, reserving the point; by the production of the original deeds the defendant was incapacitated from giving in evidence a copy of it, with which he was prepared; and the jury found a verdict for the plaintiff."

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(e) 8 *East* 548.
(f) *B. and C.*, 589.
(g) 3 *Taunt.* 60.

§ 573. When the document is not produced, pursuant to notice, a copy or counterpart may be given ; or if no copy, verbal evidence of the contents may be given : that is to say secondary evidence of the original.

See *Dwyer v. Collins.*(h)

" Where a party to a suit, or his Attorney, has a document with him in Court, he may be called on to produce it without previous notice, and in the event of his refusing, the opposite party may give secondary evidence."

And see also Morley's Digest, N. S. Tit. Ev. c. 82.

" Where the *Satás* were copied in the plaintiff's books, and stamped copies of extracts from those books were produced to support the testimony of the witnesses to the transaction ; it was held, that such copies were admissible in evidence, as the original *Satás*, being with the defendant, and he having failed to produce them, the Court were obliged to have recourse to secondary evidence. *Bindrabund v. Menzies.* 17th Aug. 1847. 2 Decis. N. W. P. 261.—Tayler and Lushington. (Begbie dissent.")

Ib. c. 124.

" Where a document was in the hands of the defendant, the plaintiff was allowed to prove its contents by secondary evidence. *Fukeer Chundur Bukshee and another v. Goluck Chundur Shah.* 21st Feb. 1848. S. D. A. Decis. Beng. 103.—Jackson."

By Act II. of 1855, Section XXXV. a copy made by a copying machine affords proof of its own correctness. A certified copy, examined or sworn copy, or if none such, verbal evidence of the contents of the original is receivable. Nor is it necessary, where the preliminaries have been laid for introducing secondary evidence, to give one description rather than another ; for there are no *degrees* of secondary evidence ; in the eye of the law all are equal. See *Doe dem : Gilbert v. Ross.*(i)

" Lord Abinger, C. B.—There can be no rule upon this point. Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is, that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to

(h) 16 *Jur.* 569.
(i) 7 *Mees. and Wels.*, 102.

the party withholding it. But the law makes no distinction between one class of secondary evidence and another. In cases where the contents of public records and documents are to be proved, examined copies are allowed as primary evidence; but this is upon public grounds; for in these cases, the law, for public convenience, gives credit to the sworn testimony of any witness who examines the entry, and produces the copy.

"Parke, B.—I concur entirely in refusing the rule on this ground. There can be no doubt that an attested copy is more satisfactory, and therefore, in that sense, better evidence than mere parol testimony; but whether it excludes parol testimony, is a very different thing. The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce. And therefore, parol evidence of the contents of a deed, or other written instrument, cannot be given, without producing or accounting for the instrument itself. But as soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence, that there is any attested copy, or better species of secondary evidence behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shown from other sources, that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. There is a case of *Brown v. Woodman*, in which I am reported to have decided this point, and my ruling was not afterwards questioned.

"Alderson, B.—I agree with my brother Parke, that the objection must arise from the nature of the evidence itself. If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case,—the existence of an original does not show the existence of any copy; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side, at the trial, may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all.

"Gurney, B., concurred."

At the same time, if a copy exists and is producible, its non-pro-

duction, and the substitution of oral evidence of the contents of the original, would be open to strong remarks.

§ 574. How the production of a document by a *witness* may be enforced, we have already explained (see ante § 336 et seq.) It may be observed, that a party, or indeed any person in Court, may be compelled to produce a document legally producible by him, without notice, see Act II. of 1855, Section XXV. And that a *party*, not *offering himself* as a witness, need not produce a document which is not relevant or material to the *case* of the party requiring its production, nor any confidential communication between himself and his legal adviser, see Act II. of 1855, Section XXII. It is a well established rule of evidence, that a person is not bound to disclose *his own title*; and I conceive that a plaintiff could not, under this Section, compel a violation of this fundamental rule, since he is only entitled to the production of documents *material to his* own case. A party out of possession, for instance, must recover on the strength of *his own title*, not on the weakness of his adversary's. It is for him to make out such a *primâ facie* title in himself, as shall put his adversary to the necessity of proving a better title in himself. But it is clear that no flaw in the defendant's title will in the least advance or better the title of the plaintiff.(*k*) And the greatest mischief and danger would attend the compulsory production of title deeds, &c.: for bystanders might see flaws and holes in a title, which, though they could not be material in the then suit, might form ground for harassing the defendant with further actions, or subject him to extortion. In Madras, for instance, there is scarcely a property of which a conveyancer could advise that there is a good title. A man buys a house, goes away without executing a conveyance; the legal estate is in his heirs or executors somewhere in Europe: and all is confusion worse confounded. To compel the production of title deeds at the bidding of any person who chose to attack a house or landholder, perhaps out of spite, and for the very object of getting at the title, to see what holes could be picked in it, would obviously unsettle property, and no man would be safe. So the Small Cause Act(*l*) which provides a simpler form of procedure

(*k*) Many instances to the contrary are to be found in the Reports of the Sudder Adawlut. Perhaps the most remarkable is in vol. 1. p. 80. No. 8 of 1848 from the Civil Court of Combaconum where the plaintiff's title being disbelieved the property was ordered to be handed over to the Collector who was no party to the suit. See also vol. 2. p. 43, No. 20 of 1850.

(*l*) Act IX. of 1850.

for the recovery of tenements than the action of ejectment, which still maintains its ground in the Supreme Court, it is provided by Section XCI.

"Where any person shall hold or occupy any house, land or tenement, of which the value or the rent payable in respect thereof, does not exceed the rate of Five Hundred Rupees by the year, without leave of the owner, or under a lease or agreement which is ended, or duly determined by a legal notice to quit, and such tenant, or if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, the owner or his agent may take out a summons from the Court directed to such tenant or occupier, to show by what title he claims to hold or occupy the premises or part thereof."

But upon this Section, which would otherwise overrule the whole law of England on this subject, the judges have always held that it is incumbent on the party out of possession, in the first instance, to prove a *primâ facie* title, before the party in possession shall be called upon to "show by what title he holds."

§ 575. Notice to produce a notice is not necessary; for if it were the notices must go on *ad infini*... So, for instance, where it has been necessary for a landlord befo... ...ing his action to give his tenant notice to quit, it is not nec... ...n the action is brought, to give the tenant notice to pro... ... notice to quit. He may be called on at the trial to admit s... ...e of the notice to quit; and on his refusal, secondary evidence of the notice to quit, accompanied by evidence of its service may be given.

§ 576. Notice to produce may be given either to the party or to his pleader. Nor can the consequences of notice be evaded by transferring the document to a third party. See *Leeds v. Cook*.(m)

"Where a letter has been written by the plaintiff to a witness, and the witness has had a *subpœna duce tecum*, but has previously delivered the letter to the plaintiff, who refuses to produce it, parol evidence of its contents is admissible."

§ 577. It must appear that the document called for, is, or ought to be, in the possession of the party to whom notice is given, or those respecting whom he has power to compel the production. For otherwise

(m) 4 *Esp.* 256.

a door would be opened to a party, to give secondary evidence of a document which might never have been in existence. Suppose for instance that A. the defendant calls upon B. the plaintiff, to produce a certain letter which A. alleges he wrote on a particular date to B. If upon B.'s not producing it, A. could forthwith give secondary evidence, it is apparent, that notwithstanding B.'s protestations that he had never received any such letter, A. would be at liberty to put in anything he chose which might make most strongly for himself, as the copy of the alleged letter. Here therefore independent proof must in the first instance be given, that the letter had reached B. Such for instance as its dispatch to the post office, or the like. As to what is sufficient *primâ facie* proof on this point, see Act II. of 1855, Sections L. and LI.

§ 578. When an original document is beyond the reach of the Court, Act II. of 1855, Section XXXVI. provides that the Court may make an order for the reception of secondary evidence; but proof must be given that the document *is* beyond the jurisdiction.

§ 579. When a document is destroyed or lost, secondary evidence of it is admissible upon proof of its destruction or loss.

See Morley's Digest, N. S. Tit. Ev. c. 66.

" Deeds lost, or otherwise not forthcoming, are allowed to be proved by evidence. *Gooroopershad Gohu and others v. Greeschunder Bukshee and others.* 25th Jan. 1847. S. D. A. Decis. Beng. 24.—Tucker."

Ibid, O. S. c. 162.

" Debt on Bond. The defendant, by his answer, denied his execution of the bond. The plaintiff, in his reply, stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be produced. At the trial the plaintiff produced the fragments, and, under Sec. 2. of the Madras Reg. XVII. of 1802, put in as evidence a registered copy of the bond. The Court admitted the registered copy as evidence, and found for the plaintiff. The Judicial Committee of the Privy Council, on appeal, reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. *Syud Abbas Ali Khan v. Yadeem Ramy Reddy.* 16th June 1843. 3 Moore Ind. App. 156."

§ 580. But there must have been a *bonâ fide* and diligent search for the missing document. What is such search, must depend upon

the particular circumstances of each case. See *Gathercole v. Miall*,(n) where Alderson, B. said :

" I shall say very shortly what I think as to the admission of the evidence. It is clear, as it seems to me, that the evidence was properly received. I think the search should be such as should induce the judge to come to the conclusion, and the court afterwards, on revising his opinion, to come to the same conclusion, that there is no reason to suppose that the omission to produce the document itself arose from any desire of keeping it back, and that there has been no reasonable opportunity of producing it which has been neglected. Now, the question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for ; and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope, in which a letter had been received, and a person said, ' I have searched for it among my papers, I cannot find it,' surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room ; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, ' I know it was taken away by A. B.' then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away, or kept it. I do not know where it would stop ; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members ; and where will you stop ? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had *bonâ fide* endeavored to produce the document itself ; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper."

§ 581. A copy of a copy is never to be received. See Morley's Digest, Tit Ev. c. 154.

" A *Zamindári* was transferred by A. to B., and the transfer was registered by the Collector. A. asserted that the transfer was in the nature of a mortgage, and referred, in support of his allegation, to a letter addressed

(n) 15 *Mees. and W.* 335.

by him to the Collector, which was the letter on the receipt of which the Collector made the registry of the transfer. He also alleged that he transmitted a copy of an agreement by B, to restore the land on payment of the mortgage money, for the information of the Collector. B. denied having executed the agreement. Held, that a copy of such letter to the Collector could not be admitted as evidence to prove any controverted fact, and much less could the Court admit the copy of a copy of an instrument which the other party denied that he ever executed. *Anon.* Case 7 of 1816. 1 Mad. Dec. 136.—Scott, Greenway and Stratton."(o)

§ 582. As to insisting on reading the whole of a document when a part only is offered by the other side, see remarks ante § 203 and it may be here well to remark that when the party called on to produce a document refuses to comply, and his adversary has then gone into secondary evidence of its contents, he cannot afterwards produce the original for the purpose of rebutting such testimony. He shall not be permitted to stand by and take his chance of what his adversary may be able to prove against him. So in *Edmonds v. Challis*,(p) Coleman, J. in delivering the judgment of the Court said as follows :—

"The ground on which the application for a new trial was rested, was a supposed misdirection in receiving in evidence the replevin bond, without due proof of the execution by the subscribing witness. It appeared by the report, that notice had been given to the defendants to produce the bond, and the plaintiff's counsel called for the bond, which the defendant's counsel declined to produce. On the part of the plaintiff, a copy was produced, and proved to have been obtained from the Sheriff's office, and was about to be read, whereupon the counsel for the defendants produced the original, and insisted that it could not be read until the subscribing witness had been called. The document, however, was read without the production of the witness ; and it is contended that this ought not to have been done. We are, however, of opinion that the evidence was properly received. The document having been in the first instance kept back, and the plaintiff having entitled himself to read a copy without any proof being given that there was a subscribing witness to the original instrument, and having put it in to be read, the defendant's counsel let slip his opportunity, and had no right then to interpose and produce the original ; and although in point of fact the original was read, that was but by a sort of legerdemain, and the proper evidence must be considered as having been read, which was the copy pro-

(o) In illustration of this see the case No. 61 of 1851, in vol. 3 Sudder Reports, p. 161. This case has given rise to much discussion, its correctness having been insisted on at length by the judge who pronounced the judgment.

(p) 6 *Dow. and L.* p. 681.

duced and proved by the counsel for the defendants. The case of *Jackson v. Allen*, bears out our view of the rights of the plaintiff's counsel under the circumstances."

§ 583. A party who has given notice to produce, is not bound to pursue the matter further ; and the opposite party cannot insist upon the document being produced, simply because he has had such notice ; nor will it thereby become evidence for himself : but if the party who has given the notice, call for the document, which is produced in consequence, and inspect it, and thereupon declines to put it in evidence, he thereby makes it evidence.

See *Wharam v. Routledge.*(q) Where Lord Ellenborough said :

"You cannot ask for a book of the opposite party, and be determined upon the inspection of it, whether you will use it or not. If you call for it, you make it evidence for the other side, if they think fit to use it."

§ 584. We come now to the last remaining great branch of our subject : that is to say, how Instruments are used in proof : And this we shall divide into two heads.

1st. How proofs are to be supplied by the parties.

2nd. How they are to be applied by the judge.

For the present we shall confine ourselves to the first head ; and this will require consideration as to three distinct topics.

1st. On whom rests the burthen of proof ; *i. e. who* is to supply the evidence.

2nd. What quantity of evidence need be produced ; *i. e.* what amount of evidence must be offered in support of an issue.

3rd. The quality of the proof which it is necessary to produce.

## I. *On whom the burthen of proof rests.*

§ 585. By Regulation XV. of 1816, Sec. X. cl. 2, 3, the *Judge* settles the issues to be proved, but the *parties* must produce the evidence to prove these issues. See Morley's Digest N. S. Tit. Ev. c. 57.

