ONUS PROBANDI

AND

PREPARATION FOR TRIAL

THE

ONUS PROBANDI,

PREPARATION FOR TRIAL, AND THE RIGHT TO OPEN AND CONCLUDE.

BY
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Ei incumbit probatio, qui dicit, non qui negat.

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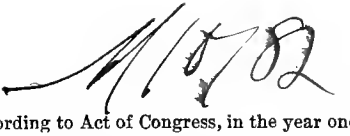

TO

HON. JOHN F. DILLON,

Juris-Consultus,

Whose deep erudition and comprehensive grasp of our Science, guided by powers of generalization unexcelled if not unequalled on this continent, has enrolled his name on the highest pinnacle of legal renown, and whose intellectuality is adorned by an exalted morale;

Of whom it may be said while living, *Clarum et venerabile nomen;* and over whose grave may be appropriately inscribed, *Cujus est solum ejus est usque ad cœlum;*

THIS WORK IS RESPECTFULLY DEDICATED.

THE AUTHOR.

PREFACE.

THE AUTHOR, finding that the subject of the ONUS PROBANDI[1] had never been separately treated, conceived the idea of writing a monograph on it for one of the law magazines, but soon discovered that justice to the subject could not be accomplished within such narrow limits, as it ramifies every department of the law.

In the preparation of this treatise he was greatly embarrassed as to the manner of presenting the law. At first he thought of distributing it under the old divisions of common law, — Equity, Admiralty, &c., — but, on reflection, he came to the conclusion that the modern lawyer would prefer to have such subjects as Negligence, Insanity, Insurance, &c., &c., treated as distinct titles, rather than be required to wade through Assumpsit, Case, &c., &c.

His observation taught him that very few practitioners studied the index as it should be, and that, for the larger number at least, the arrangement he has adopted would prove of more practical utility than the old style. He therefore has, as he believes, secured utility at the expense of symmetry.

As this work is intended more especially for use at *Nisi Prius*, and as the libraries are often found to be very meagre in reports, it was deemed better to cite as authorities, *in the main*, several reliable and easily obtained text-books, rather

[1] The term *onus*, though Latin, has been incorporated into the English language, and its use sanctioned (Matter of Convey, 52 Iowa, 197).

than the reported cases; the more especially as, when the reports are accessible, the cases will be found in the text-books cited. Many cases, however, will be found in this work *not elsewhere cited.* The corroboration thus furnished, by the number of text-books, will, it is hoped, soon gain credit for this work with the circuit judges and lawyers.

As the civil and continental law of Europe is based mainly upon codes, the author conceived that references to that law would uselessly swell the size of the book without any adequate compensation to the practitioner, so that, except where our law is borrowed from the other, he has refrained from citing authorities upon it. For like reasons, he has failed to collate the very recent statutory law of England, as these statutes have not been re-enacted in this country to any appreciable extent.

Foot-notes, unless barely explanatory, are inappropriate to a first edition of a book, and he has endeavored to complete his text without their aid. He believes that he satisfies a very general and growing wish of the profession by inserting the references in the body of the text, instead of at the bottom of the page.

He has endeavored to re-model and condense the language of the authorities, with the exception of ADAMS, BEST, KERR, and perhaps one or two others.

He has, also, strived to avoid "padding" of all kinds, but considers that his table of cases and index were necessary aids in the search for the law. A new feature is introduced in the table of authorities and their abbreviations.

The arrangement of the index is upon a plan which is conceived to be original with himself, and which met with so much favor from the profession towards his former work. It is this: instead of taking the usual adjectival expression, or a sub-title, as the initial word, he has reversed it and

employed the *nomen generalissimum*, weaving the sub-titles thereunder, and retained the ordinary form of the adjectival expression as a cross-reference. From a long familiarity with the subject, he is confident that the plan will ultimately be cordially sanctioned by the profession as a time-saver. Thus: Civil Action is indexed "ACTION CIVIL"; under C, as a cross-reference, "Civil Action, *see* Action Civil." Again: Executors is not used as the initial word, but FIDUCIARIES, under which "executors" will be classed with others *ex gr.* "(1) Agents, (2) Executors," &c. The word Executors is indexed thus: "Executors, *see* Fiduciaries (1)," or (2), as the case may be.

The author has, in the index, used coined words, catch words, and cant expressions, as the object of the index is merely to suggest to the reader where he may find the law sought for.

It is without the scope of such a treatise to state the law except by way of inducement; but it was found almost impracticable, in some instances, to refrain from doing so, and thereby fail to fully elucidate the matter in hand. Where the question was doubtful, he considered it expedient to give a succinct summary of the branch or point of law under discussion.

The title INTENSITY OF THE PROOF, while seeming to fall within the restriction which the author had placed upon himself, was so cognate and intimately connected with the subject-matter of the treatise as to require some notice. As great pains as circumstances would permit has been taken to verify his citations of reported cases, though a very few of them were inaccessible. These he approximately verified by ascertaining how they were incorporated into the various text-books.

After the manuscript was completed, the author was

urged by an eminent jurist to add to the title the words "Preparation for Trial," as he was pleased to say the work had a much broader scope than a treatise on the burden of proof merely.

In launching his little bark, he throws himself upon the indulgence of a generous profession, and "respectfully prays," according to the school-boy speech, —

"View me not with a critic's eye,
But pass my imperfections by."

THE AUTHOR.

New York, Oct., 1885.

EXPLANATION

OF THE

ABBREVIATIONS OF TREATISES USED IN THIS WORK.

The shortest abbreviation is employed.

ABBREVIATIONS.	TREATISES.
Abb. Forms	Abbott's Forms.
Abb. Ship.	Abbott on Shipping.
Abb. Tr. Ev.	Abbott's Trial Evidence.
Abb. U. S. Prac	Abbott's U. S. Practice.
Adams Ejct	Adams on Ejectment.
Adams, Eq.	Adams on Equity.
Add. Cont.	Addison on Contracts.
Add. Torts	Addison on Torts.
Alb. L. J.	Albany Law Journal.
Alex. Br. Stats.	Alexander's British Statutes.
All. Tel. Cas.	Allen's Telegraph Cases.
Allison, Cr. Law	Allison's Criminal Law.
Am. Dec.	American Decisions.
Am. Jur. (N. S.)	American Jurist (New Series).
Am. L. Rec.	American Law Record.
Am. L. Reg.	American Law Register.
Am. L. Rev.	American Law Review.
Am. L. T.	American Law Times.
Am. L. C.	American Leading Cases.
Am. Rep.	American Reports.
Ang. Wat.	Angell on Watercourses.
A. & A. Corp.	Angell and Ames on Corporations.
Arch. Civ. Pl.	Archbold's Pleading and Evidence in Civil Actions.
Arch. Cr. Pl.	Archbold's Criminal Pleading and Evidence.
Arch. N. P.	Archbold's Nisi Prius.
Arch. Prac.	Archbold's Practice.
Azuni, M. L.	Azuni's Maritime Law.
Bab. Auct.	Babington on Auctions.
Bac. Ab.	Bacon's Abridgment.
Beames, Pl. in Eq.	Beames' Pleas in Equity.

ABBREVIATIONS.	TREATISES.
Bell, Cont. Sale	Bell on the Contract of Sale.
Bell, L. P.	Bell on the Law of Property.
Benj. Chal. Dig.	Benjamin's Chalmers' Digest.
Benj. Sales	Benjamin on Sales.
Best, Beg.	Best on the Right to Begin.
Best, Ev.	Best on Evidence.
Best, Pres.	Best on Presumptions.
Bid. Stock	Biddle on Stocks, etc.
Big. B. & N.	Bigelow's Leading Cases on Bills and Notes.
Big. Est.	Bigelow on Estoppel.
Big. Fraud	Bigelow on Fraud.
Big. L. C. Torts	Bigelow's Leading Cases on Torts.
Big. Ov. Cas.	Bigelow's Overruled Cases.
Big. Torts	Bigelow on Torts.
Bill. Awd.	Billing on Awards.
Bish. Cont.	Bishop on Contracts.
Bish. Cr. L.	Bishop's Criminal Law.
Bish. Cr. Pro.	Bishop's Criminal Procedure.
Bish. M. & D.	Bishop on Marriage and Divorce.
Bish. M. W.	Bishop on Married Women.
Bish. Stat. Cr.	Bishop on Statutory Crimes.
Bisp. Eq.	Bispham on Equity.
Biss. Est. for Life	Bissett on Estates for Life.
Black. Com.	Blackstone's Commentaries.
Black. Sales	Blackburn on Sales.
Black. T. T.	Blackwell on Tax-Titles.
Bliss, C. Pl.	Bliss on Code Pleading.
Bliss, L. I.	Bliss on Life Insurance.
Booth, R. A.	Booth on Real Actions.
Bouv. L. D.	Bouviers' Law Dictionary.
Bowy. U. P. L.	Bowyer's Universal Public Law.
Brac.	Bracton.
Brandt, S. & G.	Brandt on Suretyship and Guaranty.
Broom, L. M.	Broom's Legal Maxims.
Browne, Med. Jur. Ins.	Browne's Medical Jurisprudence of Insanity.
Browne (Wood's) Car.	Browne (Wood's) on Carriers.
Browne's Dig.	Browne's Digest of Divorce and Alimony.
Bryce's (Green's) U. V.	Bryce's (Green's) Ultra Vires.
Bull. N. P.	Buller's Nisi Prius.
Bump, F. P.	Bump's Federal Procedure.
Bump, F. C.	Bump's Fraudulent Conveyances.
Buny. L. I.	Bunyon on Life Insurance.
Burr. Tax	Burroughs on Taxation.
Byles, Bills	Byles on Bills.
Calvert, Eq.	Calvert on Parties.
Camp. Neg.	Campbell on Negligence.

ABBREVIATIONS.	TREATISES.
C. L. J. or Cent. L. J.	Central Law Journal.
Chal. (Benj.) Dig.	Chalmers' Digest (Benjamin).
Chitty, Bills	Chitty on Bills.
Chitty's Black.	Chitty's Blackstone.
Chitty, Car.	Chitty on Carriers.
Chitty, Cont.	Chitty on Contracts.
Chitty, Cr. L.	Chitty's Criminal Law.
Chitty, Gen. Pr.	Chitty's General Practice.
Chitty, Pl.	Chitty on Pleading.
Clemens, Corp. Sec.	Clemens' Corporate Securities.
Coke's Inst.	Coke's Institutes.
Cole, Cr. Inf.	Cole on Criminal Information.
Cole. Coll. Sec.	Colebrooke's Collateral Securities.
Coll. Part.	Collyer on Partnership.
Com. Dig.	Comyn's Digest.
Conk. Treat.	Conkling's Treatise.
Cooke, Def.	Cooke on Defamation.
Cool. Black.	Cooley's Blackstone.
Cool. Tax.	Cooley on Taxation.
Cool. Torts.	Cooley on Torts.
Cord, Rights M. W.	Cord on the Rights of Married Women.
Cornish, P. D.	Cornish on Purchase Deeds.
Corn. Uses	Cornish on Uses.
Coryton, L. Pat.	Coryton on Letters-Patent.
Crabb, R. P.	Crabb on Real Property.
Crim. Law Mag.	Criminal Law Magazine.
Cross, L. L.	Cross on the Law of Lien.
Cr. Cir. Com.	Crown Circuit Companion.
Cruise, Dig.	Cruise on Real Property.
Curtis's Com.	Curtis's Commentaries.
Dane, Ab.	Dane's Abridgment.
Dan. Ch. Pr.	Daniel's Chancery Practice.
Dan. N. I.	Daniel's Negotiable Instruments.
De Hart, C. M.	De Hart on Court Martial.
Dos P. Stock	Dos Passos on Stocks, etc.
Drake, Att.	Drake on Attachment.
Drone, Cop.	Drone on Copyright.
Duer, Ins.	Duer on Insurance.
Dwar. Stat. (Potter)	Dwarris on Statutes (Potter).
East, Cr. L.	East's Crown Law.
East, P. C.	East's Pleas of the Crown.
Eaton's Forms	Eaton's Forms.
Ellis, Ins.	Ellis on Insurance.
Ewell, Fix.	Ewell on Fixtures.
Ewell, L. C.	Ewell's Leading Cases, Infancy, etc.
Fearne, Rem.	Fearne on Remainders.
Fed. Rep.	Federal Reporter.

ABBREVIATIONS.	TREATISES.
Field, Law. Briefs	Field's Lawyers' Briefs.
F. N. B.	Fitzherbert's Natura Brevium.
Flood, Wills	Flood on Wills.
Fortescue De Laud. Leg. Angl.	Fortescue's DeLaudibus Legum Angliæ.
Fon. Eq.	Fonblanque's Equity.
Fost. Cr. L.	Foster's Crown Law.
Foster, S. F.	Foster on Scire Facias.
Freed. Leg. Adviser	Freedley's Legal Adviser.
Free. Ex.	Freeman on Executions.
Free. Judg.	Freeman on Judgments.
Fry, Spec. Per.	Fry on Specific Performance.
Gale & W. Eas.	Gale & Whatley's Easements.
Gard. Inst.	Gardner's Institutes.
Gilbert, C. P.	Gilbert's Common Pleas.
Godolphin, O. L.	Godolphin's Orphans' Legacy.
Gould, Pl.	Gould on Pleading.
Gould, Wat.	Gould on Waters.
Gray, Com. by Tel.	Gray's Communication by Telegraph.
Greenl. Cruise, R. P.	Greenleaf's Cruise on Real Property.
Greenl. Ev.	Greenleaf on Evidence.
Greenl. Ov. Cas.	Greenleaf's Overruled Cases.
Green's Bryce's U. V.	Green's Bryce's Ultra Vires.
Gres. Ev.	Gresley's Equity Evidence.
H. P. C.	Hale's Pleas of the Crown.
Hawk. P. C.	Hawkins' Pleas of the Crown.
Haynes, Out. Eq.	Haynes' Outlines of Equity.
Herman, Ex.	Herman on Executions.
Hickling's Men and Idioms	Hickling's Men and Idioms.
High, Ex. Rem.	High on Extraordinary Remedies.
High, Inj.	High on Injunctions.
High, Rec.	High on Receivers.
Hill, Trust.	Hill on Trustees.
Hill. Torts	Hilliard on Torts.
Hind. L. P.	Hindmarch on the Law of Patents.
Hoff. Pro. Rem.	Hoffman's Provisional Remedies.
Holmes, C. L.	Holmes Lectures on Common Law.
Holt, Libels	Holt on Libels.
Hubb. Ev. Suc.	Hubback's Evidence of Succession.
Hurd, H. C.	Hurd on Habeas Corpus.
Hutch. Car.	Hutchinson on Carriers.
Ind. L. C.	Indermaur's Leading Cases.
Ins. L. J.	Insurance Law Journal.
Int. Rev. Rec.	Internal Revenue Record.
Ired. Ex	Iredell on Executors.
Jacob, L. D.	Jacob's Law Dictionary.
Jacob. S. Laws	Jacobsen's Sea Laws.

ABBREVIATIONS.	TREATISES.
Jar. Wills	Jarman on Wills.
Jer. Eq.	Jeremy's Equity.
Jones, Bail.	Jones on Bailments.
Jones, Mort.	Jones on Mortgages.
Judge-Adv. V. M.	Judge-Advocates' Vade Mecum.
Kent, Com.	Kent's Commentaries.
Kentucky Law Jour.	Kentucky Law Journal.
Kerr, A. at L.	Kerr's Actions at Law.
Kerr, F. & M.	Kerr on Fraud and Mistake.
Kneel. Attch.	Kneeland on Attachment.
Lamb. Dow.	Lambert on Dower.
Lang. S. C.	Langdell's Select Cases on Contracts.
Law. Cr. Def.	Lawson's Criminal Defences.
Law. Ex. Ev.	Lawson on Expert and Opinion Evidence.
Law. L. C. (C. L.)	Lawson's Leading Cases (Common Law).
Law. L. C. (Eq.)	Lawson's Leading Cases (Equity).
Law. Pres.	Lawson on Presumptive Evidence.
Law. U.	Lawson on Usages and Customs.
Leach, Cr. L.	Leach's Crown Law.
Leake, Dig. Cont.	Leake's Digest of Contracts.
Leigh, N. P.	Leigh's Nisi Prius.
Lewin, Trusts	Lewin on Trusts.
Lind. Part.	Lindley on Partnership.
Locke, F. A.	Locke on Foreign Attachment.
Lom. Dig.	Lomax' Digest.
Long, Disc.	Long's Discourses.
Long, Sales	Long on Sales.
Love. Wills	Lovelass on Wills.
Lund, L. P.	Lund on Letters-Patent.
Madd. Ch.	Maddock's Chancery.
Maugham, L. P.	Maugham on Literary Property.
Man. Dem.	Mansell on Demurrer.
Mart. Coll. Br. Stats.	Martin's Collection of British Statutes.
Mart. Cor.	Martin on Coroners.
Mar. W. & S.	Marvin on Wreck and Salvage.
May, Cr. L.	May on Criminal Law.
May, Ins.	May on Insurance.
Mayne (Wood's), Dam.	Mayne on Damages (Wood).
McNgtn. S. C.	MacNaghten's Select Cases.
McNally's Ev.	McNally's Evidence.
McQ. H. & W.	McQueen on Husband and Wife.
Met. Cont.	Metcalf on Contracts.
Mills, Em. Dom.	Mills on Eminent Domain.
Mit. Ch. Pl.	Mitford's Chancery Pleading.
Mitchell's M. & R.	Mitchell's Motions and Rules.