"It was held to be highly irregular for the Court below to send for records of cases, judicial or revenue, in proof of allegations before the Court, instead of leaving it to the parties to adduce their own proofs. *Anoopnauth Missur and another v. Dulmeer Khan and another.* 31st Aug. 1846. 1 De-

(q) 5 *Esp.* 235.

cis. N. W. P. 135.—Thompson, Cartwright, and Begbie. *Hafiz Mahmood Khan and others v. Moonshee Shib Lall and others.* 7th Dec. 1846. 1 Decis. N. W. P. 239.—Tayler, Thompson, and Cartwright. *Sheodial Rae and others v. Bukht Rae and others.* 15th Dec. 1846. 1 Decis. N. W. P. 249.—Tayler, Thompson, and Cartwright. *Chota Singh v. Pershaud Singh.* 8th Jan. 1847. 2 Decis. N. W. P. 1.—Thompson. *Rajah Nowul Kishore v. Syud Enayut Alee.* 22nd March 1847. 2 Decis. N. W. P. 63.—Tayler, Thompson, and Cartwright. *Deendyal v. Syed Hoossein Ali and others.* 31st July 1848. 3 Decis. N. W. P. 258.—Thompson and Cartwright. (Tayler dissent.) *Futteh Narain Singh and others v. Bhoabul Singh and others.* 6th March 1849. 4 Decis. N. W. P. 44.—Thompson."(r)

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(r) I have placed (writes Mr. Morley) these cases together, as they all bear upon the point of the power of the Court to call for documentary evidence not adduced by the parties to a suit, though slight differences exist as to their circumstances. In the first four cases the Lower Court had called for evidence recorded in suits previously dismissed; in the fifth and sixth cases the Principal Sudder Ameen had sent, at the request of the plaintiff, for records from the Collector's Office; and in the sixth, likewise for the whole of certain proceedings that were held in the execution of decree department. In the last case the Principal Sudder Ameen required from the Judge's and Collector's Office a mass of proceedings and papers which, to use the words of the deciding Judge, might "fairly be termed a chaotic heap." The decision was given with reference to that passed in the sixth case. The majority of the Court, in giving judgment in the sixth case, observed that they were further of opinion that the practice of sending for revenue or judicial proceedings, excepting such as are specially allowed by the Regulations, such as Sec. 31. of Reg. VII. of 1822, was tantamount to allowing an evasion of the Stamp Law, and quoted Sec. 17. of Reg. X. of 1829, and Sec. 18. and Schedule B. of the same Regulation. They concluded by stating, that, in their opinion, the practice was not only unsanctioned by law, but that it was opposed to every rule of practice which that law lays down, and productive of nothing but inconvenience and uncertainty from first to last. Mr. Tayler recorded his dissent in this case at considerable length, and stated, amongst other things, that the practice of the Court when he joined it was invariably to send for records or proceedings on good cause being shown; that the same practice existed in the Calcutta Court; and that the principle was recognized in Constructions No. 693, and 1259. He further observed, that the practice had been denounced by recent decisions, and referred to the cases *Hafiz Mohumed Khan*, *Chota Singh*, and *Rajah Nowul Kishore*, abovementioned, as having attracted the notice of Mr. Ledlie, the Principal Sudder Ameen at Bareilly, who addressed the Court on the subject, and requested to know whether, with reference to those decisions, he was competent, on the motion of the party disputing an exhibit, to send for the particular paper, or the entire record, if necessary, in order to ascertain whether the document had been clandestinely foisted into the file, or the record falsified, as represented. He was informed, in reply, that he had full power, and he was referred to Constructions Nos. 693 and 1259, which it was observed by the Court, *expressly* recognize the competency of the Court "to call for the records of a public office with a view to a just decision between the parties in suits pending before them." In regard to the case of *Rajah Nowul Kishore*, it was observed, "that it cannot be supposed that the Court, in passing the decision, overlooked the Construction 1259, or that they intended by implication to repudiate an authoritative rescript: the only allowable presumption is, that the Principal Sudder Ameen irregularly insisted on sending for paper, of which the parties might have obtained copies without much expense, when the circumstances of the case were not so 'peculiar' as to justify the act." Mr. Tayler proceeded to remark that he did not intend, by the decision in *Rajah Nowul Kishore's* case, to discountenance the practice of calling for records, but to condemn an indiscriminate and injudicious call for them; and added extracts from a letter of the Calcutta Court in answer to a reference made to them on this point. These extracts I subjoin, as they clearly lay down the practice of the Calcutta Court:—"Par. 3d. Viewing the question generally, the Court observe, that although ordinarily the Courts are not to seek for evidence, but to decide on what the parties choose to place before them, they are not precluded from calling for whatever evidence they may consider necessary for the elucidation of a case. The expression in Cl. 3, Sec. 10. Reg. XXVI. 1814. 'evidence may be adduced by either party,' is not considered to restrict the exercise of the Court's discretion in that respect. Par. 4th. The practice of this Court is in conformity with these views. As an instance, may be mentioned the case of *Sumeshur Pundee and others v. Rajah Gopal Surn Singh*, decided on the 24th Sept. 1845 (p. 306 of printed decisions), when the Court, through their Register, called upon Government for certain records which the Judges considered would throw light on the question before them." And see the Placita 41c. 45. 58 *et seq.*

§ 586. The Law is quiescent until certain facts are established, to which it can attach certain consequences. Hence it is for him who seeks to attach such consequences, to bring forward proof of the facts which will warrant the attachment.(s)

See Morley's Digest, Tit. Ev. c. 121.

"Where the seals affixed to two documents alleged to have been executed by the same party were different, it was held that it was incumbent on the person claiming under such instruments, and producing them, to show, by evidence, that the party who was alleged to have executed the deeds was in the habit of using one or the other, or both of these seals. *Husan Ruza Khan Bahadoor v. Mohammud Muhdee Khan.* Case 12 of 1817. 1 Mad. Dec. 167.—Scott, Greenway and Ogilvie."

Ibid, c. 125.

"Where a person, after having filed a *Rázínámeh*, pleaded that the execution of it had been forced, but, though repeatedly desired to prove his assertion, had failed so to do, the suit was dismissed with costs. *Sheikh Dahoo v. The Collector of Purnea, for the Court of Wards.* 2d July 1825. 4 S. D. A. Rep. 80.—C. Smith."

§ 587. By the Mahomedan Law, when a Defendant simply denies the truth of the Plaintiff's case, the Plaintiff must prove the affirmative; but when the Defendant pleads some special matter in defence, he must prove his plea. *Hukeem Wahid Ali v. Khan Beebee,* 3 S. D. U. R. p. 102. Morley's Digest, Tit. Ev. c. 13.

"According to the rule of Mahomedan law, it is necessary that the plaintiff should adduce evidence to prove his claim on simple denial by the defendant; but when any special plea is urged the *onus probandi* rests with the defendant. *Hurkeem Wahid Ali v. Khan Beebee.* 6th Aug. 1821. 3 S. D. A. Rep. 102.—Goad."

§ 588. As a general rule by the English law of evidence, the party who asserts the affirmative is bound to prove it; not only because it is incumbent on him to establish those facts to which he submits that certain legal consequences are to be attached; but also from the inconvenience, difficulty(t) and delay, which attend the attempt to prove a negative.(u)

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(s) Hence the maxims *actore non probante, reus absolvitur. Melior est conditio defendentis, &c. Ei. incumbit probatio qui dicit, non qui negat &c.*
See them collected Best, § 261.

(t) It is sometimes said that it is impossible to prove a negative, and that the maxim is *lex non cogit ad impossibilia*, the law does not require the performance of impossibilities: but the doctrine is a fallacy; and the negative, as will be seen in the text, not only is capable of proof, but very often must be proved.

(u) According to the English practice, it is often of great importance to preserve the right

§ 589. It is a good test for settling the question, on whom lies the burthen of proof, to consider for whom the verdict must be given, if *no* evidence were offered on either side. The party against whom the verdict would be given in the absence of evidence will have the laboring oar.

§ 590. But it is the affirmative in *substance* rather than in *form* which is to be looked to, for otherwise an ingenious pleader might frequently shift the burthen of proof from himself to his adversary by the form of his pleadings. Put the case of a Hindu family living together as an ordinary Hindu undivided family. A. has dealings with one of the members by purchasing from him part of the family estate. A suit results in which it is important to show that the family was in fact divided, in order to secure Plaintiff's title, inasmuch as it is a presumption of Hindu Law that every family living together *primâ facie* is undivided, and (*donec probetur in contrarium &c.*) the presumption shall be relied on till the contrary is proved. Here the proof of division—the affirmative that the family is divided—clearly lies on A. nor could he shift it from himself by pleading in a negative form that the family was *not undivided*. It is the substance which will be looked to here, in determining on whom lies the burthen of proof of the state of the family. See Morley's Digest, N. S. Tit. Ev. c. 135.

"Where it is alleged that property which belonged to a member of an undivided Hindu family was separate property, the burthen of proof as to division lies upon those who assert its separate character. *Gokoolanund Race and others v. Soonder Nurain Race.* 15th May 1849. S. D. A. Decis. Beng. 151.—Barlow."

See Morley's Digest, N. S. Tit. Ev. c. 136.

"It is an established rule that the *onus probandi* of self-acquisition lies on the claimant when a question of succession to property, alleged on the other part to have belonged to a family, which is admitted on both sides to have been *generally* joint and undivided in estate, arises between the heirs of a deceased ancestor. *Bamun Das Mookerjee and others v. Mt. Tarnee Dibbeah.* 30th Sept. 1850. S. D. A. Decis. Beng. 533.—Barlow, Colvin and Dunbar."

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to begin, as it carries with it the general reply by the pleader upon the whole of the evidence: but according to the Mofussil practice, where the pleaders do not address the Court until the whole of the evidence on both sides has been put in, it is perhaps of less importance; unless indeed the Court should lay down an analogous rule to that of the English law; for then it would not be the plaintiff's pleader who would always reply upon his adversary, but the pleader of that party who had been compelled to prove the affirmative. See Starkie p. 611, note (*x*). In the Sudder, the appellant has the general reply.

And the maxim is *stabitur in præsumptione donec probetur in contrarium.*

See also the case of *Soward v. Leggatt.*(w)

"Lord Abinger, C. B.—Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases, a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. The plaintiff here says, 'You did not repair;' he might have said, 'You let the house become dilapidated.' I shall endeavor by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin."

See also *Mercer v. Whall.*(x) There Lord Denman said:

"The natural course would seem to be that the plaintiff should bring his own cause of complaint before the court and jury, in every case where he has any thing to prove either as to the facts necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him.

"The law, however, has by some been supposed to differ from this course, and to require that the defendant, by admitting the cause of action stated on the record, and pleading only some affirmative fact which if proved will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial, anticipating the plaintiff's statement of his injury, disparaging him and his ground of complaint, offering or not offering, at his own option, any proof of his defensive allegation, and, if he offers that proof, adapting it, not to plaintiff's case as established, but to that which he chooses to represent that the plaintiff's case will be.

"It appears expedient that the plaintiff should begin, in order that the judge, the jury, and the defendant himself, should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial, and enables the defendant to meet it with a full understanding of its nature and character. If it were a presumption of law or if experience proved that the plaintiff's evidence must always occupy many hours, and that the defendant's could not last more than as many minutes, some advantage would be secured by postponing the plaintiff's case to that of the defendant. But, first, the direct contrary in

(w) *7 Car. and P.* 615.
(x) *5 Q. B. R.* 456.

both instances may be true; and, secondly, the time would only be saved by stopping the cause for the purpose of taking the verdict at the close of the defendant's proofs, if that verdict were in favor of the defendant. This has never been done or proposed: if it were suggested, the jury would be likely to say, on most occasions, that they could not form a satisfactory opinion on the effect of the defendant's proofs till they had heard the grievance on which the plaintiff founds his action. In no other case can any practical advantage be suggested as arising from this method of proceeding. Of the disadvantages that may result from it, one is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skilful management in confessing it by his plea, and affirming something by way of defence which he knows to be untrue, for the mere purpose of beginning. Take one or two cases. Trespass; plea; leave and licence: the plaintiff wishes to show that extensive damage has been done to his property for the purpose of wilful oppression. But the defendant affirms, and must begin. It is obviously necessary for him to state some case for the plaintiff, to show that the supposed licence applies to it. He brings evidence to prove a licence. When the plaintiff's turn comes, he clearly shows that the licence set up cannot apply to the trespass complained of. The real trial now commences; and the whole time given to the defendant's statement and evidence in support of his affirmation has been thrown away. Action for criminal conversation: plea; that the plaintiff had deserted his wife: so the defendant is to begin, and possess the jury with an affecting detail of cruelty and infidelity. He purchases this right only by admitting his adulterous intercourse, an admission which would seem to supply no very good reason for conferring any advantage upon him. He makes his attempt by calling some evidence: whether he fails or succeeds cannot be known till the whole case is closed; but the plaintiff brings forward his own complaint, the defendant's conduct, the extent of his injury, the just amount of damages, with the disadvantage of first struggling against the heavy charge with which he is loaded. Possibly the defendant makes no such attempt; but his affirmation on the record gives him the right to introduce the plaintiff's case by stating his infamy without proof, and by proving every circumstance of disparagement and degradation short of the fact which he has pleaded.

"It is not wonderful that little authority should be found on this point. Very few *nisi prius* cases were formerly reported. What is called the right to begin was in many instances rather a burden than a benefit; and a general opinion prevailed that the course adopted by the presiding judge at the trial was not subject to revision in any other Court. But I can speak of my own impression arising from attendance at *nisi prius* as a barrister near thirty years, and corresponding, as far as I have observed, with the general opi-

nion of the bar. I never doubted that the plaintiff was privileged and required to begin, whenever anything was to be proved by him. The simplicity and easy application of this mode of practice would recommend it to adoption if the question were new, and would raise a great probability that the common sense of old times had sanctioned it as a part of our system. It frequently occurred that, in an action of trespass, with plea of justification under a right, the defendant claimed to begin. He said: 'I admit the trespass; and the burden of proving the defence rests on me.' The answer constantly given was: 'I the plaintiff have the right to begin, because I go for substantial damages. I claim to disprove your right in the first place, if I think proper, but at all events to possess the jury of the extent of the mischief you have done me.' On such occasions the judge took upon himself to decide whether the plaintiff really went for substantial damages. If he did, it was always assumed that he must begin. The judge perhaps decided this matter without very adequate materials; but he would not have thought of doing so at all if the right depended on the issue as it appeared on the record.

"I am well aware of the decision in *Cooper v. Wakley*. In an action for a libel on a surgeon, charging want of skill in an operation, the defendant justified, pleaded the truth of his charge, and contended that, as the sole issue was affirmative, he had the right to begin by proving it. Lord Tenterden doubted, and, after consulting two other judges then sitting in an adjoining Court (Bayley and Littledale, Js.), determined in the defendant's favor. No three judges who ever sat together in Westminster Hall have commanded more respect than these. Yet an appeal may be made to all who were then practising at the bar, whether the decision was not universally felt to be wrong, both as against principle and as an innovation.