ABBREVIATIONS.	TREATISES.
Moak's Underhill, Torts	Moak Underhill on Torts.
Mod. Prob. Wills	Modern Probate of Wills.
Morse, Arb.	Morse on Arbitration and Award.
New. Eq. Cont.	Newland's Equity Contracts.
Nor. L. P.	Norman's Law of Patents.
Norris' Peake	Noriss' Peake on Evidence.
N. W. Rep.	Northwestern Reporter.
Notes to L. C.	Notes to Leading Cases.
Oliphant, Horses	Oliphant on Horses, Racing, etc.
Pac. C. L. J.	Pacific Coast Law Journal.
Park, Dow.	Park on Dower.
Par. B. & N.	Parsons on Bills and Notes.
Par. Cont.	Parsons on Contracts.
Par. Mer. L.	Parsons on Mercantile Law.
Par. Wills	Parsons on Wills.
Peake's Ev.	Peake's Evidence.
Perry, Trusts	Perry on Trusts.
Phear, R. W.	Phear on the Rights of Water.
Phill. Dom.	Phillimore on Domicil.
Phill. Int. L.	Phillimore on International Law.
Phil. Cop.	Phillips on Copyright.
Phil. Ev.	Phillips on Evidence.
Phil. Ins.	Phillips on Insurance.
Phil. Mech. Liens	Phillips on Mechanics' Liens.
Phill. & Amos Ev.	Phillips & Amos on Evidence.
Pierce, Am. R. R. Law	Pierce on American Railroad Law.
Poll. Prin. Cont.	Pollock on the Principles of Contracts.
Pom. Eq. Jur.	Pomeroy's Equity Jurisprudence.
Pom. Rem.	Pomeroy's Remedies and Remedial Rights.
Potter Dwar. Stat.	Potter's Dwarris on Statutes.
Pow. App. Pro.	Powell on Appellate Proceedings.
Pow. Dev.	Powell on Devises.
Pow. Ev.	Powell on Evidence.
Pow. Mort.	Powell on Mortgages.
Pulling, Accts.	Pulling on Accounts.
Pult. De Pace, etc.	Pulton De Pace Regis et Regni.
Rap. Fed. Dig.	Rapalje's Federal Digest.
Rawle, Cov. for Title	Rawle on Covenants for Title.
Ray, Med. Jur. Ins.	Ray's Medical Jurisprudence of Insanity.
Red. Am. Cas. Wills	Redfield's American Cases on Wills.
Red. Rail. L.	Redfield's Law of Railways.
Red. Car.	Redfield on Carriers.
Red. L. & Pr. Sur. Courts	Redfield's Law and Practice of Surrogate Courts.
Red. Wills	Redfield on Wills.
Reed, Stat. Frauds	Reed on the Statute of Frauds.

ABBREVIATIONS.	TREATISES.
Reeves' D. R.	Reeves' Domestic Relations.
Reeves' Hist. E. L.	Reeves' History of the English Law.
Rep.	Reporter, The.
Rich. Supp.	Richardson's Supplement.
Rob. Prin. Eq.	Roberts' Principles of Equity.
Rob. Wills	Roberts on Wills.
Rogers, Ex. T.	Rogers on Expert Testimony.
Rolle, Ab.	Rolle's Abridgment.
Roper, H. & W.	Roper on Husband and Wife.
Rorer, Jud. Sales.	Rorer on Judicial Sales.
Ros. Cr. Ev.	Roscoe's Criminal Evidence.
Ros. Ev.	Roscoe's Digest of Nisi Prius.
Ross, Com. L.	Ross' Commercial Law.
Run. Eject.	Runnington on Ejectment.
Russ. Arb.	Russell on Arbitrators.
Russ. Cr.	Russell on Crimes.
Russ. F. & B.	Russell on Factors and Brokers.
Sanders, U. & T.	Sanders on Uses and Trusts.
Sands, Eq.	Sands' Suit in Equity.
Saund. Pl. & Ev.	Saunders on Pleading and Evidence.
Schoul. D. R.	Schouler's Domestic Relations.
Sch. A. R.	Schultes on Aquatic Rights.
Scrib. Dow.	Scribner on Dower.
Sedg. C. & S. L.	Sedgwick on Constitutional and Statutory Law.
Sedg. L. C. Dam.	Sedgwick's Leading Cases on Damages.
Sedg. M. of D.	Sedgwick on the Measure of Damages.
Sel. Prac.	Sellon's Practice.
Sel. N. P.	Selwyn's Nisi Prius.
Shars. L. L.	Sharswood's Law Lectures.
Shaw, Obl.	Shaw on Obligations.
Sh. & Red. Neg.	Shearman and Redfield on Negligence.
Shelf. Lun.	Shelford on Lunacy.
Shelf. M. & D.	Shelford on Marriage and Divorce.
Shirl. L. C.	Shirley's Leading Cases.
Smith, Ch. Prac.	Smith's Chancery Practice.
Smith, Cont.	Smith on Contracts.
Smith, Man. Eq.	Smith's Manual of Equity.
Smith, M. & S.	Smith on Master and Servant.
Smith, Mer. L.	Smith's Mercantile Law.
Snell, Eq.	Snell's Principles of Equity.
South. L. R.	Southern Law Review.
Spence's Eq. Jur.	Spence's Equity Jurisprudence.
Stark. Ev.	Starkie on Evidence.
Stark. Cr. Pl.	Starkie's Criminal Pleading.
Stark. Sland.	Starkie on Slander.
Steph. Com.	Stephen's Commentaries.

ABBREVIATIONS.	TREATISES.
Steph. Dig. Ev.	Stephen's Digest of Evidence.
Steph. N. P.	Stephens' Nisi Prius.
Steph. Pl.	Stephen's Pleading.
Stewart, M. & D.	Stewart on Marriage and Divorce.
Story, Ag.	Story on Agency.
Story, Bail.	Story on Bailments.
Story, Cont.	Story on Contracts.
Story, Const.	Story on the Constitution.
Story, Eq. Jur.	Story's Equity Jurisprudence.
Story, Sales	Story on Sales.
Sug. L. Prop.	Sugden on the Law of Property.
Sug. Pow.	Sugden on Powers.
Sug. Vend.	Sugden on Vendors.
Suth. Dam.	Sutherland on Damages.
Swan's Rev.	Swan's Revisal.
Swift, Ev.	Swift's Evidence.
Swin. Wills	Swinburne on Wills.
Taite, Ev.	Taite on Evidence.
Tam. Eq. Ev.	Tamlyn's Equity Evidence.
Tapp. Man.	Tapping on Mandamus.
Tay. Corp.	Taylor on Corporations.
Tay. Ev.	Taylor on Evidence.
Thomp. Car. Pas.	Thompson's Carriers of Passengers.
Thomp. Hom.	Thompson on Homestead.
Thomp. L. of D.	Thompson's Liability of Directors.
Thomp. Stock.	Thompson's Liability of Stockholders.
Thomp. Neg.	Thompson on Negligence.
Tidd's App.	Tidd's Appendix (Caines).
Tidd's Prac.	Tidd's Practice.
Tiff. & S.	Tiffany and Smith's N. Y. Practice.
Toll. Ex.	Toller on Executors.
Tourgee, C. C.	Tourgee's Cited Cases.
Towle, Const.	Towle on the Constitution.
Town. Sland.	Townshend on Slander.
Trow. D. & C.	Trower on Debtor and Creditor.
Tuck. Black.	Tucker's Blackstone.
Tuck. Pl.	Tucker on Pleading.
Tud. L. C.	Tudor's Leading Cases.
Tyler, Eject.	Tyler on Ejectment.
Tyler, Inf. & Cov.	Tyler on Infancy and Coverture.
Tyler, Us.	Tyler on Usury.
Underhill (Moak) Torts	Underhill on Torts (Moak).
Voor. Code	Voorhies' Code.
Wade, Notice	Wade on Notice.
Wait, A. & D.	Wait's Actions and Defences.

ABBREVIATIONS.	TREATISES.
Wait, F. C.	Wait on Fraudulent Conveyances.
Wait, Prac.	Wait's Practice.
Walk. Pat.	Walker on Patents.
Ward, R. P.	Ward on Real Property.
Wash. Eas.	Washburn on Easements.
Wash. R. P.	Washburn on Real Property.
Waterman Set-off	Waterman on Set-off.
Waterman, Tresp.	Waterman on Trespass.
Wats. on A. & A.	Watson on Arbitration and Awards.
Wells, Sep. Prop.	Wells' Separate Property of Married Women.
Went. Ex.	Wentworth on Executors.
W. J.	Western Jurist.
Whart. Am. L. Hom.	Wharton's American Law of Homicide.
Whart. Conv.	Wharton's Conveyancing.
Whart. Cr. L.	Wharton's Criminal Law.
Whart. Cr. Pl. & Pr.	Wharton's Criminal Pleading and Practice.
Whart. Ev.	Wharton on Evidence.
Whart. Neg.	Wharton on Negligence.
Whart. & S. Med. Jur.	Wharton and Stille's Medical Jurisprudence.
Wheat. (Dana) Int. L.	Wheaton's (Dana) International Law.
Whit. Pr.	Whitaker's Practice.
W. & T. L. C.	White and Tudor's Leading Cases.
Whit. Pat.	Whitman on Patents.
Wild. Int. L.	Wildman's International Law.
Will. Ex.	Willard on Executors.
Wms. Ex.	Williams on Executors.
Williams, P. P.	Williams on Personal Property.
Williams, R. P.	Williams on Real Property.
Wills, C. Ev.	Wills on Circumstantial Evidence.
Wood. Lec.	Woodeson's Lectures.
Wood's Browne Car.	Wood's Browne on Carriers.
Wood's Mayne Dam.	Wood's Mayne on Damages.
Wood, Fire Ins.	Wood on Fire Insurance.
Wood, M. & S.	Wood's Master and Servant.
Wood, Nuis.	Wood's Nuisances.
Wool. W.	Woolrych on Waters.
Worth. Wills	Worthington on Wills.

TABLE OF CASES.

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As a time-saver the cases are arranged in alphabetical order under the different titles. The words *Ex parte, In re, Doe, Den, Goodtitle, etc.*, are placed after, instead of before, the words they refer to; *ex. gr., Ex parte* Young will be found as Young, *Ex parte; In re* Chandler, as Chandler, *In re;* Doe *d.* Bather *v.* Brayne, as Bather *d. v.* Brayne. So, the article *the* to signify the name of vessel is omitted altogether.

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ONUS PROBANDI.

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ONUS PROBANDI.

GENERAL PRINCIPLES.

In every mode of litigation, which is but practical logic, as assertion of a fact avails nothing without the aid of proof or presumption, some party must produce proof to sustain allegation. *Actore non probante, reus absolvitur.*

The proof thus required devolves upon the party from whom should proceed the onus probandi, or burden of proof. *Ei incumbit probatio, qui dicit, non qui negat.*

In many instances, when the necessary evidence has been offered so as to establish a presumptive or *prima facie* right, the onus probandi is shifted to the other party.

In order to determine, on general principles, upon whom the onus must lie, certain *criteria* have been adopted by the courts, in the shape of rules. An eminent writer has thus classified them: —

Rule I. *The issue must be proved by the party who states an affirmative; not by the party who states a negative.*

Rule II. *The issue must be proved by the party who states the affirmative in substance, and not merely the affirmative in form.*

Rule III. *In every case the onus probandi lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant* (Powell, Ev. 167–171).

Another test *per se*, or as explanatory of Rule II., was at an early period laid down by an eminent English judge:

namely, *The proper test is, which party would be successful if no evidence, or no more evidence, were given.* Per Alderson, B., in Amos *v.* Hughes, 1 M. & Rob. 464.[1]

Another test given by the same learned judge is: *To examine whether, if the particular allegations were struck out of the plea, there would or not be a defence to the action* (Mills *v.* Barber, 1 M. & W. 427).

[1] The general principles underlying this subject are thus stated by an eminent writer (Taylor, Ev.): A third rule which governs the production of evidence is, *That the burden of proof lies on the party who substantially asserts the affirmative of the issue.*

This rule of convenience, which in the Roman law is thus expressed, *Ei incumbit probatio, qui dicit, non qui negat,* has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable; and, moreover, it is but reasonable and just that the party who relies upon the existence of a fact should be called upon to prove his own case.

In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form; for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form at his pleasure.

The best *tests* that can be devised for ascertaining on whom the burden of proof lies, are: first, to consider which party would succeed if no evidence were given on either side; and second, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the *onus* must lie on whichever party would fail, if either of these steps were pursued.

On this general rule, that the burden of proof lies on the party holding the substantial affirmative, some exceptions have been engrafted, which should here be noticed.

First, if a disputable presumption of law is in favor of an affirmative allegation, the party who supports the negative must call witnesses to rebut this presumption. On the twofold ground, that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall in criminal proceedings on the prosecuting party, though, in order to convict, he must necessarily have recourse to negative evidence.

The second exception is this, that where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor.

See also an able article on the general doctrine, by Hayden M. Young, in 1 Kentucky Law Journal, 278.

The test suggested in Amos *v.* Hughes was adopted in subsequent English cases (Belcher *v.* McIntosh, 8 C. & P. 720; Ridgeway *v.* Ewbank, 2 M. & R. 218; Geach *v.* Ingall, 14 M. & W. 95; Doe, d. Worcester &c. *v.* Rowlands, 9 C. & P. 734; Osborn *v.* Thompson, 2 M. & R. 254); and the author has discovered no American decisions impeaching it, and two at least affirming it (McRae *v.* Lawrence, 75 N. C. 289; Hudson *v.* Wetherington, 79 N. C. 3).

Dr. Wharton has suggested a different test, but is not supported in it by the adjudged cases (1 Whart. Ev. sec. 354).

Rule I. is one of convenience, adopted not because it is impossible to prove a negative, but because a negative does not admit of the direct and simple proof of which the affirmative is capable (Drangnet *v.* Prudhomme, 3 La. Ann. 86–88; Costigan *v.* Mohawk &c. Co., 2 Den. 609; 1 Greenl. Ev. sec. 74; 1 Stark, Ev. 376; 1 Phill. Ev. 492; Peaks, Ev. 7; Best, Ev. 292; Powell, Ev. 167).

But, as shown by Rule II., such affirmative must be one in *substance,* and not merely in *form.* Thus, in an action on a contract to emboss calico in a workmanlike manner, alleging as a breach that the defendant did not so emboss, but, on the contrary, did it in an unworkmanlike manner; to which the defendant pleaded that he did emboss it in a workmanlike manner; on which issue was joined. Here the affirmative was formally with the defendant, but it was held that questions of this kind are not to be decided by simply ascertaining on which side the affirmative in point of form lies; the proper test being, *which party would succeed if no evidence were given;* and, as in such case the plaintiff would fail, the onus lies with him (Amos *v.* Hughes, *supra*). So that the form of the pleading, while usually governing, does not necessarily control, the burden of proof.

The general principle contained in Rule II. is not applicable to the plea of performance in the action of covenant, it being analogous to the plea of payment in *assumpsit*, or debt on simple contract (1 Arch. N. P. 265; 2 Greenl. Ev. sec. 247; 1 Chitty, Pl. 487).

In a *nisi prius* case (Soward *v.* Leggett, 7 C. & P. 613; see also Berty *v.* Dormer, 12 Mod. 526; Shilcock *v.* Passman, 7 C. & P. 291; Scott *v.* Lewis, *ib.* 347; Smith *v.* Davies, *ib.* 307) in covenant, plaintiff declared for a breach by non repair, charging a failure to repair, and that defendant left the premises in a ruinous condition; to which the defendant pleaded that he did repair and not leave the premises in a ruinous condition. Lord Abinger held the onus to be with the plaintiff, but stated that it appeared by the record that a part of the issue was, that the plaintiff said that the house was left dilapidated, and the defendant said it *was not* left dilapidated, and added, that on the form of this issue there is as much on the plaintiff as the defendant; so it would seem that this case does not go to the length claimed for it by Powell (Powell, Ev. 169), although the principle deducible from it falls strictly within Rule II. It is clear, that when the plea of performance in covenant is substantially payment, the obligation to pay is admitted, and the onus is with the defendant, because the affirmative here is, as in actions on simple contract, substantially made by him; but in almost every other case that can be imagined, the breach, in whatever form alleged, constitutes a substantial affirmative, and ought, on principle, to devolve the burden on the plaintiff, according to the principle laid down in Amos *v.* Hughes, *supra.*

Two other principles support this view: 1. The allegation, though in negative terms, is as susceptible of proof as if expressed affirmatively. 2. And, generally, the law will not presume a criminal or civil tort; the latter of which is often involved in a breach of covenant (2 Phil. & Amos, Ev. 828; Best, Ev. 297; Powell, Ev. 169).

The law is presumed to mete out substantial justice, and to view corresponding rights and duties according to their essence.

Thus, in an action on a simple contract or single-bill, the defence being payment, in either action, the burden of proof is devolved upon the defendant. Let us, however, take two

cases: 1. The case of a simple contract by which A agrees to build a house. 2. A covenant to build another house on the same terms. The gravamen of the breach of contract, in either case, is failure to build according to contract; the contractee under the simple contract brings *assumpsit*. The defence of performance can only be pleaded by *non assumpsit*, according to the well-settled rule, that a special plea amounting to the general issue is demurrable; and all authorities agree that in such a case the burden of proof is with the plaintiff. Then, when covenant is brought on the other contract, why should the onus be with the defendant, especially when there is strictly no general issue in covenant, *non est factum*, simply putting in issue the execution of the paper-writing?

To demonstrate the absurdity of devolving the onus on the defendant pleading, in covenant, performance: If the plaintiff frames, as he may do, his allegations of breach affirmatively, and thus necessitating a negative averment of performance, the burden lies with the plaintiff; and yet the issue is substantially the same as if the breach had been stated in negative form, and denied affirmatively.

There is yet another rule, which may be stated thus: —

RULE IV. *The burden of proof is shifted by presumptions of law, presumptions of fact of the stronger kind, and evidence strong enough to establish a prima facie case.*

When the presumption is in favor of the party asserting a negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when in favor of the affirmative that its effect becomes visible, as the opposite side is then called to prove his negative (Best, Ev. 300).

Instances of presumptions of law are familiar. Recent possession of stolen property may be cited as an illustration of a presumption of the stronger kind; and a receipt for rent accrued, due subsequently to that sued for, is *prima facie* evidence of payment (Best, Pres. 43).

Scope of this Treatise. — It is proposed, in several subsequent titles, to show with whom the onus probandi lies, as applicable to actions concerning a number of leading subjects, before proceeding to discuss the subject with reference to some particular modes of litigation.[1]

[1] For other reasons of this distribution of the subject, see PREFACE.

Part I.

LITIGATION INTER PARTES.

COMMON LAW DIVISION.

ACCIDENT.

This doctrine, as administered in courts of law, as distinguished from courts of equity, is discussed *infra* in the sub-title of *Res Ipsa Loquitur* under title Negligence.

ADVANCEMENTS.

The discussion of this title will be confined to questions arising on an intestacy, touching the claim for advancements made by the intestate to his distributee. The correlative right and obligation of the distributee grows out of the statutes of distribution. The claim is usually preferred by the administrator acting in behalf of distributees, not advanced, or not equally advanced. Presumptively, the next of kin are entitled to receive from the administrator their distributive shares of the surplus remaining after payment of debts, funeral charges, and the expenses of administration. Indeed, such is the expressed mandate of the statute. Hence it follows, that, if the administrator alleges for the purpose of affecting in whole or *pro tanto*, the distributive right, that such distributee has been advanced, the burden is cast upon him to prove that fact. The question itself can only arise on an actual intestacy (Toller, 376; Ired. Ex. 553 (15), 558 (50); Walton *v.* Walton, 14 Ves. Jr. 324; Will. on Ex. 401–2; Richmond *v.* Vanhook, 3 Ired. Eq. 581; Johns-

ton *v.* Johnston, 4 Ired. Eq. 9; Newman *v.* Wilbourne, 1 Hill, Ch. 10; Newell's case, 1 Browne, 311; Person *v.* Twitty, 6 Ired. 115).

The administrator then, in discharge of this burden, must show: —

First. That such distributee received from the intestate, personal estate of some kind without consideration (Toller, 380; Ired. Ex. 553 (18) *et seq.;* 2 Wms. Ex. 1289).

It must amount to a perfected gift (Toller, 380; 2 Wms. Ex. 1292) by delivery (Meadows *v.* Meadows, 11 Ired. 148; Adams *v.* Hayes, 2 Ired. 361), or, at least there must have been such a conveyance, as to entitle the distributee to exact the bounty, though it may not take effect in possession until after the death of the intestate (Toller, 377, 380; Ired. on Ex. 555 (30); Edwards *v.* Freeman, 2 P. Wms. 436, 442; 2 Wms. Ex. 1292).

Second. That the distributee is a child — the statute not applying to grandchildren (Ired. Ex. 555 (26); Headen *v.* Headen, 7 Ired. Eq. 159; Daves *v.* Haywood, 1 Jones, Eq. 253; Shiver *v.* Brock, 2 *ib.* 137; Skinner *v.* Wynne, *ib.* 41), unless the grandchild is called upon to account for an advancement to his parent, as child of the intestate.

Third. The value of the estate advanced at the time of the advancement (Ired. Ex. 555 (27); King *v.* Worsley, 2 Hay (N. C.), 366; Lamb *v.* Carroll, 6 Ired. 4; Stallings *v.* Stallings, 1 Dev. Eq. 298; Shiver *v.* Brock, 2 Jones, Eq. 137. See other cases cited in Tourgee, C. C. No. 3533; Oyster *v.* Oyster, 1 S. & R. 422; Warfield *v.* Warfield, 5 Har. & J. 459; Burton *v.* Dickerson, 3 Yerg. 112). When evidence to this extent has been introduced, the laboring oar is put into the hands of the distributee, and he may, in discharge of his burden, show: —

First. That the intestate was his *mother*, as it was held at an early period that the statute only applied where the intestate was a *father* (Toll. Ex. 380; Ired. on Ex. 552 (13); Holt *v.* Frederic, 2 P. Wms. 357; 2 Eq. C. Abr. 446; 2 Wms. Ex. 1286).

Second. That the thing advanced was only a trivial present, such as wedding clothes; or money spent for educational purposes, or maintenance, or given to bind him an apprentice, or to go on his travels, and the like (Toll. Ex. 380; Ired. on Ex. 554 (22); Pusey *v.* Desbouvrie, 3 P. Wms. 317, note *o*; Swin. Wills, pt. 3, pl. 19; Elliott *v.* Collier, 1 Ves. 16; Garon *v.* Trippit, Amb. 189; Elliott *v.* Collier, 3 Atk. 528; Mitchell *v.* Mitchell, 8 Ala. 414).

Third. That the articles were given at a time when the father was in debt to the child (Haglar *v.* McCombs, 66 N. C. 345).

The foregoing remarks are applicable to all the States which have adopted the English statute of distributions.

AGENCY.

Whenever it is proposed to charge one person on account of acts performed by another, the onus is with the party alleging such agency; and if the agency is averred to be touching some other act than one *in pais*, the onus extends to prove the written authority (2 Greenl. Ev. secs. 60, 61).

If the authority is in writing, it must be produced and proved (*ib.* sec. 63).

Where it rests in parol, there are various ways in which it may be shown, but the enumeration thereof is omitted from this treatise as foreign to its purpose; but in whatever mode it may be shown, the onus is as above stated (McCarty *v.* Strauss, 21 La. Ann. 592).

Upon a *prima facie* case being made, the other party may offer evidence in rebuttal, the onus then being with him (2 Greenl. Ev. sec. 68 *a*).

There is a dearth of authority on this subject, but a few illustrations may be given: —

Where a party sells goods to one whom he alleges to be an agent of a quartermaster, and all of the allegations of his pleading are traversed, he must prove the appointment both

of the quartermaster and his agent (Calkins *v.* U. S., 1 Ct. of Cl. 382).

In an action on contract where the defence is that the contract was made by the defendant as agent, the onus is with the defendant to establish such defence (Vawter *v.* Baker, 23 Ind. 63; Wheeler *v.* Reed, 36 Ill. 81; Glenn *v.* Thompson, 2 La. Ann. 29).

In an action against A for goods sold to B, his agent, the burden is on the plaintiff to prove not only that B was the agent of A, but that he sold the goods to B on A's account (Beals *v.* Merrian, 11 Met. (Ky.), 470).

Where an agent by authority from his principal, holds and deals with the property of the latter as his own, and sells it as such, the onus is with the principal seeking to recover his property, to show that the purchaser bought with knowledge of his rights (Calias &c. Co. *v.* Van Pelt, 2 Black, 372).

A promissory note signed by B as agent of an incorporated company does not, on the face of it, import a personal obligation, and the onus is with the plaintiff, to show that he is personally liable (Bradley *v.* McKee, 5 Cranch, C. C. 298). While agency having been established, his declarations touching matters connected therewith are competent, yet, before they are admissible, it lies upon the plaintiff to first establish the agency (Francis *v.* Edwards, 77 N. C. 271).

When one failed in business and afterwards did business as agent in the same place, if sued for goods sold to him while filling the latter capacity, and he interposes the defence that he was acting as agent, it seems that the burden lies upon him to show some notice to the public of the change of business (Kerchner *v.* Reilly, 72 N. C. 171).

In an action against an agent for the loss of money intrusted to him for his principal, the burden is on the agent to show that there was no breach of duty on his part (Darling *v.* Yonker, 37 Ohio, 487, reported in 41 Am. Rep. 532).

So as to the loss of a bill sent to him for collection (Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641; McKinney *v.* Neil, 1 McL. 540).

ALIMONY.

The right to alimony, according to the English practice, was dependent upon and ancillary to a decree for divorce; the burden of proof therefore is referrible to the action for divorce rendered in favor of the wife. By statute in some States, it may be allowed *pendente lite*, and the onus then will be dependent upon the language of the statute; in such cases the complaint must set forth allegations showing that it is "fit to be entertained," that is, facts showing a presumptive right to divorce (Taylor *v.* Taylor, 1 Jones, 528).

In some States such allegations cannot be controverted, *qua* the claim for alimony, but in others they may be.

The husband may show that the wife has a separate estate, so as to preclude her claim or reduce the amount of the allowance; but the onus is with him (Methvin *v.* Methvin, 15 Ga. 97; Converse *v.* Converse, 9 Rich. Eq. 535; Morse *v.* Morse, 25 Ind. 156; Killiam *v.* Killiam, 25 Ga. 186; Bishop, M. & D. secs. 562, 572, 611 *et seq.*; Poynt, M. & D. 260, note; Powell *v.* Powell, Law Rep. 3 Prob. & Div. 186, reported in 10 Eng. Rep. (Moak) 535).

ALTERATION OF INSTRUMENTS.

It would be presumptuous to lay down the principle governing the onus probandi touching this title, as there is an irreconcilable conflict of authority.

The reader will find a reference thereto under the title of Sealed Instruments.

ANIMALS.

Property in. — When the subject of an action of trover or trespass is a wild animal, the burden is upon the plaintiff to prove ownership, and that he must do by showing a capture, and confinement to a reasonable extent, and either that the animal accidentally escaped and was instantly pursued, or had

the *animus revertendi* (Pierson *v.* Post, 3 Cai. (N. Y.) 175; 2 Black. Com. 391 *et seq.*; Com. Dig. Biens, F. & Action, *sur trover*, C.; Saund. Rep. 84; Hannam *v.* Mockett, 2 B. & C. 934–944; 2 Steph. Com. 70; Amory *v.* Flynn, 10 Johns. 102).

Injury by Animals (domestic). — There is a difference as to the liability of the owner, between injuries committed by animals known as stock, and other vicious domestic animals, or those *ferœ naturæ*. As to injuries committed by stock running at large, it will depend upon whether the local law requires them to be kept up, as in England and many of our States: wherever what is commonly known as the "stock law" prevails, the breach of the duty to keep them up gives an action if they stray and commit damage, and in such cases the burden does not extend beyond proof of the ownership and damage (2 Saund. Pl. & Ev. 864; 3 Black. Com. 211; Cool. Torts, 237, 340–342; Big. Torts, 249–251; 2 Waterman, Tresp. sec. 858; 1 Thomp. Neg. 209, 248; note to Tonawanda &c. Co. *v.* Munger, 5 Den. 255, reported in 49 Am. Dec. at p. 248). No proof of *scienter* is required, as the *gravamen* of the action is the breach of duty (2 Saund. Pl. & Ev. 864; 1 Thomp. Neg. 209, sec. 26; Page *v.* Hollingsworth, 7 Ind. 317; Gresham *v.* Taylor, 51 Ala. 505; 2 Roll. Ab. 568; Bac. Ab. Trespass, G. 2; 1 Ld. Ray. 608), nor need negligence, in fact, be proved (Tillett *v.* Ward, 10 Q. B. Div. 17, reported in 22 Am. Law Reg. (N. S.) 245; Jackson *v.* Smithson, 15 M. & W. 563; fully digested in notes on L. C. Law, Lib. Oct., Nov., and Dec., 1848).

On the contrary, in those States where there has been no legislation requiring stock to be fenced in, the owner incurs no liability by permitting his stock to range at will (note to Tonawanda R. R. Co. *v.* Munger, 49 Am. Dec. 250, where the authorities are collected; 4 Kent, Com. 438, n. 1 (12 ed.); notes to May *v.* Burdett, Big. L. C. Torts, at p. 490).

The right to range gives the correlative right of action for injuries to cattle, occurring wilfully or negligently, while at large (*ib.*).

In actions against the owner of an unruly or vicious

domestic animal for an injury committed by it, the burden extends further than with regard to stock, necessitating the proof of knowledge had by the owner of such vicious propensity (3 Black. Com. 153; 1 Thomp. Neg. 201, sec. 15, and 202, sec. 16; 4 Camp. 198; 2 Strange, 1264; 2 Esp. 482; Jackson *v.* Smithson, 15 M. & W. 563; Camp. Neg. sec. 27; Whart. Neg. sec. 913; 1 Leigh, N. P. 552; Abb. Tr. Ev. 645; 1 Taylor, Ev. sec. 279; Cool. Torts, 343, 344; Big. Torts, 249; May *v.* Burdett, 9 A. & E. (N. S.) 101, reported in Big. L. C. Torts, 478, and 1 Thomp. Neg. 174; 1 Arch. N. P. 422). The burden, otherwise, is as stated *supra* with regard to cattle. The notice must be that the animal was inclined to do the particular kind of mischief alleged to have been committed (Cool. Torts, 344), or at least that or *ejusdem generis* (*ib*). The obligation rests on the keeper without regard to ownership (Cool. Torts, 345).

The defendant, if a *prima facie* case is made out, may show that the plaintiff was guilty of contributory negligence (Cool. Torts, 346; 1 Thomp. Neg. 222, sec. 37).

Animals *ferœ naturæ*. — The same burden as that required in actions for injuries committed by vicious domestic animals is required when the injury complained of was committed by an animal *ferœ naturæ* (May *v.* Burdett, *ubi supra*; 1 Thomp. Neg. 208, sec. 25).

Actions for Killing. — In actions for injuries to animals, or killing them, the burden is upon the defendant to show that it was destroying his property, or that he was in such a situation with reference to the animal, as to give reasonable ground to apprehend an attack from it, or that the animal showed evident signs of rabies (1 Thomp. Neg. 220, sec. 35; note to May *v.* Burdett, Big. L. C. Torts, at p. 491; Cool. Torts, 346). Even as to animals *ferœ naturæ*, the property in them will support a civil action for their wrongful destruction, if reclaimed. The declaration must state that fact, and it must be proved as laid (F. N. B. 86; Dyer, 306). With regard to such animals, it was laid down by Ld. Hale, that notice is not necessary of vicious or unruly propensities

(1 H. P. C. 430, pt. 1, ch. 33), but in view of the recognition of menageries in modern times, as useful institutions, such a rule would hardly be adopted by the courts (Cool. Torts, 349 and note 3). Great weight is justly attributable to English precedents, and it is to be observed that in May *v.* Burdett, cited *supra*, the injury complained of was done by a monkey, and the declaration expressly charged the *scienter*.

Diseased Animals. — When diseased animals stray and infect other animals, the question, as to whether there is necessity for proof of the *scienter*, has been differently decided. In Connecticut in the negative (Barnum *v.* Vandusen, 16 Conn. 200). In other courts, and such is the better view on principle, in the affirmative (Cook *v.* Waring, 2 H. & C. 332; Noyes *v.* Colby, 30 N. H. 143).

ASSAULT AND BATTERY.

Assault. — The plaintiff, if no actual battery has been inflicted, must prove an intentional offer or attempt by defendant to commit some personal violence upon him, and, that according to the mode of the attempt, violence to the person would have ensued but for its prevention by some accidental collateral circumstance. It is supposed that this definition embraces all the instances except that of pointing an unloaded gun.[1]

[1] The principle that an assault may be committed by pointing an unloaded gun at another, whether known to be loaded or not, is fully sanctioned by the authorities (2 Add. Torts, sec. 787; Cool. Torts, 160, 161; 1 Saund. Pl. & Ev. 103; 2 Leigh, N. P. 1409; 1 Arch. N. P. 377; Big. L. C. Torts, 230; Arch. Cr. Pl. 416; MacNally, Ev. 608; 1 East, Cr. Law, 406; Reg. *v.* St. George, 9 C. & P. 483; State *v.* Cherry, 11 Ired. 475; State *v.* Shepherd, 10 Iowa, 126; Beach *v.* Hancock, 27 N. H. 223). There is not, however, within the author's researches, any English case directly deciding it. Baron Parke in Reg. *v.* St. George, cited *supra*, put it under a semble, which means, however, a great deal, from that profound judge. The doctrine is denied by Prof. Greenleaf (2 Greenl. Ev. sec. 82, note 5, and also by Mr. Wood in his note 1 to 2 Add. Torts, sec. 788). The impeaching authorities are Reg. *v.* James, 1 C. & K.

Perhaps a more practical criterion may be thus stated: the plaintiff must show such a demonstration of force, as to induce a reasonable belief that violence was intended and about to be inflicted (State *v.* Rawles, 65 N. C. 334). It is defined, also, as an unsuccessful attempt to do harm to the person of another (Underhill (Moak) Torts, 204). The principle is so elementary as not to require the citation of authority.

Battery. — If a battery is alleged as the ground of action, the plaintiff must prove that the defendant committed violence of some kind to his person against his will. The degree is immaterial; but the plaintiff must show that it was committed in either a rude or angry manner. Rudely pulling the clothing may constitute a battery, or knocking off the hat, or a cane out of one's hands, or striking an object upon which the plaintiff was resting for support, if the effect be to cause a fall or concussion to the plaintiff, *ex. gr.* striking a horse upon which the plaintiff was riding; driving a vehicle against a carriage in which plaintiff was riding; overturning a chair in which he was sitting (Big. Torts, 101 sec. 3; Underhill (Moak) Torts, 207 *et seq.*; 1 Arch. N. P. 378; 2 Add. Torts, sec. 790); or, according to a court of great weight, if one give to a woman confectionery containing, to his knowledge, cantharides, and the woman, being ignorant of the fact, eats it, and is injured in health[1] (Com. *v.*

530 (47 E. C. L. R.), which turned upon the construction of 1 Vic. ch. 85, sec. 3, as to the words "loaded arm," and is therefore not pertinent; Blake *v.* Barnard, 9 C. & P. 626, in which Ld. Abinger held that the proof must show that the arm was loaded because it was so alleged in the pleading, and Stephens *v.* Myers, 4 C. & P. 349, reported in Big. L. C. Torts, 217, which does not bear on the point. It may be regarded as an open question.

[1] The contrary was held in Reg. *v.* Hanson, 2 Car. & Kir. 912 (61 E. C. L. R.). The opinion is an *ipse dixit*, no reason being assigned. The author submits that, on principle, the Massachusetts decision would seem to be the sounder law. At common law the civil action for such injuries would have been trespass, not case (Scott *v.* Shepherd, 1 Smith, L. C. 210, "squib case").

The distinction is clear between the direct administration of poison, and so placing it that it would be taken through natural appetite. If poisoned meat be thrown to a dog, and he eats it and is injured, *trespass* was the remedy; if

Stratton, 114 Mass. 303, reported in 10 Am. Rep. 350); or if one shoots off a pistol, and in so doing is guilty of gross negligence, and the ball glances from the object and hits one, it is a battery (Welsh *v.* Durand, 36 Conn. 182). So, if a drum be beaten so near the highway, as to frighten a horse pulling a party in a vehicle, whereby the party was injured, it is a battery (Loubz *v.* Hafner, 1 Dev. 185). Indeed, the criterion is well expressed, thus: a battery is an unlawful touching of the person of another by the aggressor himself, or any substance put in motion by him (Kirkland *v.* State, 43 Ind. 153, reported in 13 Am. Rep. 386; 3 Black. (Chitty) Com. 120, note 4).

The plaintiff is relieved from proving any intention, except such as flows from the act done, as an injury may be a trespass, although unintentional,[1] unless it were the result of inevitable accident (Underhill (Moak) Torts, 208, rule 17; Big. Torts, 103; 1 Sel. N. P. 22), and even when the defendant did not intend it, if engaged at the time in a unlawful proceeding (Big. Torts, 103). In this connection see the able notes of Mr. Moak to Underhill, Torts, 208, rule 17; 1 Saund. Pl. & Ev. 104; 2 Leigh, N. P. 1411; 3 Black. Com. (Chitty) 120, note 4; Big. L. C. Torts, 231; 2 Greenl. Ev. sec. 94.

Damages. — The plaintiff is entitled to nominal damages, at least, upon proving the assault or battery, and to such damages beyond, as he may be able to satisfy the jury that he has sustained. If he claims exemplary damages, the burden is upon him to show that the act complained of was

placed in a fence corner, and the dog comes by and eats it, *case* was the remedy (Dodson *v.* Mock, 4 D. & B. 146). It has, however, been held in England, that if a party having connection by consent, communicates a venereal disease without informing the woman, he is indictable for an assault (Reg. *v.* Bennett, 4 Fos. & Fin. 1105; Reg. *v.* Sinclair, 13 Cox, C. C. 28, reported in 11 E. R. (Moak) 385).