"Soon after I was raised to the Bench, this ruling became the subject of discussion among the judges. Many of them attended at my house to consider of it; and the following short resolution was drawn up and signed by those present, and afterwards adopted by Lord Lyndhurst, C. B., Bayley, B., Taunton, J. and myself. 'In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant.' I possess this document signed with the initials of the present Chief Justice of the Common Pleas, of Sir J. B. Bosanquet and of the late Mr. Justice Park, Littledale and Gaselee, Js., Bolland and Gurney, Bs. Among the judges who adhered to this retractation of the decision in *Cooper v. Wakley* were the two whom I have named as assessors to Lord Tenterden when that decision was made. His own opinion on the principle may be gathered from what he said in *Cotton v. James*. If ever a decision was overruled on great deliberation and by an undeviating practice afterwards, it is that in *Cooper v. Wakley*.

"An ingenious argument was used at the bar, that this resolution did not declare the law as the judges understood it, but merely enacted a new practice which they thought more convenient than the old. But I cannot think this explanation admissible. The judges have never assumed the right of sacrificing the law to their sense of convenience. The balance of convenience might have some effect on their minds as an argument to show how the rule of practice was; but their duty was limited to a declaration of that rule, which they never would have promulgated if they had not believed it to be the law. The rule of practice thus declared is confined to the case then under consideration, wisely avoiding any matters not then before the judges. Contented with the correction of what was thought a grievous mistake, they excluded from their consideration every other point, and left the practice on actions of contract in its former state.

"How then did that practice stand? Taking it now to be established as it has just been described in cases of tort, the first question seems to be, why any difference should exist between the two classes? There is the same general reason; the propriety of first hearing from the plaintiff the nature of his complaint, and his estimate of the damage sustained. There is often the same question to be tried in assumpsit or covenant as in libel, slander, or injuries to the person. Action for breach of promise to marry: plea; defendant broke his promise because plaintiff was guilty of fornication. Can any reason be assigned for allowing the defendant to begin in this case rather than when he pleaded the same facts as a justification in libel or slander? The very case now before us is an example. Covenant by an attorney's clerk for improperly dismissing him: plea; he was guilty of misconduct in the service. On what principle can it be right for the plaintiff to begin if the same plea were pleaded as a justification for libel or slander, and to follow the defendant when the very same facts are made the excuse for breach of covenant? Suppose a plea that the contract was rescinded, to an action for breach of marriage promise: according to the present argument, the proof of rescission must precede the proof of contract. The record, in duly stating such contract, gives no information as to the real understanding between the parties. There is probably a correspondence; the letters which the defendant selects as rescinding may appear to have that effect when presented alone; quite the contrary with reference to those from which, combined with conduct, the engagement itself must be inferred. Surely the proposed order of proceeding is full of embarrassment, inconvenience and confusion.

"In ejectment, the defendant may entitle himself to begin, by admitting that the plaintiff must recover possession unless the defendant can establish a certain fact in answer; and if, in an action for damages, the damages are ascertained, and the plaintiff has a *primâ facie* case on which he must re-

cover that known amount and no more, or unless the defendant proves what he has affirmed in pleading, here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But, if the extent of damage is not ascertained, the plaintiff is the person to ascertain it, and his doing so will have the good effect of making even the defence, in a vast majority of cases, much more easily understood for all who are entrusted with the decision.

"We do not deem it necessary to discuss the numerous cases recently reported from *nisi prius*; for they only prove the unsettled state of judicial opinion on this subject; but, for the reasons now given, we think that the plaintiff was entitled to begin on the present occasion."

So, as there is a presumption of law in favor of innocence, that things are rightly done, &c. it is incumbent on the party alleging that a duty has *not* been performed to prove it; nor can he shift the burthen of proof by pleading affirmatively that his adversary has been guilty of a culpable omission. See *Williams v. E. I. C.*(y)

"Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative on the party who insists on it. Therefore where a plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity (by which a loss happened) without due notice to the captain or any other person employed in the navigation, it lay upon him to prove such negative averment."

So when bastardy of a child born in wedlock is to be proved, illegitimacy must be affirmatively *proved*; for the maxim of the law is *pater est quem nuptiæ demonstrant*, he is the father whom the marriage points out. The presumption against illegitimacy therefore prevails, till proof of non-access by the husband, as for instance his absence at sea, or in a foreign country for a certain period, is established. See the *Banbury Peerage case*,(z) where the canons are thus laid down.

"A child born of a married woman whose husband is within the four seas, is always to be presumed to be legitimate; unless there is evidence affording irresistible presumption that sexual intercourse did not take place between them, at any time, when in the course of nature, the husband might have been the father of the child.

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(y) 3 *East*, 192.

(z) 1 *Sim. and St.* 153. *Head v. Head.—Ibid*, 152.

"The following are the questions put to the Judges by the House of Lords in the case of the *Banbury* claim of Peerage, and the answers returned thereto.

"Whether the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?

"The *Lord Chief Justice* of the Court of Common Pleas having conferred with his brethren, stated, that they were unanimously of opinion.

"'That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption;' and gave his reasons.

"Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always, by the law of England, *primâ facie* evidence that such a child is legitimate; and whether in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question. Whether such *primâ facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be, in fact, the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the laws of England, that a physical fact be proved?

"The *Lord Chief Justice* of the Common Pleas delivered the unanimous opinion of the Judges upon this question as follows:

"That the fact of the birth of a child from a woman united to a man by lawful wedlock, is, generally, by the law of England, *primâ facie* evidence that such child is legitimate.

"That in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question.

"That such *primâ facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary in order for the man to be, in fact, the father of the child.

"That the physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved.

"Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access?

"Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?

"In answer to the said questions, the *Lord Chief Justice* of the Common Pleas delivered the unanimous opinion of the Judges on the same, as follows:—

"That, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them) no evidence can be received except it tend to falsify the proof that such intercourse had taken place.

"That such proof must be regulated by the same principles as are applicable to the establishment of any other fact.

"Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage between the husband and wife (the husband not being proved to be separated from her by sentence of divorce) until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the father of such child?

"8th. Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife, by sentence of divorce), can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access, during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such non-access can legally be left to a jury upon any trial, in Courts of Law, to repel the presumption of the legitimacy of a child so circumstanced?

"Then the Judges being agreed in their opinion, in answer to the said questions propounded to them, the *Lord Chief Justice* of the Court of Common Pleas delivered their unanimous opinion upon the same, as follows:—

"That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife,

until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse, did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature be the father of such child.

"That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child? and the evidence to prove that he was not the Father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband could, by the laws of Nature, be the father of such child.

"The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife;' and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word 'access,' the husband may be said to have access to his wife as being in the same place or the same house; and yet, under such circumstances, as instead of proving, tend to disprove, that any sexual intercourse took place between them."

So when death has to be proved, the proof cannot be shifted by pleading that the party is *not* alive. See *Doe v. Nepean.*(a) There it was held that

"A person who has not been heard of for seven years, is presumed to be dead, but there is no legal presumption as to the time of his death. The fact of his having been alive or dead at any particular period during the seven years, must be proved by the party relying on it."(b)

§ 591. So in criminal prosecutions; on the same ground, the prosecutor must prove all that is necessary to attach penal consequences, although, in order to do so, he must have recourse to negative evidence, for he seeks to affect the status of the individual. Whenever the proof of the negative is essential to support a party's claim, he must prove that negative. Thus if A. claims as heir to his brother

(a) 5. *Barn. and Ad.* p. 86.

(b) See this case affirmed on Error. 2 *M. and W.* 894.

B, he must not only prove his brother's death, but also that he left *no* issue. See Morley's Digest, N. S. Tit. Ev. cases, 128, 129, 133, 137.

"The *onus probandi* of exemption from rent lies on the defendant. *Ghosain Doss v. Gholam Moheeoodden and another.* 28th Jan. 1846. S. D. A. Decis. Beng. 20.—Reid, Dick, and Jackson. *Bulram Punda and another v. Sheikh Gool Mohumud.* 28th Jan. 1846. S. D. A. Decis. Beng. 25.—Reid, Dick, and Jackson. *Koose Chuckerbuttee v. Sheikh Ghool Mohumud.* 28th Jan. 1846. S. D. A. Decis. Beng. 27.—Reid, Dick, and Jackson.

"The *onus probandi* of exemption from enhanced rates, claimed by a *Talookdar*, not of the nature specified in Sec. 51. of Reg. VIII. of 1793, rests with him. *Kali Das Neogee v. Dyanath Race and others.*—10th Aug. 1847. 7 S. D. A. Rep. 378.—Hawkins. *Nubboo Komar Chowdhree and others v. Ishwur Chundur Chuckerbuttee and others.* 7th June 1848. S. D. A. Decis. Beng. 515.—Tucker.

"Where the plaintiff sued for arrears of rent, and the defendant pleaded dispossession of the lands, and payment of the full amount due by him; it was held, that such pleas being special, the *onus probandi* rested with the defendant. *Joydeb Surma v. Lukheenurain Deb.* 8th March 1848. S. D. A. Decis. Beng. 142.—Tucker and Hawkins.

"In cases where a claim is preferred on general unquestionable grounds, such as inheritance, and the defendant pleads a special ground, the burthen of proof is on the defendant. *Kummul Munnee Dibbea v. Kishen Munnee Dibbea.* 12th July 1849. S. D. A. Decis. Beng. 286.—Dick, Barlow and Colvin."

§ 592. When a legislative enactment contains a proviso or an exception, within which a party seeks to bring himself or another, he must prove the circumstances which bring him or that other within the exception. The technical rule is this; when a statute *in the enacting clause* contains an exception and fixes a penalty, then the party seeking to criminate another under that statute, is bound to show that the case does *not* fall within the exception: but when there is no exception *within the enacting clause*, but in another distinct and separate clause, or even if it be in the same section, but be not incorporated with the enacting clause by words of reference, the *onus probandi* is shifted. It is not then necessary for the prosecutor to do more than show that the party whom he arraigns has been guilty of the crime in the enacting clause: and it is for the accused to show that the independent exceptive clause takes his case out of the danger of the law.

Thus in the case of *Spiers v. Parker* (c) we have an illustration of the first rule. There it was held that

"The exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration. Not so, where it is by a subsequent proviso."

And the case of *R. v. Hall* (d) affords us an example of the latter. There it was ruled that

"Where the prosecutor is not obliged to negative the exceptions in a statute, and negatives some of them only, that part of the information will be rejected as surplusage."

§ 593. So in an action on a contract, if the promise is not absolute, but contains any qualification, the plaintiff must prove that the defendant does not come within the qualification. For instance, where a carrier has undertaken to carry goods safely, fire and robbery excepted; or where a horse has been warranted sound, except as to a kick on its leg; or in the ordinary case of marine policies of insurance, when the underwriters provide for their own immunity in certain contingencies.

§ 594. It has been said that when the means of proof are peculiarly within the knowledge of the defendant or prisoner, a general sense of convenience shifts the burthen of proof; as for instance where a hawker or pedlar stands charged with trading without a license, it is easy for him to produce his license,(e) and so end the discussion, whereas it might throw the most serious impediment in the way of the prosecutor if he were bound to prove that the hawker was *not* licensed. So in an action for practising as an apothecary without a certificate, the defendant must produce his certificate. So on a charge of selling ale without a license: so in many old cases upon the game laws for shooting without a qualification: and no doubt the rule is of general application; so in *R. v. Turner*,(f) per Bayley, J.

"I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge

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(c) 1 *T. R.* p. 144.

(d) 1 *T. R.* 320.

(e) The following extract from the judgment of the C. Justice in the *Commonwealth v. Thurlow* 24 Pecher. 374. (*U. S.*) is to be read with interest.

"The last exception necessary to be considered is, that the court ruled that the prosecutor need give no evidence in support of the negative averment, that the defendant was not duly

(f) 5 *M. and S.* 211.

of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative."

But perhaps the safer exposition of the rule, and that to which the modern authorities lean is this, that the party charged, shall not in the first instance be called on to produce his license, &c. but that when substantive evidence has been produced, sufficient to show that he is liable to punishment or penalty, it shall not be incumbent on the plaintiff or prosecutor to prove the fact immediately within the adversary's knowledge; and that if the adversary does not then choose to prove his own immunity by means which are, or ought to be, within his immediate power, the plaintiff or accuser shall not be defeated by his not having proved the fact of want of license, &c., but the judge in deliberating on the weight of evidence against the party charged, will consider how far for the charge has been brought home to him; and of course the fact that he has not produced that proof of his im-

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licensed, thereby throwing on him the burden of proving that he was licensed, if he intends to rely on that fact by way of defence. The court entertain no doubt, that it is necessary to aver in the indictment, as a substantive part of the charge, that the defendant, at the time of selling, was not duly licensed. How far, and whether under various circumstances it is necessary to prove such negative averment, is a question of great difficulty, upon which there are conflicting authorities. Cases may be suggested of great difficulty on either side of the general question. Suppose under the English game laws, an unqualified person prosecuted for shooting game without the license of the lord of the manor, and after the alleged offence and before the trial, the lord dies, and no proof of license, which may have been by parol, can be given? Shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again, suppose under the law of this Commonwealth it were made penal for any person to sell goods as a hawker and pedlar without a license from the select men of some town in the Commonwealth. Suppose one prosecuted for the penalty, and the indictment, as here, contains the negative averment, that he was not duly licensed. To support this negative averment, the select men of more than three hundred towns must be called. It may be said, that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden to succeed without proof. This is true; but when the proceeding is upon statute, an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other, if it exists, leads to a strong inference, that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty who should not produce a license. Besides, the common law rules of evidence are founded upon good sense and experience, and adapted to practical use, and ought to be applied as to accomplish the purposes for which they were framed. But the court have not thought it necessary to decide the general question; cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise. In the present case, the court are of opinion that the prosecutor was bound to produce *primâ facie* evidence, that the defendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all averments necessary to constitute the substantive offence must be proved. If there is any exception, it is from necessity, or that great difficulty, amounting, practically, to such necessity; or, in other words, where one party could not show the negative, and where the other could with perfect ease show the affirmative. But if a party is licensed as a retailer under the statutes of the Commonwealth, it must have been done by the county Commissioners for the county where the cause is tried, and within one year next previous to the alleged offence. The county Commissioners have a clerk, and are required by law to keep a record or memorandum in writing of their acts, including the granting of licenses. This proof is equally accessible to both parties, the negative averment can be proved with great facility, and therefore, in conformity to the general rule, the prosecutor ought to produce it before he is entitled to ask a jury to convict the party accused."