But, civil action is not maintainable under such circumstances. The maxim *ex turpi causa non oritur actio* applies (Hegarty *v.* Shine, Irish Court of Appeals, Dec., 1878, reported in 8 Cent. L. J. 111).

[1] It is stated in a recent work, that the plaintiff must prove that the intention was unlawful (Abb. Tr. Ev. 648), but the weight of authority is the other way.

committed or accompanied with malice, violence, oppression, or wanton recklessness (2 Add. Torts, secs. 845–848; Moak's notes to Underhill, Torts, 226, rule 19; 1 Sel. N. P. 31; Drohn *v.* Brewer, 77 Ill. 280; 1 Saund. Pl. & Ev. 105), but plaintiff cannot, under the *alia enormia*, give in evidence anything which might have been specifically averred in the declaration, or anything which ought to have been alleged under a *per quod* (1 Arch. N. P. 379).

The foregoing remarks are predicated upon a defence by denial, termed anciently inficiation (Bull. N. P. 17). But if the defendant pleads in confession and avoidance, the burden is shifted.

Son Assault Demesne. — The defendant, then taking the burden, must, under the plea of *son assault demesne*, prove that the plaintiff first assaulted him (2 Add. Torts, sec. 844; 1 Sel. N. P. 25; Bull. N. P. 17; Underhill (Moak), Torts, 216, rule 18; Big. Torts, 105, sec. 4).

He must prove not only that the plaintiff made the first assault, but that it necessitated the consequent assault on the plaintiff, and that it was not excessive (1 Saund. Pl. & Ev. 106; 2 Greenl. Ev. sec. 95; 2 Leigh, N. P. 1414; Brown *v.* Gordon, 1 Gray, 182; Cool. Torts, 165; Big. L. C. Torts, 232; Elliott *v.* Brown, 2 Wend. 497, reported in 20 Am. Dec. 644; 1 Arch. N. P. 382; 2 Add. Torts, sec. 844). Under this head may also be classed the right of defending one's family or possessions, or even friends or neighbors (2 Add. Torts, sec. 839). As to the former, it is governed by the same considerations as are applicable to the defence of one's person (1 Arch. N. P. 383 *et seq.*; Cool. Torts, 167; 1 Black. Com. 429; Big. Torts, 108; 2 Leigh, N. P. 1414; Bull. N. P. 18; 1 Saund. Pl. & Ev. 107). The like doctrine is applicable to the defence of a master by a servant (*ib.*), but whether to a defence of a servant by a master, is not free from doubt (Big. L. C. Torts, 233; 2 Leigh, N. P. 1414; 1 Sel. N. P. 25). Mr. Schouler declares, that the weight of authority is in favor of the right (Schoul. Dom. Rel. sec. 479; Bull. N. P. 18: Reeves, Dom. Rel. 538 (3d ed.); Wood, M. & S. sec. 152).

As to the application of this defence to one's possession, the title is not in question (1 Arch. N. P. 383; 1 Sel. N. P. 27), but the burden extends further, and the defendant must show actual *possessio pedis;* he must also prove that before assaulting, he requested the intruder to depart or desist from entry; on refusal, that he put his hands upon him gently, and that also failing, he used only such force as was necessary to expel him (Big. L. C. Torts, 232; Cool. Torts, 167, 168; 2 Leigh, N. P. 1414; Big. Torts, 107; 1 Saund. Pl. & Ev. 107; Bull. N. P. 19; Moak's notes to Underhill, Torts, 218, 219; 2 Add. Torts, secs. 793, 844; 1 Sel. N. P. 26, 27).

But if the entry itself be forcible, so that a request, etc., would be idle, the burden is sufficiently discharged by showing that force was met by corresponding, and not excessive force (Moak's notes to Underhill, Torts, 218; 2 Leigh, N. P. 1414; Big. Torts, 106, 107; Bull. N. P. 19; Cool. Torts, 168; 1 Saund. Pl. & Ev. 107; Weaver *v.* Bush, 8 T. R. 78; Green *v.* Goddard, 2 Salk. 641; Tully *v.* Reed, 1 C. & P. 6 (12 E. C. L. R.); Trogden *v.* Henn, 85 Ill. 273; Shain *v.* Markham, 4 J. J. Marsh, 578, reported in 20 Am. Dec. 232; 1 Arch. N. P. 385; 1 Sel. N. P. 26).

Correction. — The defendant, as a justification, may show that the battery was committed in the moderate correction of his minor child, apprentice, and probably all young servants (Smith, M. & S. 68), or of his pupil, or probably his young ward, or refractory prisoner, or person placed under some system of public police and economy, or a seaman (Big. Torts, 105, sec. 4; Underhill (Moak), Torts, 219–221; 1 Saund. Pl. & Ev. 106, 107; 2 Leigh, N. P. 1416; 2 Greenl. Ev. sec. 97; Schoul. Dom. Rel. secs. 244, 467; 1 Sel. N. P. 28), or possibly his wife (1 Black. Com. 444, 445; 2 Add. Torts, sec. 840).

In Aid of Justice. — He may also show that the battery was committed in an effort to quell a riot or affray while acting as one of the *posse comitatus* (Big. Torts, 108), or that it was done to stop a breach of the peace; to arrest a felon; or by a church-warden to eject the disturber of religious

worship (Moak's note, Underhill, Torts, 221 *et seq.;* 1 Saund. Pl. & Ev. 107; 2 Add. Torts, secs. 796, 803 *et seq.;* 1 Sel. N. P. 27).

Accidentally. — Or he may show that the battery was done accidentally, or by superior agency and without blame attachable to him (2 Add. Torts, sec. 787; 2 Greenl. Ev. sec. 92; Cool. Torts, 164; Big. Torts, 103; Moak's notes, Underhill, Torts, 208, rule 17 *et seq.;* 2 Leigh, N. P. 1411; Paxton *v.* Boyer, 67 Ill. 132, reported in 16 Am. Rep. 615); and these facts can be given in evidence under the general issue.

It is hardly necessary to add, that the defendant may, as in any other case, set up such collateral defences as are applicable to any other action, in which case, the burden will be imposed or shifted according to the nature of the pleading. See title ONUS AS AFFECTED BY THE PLEADINGS.

Reply. — The burden may be shifted to the plaintiff, as for instance, if the plea in justification (*ex. gr., son assault demesne*) be true, and yet the plaintiff can justify the first assault, he should not adopt the replication *de injuria*, but reply the justification specially, whereupon his reply being in confession and avoidance, he must take the burden of proof to sustain it (2 Leigh, N. P. 1418, 1419; 1 Saund. Pl. & Ev. 107; Bull. N. P. 18; 1 Arch. N. P. 382; 1 Sel. N. P. 30).

ASSURANCES.

In considering this subject, feoffments, fines, and recoveries are eliminated, as never having obtained in this country, and, deeds will be considered as a class.

Deeds. — Whenever the law requires a writing to pass title, whether to real or personal estate, such writing must be produced, unless in those cases where *profert* dispenses with it (2 Greenl. Ev. sec. 294).

Signing and Sealing. — The burden of proof is on the party claiming under the deed, to show the signing (when required, as it is now quite universally done by the reënactment of the statute 29, C. 2) and the sealing.

At common law the sealing must have been effected by a waxen impression or wafer, but in many of the States L. S. or "Seal," written or printed, is deemed sufficient (4 Kent, Com. 453; McDill *v.* McDill, 1 Dall. 63; Long *v.* Ramsay, 1 S. & R. 72; Taylor *v.* Glazer, 2 S. & R. 502; 3 Wash. R. P. 273–275 (4th ed.)).

In some, this mode is sufficient, provided the instrument should contain some expression showing an intent to give it the effect of a sealed instrument (Baird *v.* Blaigrove, 1 Wash. 170; Austen *v.* Whitlock, 1 Munf. 487; Anderson *v.* Bullock, 4 Munf. 443).

In New Jersey the scroll is confined to money bonds (Hopewell *v.* Amwell, 1 Halst. 169).

Delivery. — He must also prove a delivery, which is done by showing that the maker has parted with his dominion over it, with the intent that it shall pass into the possession of the grantee or obligee. This may be shown in various ways.

The weight of authority is, that it may be delivered to a stranger for the grantee (2 Greenl. Ev. sec. 297 and note; Doe *v.* Knight, 5 B. & C. 671; 4 Kent, Com. 455 and note).

Every one is presumed to accept a benefit; hence the grantee is presumed to accept, and the delivery to the stranger is presumptively good (3 Wash. R. P. 282 (20 *a*) *et seq.*, 294 (31), (32); McLean *v.* Nelson, 1 Jones, 396; Green *v.* Kornegay, 4 Jones, 66; Myrover *v.* French, 73 N. C. 609); but, though presumed, such assent may be negatived by proof (Baxter *v.* Baxter, Busb. 341). The utmost burden demanded is to show that the grantee was *in esse* (3 Wash. R. P. 294 (32)).

It is laid down that the delivery of a deed after the death of the grantor is of no effect (3 Wash. R. P. 283; Baldwin *v.* Maltsby, 5 Ired. 505). This proposition, however, must be intended of a case where the grantor retained the instrument in his custody until his death, and it was thereafter delivered. For if delivered to a third person for the grantee, the death of the grantor will not prevent it from becoming his deed (Wheelwright *v.* Wheelwright, 2 Mass. 447).

Acceptance. — If the statement that acceptance is presumed is correct, then proof of acceptance is dispensed with, the burden is shifted, and non-acceptance may be shown by the party claiming adversely to the deed. He may show that the acceptance may prove a burden instead of a benefit, or even an arbitrary refusal to accept a clear benefit (3 Wash. R. P. 295 (34); 2 Greenl. Ev. sec. 297; 4 Kent, Com. 454, note 3; Baxter *v.* Baxter, *supra*).

In one instance, in the case of a single-bill (made negotiable by statute, by endorsement), payable to A. B. and offered to the named obligee for a loan of money, on her refusal to effect the loan, she was requested to indorse the same to the plaintiff in order to effect the loan with him, and she did so "without recourse." Afterwards it was offered in that shape to the plaintiff, who made the loan and took the single-bill. It was held that there was no delivery to A. B., by reason of her refusal to accept, and none to the plaintiff, *as obligee*, and no title passed to him *as indorsee*, because none had vested in his indorser, and, that he could not recover (Rcspass *v.* Latham, Busb. 138).

Registration. — Registration or recording, as it is otherwise called, is necessary to be shown whenever the statutes require it to be done, in order to be produced in evidence, and it must be shown not merely that the instrument had been transcribed upon the registration books, but that the proper preliminary steps to that end had been taken (3 Wash. R. P. 319 (54)).

In many of the States proof of valid registration supersedes the proof of execution (*ib.* 322 (58); 2 Greenl. Ev. sec. 299). In others it must be proved as at common law (3 Wash. R. P. 322 (58)). In some States, by statute, the registry of properly registered instruments is allowed the same force in evidence as the original, unless notice be given to produce such original.

If the deed is neither required nor allowed to be registered, the rule of the burden at common law, already discussed, prevails.

Escrow. — If either party alleges that the instrument, in form of a deed, is not a perfected deed, but an *escrow*, it devolves upon him to show that the same was delivered to a stranger to be delivered to the grantee, upon the performance of some condition (4 Kent, Com. 454 and note 3; 3 Wash. R. P. 298 (40); 2 Greenl. Cruise, Vol. IV., chap. 2, secs. 68, 69, 70, and notes).

Wills. — For a discussion of the onus with reference to wills, see that title.

Negotiable Instruments. — So as to this title.

Bailments. — So as to this title.

Sale. — This subject, as to purely executory sales unaccompanied with delivery, will be discussed under the title PAROL CONTRACTS. As to those in which both a sale and delivery is alleged to have been made, the onus is with the plaintiff to prove a bargain and sale of the chattel, and a delivery to the vendee. In general, proof of the delivery of the goods to the defendant, and that he has used them, is *prima facie* evidence of a contract, without proving any specific order.

The plaintiff need not prove an actual contract for the specific goods for which the action is brought; it will suffice to prove a dealing in the way of trade or business of the parties, and it will be sufficient to prove a dealing in the way of trade, when the defendant knew of and adopted the delivery of the goods. And where goods delivered, on sale or return, are not returned within a reasonable time, proof to that effect will be evidence of the goods sold.

In support of the allegation of delivery, a virtual delivery may be shown; as if the defendant refused to accept them or prevented the delivery.

The plaintiff must show that he has divested himself of all liens upon the goods, and that the defendant might maintain trover for them, without paying or offering to pay the price; delivery to an agent, or somtimes to a carrier, will be sufficient, and in some cases a symbolical delivery will be tantamount to actual delivery (2 Saund. Pl. & Ev. 535 *et seq.*;

Benj. Sales, sec. 758 *et seq.;* Williams, P. P. 34 *et seq.;* Kerr, A. at L. 125; Bell, Cont. Sale, 79 *et seq.;* Smith, Cont. (3d Am. Ed.) App. 330 *et seq.;* 1 Leigh, N. P. 88, sec. XI.). Plaintiff's property and the price or value must also be proved (2 Saund. Pl. & Ev. 540; Abb. Tr. Ev. chap. 16).

Invalidity of Deed. — If a party attack a deed made by his attorney in fact, on account of matters not apparent on its face, the burden is on the party so attacking (Clements *v.* Macheboeuf, 92 U. S. 418; Polk *v.* Wendell, 9 Cr. 87; Bagnell *v.* Broderick, 13 Pet. 436; Minter *v.* Crommelin, 18 How. 87; Bank *v.* Dandridge, 12 Wh. 64).

ATTACHMENT, FOREIGN.

This was a proceeding unknown to the common law, and borrowed from the custom of London. It is wholly the creature of statute, and was generally introduced into American jurisprudence prior to the revolutionary war.

The statutes vary in the different States, in some particulars, but the general features of all are the same. We do not allude to the warrant of attachment, which is found in the codes of remedial justice, and which has, in those jurisdictions, which have adopted the code system, *ex vi termini*, if not by express repeal, superseded the attachment known to our forbears.

The Custom of London. — It is not proposed to discuss the practice as it exists under the custom of London, though doubtless it will not be found unuseful to the practitioner, in doubtful cases. The reader is referred to Bohun's Privileges of London and Locke on Foreign Attachment (Law Library, August, 1853), and appendix to Drake on Attachment. But it may not be considered out of place to state, that under that custom, a debt could be attached, though the defendant was living within the city; indeed, the practice was not to serve the summons upon the defendant, as "the

defendant would forthwith take steps to place the debt beyond the reach of the attachment" (Locke, F. A. 12).

The summons is then returned *nihil* (*ib.* 11); thereupon, "if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum," "he shall have garnishment against him, to warn him to come in and answer whether he be indebted in manner as alleged" (*ib.* 13); "if he comes, and does not deny the debt, it shall be attached *in his hands*" (*ib.* 16).

Thereupon, three courses were open to the garnishee: either not to appear; to appear, but not to plead; or to appear and plead (*ib.*). In the two former events, the plaintiff is entitled, according to the course of the court, to sign judgment of *nil dicit;* if, however, he pleads, and a verdict is found for the plaintiff, then, as well as in the other cases, the money is attached in the hands of the garnishee. If the defendant, or the garnishee for him, shall put in substantial bail, this operates *proprio vigore* to dissolve the attachment (*ib.* 49). The garnishee might, upon taking an oath (see form, *ib.* 55), wage his law. In order to disprove the debt after judgment, the defendant must either render his body to prison, or give security to pay the debt demanded, and then may bring a *scire facias ad disprobandum debitum;* thereupon, the defendant might wage his law, and if he was a freeman of London, he must have six compurgators, who will swear "that they believe, in their consciences, that what the defendant swears is true" (*ib.* 58). If the defendant shall appear and plead, and have a verdict, judgment of restitution passed; after appearance and plea of *nil debet*, the cause is tried in the same manner as an ordinary action in court (*ib.* 60). Under the plea of *nil debet*, the defendant could show performance, release, and the like, or perhaps even the statute of limitations (*ib.* 62, 63; 1 Chitty, Pl. 517).

Its Technical Object. — Technically, it was held, that the object of the original attachment was to compel appearance, and therefore, according to the English practice, putting in substantial bail had the effect to convert an anomalous pro-

ceeding into an ordinary action of debt (Locke, 49), and such is held to be the effect in several of the States (Drake, Att. chap. 13; Hightour *v.* Murray, 1 Hay, 21; Maxwell *v.* McBrayer, Phil. 527; Jackson's Appeal, 2 Grant (Pa.), Cas. 407). And since the abolition of the *capias ad respondendum*, the same effect is produced, according to some authorities, by an appearance without giving bail (Holmes *v.* Sackett, 63 N. C. 58; Stephenson *v.* Todd, *ib.* 368). In other States the bond required from the defendant operates to secure the debt, directly or indirectly (Drake, Att. *ubi supra*).

The Affidavit. — This is the lever by which the jurisdiction of the court is brought into action. It must follow the local statute (Drake, Att. sec. 83). As this law, not being according to the course of the common law, is construed strictly (State Bank *v.* Hinton, 1 Dev. 397), the plaintiff is held rigidly, to show a full compliance with all its pre-requisites.

We do not propose to discuss (being foreign to the design of this treatise) the requisites of the affidavit, nor the nature of the action, as these are dependent entirely upon local statutes, but suffice it to say, that the plaintiff's burden extends to showing a strict compliance with the requirements of such law. He must show that the affidavit is one of those specified in the statute; that it embraces the facts which authorize the issuance of an attachment according to the purview of the statute (Drake, Att. sec. 88). It is safest to follow the language of the statute (*ib.* sec. 103). It forms a part of, and must appear in the record (*ib.* sec. 90). It must be authenticated (*ib.* sec. 91). And, probably, must be made only by the person named in the statute (*ib.* sec. 93). However, care should be taken to comply with the *spirit* as well as with the *letter* of the statute. Therefore, when an attachment is allowed upon an affidavit of removal from a county, it should also be averred that such removal was effected *for the purpose* of avoiding service of ordinary process (Leak *v.* Moorman, Phil. 168).

According to some authorities the affidavit, where several circumstances are specified disjunctively in the statute, must

state them cumulatively (Drake, Att. sec. 101), but, on principle, this idea would not seem to be tenable.

Suppose the statute, as put by Judge Drake, to prescribe as grounds for attachment: —

1. Where the defendant is about to remove his effects.
2. Where he is about to remove privately out of the county.
3. When he absconds or conceals himself so that the ordinary process of law cannot be served on him.

Now, if all of these circumstances are put conjunctively in the statute, the affidavit must put them the same way; but suppose they are put disjunctively, why should a creditor be required to swear that his debtor has committed all of the forbidden acts, when the statute declares, according to grammer and common sense, that the commission of either one shall be sufficient ground for the issuance of an attachment? The analogy as to affidavits to obtain a *capias ad satisfaciendum* may be put, and it has been held that where there were several distinct facts upon which an affidavit for a *ca. sa.* might be predicated, any one was sufficient (Brown & Maxwell *v.* Walk, 8 Ired. 517; Farmers Bank *v.* Freeland, 5 Jones, 326; Eaton's Forms, 57, 58, 420, 421).

It occurs to the author that this is the common sense of the matter, — but see Drake, Att. sec. 102. The maxim of *utile per inutile non vitiatur* applies (*ib.* sec. 105), and substantial compliance with the statute is sufficient (*ib.* sec. 106), but when required to be in positive terms, a statement "to the best of knowledge and belief" is insufficient (*ib.* sec. 108), and the affidavit must be made before the institution of the suit.

The Bond. — The statutes generally require a creditor seeking this extraordinary remedy to give a bond, and the burden is upon the plaintiff to show that such bond was executed before the attachment issued (*ib.* sec. 115), and such bond must appear in the record (*ib.* sec. 119).

The Garnishee. — In addition to the usual affidavit, the statutes, generally, prescribe that affidavit may also be made to the effect that some third person is indebted to the defendant, or has property belonging to him, and thereupon, accord-

ing to such form as the local statute may prescribe, the third person, styled garnishee, is brought into court, and required to answer whether the allegation in the affidavit be true; if admitted, no point arises; but if denied, an issue is made up between the plaintiff and such garnishee to try the disputed fact, and on that trial the burden is upon the plaintiff, to show affirmatively that the garnishee is liable (*ib.* sec. 461). The issue is formed by the denial, without a replication (Cowles *v.* Oaks, 3 Dev. 96), and it becomes substantially an action by the defendant against the garnishee (Patton *v.* Smith, 7 Ired. 438; Drake, Att. secs. 462, 541). As to his liability in respect to the character or quality of the obligation, or the interfering rights of third persons, we have no concern, but the reader is referred to Drake on Attachment, chaps. 18 to 32 inclusive.

Intervenors. — If the property of a third person should be attached, upon general principles, as well as according to the provisions of the statutes of many of the States, such person is allowed to interplead. As the levy of the attachment has put the property *in custodia legis*, it would seem, on principle, to be equivalent to a conversion, — certainly a trespass, — and would constitute the interpleader an actor, and devolve upon him the burden of proof, and perhaps the authorities so hold (McLean *v.* Douglas, 6 Ired. 233). There need be no discussion as to how objections to the proceedings may be taken advantage of, that being a question purely of local practice, and not involving, in a proper sense, the onus probandi.

As to the subject of attachment under the code-system, see title PRACTICE BETWEEN TERMS.

Attachment for Non-Payment of Costs. — The party applying therefor, must obtain a rule *nisi*, and he must show that he has served the party to be affected personally, with a copy of the rule and the master's *allocatur*[1] thereon, and that the

[1] This is the form of the *allocatur* : —

I allow £----------.

LE BLANC (Master or Prothonotary, as the case may be).

[Date.]

rule itself was at the same time shown to him, and a demand made for the costs by the person to whom they are payable by the terms of the rule (2 Arch. Prac. 340; 3 Chitty, Genl. Prac. 602).

Although, at first blush, it would seem as if this subject should have fallen under Part III., as a proceeding *quasi in rem*, yet, if we distinguish between the practical use and its legal intendment, we will see that it could not with any accuracy be so classified. We might as well say that an action of debt (before the great reform in England) could have been brought in the King's Bench, without the *ac etiam*, or in the Exchequer, without the *quo minus* clause. *In fictione juris equitas semper existit.* It is true that it is sometimes termed *sui generis;* sometimes, in the nature of a proceeding *in rem* (Drake, Att. secs. 4, 5), and by our highest court as partaking of both suits *in personam* and *in rem* (Cooper *v.* Reynolds, 10 Wall. 308). With great deference to these high authorities, the author feels bound to adhere to his opinion that it is a suit *in personam;* that the criterion is the proposed technical object of the suit, as contradistinguished from *the purpose* of the suitor in selecting it. Indeed, the *distringas* at common law might as well be treated as a proceeding *in rem*, when we well know, that although thereby the defendant was "gradually stripped" (3 Black. Com. 281) of his substance, it was a mere process to compel appearance. It is highly probable that the custom of London took its origin from the *distringas*, as the plaintiff, as Locke says, was careful to have the summons returned *nihil.* The technical object then seems to be the governing criterion, rather than the ultimate practical fruits and effects.

AWARD.

Submission. — There are several points to be considered on this subject. In actions or defences based upon an award, the onus, on *nul agard* pleaded, is with the party claiming

under it, to prove: 1. The submission (Russ. Arb. 515; Bill. Awd. 216 *et seq.;* Watson, A. & A. 379, 380, 381; Morse, Arb. 488, 600; 1 Saund. Pl. & Ev. 185, 186).

Award. — 2. The award (*ib*). If an umpire shall have been provided for in the submission, the disagreement contemplated, as well as the umpirage, must be proved (Watson, A. & A. 381; Russ. Arb. 515; 1 Saund. Pl. & Ev. 185, 186).

Breach. — He must also show the breach (1 Saund. Pl. & Ev. 186).

Damages. — And the damages (*ib*).

Revocation. — The defendant, pleading in confession and avoidance, the death of the plaintiff before delivery of the award may show that fact (*ib*), as his death extinguished the power of the arbitrator (2 Saund. Rep. 1336; Dowse *v.* Coxe, 3 Bing. (11 E. C. L. R.) 30, 31), or that the authority was otherwise revoked (1 Saund. Pl. & Ev. 186).

BAILMENTS.

It will probably be most advisable, to a clear distribution of this subject, to follow in the rut of STORY.

Deposits. — In this class of bailments, the bailee is bound to reasonable care, measured by the particular circumstances of each case, and, when sued for loss, the onus will be with the plaintiff to establish it by suitable proofs (Story, Bail. sec. 79).

Mandates. — With regard to this species of bailment it may be proper to remark, that something may depend upon the form of the action, and upon the posture of the evidence at the trial, as well as upon the stage of the cause at which the question arises. It may possibly be different where a *prima facie* case to support an action of trover is made out at the trial, from what it would be, in an action of assumpsit, or an action on the case founded on negligence. In the latter actions, the plaintiff must make out his case *prima facie*, as he charges it. In the former, he may rely on

apparent conversion or on a demand and refusal, and thus shift the burden of proof. But, waiving all considerations of this sort, it seems a general principle of the common law, that every person is presumed to do his duty until the contrary is established: and on this account, in many cases, the burden is on the plaintiff, to negative this presumption by appropriate proofs (Story, Bail. sec. 213).

Gratuitous Bailments. — In this class of bailments, also, the question arises as to whether the onus rests upon the lender to establish the neglect of the borrower, or upon the borrower to prove his innocence. POTHIER intimates his opinion to be, that the burden of proof is upon the borrower, and, this is the doctrine of the Roman law. It is not perhaps easy to lay down any unbending rule on the subject, as the rule of the common law, which might not be subject to exceptions. Where a demand of the thing loaned is made, the party must return it, or give some account as to how it was lost. If he shows a loss, the circumstances of which do not lead to any presumption of negligence on his part, then the burden of proof might, perhaps, be with the plaintiff to establish it. There are cases, at least, in which it has been held, that the plaintiff must prove the negligence under special circumstances. But where there is a demand of the thing loaned, and a general refusal, without any special excuse, stated or proved at the time of the demand, then the burden of proof would seem to be with the defendant to negative the *prima facie* right of recovery thus made out by the plaintiff. And in many complicated cases of evidence, the onus may alternately shift from one party to the other in different stages of the trial (Story, *ib.* sec. 278; and see on this subject 2 Wait's A. & D. 4; see Turton *v.* Dufief, 6 Wall. 420; Chicopee Bk. *v.* Phila. Bk., 8 Wall. 641).

Pawns. — It would seem that in the Roman and foreign law generally, the onus is upon the pawnee to establish the loss to have occurred by some casualty, superior force, or intrinsic defect. POTHIER agrees to this. The common law does not probably differ, when a suit is brought for the resti-

tution of the pawn, after demand and refusal. In such case, the demand and refusal would ordinarily be evidence of a tortious conversion of the pawn; and it would then be incumbent on the pawnee to give some evidence of a loss by casualty or by superior force. If suit should be brought against the pawnee as for a negligent loss of the pawn, then it would be incumbent upon the plaintiff to offer proper proofs, and the onus in this respect would be cast upon him (Story, *ib.* sec. 339).

Hiring. — It would seem that the burden of proof of negligence is with the bailor, and that proof of loss merely is not sufficient to devolve the onus upon the defendant (Newton *v.* Pope, 1 Cow. 109; Cooper *v.* Barton, 3 Camp. 5; 2 Kent, Com. 587). The authorities are not, however, all in harmony, and the reader had best consult them as found referred to, under sections 410, 411, Story on Bailments.

Depositaries for Hire. — Warehousemen. — In respect to these, there seems to be a conflict of authority as to the cast of the burden of proof. In England, the onus is upon the plaintiff; while in America there is not entire uniformity of opinion, but Justice Story concludes that the weight of authority coincides with the English doctrine (Story, *ib.* sec. 454; Claflin *v.* Meyer, 75 N. Y. 260, reported in 31 Am. Rep. 467). The following are the leading English authorities: Finacune *v.* Small, 1 Esp. 315; Cooper *v.* Barton, 3 Camp. 5 in notes; Harris *v.* Packwood, 3 Taunt. 264; Gilbert *v.* Dale, 5 A. & E. (N. S.) 543. In America the authorities are conflicting. In some of the States the burden is held to be upon the defendant (Cass *v.* Boston &c. Co., 14 Allen, 448 (Bigelow, C. J., dissenting); Lichtenhein *v.* Boston &c. Co., 11 Cush. 70; Platt *v.* Hibbard, 7 Cow. 497; Clarke *v.* Spence, 10 Watts, 335, cited in 45 Am. Dec. 735; Thomas *v.* Darden, 22 La. Ann. 413; Boies *v.* Hartford &c. Co., 37 Conn. 272, reported in 9 Am. Rep. 347).

In others, that it is upon the plaintiff (Jackson *v.* Sacremento &c. Co., 23 Cal. 269; Denton *v.* Chicago &c. Co., 52 Iowa, 161, reported in 35 Am. Rep. 263). Even where the

goods are stolen by a burglar, or destroyed by fire, it is upon the plaintiff to show that the negligence of the defendant contributed to the loss (Claflin *v.* Meyer, *supra*; Denton *v.* Chicago &c. Co., *supra*).

And in some a shifting rule is adopted, that is, if the goods have been lost or destroyed, the burden is upon the defendant (Schmidt *v.* Blood, 9 Wend. 268, reported in 24 Am. Dec. 143), or on failure to deliver on demand (Claflin *v.* Meyer, *supra*); but if the goods are only injured, the burden is upon the plaintiff (Schmidt *v.* Blood, *supra*), and refusal to deliver on demand is *prima facie* evidence of negligence (see notes to Schmidt *v.* Blood, 24 Am. Dec. at p. 150).

It is suggested that the criterion is not, *with whom* the onus rests at the outset, as the plaintiff discharges the burden upon proof of the bailment and refusal to deliver on demand, and establishes a *prima facie* case; but it depends upon the proof thereupon made by the defendant; if he proves that they were stolen, burned, or lost by overpowering force or by confiscation under the *vis major*, the burden to overcome this evidence is shifted to the plaintiff (McCullom *v.* Foley, 17 La. Ann. 89; Babcock *v.* Murphy, 20 *ib.* 399; Platt *v.* Hibbard, 7 Cow. 497). In an action against a warehouseman for goods lost, it appearing that the goods were stolen by a burglar, the burden is still on the plaintiff to show that the negligence of the defendant contributed or led to the loss (Claflin *v.* Meyer, *supra;* Schmidt *v.* Blood, *supra*). According to the opinion of the Court of Appeals of New York, the burden in actions against warehousemen is with the plaintiff, and never shifts (*ib.*).

Carriers of Goods. — In all cases of loss by a carrier, it seems that the onus is upon him to exempt himself from liability, the onus, at first, only being with the plaintiff to show delivery for carriage and non-delivery[1] (Story, *ib.* secs. 410, 446, 529, 573; Jones, Bail. App. 101, 102, 103;

[1] But as to losses at sea, *vide* Bell *v.* Reed, 4 Binn. 127, reported in 5 Am. Dec. 398.

Wood's Browne, Car. Chap. VIII.; Read *v.* St. Louis &c. Co., 60 Mo. 199; Montgomery &c. Co. *v.* Moore, 51 Ala. 394; McCoy *v.* K. &c. Co., 44 Iowa, 424; Ill. &c. Co. *v.* Cowles, 32 Ill. 116; Tarbox *v.* E. Steamboat Co., 50 Me. 339; Humphreys *v.* Switzler, 11 La. Ann. 320; Steamer Niagara *v.* Cordes, 21 How. 7; Shaw *v.* Gardner, 12 Gray, 488; The Mary Washington, 1 Abb. C. C. 1; Chapman *v.* New Orleans &c. Co., 21 La. Ann. 224; Denton *v.* Chicago &c. Co., 52 Iowa, 161, reported in 35 Ann. Rep. 263; Hunt *v.* Morriss, 6 Mart. 676, reported in 12 Am. Dec. 489; Ewart *v.* Street, 2 Bail. 157, reported in 23 Am. Dec. 131; Shriver *v.* Sioux &c. Co., 24 Minn. 506, reported in 31 Am. Rep. 353; 2 Wait's A. & D. 35, 36; 6 *ib.* 724; Redfield, Car. sec. 538, note 11, and sec. 259; The Pharos, 9 Fed. Rep. 912).

And, in connecting railways, the burden is upon the last carrier (Dixon *v.* R. & D. R. R. Co., 74 N. C. 538). However, upon proper exculpatory proof, the onus is shifted to the plaintiff (Mitchell *v.* U. S. Ex. Co., 46 Iowa, 214).

Notices by Shippers. — Where, by law, the shipper is bound to give notice of the character of goods shipped, etc., the burden of proof of negligence is on the party who sends the goods (Story, Bail. sec. 573; Wood's Browne, Car. sec. 226 [1]).

Carriers of Passengers. — The question of the onus in this case is deferred, to be treated of under the title of NEGLIGENCE.

Innkeepers. — Upon proof of loss, in general, the onus is cast upon the innkeeper (Story, *ib.* sec. 472; Dawson *v.* Chamney, 5 A. & E. (N. S.) 164 (48 E. C. L. Rep.)).

Officers of Court. — In an action for loss of records, property, etc., by such officers, the onus is with the plaintiff, as there is a presumption of duty performed at the start (Story, *ib.* sec. 620).

[1] Under the higher civilization of England, a party who forwards dangerous substances without giving notice is liable civilly and criminally for any injurious consequences arising therefrom (Wood's Browne, Car. sec. 226). This is as it should be.

It has, however, been held that a clerk of court is an insurer with regard to moneys coming into his hands as such (Havens *v.* Lathene, 75 N. C. 505).

Limiting Liability. — In an action against a carrier, when it is shown that a receipt limiting its responsibility is in the possession of the plaintiff, the onus is upon him to prove that he did not assent thereto (Boorman *v.* Am. Ex. Co. 21 Wis. 152).

But the onus, to prove any restriction of the common-law liability rests with the carrier (Redfield, Carriers, sec. 147).

Loans for Hire. — It has been held that where a loss ensues, the burden of proof is on the borrower to show that it was the result of inevitable accident or of a wrongful act, which in the exercise of due diligence, could not have been foreseen or prevented (Bennett *v.* O'Brien, 37 Ill. 250; Cumins *v.* Wood, 44 *ib.* 416; see Perry *v.* Beardslee, 10 Mo. 568; Beardslee *v.* Perry, 14 *ib.* 88; 2 Wait's A. & D. 275).

There are cases, surrounded by special circumstances, under which the plaintiff must prove the negligence (2 Wait, *ib.* 275; Beardslee *v.* Richardson, 11 Wend. 25, reported in 25 Am. Dec. 596; Doorman *v.* Jenkins, 2 A. & E. 256; Harris *v.* Packwood, 3 Taunt. 264; Platt *v.* Hibbard, 7 Cow. 497, 500).

Pledge. — In case of a total default to return the thing pledged on demand, the burden of accounting for the default lies with the pledgee (5 Waits, A. & D. 180); but when he has shown a loss by casualty or by superior force, the law will not intend negligence, and the onus is then shifted to the plaintiff (*ib.*).

If a defence consists in a submission to a paramount title, the onus to establish such title is with the pledgee (6 Wait's A. & D. 724).

Private Carrier. — In cases of the carriage of goods by a private carrier for hire, the weight of authority in England and in this country would seem to be in favor of the rule, that the burden of proof is on the plaintiff, to show that the loss has been occasioned by the negligence of the carrier or

his servants: but in many complicated cases of evidence the burden of proof may alternatively shift from one party to the other, in different stages of the trial (2 Wait's A. & D. 6, and cases cited).

Deposits for Accommodation.—These are commonly termed "special deposits," as where some article is left with a party merely to keep without reward. In order to charge such a bailee, the burden will rest on the plaintiff, not only to show a demand and non-return, but, if the article cannot be found, that either there was a conversion, or such gross neglect as to be almost tantamount to it (First Nat. Bank &c. *v.* Ocean N. Bank, 60 N. Y. 278, reported in 2 Cent. L. J. 267 (Mch. 23, '75); Wiley *v.* First Nat. Bank &c., 47 Vt. 546, reported in 2 Cent. L. J. 271, and Legal Gazette for 1875).

These deposits are taken generally with the distinct understanding that the bailee is not to be held liable, and the better opinion seems to be that any contract touching the same by a national banking association is *ultra vires*.

BASTARDY.