But the rule seems settled otherwise in other States.

munity which he easily might, if innocent, will tell very strongly against him. Just as in the case of a man charged with theft, when the only proof of his guilt is his possession of the stolen property shortly after the theft. Here his mere possession would not supersede the necessity of proving the *fact* of the theft, &c., but when the prosecution had started this evidence, it would be for the prisoner to account for the way in which he became possessed of the stolen property.(*g*) The incumbency on the prisoner to give this account, and the pressure upon him of presumption of guilt from his omission so to do, will vary with the circumstances of each case, and will depend upon the lapse of time between the theft and the finding of the property in his possession, the description of the article stolen; its questionable identity, the place in which it was found; and the like.(*h*) The case of *R. v. Crowhurst*, 1 Car. and K. 370, should be consulted There Alderson, B. said:

"In cases of this nature you should take it as a general principle, that, where a man, in whose possession stolen property is found, gives a reason-

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(*g*) Though the law raises a presumption of a man's guilt from the recent possession of stolen property unaccounted for: yet it is to be remembered, that there is also a presumption of law in favor of innocence; and therefore as this is prior to the other, the law will not raise the presumption of guilt, till *primâ facie* evidence destructive of the presumption of innocence has been given. Hence the necessity of the prosecution establishing the fact of theft, &c. By the form of criminal pleading the issue is simply not guilty. The issue is not reduced, as in civil actions, to a limited question, as for instance, not possessed, when issue might be taken on the fact of possession.

(*h*) This point occurs so constantly in criminal practice that it may be well to give here in the form of a note the remarks of Mr. Best, as they will serve for a practical guide to the pleader, though their introduction here into the text would lead too far away from the immediate subject under consideration. See § 205—207.

"There is one species of real evidence which from its frequent occurrence and the stress usually laid on it, deserves a more particular consideration; namely, the presumption of larceny drawn from possession by the accused of the whole or some portion of the stolen property. Not only is this presumptive evidence of delinquency when coupled with other circumstances; but even when standing alone is in many cases considered to raise a presumption of guilt sufficient to cast on the accused the onus of showing that he came honestly by the stolen property, and if he fail in so doing, warrant the jury in convicting him as the thief. This presumption is not only subject to the infirmative circumstances attending real evidence in general, but, from its constant occurrence, and the obvious danger of acting indiscriminately upon it, has, as it were, attracted the attention of the judges, who have endeavored to impose some practical limits to its operation in cases where it constitutes the *only* evidence against the accused. And, first, it is clearly established that in order to put the accused on his defence his possession of the stolen property must be *recent*; although what shall be deemed such must be determined by the nature of the articles stolen; *i. e.* whether they are of a nature likely to pass rapidly from hand to hand, or of which the accused would be likely, from his situation in life or vocation, to become innocently possessed. A poor man, for instance, might fairly be called to account for the possession of articles of plate, jewels, or rare and curious books, after a much longer lapse of time than if the property found on him consisted of clothes, or articles of food suitable to his condition in life, tools proper for his trade, &c. In the first reported case on this subject, Bayley, J., directed an acquittal, because the only evidence against the prisoner was that the stolen goods, (the nature of which is not stated in the report,) were found in his possession after a lapse of *sixteen* months from the time of the loss. Where, however, seventy sheep were put on a common on the 18th of June, but not missed till November, and the prisoner was in possession of four of them in October, and of nineteen more on the 23d November, the same judge allowed evidence of the possession of both to be given.

able account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *primâ facie* a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one."

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In the subsequent case of *R. v. Adams*, where the prisoner was indicted for stealing an axe, a saw, and a mattock, and the whole evidence was that they were found in his possession *three* months after they were *missed*, J. Parke, J., directed an acquittal. And in a more recent case of *R. v. Cruttenden*, where a shovel which had been stolen was found about *six* or *seven* months after the theft in the house of the prisoner, who was not then at home, Gurney, B., held, that on this evidence alone, the prisoner ought not to be called on for his defence. In *R. v. Partridge*, however, where the prisoner was indicted for stealing two "ends" of woollen cloth, (*i. e.*, pieces of cloth consisting of about twenty yards each,) which were found in his possession about *two* months after they were *missed*; on its being objected that too long a time had elapsed, Patterson, J., overruled the objection, and the prisoner was convicted. Afterwards, in *R. v. Hewlett*, a prisoner was indicted for stealing three sheets, the only evidence against him being that they were found on a bed in his house three calendar months after the theft. On this it was objected by his counsel, on the authority of *R. v. Adams*, that the prisoner ought not to be called on for his defence; but Wightman, J., said, that it seemed to him impossible to lay down any definite rule as to the precise time which was too great to call on a prisoner to give an account of the possession of stolen property; and that although the evidence in the actual case was very slight, it must be left to the jury to consider what weight they would attach to it. The prisoner was acquitted. In *R. v. Moore*, where a mare which had been lost on the 17th of December was found in the possession of the prisoner between the 20th of June and the 22nd of July following, and there was no other evidence against him, Maule, J., held the possession not sufficiently recent to put him on his defence. In dealing with this subject, it is to be remarked that the probability of guilt is increased by the coincidence in number of the articles stolen with those found in the possession of the accused, the possession of one out of a large number stolen being more easily attributable to accident or forgery than the possession of all.

"But in order to raise this presumption legitimately the possession of the stolen property should be clearly traced to the accused, and be *exclusive* as well as recent. The finding it on his person, for instance, or in a locked-up house, room, or box of which he kept the key, would be a fair ground for calling on him for his defence; but if the articles stolen were only found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or an open box to which others had access, no definite presumption of his guilt could be made. An exception is said to exist where the accused is the occupier of the house in which stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent anything coming in or being taken out without his sanction. As a foundation for *civil* responsibility this reasoning may be correct; but to conclude the master of a house guilty of *felony*, on the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance, and secondly, that he was the thief who stole them, and there are no corroborating circumstances, is certainly treading on the very verge of artificial conviction.

"Indeed, there can be no doubt that, in practice, the legitimate limits of the presumption under consideration are sometimes overstepped. "Nothing," remarks Bentham, "can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances: nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes: the jewel in a case; the case in a box; the box in a bureau; the bureau in a closet; the closet in a room; the room in a house; the house in a field. Possession of the jewel, *actual* possession, may thus belong to half a dozen different persons at the same time: and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit." It is in its character of a *circumstance* joined with others of a criminative nature that the fact of possession becomes really valuable, and entitled to consideration, whether it be ancient or recent, joint or exclusive. But, whatever the nature of the evidence, the jury must be morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract."

And the law is well stated in East's Pleas of the Crown, vol. 2, p. 656.

"It may be laid down generally, that wherever the property of one man, which has been

In accordance with the principles considered in this section, of which the possession of stolen property is one illustration, is the dictum of Holroyd, J. in *R. v. Burdett*.(i) He says the rule in question

"Is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

And the words of Lord Denman in *Doe d. Bridger v. Whitehead*(k) are worthy of perusal:

"I do not dispute the cases on the game laws which have been cited; but there the defendant is, in the first instance, shown to have done an act which was unlawful unless he was qualified; and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and therefore takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law. And the landlord might have had a covenant inserted in the lease, to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the Court cannot assist him."

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taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted, by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as, the length of time which has elapsed between the loss of the property and the finding it again; either as it may furnish more or less doubt of the identity of it; or as it may have changed hands oftener in the mean time; or as it may increase the difficulty to the prisoner of accounting how he came by it; in all which considerations that of the nature of the property must generally be mingled. So the probability of the prisoner's having been near the spot from whence the property was supposed to be taken at the time: as well as his conduct during the whole transaction, both before and after the discovery are material ingredients in the investigation. But the bare circumstance of finding in one's possession property of the same kind which another has lost, unless that other can from marks or other circumstances satisfy the court and jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though, where the fact is very recent so as to afford reasonable presumption that the property could not have been acquired in any other manner, the court are warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus a man being found coming out of another's barn; and upon search, corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt.

"So persons employed in carrying sugar and other articles from ships and wharfs have often been convicted of larceny at the O. B., upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must at least be understood of articles like those abovementioned, the identity of which is not capable of strict proof from the nature of them."

(i) 4 *B. and Al.* 140.

(k) *A. and E.* 571.

§ 595. When a party seeks to avoid responsibility for an act on account of some exceptive circumstance, he must prove that exceptive circumstance. Here the affirmative is clearly on him. As for instance in an action against a police officer for arrest and false imprisonment, or in any case where the defendant justifies under the authority of the law, he must prove his authority. So a party seeking to avoid his contract on the ground that it was obtained from him by duress or fraud, must prove the duress or fraud.

See Morley's Digest, N. S. Tit. Ev. case 21.[a]

"It is sufficient *primâ facie* evidence that a sale is *bonâ fide*, and not fictitious, if the vendor admits the sale, though alleging it to be fictitious and fraudulent, and the purchaser produces a deed duly registered; and it is not necessary to require the purchaser to file proof of payment. *Mohun Singh v. Kunhya Lal Jah and others.* 29th April 1850. S. D. A. Decis. Beng. 159.—Dick."

In 1 Moore's Indian Ap. p. 1, *Motee Lal Opudhiya v. Juggurnath Gurg.* There

"The Court of Sudder Dewanny Adawlut having refused to set aside a deed of *Rázinámeh* for compromising an appeal then pending from that Court to the King in Council, alleged to have been obtained by fraud and duress: held on appeal by the Judicial Committee that the *onus* of proving such fraud and duress lay upon the appellant in proceeding upon his petition in the Court below, and their Lordships being satisfied that full opportunity for such proof had been afforded him, confirmed the judgment of the Sudder Court, but, under the circumstances, without costs."

See *Rajunder Narain Rae v. Bajai Govind Singh*, 2 Moore's In. Ap. p. 181. where it was held as follows:—

"A *soluhnamah* or deed of agreement to compromise conflicting claims entered into in the presence of witnesses and solemnly acknowledged in Court, by parties who were mutually ignorant of their respective legal rights, cannot afterwards be set aside upon plea of ignorance of the real facts, when the party seeking to avoid the deed had the means of ascertaining those facts within his reach.

"Gross fraud and imposition are not to be imputed upon mere suspicion, and unless the charge is proved, a party cannot be released from an agreement entered into by their own solemn act."

See Morley's Digest, O. S. Tit. Ev. c. 82.

"The *onus* of showing that a compromise has been fraudulently obtained

by intimidation and false representation, is cast upon those who seek to impeach the validity of their own deed.—*Ib.*"

§ 596. The plaintiff is not bound to negative the defence in the first instance. Thus where the defence to an action on a bond is duress, it suffices for the plaintiff to prove the bond. It would lead to great delay were he to proceed further, and endeavor to prove (except by the attesting witnesses as to what took place at the execution, *i. e.* the circumstances of the execution in full) negatively, that there was no duress. The defendant may fail in establishing his defence; his witnesses may break down; and clearly it would have been time wasted for the plaintiff to attack a case which falls from its own weakness. But the plaintiff may generally call evidence in reply, but such evidence in reply must be confined to negative specific facts sworn to by the defendant's witnesses, the proof of which he could not be supposed to anticipate. For a plaintiff is not to be allowed to cut his own case in halves, and prove half or a portion in his opening, and the remainder by way of reply, if he thinks the nature of the defence requires him to strengthen his hand. He must lay the whole strength of his case on which he intends to rely upon before the judge when he is in possession of the Court.

So in the great case of *Rowe v. Brenton*(*l*) where the plaintiff's title to a mine was in question, and he chose to rest his case upon evidence of *possession*, it was held that he could not in reply adduce evidence of his *title*.

§ 597. In addition to the substantive evidence which a party adduces, he is entitled to the aid of the comments and arguments of his pleader. This latter method of establishing a case is called by the Roman law(*m*) *probatio artificialis*, as opposed to the *evidence* which is termed *probatio inartificialis*, inartificial proof.(*n*)

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(*l*) 3 *M. and R.* 139—281.

(*m*) *Quint. l. 5. c.* 8.

(*n*) The following remarks from Archbishop Whately's work on Rhetoric (p. 72) may be usefully studied:—

"It is a point of great importance to decide in each case, at the outset, in your own mind, and clearly to point out to the hearer, as occasion may serve, on which side the *Presumption* lies, and to which belongs the [*onus probandi*] *Burden of Proof*. For though it may often be expedient to bring forward more proofs than can be fairly *demanded* of you, it is always desirable, when this is the case, that it should be *known*, and that the strength of the cause should be estimated accordingly.

"According to the most correct use of the term, a "Presumption" in favor of any supposition, means, not (as has been sometimes erroneously imagined) a preponderance of probability in its favor, but, such a *pre-occupation* of the ground, as implies that it must stand good till some sufficient reason is adduced against it; in short, that the *Burden of proof* lies on the side of him who would dispute it.

## 2. *Quantity of proof.*

§ 598. This is the second proposed head of the present enquiry. Let us consider first what need *not* be proved.

1st. Proof need not be offered of that of which the Court is bound to take judicial notice: see ante § 444 for it would be superfluous: and the maxim of the law is *lex non requirit verificare quod apparet curiæ.* The law requires no proof of that which is apparent to the Court.

2nd. No proof is required of that which is admitted by the opposite pleadings (see ante § 555.)

3rd. No proof is required of what the opposite pleader may admit in Court, or before hand by agreement for the purposes of the trial.

4th. Where in the pleadings superfluous matter has been set forth, it need not be proved, so that the residue forms a legal cause of action or defence. *Utile per inutile non vi-*

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"Thus, it is a well known principle of the Law, that every man (including a prisoner brought up for trial) is to be *presumed* innocent till his guilt is established. This does not, of course, mean that we are to *take for granted* he is innocent; for if that were the case, he would be entitled to immediate liberation: nor does it mean that it is antecedently *more likely than not* that he is innocent; or, that the majority of those brought to trial are so. It evidently means only that the "burden of proof" lies with the accusers;—that he is not to be called on to prove his innocence, or to be dealt with as a criminal till he has done so; but that they are to bring their charges against him, which if he can repel, he stands acquitted.

"Thus again, there is a "presumption" in favor of the right of any individuals or bodies corporate to the property of which they are in *actual possession.* This does not mean that they are, or are not, *likely* to be the rightful owners: but merely, that no man is to be disturbed in his possessions till some claim against him shall be established. He is not to be called on to prove his right; but the claimant, to disprove it; on whom consequently the "burden of proof" lies.

"A moderate portion of common sense will enable any one to perceive, and to show, on which side the Presumption lies, when once his attention is called to this question: though, for want of attention, it is often overlooked: and on the determination of this question the whole character of a discussion will often very much depend. A body of troops may be perfectly adequate to the defence of a fortress against any attack that may be made on it; and yet, if, ignorant of the advantage they possess, they sally forth in the open field to encounter the enemy, they may suffer a repulse. At any rate, even if strong enough to act on the offensive they ought still to keep possession of their fortress. In like manner, if you have the "Presumption" on your side, and can but *refute* all the arguments brought against you, you have, for the present at least gained a victory: but if you abandon this position, by suffering this Presumption to be forgotten, which is in fact *leaving out one of, perhaps, your strongest arguments,* you may appear to be making a feeble attack instead of a triumphant defence.