Bastardy is a *quasi* civil action (Hinman *v.* Taylor, 2 Conn. 357; Smith *v.* Lint, 37 Me. 546; Mann *v.* People, 35 Ill. 467; Walker *v.* State, 6 Blackf. 1; State *v.* Evans, 19 Ind. 92; State *v.* Pate, Busb. 244; Marston *v.* Jenness, 11 N. H. 156; Little *v.* Dickinson, 29 *ib.* 56), though alternatively punitive in its inception and judgment (Holcomb *v.* People, 79 Ill. 409), and wholly regulated by local statutes, which either do not give any peculiar force to the examination of the mother, or do give to it greater or less effect; consequently the burden of proof will vary correspondingly. To illustrate: at one time in North Carolina, under an act passed in 1741, the examination of the mother was construed to amount to plenary proof, which could not be controverted by any kind of evidence, even if the child was black, the defendant white (State *v.* Patton, 5 Ired. 180; State *v.* Goode,

10 *ib.* 49); by the act of 1814, it was made *prima facie* evidence, and it was held under this act that it was not its purpose to shift the burden of proof, but only to give to the party accused an opportunity to show that he was not the father, *i.e.*, to show impotency, etc.; but still he could not attack the credibility of the woman by proof of general bad reputation; that the issue given by the act was whether the child was the child of the defendant, and the burden of exculpatory proof, although of a negative, was on the defendant (*ib.*); afterwards, by the act of 1850, the examination of the woman was made presumptive evidence of paternity, still devolving upon the defendant the burden of proving that he was not the father of the child, but extending the degree and character of his proof, so as to allow him to show the bad reputation of the woman, her lewdness, the color of the child, *alibi*, that it does not resemble him (in Massachusetts beyond a reasonable doubt, Sullivan *v.* Kelley, 3 Allen, 148), impotency, and other defences (State *v.* Broadway, 69 N. C. 411; State *v.* Floyd, 13 Ired. 382; State *v.* Bowles, 7 Jones, 579; Paulk *v.* State, 52 Ala. 427; State *v.* Pratt, 49 Iowa, 631); and to show resemblance or non-resemblance, the child may be exhibited to the jury,[1] but evidence of resemblance or otherwise is not admissible in Maine (Keniston *v.* Rowe, 16 Me. 38), nor in Maryland (U. S. *v.* Collins, 1 Cr. C. C. 592), nor in Massachusetts (Eddy *v.* Gray, 4 Allen, 435), by calling witnesses, but may be made by inspection (Finnegan *v.* Dugan, 14 Allen, 197; Gilmanton *v.* Ham, 38 N. H. 108); he can also show that the child is the offspring of a married woman (State *v.* Rose, 75 N. C. 239; Sword *v.* Nestor, 3 Dana, 453; Gaffery *v.* Austin, 8 Vt. 70; Paulk *v.* Slocum, 3 Blackf. 421); such evidence would shift the burden of proof (if predicated alone upon the examination), and then it would devolve upon the prosecution to prove the non-access of the husband (State *v.* Pettaway, 3 Hawks, 623; State *v.* Herman, 13 Ired. 502); [by other evidence than that of the husband or wife

[1] It is the practice in North Carolina to allow either side to exhibit the child to the jury (State *v.* Woodruff, 68 N. C. 89).

(Tioga Co. *v.* S. C. Township, 75 Pa. 433), *aliter* in Indiana by statute (Cuppy *v.* State, 24 Ind. 389)]; (Com. *v.* Wentz, 1 Ashm. (Pa.), 269; Parker *v.* Way, 15 N. H. 45; Com. *v.* Shepherd, 6 Binn. 283). In New Hampshire the defendant may show that the prosecution was commenced after the birth of the child (J— *v.* B—, 47 N. H. 362). In Tennessee, that the child was not born in the county (Edmonds *v.* State, 5 Hump. 94). So also that a fair compromise was made (Humphrey *v.* Kasson, 26 Vt. 760; Blackhawk *v.* Cotter, 32 Iowa, 125; Spaulding *v.* Fitch, 1 Root, 319; Baker *v.* Roberts, 14 Ind. 552; Burgen *v.* Strangham, 7 J. J. Marsh, 583) but not in a prosecution to compel defendant to give security (Com. *v.* Turner, 4 Dana, 511); and not in Indiana and Maine, it seems, until ratified by the court and entered on record with the woman's consent (Reeves *v.* Ellis, 37 Ind. 441; Pickler *v.* State, 18 Ind. 266; Fisher *v.* State, 65 Ind. 51; Harness *v.* State, 57 Ind. 1; State *v.* Reynearson, 19 Ind. 211; Harmon *v.* Merrill, 18 Me. 150). So in Alabama a compromise *pendente lite* may be pleaded (Martin *v.* State, 62 Ala. 119). Or in Vermont the marriage of the parties (Gordon *v.* Amidon, 36 Vt. 735). The defendant having the burden of proof, may also show that, about the time when by the course of nature the child should have been begotten, the prosecutrix habitually indulged in intercourse with another man (State *v.* Britt, 78 N. C. 439; State *v.* Read, 45 Iowa, 469; Baker *v.* State, 47 Wis. 111; Low *v.* Mitchell, 18 Me. 372; see also Ronan *v.* Dugan, 126 Mass. 176; Bowen *v.* Reed, 103 *ib.* 46; State *v.* Pratt, *supra;* O'Brien *v.* State, 14 Ind. 469; Holcomb *v.* People, 79 Ill. 409; Rawles *v.* State, 56 Ind. 433; Walker *v.* State, 6 Blackf. 1; Ginn *v.* Conner, 5 Litt. (Ky.) 300; Duffies *v.* State, 7 Wis. 672). The proceeding being treated as a civil action, the burden of proof cast, whether on the prosecution or the defendant, is discharged by a preponderance of the evidence (State *v.* Rogers, 79 N. C. 609; People *v.* Cantine, 1 Mich. N. P. 140; Young *v.* Makepeace, 103 Mass. 50; People *v.* Christman, 66 Ill. 162; McCoy *v.* People, 65 *ib.* 439; McFarland *v.* People, 72

ib. 368; Lewis *v.* People, 82 *ib.* 104; Richardson *v.* Burleigh, 3 Allen, 479). And the defendant, taking the burden of proof, may show that the woman has once refused, when brought before the proper tribunal, to declare the father (State *v.* Brown, 1 Jones, 129; State *v.* Price, 81 N. C. 516; State *v.* Trimble, 33 Md. 468; Gipe *v.* State, 40 Ind. 158). For the purpose of affiliation on a township in a proceeding directed to that end, the onus is upon the party suing to show (at least in New Jersey):

1. That a bastard child is born.
2. That it was chargeable on the township.
3. That the proper application has been made for relief.
4. That the justices have in fact adjudged the defendant to be the father (State *v.* Overseers &c., 32 N. J. L. 275).

It is also a matter of defence to prove that the child was begotten and born without the State, and that the parties never resided therein, or, in Indiana, was not a resident of the State (Smith *v.* State, 4 Blackf. 188; see Com. *v.* Gurley, 45 Pa. 392; Graham *v.* Monsergh, 22 Vt. 543; Grant *v.* Barry, 9 Allen, 459; but see Kolbe *v.* People, 85 Ill. 336). It is also a matter of defence in Maine, New Hampshire, Connecticut, and Massachusetts, that the woman did not "discover the truth of the accusation at the time of her travail," or "was not constant in it" (Wilson *v.* Woodside, 57 Me. 489; Dennett *v.* Kneeland, 6 *ib.* 460; Bradford *v.* Paul, 18 *ib.* 30; Booth *v.* Hart, 43 Conn. 480; Warner *v.* Willey, 2 Root, 490; Hitchcock *v.* Grant, *ib.* 107; R. R. *v.* J. M., 3 N. H. 135; Drowne *v.* Stimpson, 2 Mass. 444; Com. *v.* Cole, 2 *ib.* 518; McManagil *v.* Ross, 20 Pick. 99).

Admission, executed in writing, by the mother, that provision has been made for the child's support, is also a defence in Indiana (Carter *v.* State, 32 Ind. 404). In Wisconsin, that an adjudication by the justice has been made; that on the suing out of the warrant no probable cause was shown for believing that the defendant is the father of the child (State *v.* Braun, 31 Wis. 600), *aliter* in Indiana (Davis *v.* State, 6 Blackf. 494). The death of the child *pendente lite*,

in North Carolina, is a defence as against the full measure of maintenance (State *v.* Beatty, 66 N. C. 648; see, however, Meredith *v.* Wall, 14 Allen, 155; Hauskins *v.* People, 82 Ill. 193; Evans *v.* State, 58 Ind. 587); and if the child be still-born, it is, in Indiana, a complete defence (Canfield *v.* State, 56 Ind. 168). In Vermont, exceptionally, the death of the mother *pendente lite* is a full defence (Rollins *v.* Chalmers, 49 Vt. 515). It may also be shown that the prosecutrix was the defendant's wife when the child was begotten, or before its birth (State *v.* Worthingham, 23 Minn. 528; S. P. Doyle *v.* State, 61 Ind. 324). In Kentucky, that the child begotten was a slave when born (Lewis *v.* Com., 3 Bush. 539). In all these defences the burden of proof is upon the defendant.

When it is shown that the woman was habitually lewd at the time of the procreation, it is held in Iowa that the onus is shifted to the prosecution to prove facts, which may overcome the force of this testimony with the jury (State *v.* Pratt, 49 Iowa, 631).

So the prosecution may, to the defence of compromise, release, etc., reply *per fraudem*, the onus being with it (Keezartte *v.* Cartmell, 31 Ohio, 522; State *v.* Wilson, 16 Ind. 134) to establish such allegation by a preponderance of testimony (McElhaney *v.* People, 1 Ill. App. 550). So in response to such defence the prosecution may reply duress (Mulrey *v.* McDonald, 124 Mass. 345); or, in Indiana, that it was not entered of record (Pickler *v.* State, 18 Ind. 266; Reeves *v.* Ellis, 37 Ind. 441). So in reply to the defence that the child was begotten and born out of the State, the prosecution may show that it occurred during a temporary absence of the mother, and that she is a *bona fide* inhabitant of the State (Egleson *v.* Battles, 26 Vt. 548).

It is not proposed here to discuss the application of the onus probandi to proceedings on bastardy bonds, as they are governed by the same general principles that affect other, especially statutory bonds.

BETTERMENTS.

As is well said by the Supreme Court of Iowa, the legal[1] right to recover the value of improvements made on another's land is but the creature of statute, and therefore the statute creating it must be strictly followed (Webster *v.* Stewart, 6 Iowa, 401).

The party claiming is necessarily the actor, and the burden of proof rests upon him to bring his case within the statutory requirements.

In general he must show that he took possession and made the improvements under a *bona fide* claim to the property (Bellows *v.* Copp, 20 N. H. 492; McKelway *v.* Armour, 10 N. J. Eq. 115; McKinley *v.* Holliday, 10 Yerg. 477; Howard *v.* Richeson, 13 Tex. 553; Dorn *v.* Dunham, 24 Tex. 376; Waterman *v.* Dutton, 6 Wis. 265; Howard *v.* Zeyer, 18 La. Ann. 407; Gibson *v.* Hutchins, 12 La. Ann. 545; Roberts *v.* Brown, 15 *ib.* 698; Ormond *v.* Martin, 37 Ala. 598; Marlow *v.* Adams, 24 Ark. 109; Bomberger *v.* Turner, 13 Ohio, 263; Morrison *v.* Robinson, 31 Pa. 456). The statutes generally require that the claim of the improver shall be a *bona fide* one.

BREACH OF MARRIAGE PROMISE.

Mutuality. — The burden is upon the plaintiff to show that the promise to marry was mutual, though an exception exists where one of the parties is an infant, in which case the promise of the adult is binding.

It is not essential that there should be any precise formula adopted, the rule of law allowing the juries to follow the

[1] This word "legal," is here used in its strict technical signification as distinguished from *equitable;* for, if a plaintiff's claim to realty be such that to enforce it he must seek the aid of a Court of Equity, and the defendant shows that he made improvements in good faith, the court will, in general, compel reimbursement on the maxim that he who seeks equity must do equity (3 Pom. Eq. Jur. sec. 1241), and the like principle is extended in equity to other instances (see *ib.* sec. 1240 *et seq.*).

adage, that silence gives consent. It may be inferred (2 Saund. Pl. & Ev. 665; 3 Wait, A. & D. 678; Abb. Tr. Ev. 676, 677; 3 Add. Cont. secs. 1351, 1352; Hunt *v.* Peake, 5 Cow. 475, reported in 15 Am. Dec. 475, and Law. L. C. 43; see also Law. L. C. 120–122; Poll. Prin. Cont. 40).

Offer to Consummate. — The plaintiff must also show that the defendant failed, after a reasonable lapse of time, to comply with the promise (2 Saund. Pl. & Ev. 666); and unless the defendant was married, that the plaintiff offered to marry the defendant, and that the defendant refused such offer (3 Add. Cont. sec. 1353; 3 Wait, A. & D. 678; 2 Saund. Pl. & Ev. 666), unless, indeed, the defendant superseded the necessity for such proof by "breaking off" the engagement, or by his declarations and conduct as equivalent thereto (*ib.*).

Damages. — There is no rule by which the onus with regard to proof of the damages is regulated.

The plaintiff upon making the proof above stated is entitled to at least nominal damages, and such other as the jury, subject to the restraint of the court, may assess (Wood's Mayne, Dam. sec. 676; Harrison *v.* Swift, 13 Allen, 144). Mr. Shirley says that "fancy" damages may be given (Shirl. L. C. 196, note).

Aggravation; Seduction. — The plaintiff (woman) in aggravation of damages, may show that she was seduced[1] (Abb.

[1] There are decisions to the contrary in Pennsylvania and Kentucky, but the current of authority is as stated in the text.

Judge Abbott says that this evidence is admissible if pleaded. This point is not noticed in the Massachusetts case, but the author inclines to the view stated by Judge Abbott.

The precedents found in Chitty (2 vol. 321 *et seq.*) do not aver the seduction, and being in form, in assumpsit, of course do not allege the *alia enormia*.

It is laid down by Addison, that in an action for breach of promise of marriage, wherein it is *laid as special damage*, that the defendant debauched the plaintiff, it would be misdirection to instruct the jury that they might give damage as a *solatium*, etc., citing Berry *v.* Da Costa, L. R. 1 C. P. 331; S. C., 35 L. J. C. P. 191; 1 H. & R. 291; 12 Jur. 588; 14 W. R. 279.

From this it is inferrible that in the only English case cited for the position stated in the text, the *narr* contained the averment of special damage, although the pleading is not set forth in the report of the case.

Tr. Ev. 678; notes to Underhill (Moak), Torts, 86; Sherman *v.* Rawson, 102 Mass., 395, reported in Sedg. L. C. Dam. 757; Wood's Mayne, Dam. sec. 678).

Wealth and Standing. — The plaintiff may also show the wealth and social position of the defendant (Wood's Mayne, Dam. sec. 677; Abb. Tr. Ev. 678; Kniffen *v.* McConnell, 30 N. Y. 285, reported in Sedg. L. C. Dam. 760).

Notoriety. — The plaintiff may show the announcement of the engagement, and the advanced preparations for the wedding, at the time of the breach (Abb. Tr. Ev. 678; Reed *v.* Clarke, 47 Cal. 194, 199).

False Defence. — So, if the defendant makes an unsuccessful attempt in pleading or evidence, to rest his defence in whole or part on charges of bad character or improper conduct on the part of the plaintiff, it is held in New York that any of these circumstances may be urged in aggravation of the damages[1] (Abb. Tr. Ev. 678; 3 Wait, A. & D. 679; Thorn *v.* Knapp, 42 N. Y. 474; Kniffen *v.* McConnell, 30 N. Y. 285).

Loss of Health. — So, too, if pleaded, loss of health may be shown in aggravation, at least in New York (Abbott *ib.*; Bedell *v.* Powell, 13 Barb. 183).

The defendant taking the burden of proof may show: —

Bad Character. — That he (a man) has ascertained, since his promise, the fact, that the plaintiff was at the time a lewd woman, or that her reputation for chastity or character was bad, or that she was lasciviously inclined, or with child, and that he broke his promise on that account[2] (2 Saund. Pl. &

[1] The contrary is held by the Supreme Court of California (Powers *v.* Wheatly, 45 Cal. 113; Reed *v.* Clarke, 47 Cal. 194, 203).

[2] There is a discrepancy in the American authorities as to the point whether bad reputation, lascivious conversation, and the like, go in bar of the action or in mitigation of damages.

The reader may consult, on this point, Underhill (Moak), Torts, 86 *et seq.*; Abb. Tr. Ev. 679, 680. The English authorities lay it down as a bar. See Saund. *supra.*; 3 Add. Cont. sec. 1356; Wood's Mayne, Dam. sec. 680; Willard *v.* Stone, 7 Cow. 22, reported in 17 Am. Dec. 496, and Law. L. C. 122.

Mr. Shirley also lays it down: "Of course it would be necessary for a woman defendant to fix the plaintiff with much more than mere sexual im-

Ev. 666; 3 Wait, A. & D. 678; Underhill (Moak), Torts, 88 *et seq.*; Abb. Tr. Ev. 679; 3 Add. Cont. sec. 1356; Wood's Mayne, Dam. sec 680; Atchinson *v.* Baker, Peake, Add. Cas. 103, reported in Shirl. L. C. 195 and notes).

Family. — So, according to the English authorities, the defendant may show as a bar, that he was induced to make the promise by false representations as to the circumstances of the family of the plaintiff, or of her previous life, or that there was merely a wilful suppression as to the real state of these facts (Wood's Mayne, Dam. sec. 680; 3 Add Cont. sec. 1356; Shirl. L. C. 196, note).

Brutality. — So, the defendant being a woman, may show that, subsequently to the making of her promise, the plaintiff "conducted himself in a brutal manner and threatened to use her ill" (Wood's Mayne, Dam. sec. 680; 3 Add. Cont. sec. 1354).

Disease. — So, supervenient disease, unfitting the defendant for the marriage state, not known to the defendant at the time of entering into the agreement, may be shown in bar (Wood's Mayne, Dam. sec. 680).

If a man contracts a disease, incapacitating him from performing marital duties, while no defence to him if sued, yet, if he be the plaintiff, it may be shown by the woman in bar [1] (Wood's Mayne, Dam. 680; 3 Add. Cont. 1358; Hall *v.* Wright, El. B. & El. 763 (96 E. C. L. R.), reported in 29 L. J. Q. B. 43, Shirl. L. C. 196, note).

Off. — The defendant may also show from a mutual cesser

morality before she would be entitled to disregard her promise" (Shirl. L. C. 196, note).

It is observable, however, that in America we are rapidly approaching to a higher scale of ethics in our cultured communities, and that the rule thus stated will eventually be abrogated.

[1] But it is no defence that the plaintiff had been of unsound mind prior to the promise, if unknown to the defendant at the time of making the promise, *provided she had been cured before making the engagement* (Baker *v.* Cartwright, 10 C. B. (N. S.) 124; 30 L. J. C. P. 364).