"Such an obvious case as one of those just stated will serve to illustrate this principle. Let any one imagine a perfectly unsupported accusation of some offence to be brought against himself; and then let him imagine himself—instead of replying (as of course he would do) by a simple denial, and a defiance of his accuser to prove the charge,—setting himself to establish a negative,—taking on himself the burden of proving his own innocence, by collecting all the circumstances indicative of it that he can muster; and the result would be in many cases that this evidence would fall far short of establishing a certainty, and might even have the effect of raising a suspicion against him; he having in fact kept out of sight the important circumstance, that these probabilities in one scale, though of no great weight perhaps in themselves, are to be weighed against absolutely nothing in the other scale."

*tiatur*. The essential is not vitiated by the unessential; surplusage need not be proved.(o)

§ 599. Having shown what need not, we now come to show what must be proved.

§ 600. The respective issues are to be proved; but the proof must be confined to the issue; for the judge's province is to determine *secundum allegata et probata*, according to what is alleged and what is proved, that is with reference *both* to the *pleadings and the evidence*. To admit proof of what is not pleaded and taken issue on, would be to encumber the record with evidence of something not *allegatum*.

See Reg. XV. of 1816, Sec. X. cl. 3—4. and C. O. S. U. 25th March 1853. See Morley's Digest, N. S. Tit. Cr. Law, c. 131.

"Warrants in execution of former convictions are not to be brought forward as evidence for the prosecution; but, after conviction, due weight is to be given to them in awarding punishment. *Case of Hur Patell Bin Chind Patell.* 27th July 1846. S. F. A. Rep. 255.—Hutt & Grant."

§ 601. So in an action for assault, when the defence is "not guilty," the defendant will not be allowed to show that the plaintiff committed the first assault, which *in law* would justify the defendant's conduct; for his plea of not guilty, only puts in issue the *fact* of assaulting; and if he were to give evidence of the plaintiff having struck first, he would thereby be giving evidence of something "*non allegatum*;" had he relied on this defence, he should have pleaded the facts: *i. e.*, though it is true that he struck the defendant, yet he struck in his own defence, having been first assaulted—or as it is called, *son assault demesne*. The like law is of the case where the defendant justifies the battery in defence of his possession—using no more force than was necessary to oust the plaintiff, or "*molliter manus imposuit*," as the plea is termed.

§ 602. It follows from this rule, that evidence of collateral facts is generally speaking not to be received. As for instance, in an action for not supplying the plaintiff with good beer, the defendant could not show that he had supplied *other* parties with good beer.

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(o) The practice of the Company's Courts, whereby the judge fixes the issues, will afford much assistance to the pleader: but a judge *may* fix an immaterial issue The pleader should object to this, See S. Proceeding Rules, 1st July 1855. Title 1st hearing on the merits rule 19. See Morley's Digest, N. S. Tit. Ev. c. 14.

"The Court is to record the points to be established respectively by the parties; and having done that, it is for the parties to produce the evidence in support or refutation of such points; but no party can be allowed to plead as an excuse for neglecting to file evidence, that the Court did not specifically call for it. *Colville and others v. Bennett and others.* 9th Jan. 1849. S. D. A. Decis. Beng. 13.—Hawkins.

§ 603. Evidence of the character of a party is generally not receivable, except when it is put directly in issue, as in an action for defamation, or on a trial for any crime; and the character of the prosecutor may become a material question in a criminal trial; as for instance the character of the prosecutrix for chastity, or the reverse, on a charge of rape. It is true that a prostitute may be raped, but the probability of the charge ought to be very much weakened by showing that she had formerly been connected with the prisoner, with other men, or had walked the streets and the like. See *Robin's case*,(p)

"The prosecutrix having denied on cross-examination that she was acquainted, or had had connection with several men named, and shown to her at the time she was questioned, the counsel for the defence proposed to call these persons to contradict her. Their evidence was objected to as inadmissible, and *Hodgson's case*, was cited. Coleridge, J., after consulting Erskine, J., said that neither he nor that learned judge had any doubt on the question. It is not immaterial to the question whether the prosecutrix has had this connection against her consent to show that she has permitted other men to have connection with her, which on her cross-examination she has denied. The witnesses were accordingly examined, and the prisoner was acquitted."

Where evidence of character is admissible, it must be of a general nature, so as to show what reputation the person bore among his neighbours. In civil cases, character is of importance only where it affects the amount of damages, as in actions for libel, where the excellence or the contrary of the plaintiff's character previous to the defamation is matter for consideration, in determining the amount of injury the plaintiff has received and the consequent compensation to which he is entitled. But in actions on contract it clearly matters not whether the plaintiff has suffered damage from a good man or one of indifferent character: the question is the amount of loss which the breach of the contract has occasioned. Nor can the plaintiff's character in such a question affect the decision any more than that of the defendant. But in criminal cases, the prisoner is always permitted out of motives of humanity to call witnesses to his character. The prosecutor may not call witnesses to show the prisoner's bad character in the first instance, but he may do so in reply, when the prisoner on his defence calls witnesses to character whom it is important to the prosecutor to rebut. It may be remarked here, that where the facts are

(p) *Moo. and R.* 512.

clearly brought home to the prisoner, his character can have no weight in determining on his guilt or innocence of the particular charge under investigation. Where the facts remain in doubt, evidence of character may give the measuring cast in the prisoner's favor. Though evidence of character will not, except in such cases, have any influence on the question guilty or not guilty, it is always worthy of consideration when the amount of punishment or sentence is before the Court. See Taylor, § 258.

"The enquiry, too, must be confined, except where the *intention* forms a material ingredient in the offence, to the *general* character of the prisoner, and must not condescend to *particular* facts; for although the common reputation, in which a person is held in society, may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can afford no such presumption. 'None are all evil,' and the most consummate villain may be able to prove, that on some occasions he has acted with humanity, fairness, or honor. In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him; as, for instance, if he be accused of theft, that he has been reputed an honest man;—if of treason, a loyal one. Subject to these observations, evidence of the defendant's general good character is admissible in all prosecutions, whether for felony or misdemeanor."

§ 604. Evidence of character is receivable to impeach or support the veracity of *witnesses*: for it is *never* immaterial to the judge to have the real character of the witnesses, on whose story he is to found his judgment, as fully before him as possible.

§ 605. But when a collateral fact is material to the proof of any issue, as when the *factum probandum* is not susceptible of *direct* proof, (see ante § 105) evidence of the collateral fact is necessarily admissible. Whether such a fact is material, or is so completely collateral as to be entirely beside the issue, is a question which it is the province of the judge to decide; and this is often a question of great nicety. Where a pleader offers in evidence a fact which is apparently collateral, it is frequently admitted, on his pledge or undertaking that he will subsequently show its relevancy. Because the judge does not know the details of proof by which the pleader seeks to establish

his case; whereas the skilful pleader proceeds on some predetermined plan of action; and thus it may happen that the bearing of a fact may not strike the judge at the moment of its introduction, notwithstanding its relevancy may become afterwards apparent, in connexion with facts subsequently proved. Hence credit is given to the pleader; but he must be cautious not to abuse his trust, and if he fails to redeem his pledge, the evidence already received, I conceive, ought to be struck out of the record; at any rate it should not be allowed any influence when the judge is considering the weight of evidence.

§ 606. In criminal cases it is still more stringently the rule to exclude evidence of *other* circumstances than that which is the immediate subject of enquiry: as for instance of *other* thefts, &c. It is frequently the practice of a policeman to blurt out that the prisoner is "an old offender," which should never be permitted, until *after* the question of guilt has been established. It is evidence of character, in point of fact, and of other distinct offences. It may be of importance when determining the sentence.

§ 607. But in crimes, the essence of which consists in *guilty knowledge*, as when a man is charged with having uttered false coin, the question whether he did so with a guilty knowledge of the character of the coin is material, and the proof of *other* utterings by him about the same time, or his possession of other base coins at the time of his arrest, will be admissible to prove his guilty knowledge. Suppose a man is arrested in a public bazaar on a charge of having paid for articles purchased at a particular shop with counterfeit coin, proof might be brought that he had done the same at other shops in the vicinity, and the fact that other counterfeit coins were found upon him at the time of his arrest would also be cogent evidence against him. The law is the same with regard to uttering forged notes and other instruments. In *Whiley's* case,(q) Heath, J. thus lays down the law:

"The charge in this case puts in proof the knowledge of the prisoner; and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances."

So also on a charge of receiving stolen goods, where the gist is the *knowing* them to be stolen, proof of other articles found in the posses-

(q) 2 *Leach C. C.* 983.

sion of the prisoner is receivable to bring home the guilty knowledge. So in *Dunn's* case.(r)

"Where upon an indictment for receiving, it appeared that the articles had been stolen, and had come into the possession of the prisoner at several distinct times; the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury, that they might take into their consideration the circumstance of the prisoner having the various articles of stolen property in her possession, and pledging, or otherwise disposing of them at various times, as an ingredient in coming to a determination, whether when she received the articles, for which the prosecutor elected to proceed, she knew them to have been stolen."

§ 608. So where the gist of the crime is the *intent* with which the act was done, evidence of other acts tending to prove the intent is admissible. So in *Coke's* case(s) where the prisoner was charged with maliciously shooting at A, evidence was received of the prisoner having shot at the prosecutor a quarter of an hour before the shooting with which he stood charged. So on the trial of *Campbell* for murder, before the Madras Supreme Court, at the third Sessions of the year 1850, evidence was received of his having shot at other fishermen on the river from his house on previous occasions. So on a charge of sending a threatening letter, other letters of a similar character sent by the prisoner are admissible. So on an action for libel, other libels may be proved to show the *animus* of the defendant. On the same principle former menaces, old grudges, &c. may be proved against the prisoner on a charge of murder.

§ 609. It is sufficient if the *substance* of the issue be proved: that is to say, the real substantial question raised between the parties. Thus in an action against a gaoler, police officer, &c. for permitting *voluntarily* the escape of a person in his custody, it is sufficient to show a *negligent escape*. So in a suit for an account, it is sufficient to prove the liability of the defendant to account to the plaintiff, as for instance, his receipt of funds as trustee, or agent, without going into the items of account. A decree for the account follows as a matter of course. And the items will then have to be proved in order to strike the balance. See Macpherson's Procedure, p. 232.

"It is not necessary for the plaintiff, however strong his case may be, to

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(r) 1 *Moo. C. C.* 150.
(s) *Russ. and Ry.* 531.

allege or to establish more than what is requisite to entitle him to the decree which he seeks.

"Thus when the suit is for an account, and the account is of a kind which must be referred to some Officer for special investigation, all the evidence that need be adduced at the hearing is that which proves the defendant to be a party liable to account to the plaintiff; and then the decree to account follows of course."

§ 610. So if a defendant pleads two matters, each of which is a complete defence,(*t*) such as denial of the fact, justification, excuse, &c. it will be sufficient for him to prove only one or more of such issues. If for instance in an action of trespass by A. against B. the pleas are first a right of entry in B., and secondly entry by leave and license of A., proof of either issue will be sufficient.

§ 611. But to return to proving the substance of a particular issue; in criminal trials a man charged with burglary,(*v*) may be convicted of theft, if the proof of burglary fails. So a man charged with murder may be convicted of manslaughter: so again on a charge of theft, it is sufficient to prove the theft of any one or more out of the entire articles stolen; for *omne majus continet in se minus*, the greater ever contains the less. So an indictment for poisoning by arsenic, is supported by proof of administering any poison of an irritative character, operating to the destruction of life in the same way as arsenic. Thus proof of corrosive sublimate would sustain such an indictment, though proof of laudanum would not.(*w*) So where it is charged that death was caused by a knife, proof of death by any cutting instrument will suffice, but death by a club would not. And so when death is charged to have been caused by a blow from a stick, proof of a blow from a stone will support the indictment.(*x*) So on an indictment for forgery, uttering, or obtaining goods by false pretences, it is not now(*y*) necessary to prove an intent to defraud *the prosecutor* or any particular person, but proof of an intent to defraud *generally* is sufficient.

(*t*) Observe this is an instance of proving only *one* of several issues, not of proving a portion only of one issue.

(*v*) Breaking into a dwelling house and larceny therein, between the hours of 9 P. M. and 6 A. M. See Act XXXI. of 1838, Sec. XI.

(*w*) On the charge of *Daubeny* for murder before the Supreme Court, the indictment laid the poisoning by laudanum; and the Grand Jury is understood to have thrown out the bill for want of proof of that specific poison having been administered. It is conceived that symptoms attributable to the presence of any poison acting on the body in the same way as laudanum, would have warranted the finding a true bill.

(*x*) Now by Act XVI. of 1852, (applicable to H. M.'s Courts only). Sec. IV. provides that the means by which the injury was inflicted need not be specified in an indictment for murder or manslaughter.

(*y*) See Ibid, Sec. VIII.

§ 612. Yet if the *substance* of the issue be not proved, it will be fatal to the party on whom the proof of the issue lies, for there will be a material variance between the *allegata et probata* the pleadings and the proof, and judgment is always to be given according to *both*.

Thus Macpherson writes of the Procedure of the Mofussil Courts in this respect, page 233.

"It is not only necessary that the substance of the case set up by a party should be proved; it must be essentially the same case, and not a different case; for the Court will not allow a man to be taken by surprise by a case proved on the other side, which, though plausible in itself, is substantially different from that which was set up in the pleadings.

"There must be a direct and real conformity, though not perhaps a minute literal conformity, between the proofs and the pleadings; parties who come for the execution of agreements must state them as they ought to be stated, and not set up titles which, when the cause comes to a hearing, they cannot support.

"Thus a party should not set up a general title, such as inheritance, and then seek to recover under a particular deed merely.

"Where the plaintiff sues on a special ground, such as an *oonomuttee putr*, or deed granting power to adopt, the judge should confine himself to the investigation of that point only; and, on its not being established, he should simply dismiss the suit. He should not decree any portion of the property in suit, on a ground totally different from that on which the claim was preferred,—that is to say, upon the general right of inheritance, when the claim was founded on right to adopt, which was rejected as invalid.

"A party cannot be allowed to prove facts inconsistent with his case as stated in the pleadings. It must be decided with reference to the allegations upon which he has himself rested it; and when his averments have been of an original and exclusive right and unbroken possession on his part, no presumptions of his having acquired the property by purchase or in any other manner can avail him.

"In cases where the burden of proof rests manifestly upon the plaintiff, if the plaintiff do not establish the special grounds on which he comes into Court, there is no necessity to investigate the grounds upon which the defence rests.

"When a man advances one set of claims and establishes another, judges are very often tempted to take irregular courses for the purpose of saving further litigation. But it is reasonable and just that the right of parties litigating should be decided *secundum allegata et probata*: and attempts to reach the supposed equity of each case by departing from the rules which have been established for the purpose of maintaining and administering jus-

tice, generally lead in the particular cases to results, which were never contemplated, and introduce disorder, uncertainty and confusion into the general practice of the Courts."

§ 613. Hence we may lay it down as a general rule that a party shall not recover upon one title by his pleadings and another by his proof. The same law prevails as to defence.

So where a party sues another upon a contract, the contract, when proved, must correspond with the effect of the contract as alleged in the pleadings. For example, in an action on a breach of warranty of a horse, alleged by the plaintiff to have been "warranted sound," proof that the warranty was, except as to a kick on the leg, would not support the plaint. (See ante § 593).

Hence a material alteration in an instrument when produced constitutes such a variance from the allegation of the contract, that the party cannot recover. The law seeks to repress all such fraudulent acts; and in the note to the great case of *Master v. Miller*,(z) the whole of the authorities will be found collected. The *placitum* of *Master v. Miller* is as follows:—

"An unauthorized alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, even though made by a stranger, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration."

Alterations in the date, sum, or time of payment, or the insertion of words authorizing transfer, or expressing the value to be received on some particular account, or an unwarranted place for payment, and the like, are material variances. The *onus* of accounting for the variance, for instance, showing its *bonâ fide* character and the consent of all parties to the alteration, lies upon the party producing the instrument. "A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state,"(a) says the judgment in *Davidson v. Cooper*. "If he omits to do so, and thus destroys his remedy he cannot complain; an alteration cannot be made in the instrument except through fraud or laches on his part." With these principles the case of *Shait Gopaul Krishan Doss v. Nabob Khutbut Mulk Subja Ali Khan Bahadur*(b) seems singularly inconsistent. The case is indifferently reported: but the Civil Court had found that the

(z) 1 *Smith's L. C.*, p. 459.
(a) 13 *M. and W.* 352.
(b) Reported p. 43 of Madras Sudd. Rep. for the year 1855.

Kararnamah on which the plaintiff sued had been altered in a material particular, and therefore nonsuited the plaintiff. On appeal, the alteration was pointed out, and the Sudder Adawlut's judgment admits "that there are apparently more alterations in the deed than one." The facts were shortly these. The Nabob was a creditor of a Benares banking-house which had a branch at Masulipatam. He was about to sue the agent of the Kotee in the Masulipatam Court; whereupon the agent agreed to execute a Razeenamah, providing for the liquidation of the claim by certain specified instalments. The plaintiff thereupon prevailed upon the Nabob (apparently without any consideration) and the agent, to allow the plaintiff, who was also a creditor of the Kotee, to include his claim in the Razeenamah. The Nabob thereupon gave the plaintiff a Kararnamah, whereby he agreed to pay the plaintiff proportionally out of every instalment he should receive *from the agent* at Masulipatam. Before any instalment was paid the bank failed. The Nabob at great expense sued the principals at Benares, and after long litigation and appeals to the Calcutta Sudder, was declared entitled to a dividend. The plaintiff then sued the Nabob to recover his proportion of the dividend. The Kararnamah was the foundation of the action. The Nabob maintained that he was only liable to pay the plaintiff in event of receiving instalments *from the agent* at Masulipatam. That he had been put to great expense in pursuing his remedy at Benares; and that the plaintiff had borne no share in the expenses of that litigation. When the Kararnamah was produced, it appeared that an alteration had been made in it, and the terms "*or owner*" inserted after the word agent. Thereupon the plaintiff was nonsuited. It was strongly contended on the argument in appeal, that this was a material alteration, made while the Karar was in the plaintiff's possession: that it sought to make the Nabob liable upon a totally different contingency than that stipulated by the Nabob:(c) that as there was no consideration for the Nabob giving the Kararnamah, it was unreasonable that he should be made liable under circumstances which he had never contemplated; and that to allow a party to recover on a forgery was holding out a premium for that crime to the community at large. The Court threw out that there

(c) It will be observed that the printed judgment misconstrues the argument on this point. It was not contended that the "alteration was introduced with a view of making *the owners or principals* of the Kotee responsible and not merely their agent;" but that the alteration was with a view of making the *defendant* liable on an event not provided for by the original terms of the bond.

was an equity ; but it was answered, that a forgery could no more be made the foundation of a suit in equity than of an action at law. With all deference to the Court, it is submitted that this judgment is not sustainable. It may be, that had the plaintiff framed his suit differently ; had he insisted that as the Nabob had in part recovered, in the shape of dividend, a larger sum than he would, but for plaintiff's claim being included in the Razeenamah, I am not prepared to say that he might not have had an equitable claim to a proportionate share, upon payment of his due quota of the costs incurred in the recovery of the dividend. But when he founded his claim upon his Kararnamah, and was proved to have forged and altered it, to support the case he made, the principles in the text and authorities, and indeed the plain sense of the matter, seem conclusive against his being permitted to recover upon the altered instrument.

Wherever a contract contains an exception qualifying the promise, or rendering its fulfilment conditional, instead of absolute ; that exception must be alleged in the pleadings (see ante § 593) and it must be shown not to affect the plaintiff's case ; for if it be not alleged, the instrument when produced will establish a fatal variance between the *allegata* and *probata*.

So a right to enter on a man's land to take minerals, is not supported by proof of such a right, *subject* to the payment of a compensation : for this is a different right. But the proof of a larger right will always sustain an allegation of a less right ; for "*omne majus, &c.*" Thus an allegation of a right of ferry from A. to B., is supported by proof of a right of ferry from A. to B. and back again.

§ 614. These remarks apply to actions founded upon contract. Where the action is founded upon a tort (or wrong) it is no variance to prove only a *part* of the wrong alleged. Thus in an action of slander, where it is alleged that the libel prefers various charges, proof of the libel containing any one of these charges will suffice.

§ 615. Where a pleading contains an allegation of *time*, it must be proved, whenever it is material or matter of description ; as for instance on a charge of burglary, where it is of the essence of the crime that the offence should have been committed between the hours of 9 P. M. and 6 A. M. (see ante § 611 note (*v*) ). So an allegation of a promissory note bearing date on the 1st January 1856, is not supported by the proof of a promissory note bearing date 1st July 1856. Thus the date of the execution of an instrument, or the date of a contract, is material

in a Mofussil Court, whenever it is sought to affect it by the Regulation of Limitations.(d) See Regulation II. of 1802, Section XVIII.

§ 616. But when the time is immaterial, it need not be proved as laid. Thus in trespass, the proof of a trespass committed on any day before the filing of the plaint will suffice. Thus in criminal cases, proof of a theft on another day than that stated in the indictment is sufficient. But it is advisable nevertheless for the careful pleader to state his facts as nearly true as possible.

§ 617. So also with respect to allegations of *place*: when the place is used as matter of *description*, it must be proved as laid. Thus an allegation of larceny in a *dwelling-house*, is not supported by proof of larceny in a warehouse, shop, or building in which nobody lives. Where *place* must be proved in order to give the Court jurisdiction, a variance is fatal. Thus in a trial before the Supreme Court for an assault, if it turned out that the assault was committed on the high seas, the indictment could not be supported, unless it were alleged to be within the admiralty jurisdiction. So in the Mofussil Courts, *place* is frequently material in order to raise the jurisdiction. See Regulation II. of 1802, Sections V, XII. And so where an offence is local, as a contempt in open Court, it is not supported by proof of a contempt of a judicial officer *not* in Court.(e)

§ 618. An allegation of *value* falls under the same rule. On a trial for theft, it is not material to prove the value of the article as laid; though the article must be proved to be of *some* value, as there cannot be larceny of things of *no* value. But in some cases value becomes material, as for instance on a charge of stealing in a dwelling house above the value of 50 Rupees.(f)

§ 619. It is a general rule that all matter of description must be proved as laid. If a man be charged with stealing *brass* pots, he cannot be convicted in proof of having stolen *silver* pots. If the matter be described with greater particularity than necessary, it must be

(d) The great particularity of Courts Martial in this respect is worthy of observation. It is correct enough to lay letters, &c. with the true date; but the Court ought to be instructed by the Judge Advocate that the exact correspondence of proof in this respect is seldom material, or the members are apt to become embarrassed with scruples which have no legal warrant.

(e) See Regulation XIII. of 1832, Section VII. I was concerned in an appeal in the ... lder Court, on miscellaneous petition, in a case wherein a judge had fined an officer of Court 10 Rupees for contempt of Court. It appeared that the alleged offence was committed more than a mile from the Court, and the fine was remitted. Being on M. P. the case is not reported.

(f) As to these points of time and value, see Act XVI. of 1852, Section XXI. (applicable to Supreme Courts only).

proved as laid. It cannot be struck out as surplusage. In the case above put; it would have sufficed to charge the prisoner with stealing *pots*, simply: and then proof of silver or brass pots would have sufficed for his conviction. But to charge him with stealing pots of a description which he knows he did not take, as for instance silver or gold pots, might mislead him as to his defence; and if the description, though not essential to support the charge, be stated with needless particularity, the prosecutor is bound to prove it as he himself has elected to lay it.

§ 620. So the description of the *person* is sometimes material; as on a charge of larceny or embezzlement *by a servant*. Here, it is necessary to charge that the prisoner was a servant, for that is the gist of the offence; and proof that he was not, would be a fatal variance: though he might still be convicted on such an indictment of *simple* larceny; for *omne majus, &c.* So of a charge of stealing a letter by a person employed in a post office.(*g*) And it is prudent, if not necessary, to describe the person in the terms used by an Act.(*h*)

## III. *Quality of Proof.*

§ 621. The fundamental rule, as already noticed, (see ante § 39) to which all others are subservient, and of which the apparent exceptions are but so many actual illustrations, is that the best evidence which the case admits of shall always be produced.

§ 622. This rule does not require the production of the greatest possible *quantity* of evidence; as for instance a repetition of proof of the same fact by various witnesses; for in law, the testimony of one witness, if thoroughly credible, is equivalent to that of a hundred; and in almost all matters, the proof of a fact may be established by a single witness,(*i*) except in charges of treason or perjury. Therefore, although there may be two or more attesting witnesses to a document, this rule does not require that *all* must be called. It will be satisfied by the production of one, or where none are procurable, by the proof of the document *aliunde*. But it is framed to prevent the introduction of any evidence which raises the supposition that there

(*g*) See Act XVII. of 1837, Section XXXIII—VI. Act XVII. of 1854, Section LI, LIV, LVII.

(*h*) On these two subjects that evidence should be confined to the issue, and that it is sufficient to prove the substance of the issue, the student should read Roscoe's Criminal Evidence, pages 81—114.

(*i*) See Act II. of 1855, Section XXVIII.

is *better* evidence behind, in the possession, or under the control of the party, by which he might prove the same fact. Thus, depositions only become evidence when the deponent himself cannot be produced; because if he were produced, his *vivâ voce* examination in open Court, on oath, and subject to cross-examination, coupled with the opportunity afforded the judge of observing his demeanor, &c. offers better means of testing and searching the veracity and credibility of his story, than the perusal, however astute and critical, of that story from a mere written record of it. Thus a written document affords the best evidence of its own contents, and the contents must be taken from the paper, which will speak for itself, not from a copy, or the treacherous memory of man speaking for it. So in *Strother v. Barr*,(*k*) Best, C. J. said:

"I seldom pass a day in a *Nisi Prius* court without wishing that there had been some written statement, evidentiary of the matters in dispute. More actions have arisen perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing no parol testimony can be received of its contents, unless the instrument be proved to have been lost. It is assumed the case before us is not within this rule, and that the [illegible]ffs did not give parol evidence of the contents of the lease of the pre[illegible]r the injury for which this action was brought. This will be found [illegible] mistake; for the declaration states that the Plaintiffs had let these [illegible]es to certain tenants, and that the conduct of the Defendants is in[illegible]s to the reversion which the Plaintiffs have in them. This statement [illegible]be proved; and is not the lease, which states all the circumstances of the tenancy, the best evidence of them?"

So in Morley's Digest, Tit. Ev. case 153.

"Where a party claimed certain property under a *Hibeh námeh*, and did not produce the deed, alleging that it was lost, and giving various frivolous reasons for such loss, he was nonsuited, with all costs against him. *Zamin-*

(*k*) 6 *Bing.* p. 151.

*dár of Carvatenagar v.*———. Case 12 of 1815. 1 Mad. Dec. 133.—Scott, Greenway & Ogilvie."

Thus where a contract has been reduced to writing, the instrument is regarded as the record of the final intention and agreement of the contracting parties, and the terms of their contract shall be taken from the record which they have themselves appointed, not from parol testimony of what the parties said or intended.

See Starkie, p. 651.

"To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose recollection, and uncertainty of memory, for the most sure and faithful memorials which human ingenuity can devise, or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices."

Thus, where a bond is in its terms absolute, parol evidence cannot be admitted to show that it was *intended* to be conditional, or to operate merely as an indemnity. Analogous to this, is the case of *Syed Hamed v. Kerakoose and Atkinson* before the Supreme Court. There the plaintiff filed his bill to compel the defendant to carry out the trusts of a creditor's deed, of which the defendants were trustees. The defendant Kerakoose, who had refused, after accepting the trust, to proceed further in it, replied that there were certain conditions understood between himself and the plaintiff of a preliminary nature, which had not been carried out, and that he therefore declined to act upon the trust. But the trust deed itself contained no such terms, and it was held that the defendant could not give parol evidence of their existence.

§ 623. But this rule touching the *best* evidence has been much misunderstood, and it must always be so, until a clear philosophical judgment and practical experience shall have settled *what* is the best evidence. It was from a mistaken notion on this point, an over anxiety to exclude evidence open to the faintest suspicion, that the English law so long refused to listen to the parties themselves; to witnesses pecuniarily interested; to witnesses convicted of crime, and the like; and threw many technical difficulties in the way of proving documents, where the attesting

witnesses, or deponents, were not procurable. It is to this that we must attribute the exclusion of various classes of witnesses by the laws of other nations.(l) Thus by the constitutions of the Greek Emperor, Pagans were excluded from giving evidence altogether; Jews from bearing testimony against Christians; thus in the West Indies the evidence of a slave was not receivable against a free man; thus the evidence of a Hindu was not receivable against Mahomedan; thus both the Mahomedan and Hindu laws exclude the testimony of woman; thus the Roman and Mediæval Civil law regarded the testimony of woman with considerable jealousy; and drew fanciful distinctions, such as the rule that greater credit was due to a virgin than a widow.

§ 624. Neither does the rule exclude secondary proof of an original instrument by verbal testimony rather than by a copy.(m) For there are no degrees of secondary evidence.