It is remarkable that the qualification italicized, although contained in the *syllabus*, and without which the statement would not be law, is omitted both from Mayne, sec. 680; 3 Add. Cont. sec. 1356; and Pollock, Prin. Cont. 481.

of attentions, etc., that the engagement was treated by the parties as at an end (Shirl. L. C. 196, note).

In Writing. — Judge Abbott lays it down that to invoke the protection of the statute of frauds (29 C. 2), it must appear that the terms of the promise were to the effect, that the marriage was not to be performed within one year[1] (Abb. Tr. Ev. 678, 679); to the same effect is Addison (1 Add. Cont. sec. 212; 2 *ib.* sec. 1352).

This defence should not be confounded with agreements made in consideration of marriage, which are required by the same statute to be in writing, as that provision does not extend to contracts to marry (1 Add. Cont. sec. 211; Smith, Cont. 57, 58; Law. L. C. 59).

Prohibited Degrees. — The defendant may also show that the parties are related within the prohibited degrees, at least, if unknown to the defendant at the time of the making of the promise (Poll. Prin. Cont. 257; Millward *v.* Littlewood, 5 Ex. (W. H. & G.) 775).

Of course, the defendant taking the burden may make proof in support of any of the collateral defences in confession and avoidance applicable to actions generally.

CHARTER PARTY.

The burden is upon the plaintiff to prove all the material averments in the declaration if the action be framed in *assumpsit*, but, if the form of action be debt, only those expressly put in by the pleading need be proved; the burden throughout is upon the plaintiff (1 Saund. Pl. & Ev. 361, 362).

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[1] Mr. Shirley says that the promise need not be in writing, citing for this position, Harrison *v.* Cage, 1 Ld. Ray. 386, which was a decision, not upon the section requiring agreements, not to be performed within a year, to be made in writing, but upon that section which requires agreements, made in consideration of marriage, to be in writing.

It had been held in Philpott *v.* Wallett, 3 Lev. 65 that such a promise came within the latter section, but this case was overruled by Cork *v.* Baker, 1 Str. 34; see also 1 Reed, Stat. Frauds, secs. 172, 186; Bish. Cont. sec. 538.

CONNECTING LINES OF CARRIAGE.

The practical questions growing out of this subject arise mainly from an attempt by railway or steamboat corporations whose lines connect, to carry goods over such lines by some agreement as between themselves. Such agreement may, by its terms, create an agency, a joint undertaking, or a partnership. It is not proposed to discuss the point as to such an agreement being *ultra vires*. The text-books and the reported cases are not in unison, and reference is only made to them without discussion (Pierce, Am. R. R. Law, 451 *et seq.* and notes; Red. Car. chaps. 15, 16; Green's (Bryce's) *Ultra Vires*, 1st ed. App. III. 673; Ogdensburg &c. Co. R. R. Co. *v.* Pratt, 22 Wall. 123; Phillips *v.* N. C. R. R. Co., 78 N. C. 294).

Assuming that such an agreement is not *ultra vires*, there still remains a distressing conflict of judicial opinion upon the question as to the extent of the liability of the receiving carriers, and, these opinions may be divisible into three heads: —

1. When carriers receive and receipt for goods consigned to a point beyond the terminus of their road, without any special contract respecting the same, the English courts, and some American, hold, that the agreement is one for transportation the whole distance (Muschamp *v.* Lancaster &c. Co., 8 M. & W. 421; Collins *v.* Bristol &c. Co., 11 Exch. 790; Illinois &c. Co. *v.* Copeland, 24 Ill. 332; Angle *v.* Mississippi &c. Co., 9 Iowa, 487; Mulligan *v.* Illinois &c. Co., 36 Iowa, 181; S. C., 2 Am. Rail. Rep. 322; and see Penn. R. R. Co. *v.* Berry, 68 Pa. 272; S. C., 1 Am. Rail. Rep. 501; Chitty, Carriers, 88).

2. Where a common carrier receives goods marked for a particular destination beyond the terminus of its line, and does not expressly undertake to deliver them to the point designated, the implied contract is only to transport over its own line, and foward according to the usual course of business, from its terminus (Conkey *v.* Milwaukee &c. Co., 31

Wis. 619, reported in 11 Am. Rep. 630, and 2 Am. Rail Rep. 353; Babcock *v.* Lake Shore &c. Co., 49 N. Y. 491; S. C., 3 Am. Rail. Rep. 381; Hooper *v.* Chicago &c. Co., 27 Wis. 81; S. C., 5 Am. Rail. Rep. 302; Condict *v.* Grand Trunk &c. Co., 54 N. Y. 500; S. C., 6 Am. Rail. Rep. 410; Phillips *v.* N. C. R. R. Co., 78 N. C. 294; McMillan *v.* Mich. Southern &c. Co., 16 Mich. 120; Van Santvoor *v.* St. John, 6 Hill (N. Y.), 3, 157; Farmers' &c. Bank *v.* Champlain Trans. Co., 21 Vt. 186; Brintwall *v.* Saratoga &c. Co., 32 Vt. 665; Hood *v.* N. Y. &c. Co., 22 Conn. 1, 502; Elmore *v.* Naugatuck &c. Co., 23 Conn. 457; Naugatuck &c. Co. *v.* Waterbury Button Co., 24 Conn. 468; Nutting *v.* Conn. &c. Co., 1 Gray, 502; Burroughs *v.* Norwich &c. Co., 100 Mass. 26; Darling *v.* R. R. Co., 11 Allen, 295; Root *v.* G. W. &c. Co., 45 N. Y. 524; Jemison *v.* Camden &c. Co., 4 Am. L. Reg. 234; U. S. Ex. Co. *v.* Rush, 24 Ind. 403; Penn. R. R. Co. *v.* Schwarzenberger, 45 Pa. 208; Rome &c. Co. *v.* Sullivan, 25 Ga. 228).

3. That the mere acceptance of goods by a common carrier marked to a destination beyond its line, as *a matter of law*, imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is *a matter of evidence* to be submitted to the jury, from which, in connection with other evidence adduced, they should determine as *a question of fact*, what the real agreement is (Gray *v.* Jackson, 51 N. H. 9). The intelligent lawyer thus perceives that no general principle can be laid down as applicable to all courts. If there be proof of a contract in express terms, or as found by a jury, that the carrier contracted to deliver beyond its terminus, the plaintiff recovers on showing breach, as in any other case of contract, but the onus is with him; and so, if he bases his action upon an agreement between different connecting carriers, *inter sese*, the onus is with him to show, according to the principles applicable to the law of contracts, that such carriers have made either a contract with him or with the public; so, if he predicates his action upon the fact that the receiving carrier constituted the ultimate carrier its

agent, the onus is with him to establish such agency. So, if the action be brought in those courts which adhere to the second proposition above stated, the onus is with the plaintiff to show a failure to deliver to the connecting carrier.

An important question arises as to the right of the shipper to sue a carrier connecting with the receiving carrier.

This, of course, depends, if the action be *ex contractu*, upon the *status* of the agreement, as between the receiving and connecting carriers; if it be a mere agency, the shipper could not sue in contract, on the general principles governing the relations of principal and agent; if the agreement between them should amount in law to a partnership, then, if allowable by the local practice to sue one of several joint contractors, the connecting carriers could be sued; but the onus to establish such a concatenation of circumstances, as to authorize the bringing of an action, is with the plaintiff (Wyman *v.* Chicago &c. Co., 4 Mo. App. 35).

For any injury or conversion, the carrier committing it is liable without reference to any contract.

In connection with this subject it has been held, in at least two courts, that when goods are shipped over a connecting line, and reach the consignee in a damaged condition, the onus is with the last connecting carrier who is sued, to show that the goods when they reached it, were in bad order (Dixon *v.* R. & D. &c. Co., 74 N. C. 538; Laughlin *v.* Chicago &c. Co., 28 Wis. 204, reported in 9 Am. Rep. 493; Halliday *v.* St. Louis &c. Co., 74 Mo. 159, reported in 41 Am. Rep. 309; Lindley *v.* R. R. Co., 88 N. C. 547; Smith *v.* N. Y. &c. Co., 41 N. Y. 620; Shriver *v.* Sioux &c. Co., 24 Minn. 506; S. C., 31 Am. Rep. 353; *contra,* Marquette &c. Co. *v.* Kirkwood, 45 Mich. 51; S. C., 40 Am. Rep. 453).

It is also held that a connecting road receiving fare is liable for baggage (Baltimore &c. Co. *v.* Campbell, 36 Ohio, 647, reported in 38 Am. Rep. 617).

CONSIDERATION.

Proof of consideration is only required in parol contracts, and not even in those parol contracts which are founded on the law merchant, nor, promissory notes; see Pt. I. title PAROL CONTRACTS.

It must also be shown to maintain an action or bill for specific performance and in various instances on the shift of the burden; see Pt. I. titles NEGOTIABLE INSTRUMENTS and BONA FIDE PURCHASER.

CONSPIRACY.

Under the ancient law the writ of conspiracy was distinguishable from deceit (which will be considered in its order), by requiring proof of injury caused by the wrongful act of two or more persons (3 Black. Com. 126; Bull. N. P. 14; Big. Torts, 91), but in an action on the case in the nature of conspiracy, the plaintiff may recover, though only one be found guilty (Bull. N. P. 14; Big. L. C. Torts, 214; 2 Sel. N. P. 251).

The Combination. — While this is true, as applicable to an action against several for a joint malicious prosecution and the like, yet, when the act done is not actionable, if committed by one alone, it is still necessary to allege and prove that it was the fruit of a joint agreement of two or more, as in this latter instance the gravamen of the action is the perpetration, through a conspiracy, of a non-actionable wrong (Big. L. C. Torts, 215; Cool. Torts, 125).

The burden does not impose proof of actual participation of all in the wrongful act itself, it being sufficiently discharged by the evidence of a common plan or purpose, and acts by any of the conspirators in furtherance thereof (Big. Torts, 93, § 2, Cool. Torts, 125; Brinkley *v.* Platt, 40 Md. 529), even when a plan has been formed through the medium of a society, and a person joins such society with a knowl-

edge of such plan, he becomes to all legal intents a participant (Big. *ib.*; Cool. Torts, 127; 3 Greenl. Ev. sec. 93).

The burden as to proof of the conspiracy is two-fold: to the court, as a foundation for the admission of declarations of one not shown to have actually participated; to the jury as one essential element of recovery (Abb. Tr. Ev. 191; 3 Greenl. Ev. sec. 93). It is important to bear in mind in this connection, that a much slighter quantum of proof would be required by the court, to lay the foundation for the reception of declarations of non-participants, in evidence, than to convict; a *prima facie* case being sufficient for the former purpose (*ib.*); whereas, for the latter, the proof must produce full satisfaction.

Termination of the Prosecution. — If the gist of the action be for a conspiracy to maliciously prosecute plaintiff, which is carried out, it must be made to appear by plaintiff that the prosecution has been terminated, the character of which proof will be explained under the title of MALICIOUS PROSECUTION (Big. Torts, 95, § 3; 2 Sel. N. P. 251).

Want of Probable Cause. — Also, in like manner, the burden is on the plaintiff to show want of probable cause (Big. *ib.* 96, § 4).

Malice. — But malice, in its acceptation as applied to the action for malicious prosecution, need not be shown (Big. *ib.* 96, § 5).

Damages. — It is incumbent upon the plaintiff to show that an overt act, the fruit of the conspiracy, has caused damage to the plaintiff (Big. *ib.* 96, §. 6).

The action, otherwise than for a conspiracy to commit, and the perpetration in furtherance thereof of some non-actionable wrong, is conspiracy in name only, as it cannot be maintained for a mere conspiracy, but the wrongful purpose must, to some extent, at least, have been consummated, resulting in injury to the plaintiff, and, taken in this sense, it amounts in legal effect, to an action against two or more wrong-doers, and is predicated upon an agreement to do an unlawful act, and the consummation of that purpose, to the extent of

proximate injury to the plaintiff, and the gist being the injury inflicted, it will be sufficient to show it was accomplished by one of the defendants, and would be thus substantially resolved into an action for deceit, malicious prosecution, false imprisonment, or other like tort (Big. Torts, 92; 2 Add. Torts, sec. 850 and note 1).

It follows, therefore, that the like burden of proof is imposed upon the plaintiff, as in those actions when brought against a single individual, which need not be repeated.

CONTEMPT, PROCEEDINGS IN.

Contempt of Court may be shown to have been committed in various ways: by officers of the court, by parties, counsel, witnesses, and other persons.

Proceedings in contempt are in the nature of criminal proceedings. Unless committed in *facie curiæ*, they must be predicated, in general, upon affidavit of the facts constituting the contempt; the procedure by which the offending party is brought before the offended tribunal is dependent mainly upon statute or local usage; but, whatever the form may be, except in one or two instances, it must be substantially based upon affidavit. The exceptions mainly are, where the contempt is committed in the presence of the court, or where an officer, party, or witness has been ordered to do some legal act by the court and refuses to perform it, *ex. gr.*, where upon a suit for specific performance, a party is ordered by decree to execute a deed and refuses, that fact appearing to the court, the party so refusing will be imprisoned until he shall have complied with the order (1 Spence, Eq. Juris. 391, 392; *In re* Chiles, 22 Wall. 157). The refusal or wilful neglect of a witness, under subpœna, to attend court, is a contempt; but before an attachment can issue, it devolves upon the complaining party to show wilful disobedience, by affidavit, and it must contain all facts which by the *lex fori* tend to constitute such disobedience (2 Taylor, Ev. sec. 1142).

The same principle applies as against a party arresting a witness, while in attendance as such, or *eundo*, *morando*, or *redeundo*, or as against a party preventing a witness from obeying his subpœna, or for intimidating a witness from giving his testimony, or endeavoring to do so by threatening language (2 Taylor, Ev. sec. 1209; 1 Greenl. Ev. sec. 316). In all these instances the onus is with the complaining party. So if a witness should remain in court after an order to withdraw, he is liable for contempt, and unless the contempt be *super visum*, the onus is also with the party complaining (2 Taylor, Ev. sec. 1260).

If a witness refuses to be sworn, or to testify, or to answer proper questions, the court *super visum* adjudges the contempt (2 Taylor, Ev. sec. 1262).

It may be stated, generally, that whenever a contempt is committed in the presence of the court, in whatever form, the court adjudges it *ex mero motu*; but, when the contempt is committed outside of, or away from the court, the procedure to punish it must be by affidavit and notice of some kind (1 Tidd. Prac. 481, 482 (4 Am. Ed.), where the illustrations are given), and the onus is then with the complaining party.

This is a fair criterion as affecting the burden of proof.

A very remarkable departure from this well-settled rule is to be found in the case of *Ex parte* Moore, 63 N. C. 397.

In that case the Supreme Court of North Carolina based a rule *nisi* for contempt against a number of attorneys, upon *no other evidence* than an article in a newspaper purporting to be signed by them. This case stands alone in that, a rule was entered, without any affidavit, predicated alone, upon a publication in a newspaper.

The whole current of authority is to the effect that in order to punish for contempt, not committed in the presence of the court, the procedure must be predicated upon an affidavit (see illustrations, People *v.* Judges, 2 Caines, 97; Schoonmaker *v.* Gillet, 3 Johns. Ch. 311; St. Amart *v.* De Beixcedon, 3 Saund. 702; People *v.* Murphy, 1 Daly, 462; Baker *v.* Williams, 12 Barb. 527; Potter *v.* Lowe, 16 How. Pr. 549;

Gerrigani *v.* Wheelwright, 3 Abb. Pr. (N. S.) 264; *Ex parte* Ireland, 38 Tex. 344; Vose *v.* Reed, 1 Woods, 647; McConnell *v.* State, 46 Ind. 298; Burke *v.* State, 47 Ind. 528; State *v.* Gilpin, 1 Del. Ch. 25; Sutton *v.* Davis, 13 N. Y. Superior Ct. 237; Whittem *v.* State, 36 Ind. 196; State *v.* Blackwell, 10 S. C. 35; Wilson *v.* Wy. Territory, 1 Wy. Ter. 155; two well considered articles in C. L. J. vol. xv. p. 42, and vol. xvi. p. 222; Witter *v.* Lyon, 34 Wis. 564; 4 Black. Com. 286).

There is an expression in Blackstone to the effect that in very flagrant instances of contempt the attachment issues in the first instance, and he cites Salkeld and Strange, but it will be found, upon an examination of the cases, in those reports referred to, that affidavits were filed. It is evident that Blackstone meant that, when a proper basis was laid for such proceedings, the Court might issue a rule or an attachment.

There is a difference between the practice in courts of law, and equity to punish for contempt for disobedience of an order to pay money; in the former, if the defendant clears himself, the onus being shifted by his answer, the complaint will be dismissed; but, in equity, the answer may be contradicted (Buck *v.* Buck, 60 Ill. 105).

CONTINUANCE OF A FACT.

It is a very general presumption that things once proved to have existed in a particular state or condition, are to be understood as continuing in that condition, until the contrary is established by evidence (Best, Ev. 342, 343; Rixford *v.* Miller, 49 Vt. 319; Darden *v.* Allen, 1 Dev. 466; State *v.* Lanier, 79 N. C. 622; 1 Greenl. Ev. secs. 41, 42; 1 Taylor, Ev. secs. 155, 156; 1 Phil. Ev. 449; 3 Starkie, Ev. Part IV. p. 1252).

The illustrations under this head are very numerous, which will be found best collated in Taylor, Ev., and Lawson on Presumptions.

CONTRIBUTORY[1] NEGLIGENCE.

There is a painful and irreconcilable conflict of judicial opinion in the Statal Courts, on the subject of the cast of the burden with reference to what is termed contributory or contributive negligence. In the following States it is held to be upon the plaintiff: —

Connecticut (Birge *v.* Gardner, 19 Conn. 507, reported in 50 Am. Dec. 261; Beers *v.* Housatonic, *ib.* 566; Park *v.* O'Brien, 23 *ib.* 339; Fox *v.* Glastenbury, 29 *ib.* 204; Bell *v.* Smith, 39 *ib.* 216).

Georgia (Brannan *v.* May, 17 Ga. 136; Campbell *v.* A. &c. R. R. Co., 53 *ib.* 488, but see Thompson *v.* C. R. R. Co., 54 *ib.* 509).