§ 625. But it requires that the evidence should come from the proper sources; hence it requires documents to be produced from their natural place of custody; hence it excludes evidence which clearly shows that there is better behind; as hearsay, while that which the witness has heard may be told in Court by the person from whom he heard it.

§ 626. The observations of Best are so clear and cogent that they must be quoted here:

"Confining our attention therefore to evidence *in causâ*—it was said by a most eminent judge in a most important case, that 'the judges and sages of the law have laid it down that there is but one general rule of evidence, *the best that the nature of the case will admit.*' And Lord Chief Baron Gilbert, to whom principally we are indebted for reducing our law of evidence into a system, says, 'The first and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the fact is capable of.' 'The true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, is this: That no such evidence shall be brought, which *ex naturâ rei* supposes still a greater evidence behind in the party's own possession and power.' And in another old work of authority; 'It seems in regard to evidence to be an incontestable rule, that the party who is to prove any fact must do it by the *highest* evidence the nature of the thing is capable of:' and similar language is to be found in most of our modern books. The important rule in question has,

(l) See *Best*, § 63—4.

(m) See *Doe d. Gilbert v. Ross*, ante § 573.

however, been very generally misunderstood: partly from the ambiguous nature of the language in which it is enunciated, and partly from its being commonly accompanied by an illustration which has been confounded with the rule itself. 'If,' say the books, 'a man offers a copy of a deed or will when he ought to produce the original, this carries a presumption with it that there is something in the deed or will that makes against the party, or else he would have produced it, and therefore the proof of a copy in this case is not evidence.' This is undoubtedly true, but it is a great mistake to suppose it the full extent of the rule. Sometimes, again, it has been misunderstood as implying that the law requires in every case the most convincing or credible evidence which could be produced under the circumstances. But all the authorities agree that this is not its meaning; as further appears from the maxims, that 'there are no degrees of parol evidence,' and 'there are no degrees of secondary evidence.' Suppose an indictment for an assault: or, to make the case stronger, for wounding with intent to murder, (an offence still capital): the injured party, though present in court, is not called as a witness, and it is proposed to prove the charge by the evidence of a person who witnessed the transaction at the distance of a mile, or even through a telescope; this evidence would be *admissible*, because it is connected with the act—the senses of the witness having been brought to bear upon it;—and the not producing, what would probably be more satisfactory, the evidence of the party injured, is mere matter of observation to be addressed to the jury. Again, by 'secondary evidence' is meant derivative evidence of the contents of a written document; and it is a principle that such is not receivable unless the absence of the 'primary evidence,' the document itself, is satisfactorily accounted for. But when this has been done, any form of secondary evidence is receivable: thus, the parol evidence of a witness is admissible though there is a copy of the document, and the probability that it would be more trustworthy than his memory is only matter of observation."

§ 627. Starkie thus lays down the broad rule with respect to written instruments.(n)

"Wherever written instruments are appointed, either by the requirement of law or by the compact of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them."

He shows that parol evidence may be *offered* with relation to written instruments in one or other of these three aspects.

1st. In *opposition* to written evidence.

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(n) *Page* 848.

2nd. In *aid* of written evidence.

3rd. As independent evidence of a fact of which there may exist written evidence.

We must now consider each of these three heads.

1*st*. *Where parol evidence is offered in opposition to written evidence.*

Here its object is

1st. To supersede ;

2nd. To contradict, or to vary ; or

3rd. To subvert, to add to, or subtract from the written evidence.

§ 628. It seeks to supersede. Where the policy of the law has required the evidence of a particular fact to be in writing, the want of such written evidence can never be supplied by oral evidence, for this would be to subvert the rule itself. Thus the law requires a will to be in writing ; (except in certain cases where a nuncupative will suffices, as of a soldier in the field,(o) who is *inops consilii*) and if the deceased has not complied with this statutory requirement, no verbal testimony of his intention can supply the omission : and though the law abhors an intestacy, he shall be deemed to have died intestate, rather than such evidence be admitted.

§ 629. Where the law does *not* require any written testimony, but the parties have eventually agreed that there shall be a written record of their intentions, the same principle applies.(p)

To permit points to be supplied by parol testimony, would clearly supersede the necessity of reducing such particulars to writing. For instance, where a promissory note on the face of it is expressed to be payable on demand, evidence of a contemporaneous agreement that it should not be payable till a given event is inadmissible.

So in the case of *Moseley v. Hanford*,(q) it was held :

" Where a promissory note is, on the face of it, made payable on demand :

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(o) See 1 Vic. c. 26. s. IX.

(p) " By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add or to subtract from, or in any manner to vary or qualify the written contract ; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract ; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."
Per Lord Denman in *Goss v. Lord Nugent*, 5 *B. and Ad.* 64.

(q) 10 *Barn. and Cr.* 729.

oral evidence of an agreement entered into when it was made, that it should not be paid until a given event happened, is inadmissible."

*Secondly;* as to contradiction varying, &c. Here parol evidence is never allowed to be received.

So where upon the face of a document, a party appears to be bound as principal, he cannot show orally that it was agreed he should be merely a surety. So where a man signs as principal, he cannot in an action against him by a third party, show that he signed only as agent.(r) So where a Marine Policy was effected from London to Leghorn, it was not open to show a contemporary agreement that the risk should commence from the docks only. So the terms of an auction must be gathered from the printed particulars of sale, and the verbal declaration of the auctioneer at the time of sale cannot be introduced, for the purpose of varying the effect of the printed conditions of sale. Thus in *Kickwick v. Richardson,* in the Supreme Court, in which the plaintiff sued the defendant, an auctioneer, for a warranty of a ruby ring which turned out to be glass, parol evidence of the declaration of the defendant at the time of the sale, limiting his liability, was refused.

§ 630. It may be observed that the above instances are as much examples of the rejection of parol evidence to *vary* as to *supersede* written evidence. The class of cases specified in § 628 affords illustration of attempts at pure supersession: that in § 629 of attempts to supersede the necessity of written evidence of a particular fact or facts, not to supply the omission of an entire instrument. And in this latter class of cases, that is to say, supersession of written testimony of a particular fact, the effect must always be also to *vary* the instrument.

§ 631. It is to be observed, that in the instances above given, the documents were themselves consistent and *unambiguous:* but some extrinsic independent fact was sought to be imported into the document by parol testimony. It often happens however that the document is so worded, that its meaning is *ambiguous,* or that though there may be no ambiguity on the face of the document, yet that extrinsic circumstances render the application of the document to one of two given states of facts a matter of doubt and ambiguity. Here are two kinds of ambiguity, of which the sources are clearly distinct. The

(r) Though he may show his real character in an action between himself and his principal.

one appears upon the instrument itself, and the ambiguity is raised by the inherent vice or defect of the language used ; it is patent to all the world, and therefore it is called *Patent Ambiguity*. The second kind however would not be apparent to any indifferent reader, unacquainted with the facts ; and though the language used is unambiguous, it may fit several conditions of fact equally well. Here, the ambiguity is concealed : its source is extrinsic to the document, and it is called a *Latent Ambiguity*.

§ 632. It is a good test of the character of an alleged ambiguity, to put the document into the hands of a person unacquainted with the facts ; if such a one, on perusal, points out the ambiguity, it is *Patent ;* as where, in a will, an estate is left to ————.

If he discovers not the ambiguity, but circumstances of which he has no knowledge render the applicability of the document uncertain ; the ambiguity is *Latent* : as for instance, if a testator having *two* estates named *Blackacre*, leaves his " estate named Blackacre to A. B." or leaves his estate Whiteacre to his " Cousin William," he in fact having two cousins named " William."

§ 633. The distinction is an important one ; because parol evidence is never admitted to explain a *patent* ambiguity. Thus in the case put of a will bequeathing an estate to ————, the blank can never be supplied by parol evidence : for intention is not to be gathered from slippery reminiscences, independent of the expressions used, but from the expressions themselves. But the same reason does not hold good with respect to the other class of ambiguities, as we shall see hereafter ; and therefore the rule does not prevail ; extrinsic evidence is admissible to explain an ambiguity which is introduced by extrinsic circumstances ; and the maxim is " *quod ex facto oritur ambiguum, verificatione facti tollitur.*(s)

§ 634. But a document is not patently ambiguous because it is unintelligible to an uninstructed person : as the following observations of Vice-Chancellor Wigram show.(t)

" Words cannot be ambiguous, because they are unintelligible to a man who cannot read ; nor can they be ambiguous, merely because the court which is called upon to explain them may be ignorant of a particular fact,

(s) As parol evidence *is* admissible to explain latent ambiguity, this will more properly fall under the second head, *i. e.* where parol testimony is offered in aid of written evidence.

(t) Wigram on Extrinsic Evidence in Interpretation of Wills, § 200.

art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow—that the question, whether a will is ambiguous, might be dependant—not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess ; nay, the technical precision and accuracy of a scientific man might occasion his intestacy,—a proposition too absurd for an argument."

Hence, foreign languages, terms of art, or commerce, writing in cipher, obsolete terms, and the like, will not create an ambiguity Here the evidence of persons skilled to decipher, or to explain, is always admissible. It is ambiguity in point of *fact* rather than *form*, to which the rule applies.

§ 635. So again we must discriminate between *inaccuracy of expression* and ambiguity. On this Vice-Chancellor Wigram writes as follows :—(v)

" Again, a distinction must be taken between *inaccuracy* and *ambiguity* of language. Language may be *inaccurate* without being *ambiguous*, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one *leasehold house* in a given place, and *no other house*, were to devise his *freehold* house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an *inaccurate* description is found to be sufficient *merely by the rejection of words of surplusage* are cases in which no ambiguity really exists. The *meaning* is certain, notwithstanding the inaccuracy of the testator's language."

§ 636. It will always be the duty of the judge to give effect to the terms of the document, if, by a sound reasonable construction, he can remove an apparent ambiguity.(w)

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(v) *Best, page* 287.

(w) Notwithstanding that it is laid down in the text books that a Hindu cannot make a will, the advance of society has already to a very considerable extent introduced wills among the Natives of India ; and doubtless such documents will more and more prevail, as it becomes necessary to remove the restrictions upon alienation of property. English wills may have to be adjudicated on in Mofussil Courts, or advised on by Mofussil pleaders : and hence it may be useful to give the general rules of the law which prevail for the construction of English wills. Some of these rules are of a technical character ; others are not applicable to other than English wills : but as a body, these rules convey sound principles of construction for written instruments in general. I take the following summary from *Jarman on Wills*, vol. 2, p. 740.

" I. That a will of real estate, wheresoever made, and in whatever language written, is

§ 637. Thirdly, parol evidence is sometimes offered to *subvert* a written instrument; that is to say, to show that it really never had any legal existence; and for this purpose such evidence is admissible; for here the object is not to contradict, vary, &c. the terms; but assuming and admitting that these terms are apt and sufficient, to show that on account of some fact proved *aliunde*, the entire instrument is worthless.

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construed according to the law of England, in which the property is situate, but a will of personality is governed by the *lex domicilii*.

"II. That technical words are not necessary to give effect to any species of disposition in a will.

"III. That the construction of a will is the same at law and in equity, the jurisdiction of each being governed by the nature of the subject; though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

"IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period.

"V. That the heir is not to be disinherited without an express devise, or necessary implication; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed.

"VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object.

"VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcileable, the latter must prevail.

"VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will, (though it may be used to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity.)

"IX. Nor to vary the meaning of words; and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible; but the

"X. Courts will look at the circumstances under which the devisor makes his will—as the state of his property, of his family, and the like.

"XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition.

"XII. That an express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will; and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents; though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt.

"XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous; nor is the fact, that the testator did not foresee all the consequences of his disposition, a reason for varying it: but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose.

"XIV. That the rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake, for one which would have rendered the devise void.

"XV. That favor or disfavor to the object ought not to influence the construction.

"XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy.

"XVII. That, where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary.

"XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject. And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning.

"XIX. That words and limitations may be transposed, supplied, or rejected, where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.

§ 638. Thus for instance a written instrument may be impeached on the ground of *fraud* in its concoction; for fraud as before observed (see ante § 495) vitiates every thing, and the instrument is void *ab initio*: it never had any *legal* existence. "The fraud," says Lord Coke, "doth suffocate the right;" and there would be a very poor protection against fraud, if it could only be proved by *written* testimony, a species of inconvenient record which it generally seeks to escape.

§ 639. So parol evidence is admissible to show that the contract was made in furtherance of some object forbidden by the law. See *Collins v. Blantern*,(x) the leading case on this point.

§ 640. So it may be shown that the contract was made upon some immoral consideration; for the law will not recognize any contract *contra bonos mores*.

§ 641. The fundamental principle upon which the three last rules are based is the maxim, "*Ex turpi causâ non oritur actio.* No action arises from a base cause. And of this the maxim, *Ex dolo malo non oritur actio*, no action arises from a fraud; (see § 638) and "*Ex pacto illicito non oritur actio*," from an illicit agreement, or one which is against the law, no action arises (see ante § 639—40) are but more confined expressions: in the language of Wilmot, C. J. in the great case of *Collins v. Blantern* "whenever Courts of law see such attempts made to conceal such wicked deeds, they will break away the whole varnish and *show the transaction in their true light.*" So again:—"This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void is for the public good; you shall not stipulate for iniquity. All writers

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"XX. That words which it is obvious are mis-written, (as dying *with* issue, for dying *without* issue), may be corrected.

"XXI. That the construction is not to be varied by events subsequent to the execution; but the courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them.

"XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them.

"XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.

"XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction."

(x) 1 *Sm. L. C.* 154.

upon our law agree in this—no polluted hand shall touch the pure fountains of justice."

§ 642. How, it may be asked then, shall a defendant who shows his own pollution, who does not come into Court with clean hands, be allowed to defend himself by showing that he himself is tainted, that he too has been *particeps criminis*, and a party to the illegal or immoral act? Is it not a general maxim, that "*nemo allegans suam turpitudenem est audiendus?* (See ante § 291.)

I know not how the question can be more conclusively answered than in the words of Lord Mansfield, the same great judge who said, as against *an innocent party*, "no man shall set up his own iniquity as a *defence* any more than as a *cause* of action."(*y*) In *Holman v. Johnson*(*z*) he said as follows :—

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who sounds his cause of action upon an immortal or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis.*"

§ 643. So it may be shown by parol evidence, that the written instrument has been obtained by Duress. See Broom's Legal Maxims, p. 96.

"We may, however, take this opportunity of observing, that, where such compulsion consists in an illegal restraint of liberty, a contract entered into by reason thereof will be void; if, for instance, a man is under duress of imprisonment, or if, the imprisonment being lawful, he is subjected to undue and illegal force and privation, and, in order to obtain his liberty, or to avoid such illegal hardship, he enters into a contract, he may allege this

(*y*) *Montefiori v. Montefiori*, 1 *W. Bl.* 363.
(*z*) *Cowp.* 343.

duress in avoidance of the contract, so entered into; but an imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party was in proper custody under the regular process of a court of competent jurisdiction; and this distinction results from the above rule of law, *executio juris non habet injuriam.*"

I have been thus particular in describing duress, because it is not every trumpery pressure that will avoid a contract; and it is very common to see the parties, by their pleadings in actions in the Company's Courts, alleging that every instrument which pinches, has been obtained from them by compulsion.

§ 644. So an instrument may be rebutted by showing that the party was affected by any other legal disability, from entering into the contract: for instance; infancy or marriage—for where the law will not allow such parties to contract, of course their contracts can have no effect against them.

§ 645. The law is the same with regard to insanity, idiotcy, and intoxication. The old law with respect to this class of defences, especially the last, has undergone much change lately. It was formerly held that a man should not be allowed to stultify himself. But now, see the leading case of *Gore v. Gibson,*[a] where Pollock, C. B. said,

"I am of opinion that the defendant is entitled to our judgment. The authorities on this subject are collected in Kent's Commentaries, p. 451, where the author observes, that, although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is, that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice. With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have

(a) 13 *M. and W.* 623.

protested against such a contract. So, a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail."

And the case of *Moulton v. Camroux*,(b) the leading case as to the contracts of a lunatic, holds that,

"When a person apparently of sound mind and not known to be otherwise enters into a contract, which is fair and *bonâ fide* and which is executed and completed, and the property, the subject-matter of the contract cannot be restored, so as to put the parties in statu quo, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him: and therefore

"In an action by the personal representative of a lunatic to recover from an Assurance Society the price of two annuities on his life paid by the deceased to the Society, a special verdict found, that the purchasing of the Annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the Annuities were fair transactions and of good faith on the part of the Society, without any knowledge or notice on the part of the Society of the unsoundness of the mind of the deceased:—Held, that the action could not be maintained."(c)

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(b) 12 *Jur.* 800.

(c) The following important note is taken from 9 *Jur.* p. 142.

"The case, and the authorities referred to in it, show how difficult it is to eradicate a false principle, which has once become established in the law of any country. It is expressly laid down by Littleton, S. (405), that 'no man of full age shall be received in any plea, by the law, to disable his own person,' or, as Lord Coke expresses it, to stultify himself; (*Beverley's case*, 4 Co. 123 b); and, as a corollary from this enlightened proposition, no person was allowed to avoid any civil act by showing he did it while he was *non compos mentis* or in a state of intoxication, or could avail himself of the latter for any purpose, civil or criminal. (Co. Litt. 247. b.) It is, however, both just and important to remark, that a contrary opinion was strongly maintained by Fitzherbert, in his *Natura Brevium*, (202. d.), and the more ancient authorities seem not to be uniform on the point. The doctrine of Littleton and Coke, however, completely prevailed; (*Stroud v. Marshall*, Cro. Eliz. 398; *Cross v. Andrews*, Id. 622); and the ingenuity of courts in modern times has been frequently exercised in qualifying and restricting its mischievous operation, so that it is now almost, if not entirely, at an end. (See Kent's Commentaries, vol. 2, p. 451). For the present, it is only proposed to consider this maxim with reference to the subject of drunkenness. Lord Coke assigns as a reason for the rule, that 'no man shall be allowed to stultify himself, or show that he was *non compos mentis*, or of *non-sane* memory,' that, when he recovers his memory, he cannot know what he did when he was *non compos mentis*; (*Beverley's case*, *ut supra*); an argument, which, if carried out, would go to this; that, although the parties to a suit at law are incompetent witnesses to prove any fact for themselves, yet it is not competent to bring before the jury, by competent and credible witnesses, any fact which does not lie within the personal knowledge of the litigant parties. Speaking of the case of drunkenness in particular, he says, 'A drunkard, who is *voluntarius dæmon*, hath (as has been said) no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *omne crimen ebrietas incendit et detegit.*' (Co. Litt. 247. a.) And, in *Beverley's case*, he adds, 'Drunkenness is a great offence in itself, and, therefore, aggravates his offence, *and doth not derogate from the act which he did during that time.*' The doctrine laid down here arises from confounding excuses for crime with defects annulling acts which merely entail civil consequences; the distinction between which seems to be perfectly well understood by the lawyers of most other countries. The principles of natural law on the subject are thus clearly laid down by *Puffendorff*, *Droit de la Nature et des Gens, traduction de Barbeyrac*, (liv. 3, c. 6, art. 5):—'Reason is also frequently much disturbed, and sometimes entirely taken away, by *drunkenness*, which is sufficient, in my opinion, to render void all promises and agreements, when the party is reduced by wine to such a state that he does

§ 646. So it may be shown that there never was any *consideration*, or that there has been a *total* failure of consideration: for here again the party has no right of action. The maxim of the law is *Ex nudo pacto non oritur actio*[d]—no action arises from a bare agreement. A gratuitous undertaking may indeed form the subject of a moral obligation, and be binding in *foro conscientiæ*, but it does not create a legal responsibility. So when a man simply promises to pay another fifty Rupees, no action will lie to recover the money promised, because there was no consideration for the promise. This distinction between the ob-

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not know what he is doing. But where a man has only drunk a little more than usual, not going beyond a pleasing gaiety, which does not cloud his reason, obligations contracted by him under such circumstances are not void, especially if he afterwards assents to them when he becomes sober. With respect to *extreme* drunkenness, a difficulty presents itself which ought to be resolved. It is universally allowed, that wine is no excuse for *crimes* committed under its influence. In short, although a drunken man does not know what he is doing, still, as he has voluntarily drunk to excess a liquor with the effects of which he was acquainted, he is deemed a consenting party to all the consequences of that intoxication. But, does it not follow from thence, that promises made by a person in that state are in like manner binding on him? I answer, no; and my reason is, that there is a great distinction between the effect of crimes, and the effect of obligations which are contracted voluntarily. For, as we are absolutely forbid to do wrong, we should avoid with the utmost care all occasions which seem capable of leading us to anything mischievous; and it is almost impossible that any one should be ignorant of the consequences produced by taking too much wine. Thus, drunkenness being a sin which has a peculiar tendency to lead to the commission of crimes, what pretence is there for saying that the latter should not be treated as criminal acts, because they arise from an act which is in itself criminal? But this reasoning does not hold in the case of obligations voluntarily entered into. As it depends entirely on each person to contract such, or not, as he pleases, he is not bound to avoid occasions when some one else may obtain his consent through surprise. Besides in order to render a promise or an agreement valid, it is essential, that, at the time the consent is given, the parties should know what they are doing; and there is no ground whatever for presuming, that, because a man has suffered himself to be persuaded to drink to excess of a liquor capable of disturbing his reason, he thereby consents to every thing which it may be proposed to him to do while he is under its influence. Add to all this, that crimes and offences usually cause injury to others, whereas the only effect of the promises we are here considering is to give to another person a benefit to which he was not entitled.' These principles have been recognized by the laws (it is believed) of every country except our own. According to the civil law, total drunkenness avoided all contracts, (Poth. Obl., art. 49). but was no excuse for crime. (See *Matthæus de Criminibus*: *Prolegomena*, cc 1, 2). Two passages in the Digest are sometimes cited, as at variance with this latter proposition; viz. Dig.. lib. 49, tit. 16, l. 6, where it is said, '*Per vinum aut lasciviam lapsis, capitalis poena remittendaest*;' and Dig., lib. 48, tit. 3, l. 12: but the context of both clearly shows that they are not intended to be of universal application, as they only refer to certain *military* offences, and neither states drunkenness to be an *excuse* for those offences, but only a ground for inflicting a milder punishment than death. The canon law seems to have taken the same distinction between partial and total intoxication. *See Tractatus Tractatuum*, (Index, tit. 'Ebrius'), where it is said, '*An possit* (*scil. ebrius*) *contrahere matrimonium*? *Hyeon. Magn. tenet negativum, si est ita ebrius quod nullo modo habet usum rationis, quia nescit omnino quid agat; secus auten, si non est tanta.*' For the Scotch law on this point, see the authorities cited in the note to *Pitt v. Smith*, (3 Camp. 33). Then, as to the law in America, in the passage cited by the Lord Chief Baron from Kent's Commentaries, that learned author, besides citing the English cases at *Nisi Prius*, which will be referred to presently, together with three American decisions, says, 'This question was fully and ably considered in *Barratt v. Buxton*, (2 Aiken's Vermont Rep. 167); and it was decided, that an obligation executed by a man when deprived of the exercise of his understanding by intoxication, was voidable by himself, though the intoxication was voluntary, and not procured through the circumvention of the other party.' In this country, the *Nisi Prius* decisions of *Cole v. Robins*, (B. N. P. 172), *Pitt v. Smith*, (3 Camp. 33), and *Fenton v. Holloway* (1 Stark. 126) point to the conclusion, that a contract entered into by a party in a state of *complete* intoxication is void which may now be deemed settled by the decision of the Court of Exchequer in this present case of *Gore v. Gibson*."

See also an article on the subject, 9 *Jur.* vol. 2. p. 75.

(*d*) See *Broom's L. M.* p. 683.

ligation of law and morality was touched on in my Inaugural Address, and it will form a subject of discussion in the delivery of Lectures upon Jurisprudence ; but it cannot be further pursued here. So too the whole subject of " Consideration" falls rather under the head of Lectures on Contracts than on Evidence ; and it must be here briefly dismissed. " Consideration" has been well defined as follows :—(e)

" ' Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered, by the plaintiff with the consent, either express or implied, of the defendant.' And again, ' consideration means something which is of *some* value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or some detriment to the plaintiff, but, at all events, it must be moving from the plaintiff.' "

§ 647. Where a written contract *omits* mention of consideration, but there has in fact been a consideration, its existence may be proved by parol evidence(f) : as in the case above put, if the promise to pay the fifty Rupees had been in consideration of a *pre-existing* debt, and the acknowledgment was simply the common case of I. O. U. 50 Rupees, parol testimony would be admissible to show, that in fact the writing had been given in consequence of the maker being pressed by the payee for settlement of the sum due to him, or the like.

§ 648. According to the *Common Law*, *total* want or failure of consideration is a defence. *Partial* failure of consideration, however small may have been the actual consideration, cannot be enquired into. *In equity* the rule is different ; and there partial failure of consideration may be pleaded as a defence, where the failure is so gross as to be evidence of overreaching ; such for instance are the cases of catching bargains with heirs, *post obit* transactions and the like, wherein the money lender(g) obtains an unconscientious advantage of the party with whom he deals. It is to be borne in mind that the Company's Courts are Courts of Equity, not tied down by the strict rules of law, but bound to administer justice according to conscience ; I conceive therefore that they may always entertain the question of adequacy of consideration ; and it frequently arises in cases of overreaching bargains

(e) *Broom's L. M.* p 586.

(f) *Peacock v. Monk*, 1 *Ves. Sen.* 128.

(g) *Chesterfield v. Jansen* 1. *White and Tudor's L. C. in Equity* 314.

with Hindu widows, between young men of property and their guardians, and the like.

§ 649. Observe too in connection with this subject, the remarks made (see ante § 91—3) as to the proof of consideration in deeds, promissory notes, and other simple contracts.

§ 650. Analogous to the observations in § 646 are those which may be made with respect to parol evidence offered to show that by some *accident* or *mistake*, the instrument does not express the intentions of the parties. As a general rule, Courts of Equity alone can take cognizance of such cases, and as the Company's Courts are Courts of Equity, they should in this case, I conceive, exercise an equitable jurisdiction. The subject in all its bearings is a wide one, and scarcely within the scope of the present Lectures. But Taylor, § 819, gives a summary which may be consulted with advantage, in order to obtain a general idea of the topic.

"Courts of Equity will also sometimes admit parol evidence to contradict or vary a writing, where, by some *mistake in fact*, it speaks a different language from what the parties intended; and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms. In all cases, however, of this kind, the party seeking relief undertakes a task of great difficulty, since a Court of Equity will not interfere, unless it be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected. A *plaintiff* may seek the relief in equity by filing a bill, either to *reform* the writing,—in which event it will be necessary to satisfy the Court that there was a mistake on *both* sides; or to *rescind* the instrument,—in which case, though conclusive proof of error or surprise on the plaintiff's part alone will suffice, it must appear that the mistake was one of vital importance. In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the Court in granting the relief prayed. A *defendant*, also, against whom a specific performance of a written agreement is sought, may insist by way of answer upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract."

§ 651. It has already been shown that parol evidence is admissible to prove that a written instrument never had a *legal* inception; as that it was vitiated and void by fraud, &c. from the very commencement. Analogous to this is the case where it is sought to show, that although an instrument is not vitiated by fraud in its inception, yet that it never has in fact had any legal effect or validity, because it was not the intention of the parties that it should commence to have any effect or vitality until a particular event, which has not arisen. Thus a deed takes effect from the date of its delivery; but where a deed has been delivered as an *escrow*, as it is called, (or mere *scroll*) that is to say, to some third party to hold until a given event shall have arisen, parol evidence is admissible to show that the instrument was delivered in that character. So in the case of *Bowker v. Burdekin*(h) it was held that,

"It is not necessary that the delivery of a deed as an escrow should be by express words; if, from the circumstances attending the execution, it can be inferred that it was delivered not to take effect as a deed until a certain condition were performed, it will operate as a delivery as an escrow only."

And in *Pym v. Campbell*(i) it was held that,

"In an action for non-fulfilment of a written agreement, parol evidence is admissible, under the plea of *non assumpsit*, to show that defendant signed the document upon the understanding between the parties that it was not to operate as an agreement unless a certain condition was performed."

Opposed to these principles is the case of Samoo Oodyan in A. S. No. 146 of 1854, on the file of the Assistant Court of Combaconum.

In that case one of the parties had purchased a piece of land from the other, who had executed to him an absolute bill of sale. At the same time the purchaser signed an agreement to allow the vendor to repurchase the land at any time within five years. This agreement was handed over to a third party, by consent of both, with a letter authorizing him to deliver the agreement to the vendor as soon as the registry had been transferred. This never was done; and the agreement was returned to the purchaser subsequently. The vendor afterwards tendered the purchase money within the five years, and required the resale of the land. This was refused: and in the suit which followed, in which the purchaser himself filed the agreement, the judge held that the agreement for resale was binding, and refused

(h) 11 *M. and W.* 128.
(i) 20 *Jur.* 641.