Illinois (Aurora &c. *v.* Grimes, 13 Ill. 585; Galena &c. Co. *v.* Yarwood, 15 *ib.* 468; Dyer *v.* Talcott, 16 *ib.* 300; Galena &c. Co. *v.* Fay, *ib.* 558; Chicago &c. Co. *v.* Mayer, 18 *ib.* 349; Galena &c. Co. *v.* Jacobs, 20 *ib.* 478; Galena &c. Co. *v.* Dill, 22 *ib.* 264; Chicago &c. Co. *v.* Hazzard, 26 *ib.* 373; Chicago &c. Co. *v.* Gregory, 58 *ib.* 272; Kepperly *v.* Ramsden, 83 *ib.* 354; Chicago &c. Co. *v.* Harwood, 90 *ib.* 425; Chicago &c. Co. *v.* Lewis, 5 Ill. App. 242; S. C., 5 Bradw. 242).

Indiana (Town of Mt. Vernon *v.* Dusouchett, 2 Ind. 586; Wayne Co. *v.* Berry, 5 *ib.* 286; Wabash &c. Co. *v.* Mayer, 10 *ib.* 400; Evansville R. R. Co. *v.* Hiatt, 17 *ib.* 102; Indianapolis &c. Co. *v.* Keeley, 23 *ib.* 133; Evansville &c. Co. *v.* Dexter, 24 *ib.* 411; Jeffersonville &c. Co. *v.* Hendricks, 26 *ib.* 228; Toledo &c. Co. *v.* Bevin, 26 *ib.* 443; Pittsburg &c. Co. *v.* Vining, 27 *ib.* 513; Michigan &c. Co. *v.* Lantz, 29 *ib.* 528; Maxfield *v.* Cin. &c. Co., 41 *ib.* 269; Riest *v.* Goshen, 42 *ib.* 339; Hathaway *v.* R. R. Co., 46 *ib.* 25; Jackson *v.* R. R. Co., 47 *ib.* 454; St. Louis &c. Co. *v.* Matthias 50 *ib.* 65; Higgins *v.* R. R. Co., 52 *ib.* 110; Jeffersonville &c. Co. *v.* Lyon, 55 *ib.* 477; Sullivan *v.* Toledo &c. Co., 58 *ib.* 26; Toledo &c. Co. *v.* Branagan, reported in 5 A. & E. R. C. 630).

[1] The more accurate expression is *contributive*, but, as the other is more popular, and conveys the idea, it is chosen.

Iowa (Rusch *v.* City of Davenport, 6 Iowa, 443; Donaldson *v.* M. M. R. R. Co., 18 *ib.* 281; Greenleaf *v.* Illinois &c. Co., 29 *ib.* 14, reported in 4 Am. Rep. 181; Baird *v.* Morford, *ib.* 531; Reynolds *v.* Hindman, 32 *ib.* 146; Plaster *v.* Illinois &c. Co., 35 *ib.* 449; Carlin *v.* C. R. &c. Co., 37 *ib.* 316; Patterson *v.* R. R. Co., 38 *ib.* 279; Nelson *v.* Chicago &c. Co., 38 *ib.* 564; Muldowney *v.* Illinois &c. Co., 39 *ib.* 615; S. P. 36 *ib.* 462, 32 *ib.* 176; Way *v.* Illinois Central &c. Co., 40 *ib.* 341; Benton *v.* Central R. R. Co., 42 *ib.* 192; Cramer *v.* City of Burlington, *ib.* 315; Steel *v.* Central &c. Co., 43 *ib.* 109; Murphy *v.* Chicago &c. Co., 45 *ib.* 661, S. P. 38 *ib.* 539; Starry *v.* D. & S. W. R. R. Co., 51 *ib.* 419; Bonce *v.* Dubuque &c. Co., 53 *ib.* 278).

Louisiana (Moore *v.* Mayor &c., 3 La. Ann. 645).

Maine (Kennard *v.* Burton, 25 Me. 39, reported in 43 Am. Dec. 249; Merrill *v.* Hampden, 26 *ib.* 234; Perkins *v.* Eastern &c. R. R. Co., 29 *ib.* 307; Dickey *v.* Telegraph Co., 43 *ib.* 492; Buzzell *v.* Laconia Co., 48 *ib.* 113; Gleason *v.* Bremen, 50 *ib.* 222; Bigelow *v.* Reed, 51 *ib.* 325).

Massachusetts (Lane *v.* Crumbie, 12 Pick. 177; Adams *v.* Carlisle, 21 *ib.* 146; Carsley *v.* White, *ib.* 254; Bosworth *v.* Swansey, 10 Met. 363; May *v.* Princeton, 11 *ib.* 442; Parker *v.* Adams, 12 *ib.* 415; Lucas *v.* New Bedford Co., 6 Gray, 64; Robinson *v.* Fitchburg &c. Co., 7 *ib.* 92; Edwards *v.* Carr, 13 *ib.* 234; Wilson *v.* Charleston, 8 Allen, 137; Warren *v.* R. R. Co., *ib.* 227; Callahan *v.* Bean, 9 *ib.* 401; Hickey *v.* R. R. Co., 14 *ib.* 429; Bigelow *v.* Rutland, 4 Cush. 247; Gaynor *v.* Old Colony Co., 100 Mass. 208. Murphy *v.* Dean, 101 *ib.* 455; Mayo *v.* Boston &c. R. R. Co., 104 *ib.* 137; Allyn *v.* R. R. Co., 105 *ib.* 77, reported in 2 Am. Ry. Rep. 399; Wheelock *v.* B. &c. Co., 105 *ib.* 202; Lane *v.* Atlantic &c. Works, 107 *ib.* 104; Prentiss *v.* Boston &c. Co., 112 *ib.* 43; Hinckley *v.* R. R. Co., 120 *ib.* 257).

Michigan (Detroit &c. *v.* Van Steinburg, 17 Mich. 99 & 119; Lake Shore &c. Co. *v.* Miller, 25 *ib.* 274, reported in 5 Am. Ry. Rep. 478; Daniels *v.* Clegg, 28 *ib.* 32; Michigan &c. R. R. Co. *v.* Coleman, *ib.* 440; Le Barron *v.* Joslin, 41 *ib.* 313; Teipler *v.* Hilsendegan, 44 *ib.* 461).

Mississippi (Miss. C. R. R. Co. *v.* Mason, 51 Miss. 234; Vicksburg &c. *v.* Hennessey, 54 *ib.* 391).

New York (Johnson *v.* R. R. Co., 5 Duer, 21; De Benedetti *v.* Mauchin, 1 Hilt. 213; Lehman *v.* Brooklyn, 29 Barb. 234; Robinson *v.* N. Y. R. R. Co., 65 *ib.* 146; Van Lien *v.* Scoville Man. Co., 14 Abb. Prac. 74; Griffin *v.* Mayor &c., 9 N. Y. 456; Button *v.* R. R. Co., 18 *ib.* 248; Johnson *v.* Hudson R. R. Co., 20 *ib.* 65; S. C., 6 Duer, 633; Curran *v.* Warren Chemical Co., 36 N. Y. 153; Warner *v.* R. R. Co., 44 *ib.* 465; Gillespie *v.* City, 54 *ib.* 468; Reynolds *v.* R. R. Co., 58 *ib.* 248, reported in 7 Am. Ry. Rep. 6; Claflin *v.* Meyer, 75 *ib.* 260, reported in 31 Am. Rep. 467; Cordell *v.* R. R. Co., 75 *ib.* 330, reported in 19 Alb. L. J. 134; Hale *v.* Smith, 78 *ib.* 480; Riceman *v.* Havemeyer, 84 *ib.* 647; Garrison *v.* Mayor &c., 5 Bosw. 497; Williams *v.* Holland, 22 Howard, Pr. 137; Squire *v.* Cent. Park &c. R. R. Co., 4 Jones & Sp. 436).

Oregon (Kahn *v.* Love, 3 Oreg. 206; see also Walsh *v.* O. R. N. Co., 10 *ib.* 253).

To like effect in C. C. U. S. see Hull *v.* Richmond, 2 Woodb. & M. 337, and Beardsly *v.* Swann, 4 McLean, 333.

In the courts of the following States and Territories, the onus is held to be with the defendant: —

Alabama (Smoot *v.* Mayor &c., 24 Ala. 112).

Arkansas (George *v.* St. Louis &c. Co., 34 Ark. 613).

California (May *v.* Hansom, 5 Cal. 360; Gay *v.* Winter, 34 *ib.* 153; Robinson *v.* Western &c. Co., 48 *ib.* 409; McQuiliken *v.* R. R. Co., 50 *ib.* 7; Fernandez *v.* Sacramento &c. Co., 52 *ib.* 45; McDougall *v.* Cent. R. R. Co., reported in 12 A. & E. R. Cas. 143).

Dakota (Mares *v.* N. P. R. R. Co., reported in 18 Rep. 782; Sanders *v.* Reister, 1 Dak. 151).

Kansas (Kansas P. R. R. Co. *v.* Pointer, 14 Kan. 37; S. P. 9 *ib.* 620).

Kentucky (Louisville Canal Co. *v.* Murphy, 9 Bush. 522; Paducah &c. Co. *v.* Hoehl, 12 *ib.* 41; Louisville &c. Co. *v.* Goetz, 79 Ky. (Rodman) 442, reported in 42 Am. Rep. 227).

Maryland (Baltimore &c. Co. *v.* Marriott, 9 Md. 160; Northern &c. Co. *v.* State, 31 *ib.* 357; Frech *v.* R. R. Co., 39 *ib.* 574; State *v.* B. & P. &c. Co., 58 *ib.* 482; Irwin *v.* Sprigg, 6 Gill. 206).

Minnesota (St. Paul *v.* Kirby, 8 Minn. 154; St. Anthony Falls &c. Co. *v.* Eastman, 20 *ib.* 277; Hocum *v.* Weitherick, 22 *ib.* 152; Whittier *v.* Chicago, 24 *ib.* 394; Wilson *v.* Northern &c. Co., 26 *ib.* 278).

Missouri (Thompson *v.* R. R. Co., 51 Mo. 190, reported in 3 Am. Ry. Rep. 492; Buesching *v.* St. Louis &c. Co., 73 *ib.* 219, reported in 39 Am. Rep. 503; Hicks *v.* Pacific &c. Co., 65 *ib.* 34, S. P. 64 *ib.* 430; Shuerman *v.* Missouri R. R. Co., 8 Mo. App. 565).

New Hampshire (White *v.* Concord &c. Co., 30 N. H. 188).

New Jersey (Moore *v.* Cent. &c. Co., 24 N. J. L. 268; Durant *v.* Palmer, 29 *ib.* (5 Dutch) 544; N. J. Ex. Co. *v.* Nichols, 33 *ib.* (4 Vroom) 434, S. P. 32 *ib.* 166).

Ohio (Little Miami &c. Co. *v.* Stevens, 20 Ohio, 415; Cleveland &c. R. R. Co. *v.* Crawford, 24 *ib.* 631, reported in 7 Am. Ry. Rep. 172; Baltimore &c. Co. *v.* Whitacre, 35 *ib.* 627).

Pennsylvania (Hays *v.* Gallagher, 72 Pa. 136, opposing the earlier cases of Waters *v.* Wing, 59 *ib.* 211; Beatty *v.* Gilmore, 16 *ib.* 463; Penn. R. R. Co. *v.* McTighe, 46 *ib.* 316; Lehigh &c. Co. *v.* Hall, 61 Pa. 361, and Cleveland Co. *v.* Rowan, 66 *ib.* 393. The latest cases sustaining the view that the burden is upon the defendant are: Penn. Canal Co. *v.* Bentley, 66 Pa. 30; Penn. R. R. Co. *v.* Weber, 76 *ib.* 157, S. P. 72 *ib.* 27; Weiss *v.* Penn. R. R. Co., 79 *ib.* 387, and Mallory *v.* Griffey, 85 *ib.* 275; see the following other cases in that court: Erie Co. *v.* Schwingle, 22 *ib.* 384; Bush *v.* Johnston, 23 *ib.* 209; Allen *v.* Willard, 57 *ib.* 374).

Rhode Island (Cassidy *v.* Angell, 12 R. I. 447, reported in 34 Am. Rep. 690).

Texas (Walker *v.* Herron, 22 Tex. 55; Texas R. R. Co. *v.* Murphy, 46 *ib.* 356; Dallas &c. Co. *v.* Spicker, 61 *ib.* 427, reported in 48 Am. Rep. 297, and 18 Rep. 378).

Vermont (Lester *v.* Pittsford, 7 Vt. 158; Barber *v.* Essex

&c. Co., 27 *ib.* 62; Hyde *v.* Jamaica, *ib.* 443; Hill *v.* New Haven &c. Co., 37 *ib.* 500; Walker *v.* Westfield, 39 *ib.* 246).

Virginia (Baltimore &c. Co. *v.* Whittington, 30 Gratt. 805).

West Virginia (Snyder *v.* Pittsburg &c. Co., 11 W. Va. 14).

Wisconsin (Chamberlaine *v.* Milwaukee &c. Co., 7 Wis. 425; Dressler *v.* Davis, *ib.* 527; The two above cases holding the Massachusetts view were overruled by Milwaukee &c. Co. *v.* Hunter, 11 *ib.* 160; Achtenhagen *v.* Watertown &c. Co., 18 *ib.* 331; Potter *v.* Chicago &c. Co., 22 *ib.* 615, S. P. 21 *ib.* 372; Castello *v.* Landwehr, 28 *ib.* 522; Karasich *v.* Hasbroue, 29 *ib.* 569; Wheeler *v.* Westport, 30 *ib.* 392; Strahlendorf *v.* Rosenthal, *ib.* 674; Hoyt *v.* City of Hudson, 41 *ib.* 105, reported in 4 Cent. L. J. 573, and 22 Am. Rep. 714; Prideaux *v.* City &c., 43 *ib.* 513, reported in 28 Am. Rep. 558, and 6 C. L. J. 428).

In addition to these latter authorities, the Supreme Court of the United States and several Circuit Courts hold that the onus is with the defendant (Railroad Co. *v.* Gladmon, 15 Wall. 401, followed by R. R. Co. *v.* Horst, 93 U. S. (3 Otto) 291; Dillon *v.* Union &c. Co., 3 Dill. C. C. 319; Secord *v.* St. Paul &c. Co. (C. C. Minn.), 18 Fed. Rep. 221; Knaresborough *v.* Min. Co., 3 Sawy. 500; Holmes *v.* O. C. R. Co., 6 *ib.* 289; Conroy *v.* O. C. Co. (C. C. D. Or.), 18 Rep. 486). In the first-named case, Mr. Justice Hunt delivers the unanimous opinion of the Court, and he, a former Justice of the Court of Appeals of New York, quotes from the decisions of that State, and seems to consider the Courts thereof as ranged on the side he was maintaining; but, we think that upon examination of all the cases from that State, the weight of its own authority, though not harmonious, ranks it, as we have placed it. If upon the defendant, it must be established by a preponderance of the testimony (R. R. Co. *v.* Horst, *ubi supra*). The Supreme Court of North Carolina in a late case (Owen *v.* R. & D. R. R. Co., 88 N. C. 502) hold, that the burden is not upon the defendant, in the sense of requiring affirmative proof of contributory negligence, but, that where there is any evidence, *in the whole case*, of such negligence, it should be

left as an open question to the jury. In that case plaintiff proved that huge rocks had fallen upon the track, and that the locomotive ran against them, whereby his intestate, who was the engine-driver, was instantly killed, the lever being found partly reversed; the majority of the court speak of this, in this way: "The deceased . . . ran it . . . with great violence upon the obstructing rubbish." It was in evidence, on the part of the plaintiff, that it was a dark night. How, *in the sense of contributory negligence*, the deceased could be said to have run the locomotive into the obstruction, it is hard to conceive: the exonerative evidence came wholly from defendant. Ruffin, J., dissents in a very able and satisfactory opinion. This case has been since cited with approval (Aycock *v.* R. R. Co., 89 N. C. 321). The case of Lane *v.* Crumbie, 12 Pick. 177, constitutes the initial point of error. In that, and a number of other cases following, in the same court, as well as in the cases decided in Maine, and perhaps other courts, favoring the first view, the case of Butterfield *v.* Forrester, 11 East. 60, is cited, and formed the basis of decision. The case of Butterfield *v.* Forrester decides nothing touching the onus probandi, but merely that when a plaintiff, *by his own* testimony, shows contributory negligence, he must be non-suited. The great respect entertained for the Massachusetts decisions doubtless had its effect in causing other courts to follow them without narrowly examining into their foundation. In this way the case of Butterfield *v.* Forrester has proved an *ignis fatuus* (see article in 15 Western Jurist, 529, and note to 39 Am. Rep. 515). It is to be observed, however, that the Massachusetts Court have lately toned down their former decisions, by holding that it is not necessary for the plaintiff to prove due care by affirmative evidence, but "that the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative" (Mayo *v.* Boston &c. Co., 104 Mass. 137; Hinkley *v.* Cape Cod &c. Co., 120 *ib.* 257; Tay. Cor. sec. 376), thus practically emasculating, in most instances, though not expressly overruling, the principle laid down in

the earlier cases. The case of Butterfield *v.* Forrester only decides the *question of right* as distinguished from the *manner of its ascertainment.* There seems to have been in England no direct decision upon the exact point until 1878. Before that time, the question was incidentally touched upon (Chitty, Car. 272; Christy *v.* Greggs, 2 Camp. 79; Martin *v.* Great &c. Co., 16 C. B. (81 E. C. L. R.) 179; Holden *v.* Liverpool &c., 3 C. B. (54 E. C. L. R.) 115 and note thereto). If the law, as it is said, speaks in good pleading, none of the English precedents contain any averment of due care by plaintiff, or otherwise negative his contributory negligence (2 Chitty, Pl. 647–650; Chitty, Car. App. 602; 1 Arch. N. P. 439). Indeed, Ld. Penzance in a case (Dublin &c. Co. *v.* Slattery, L. R. 3 App. Cas. H. of L. 1155) to be presently noticed, in advising the House of Lords, says of such a pleading: "Yet I think I may safely say no such declaration was ever seen" (pp. 1180, 1181). In Smith *v.* St. Lawrence &c. Co., L. R. 5 Priv. C. C. 308, reported in 8 E. R. (Moak) 236, contributory negligence was set up by a defence styled "a perpetual peremptory exception." In 1878, the point was involved in the case of Dublin, Wicklow, and Wexford Railway Co. *v.* Slattery, L. R. 3 App. Cas. H. of L. 1155, and Ld. Penzance delivering the opinion of a majority of the Law Lords, holds, quite emphatically, that the onus is with the defendant, and even the dissentient Lords do not take the contrary view, but one of them (Ld. Blackburn) expressly coincides, on this point, with the view of Ld. Penzance (p. 1209).

In the previous case of Caswell *v.* Worth, 5 El. & Bl. (85 E. C. L. R.) 849; 2 Jur. 116; 25 L. J. (Q. B.) 121, the point arose on a plea of contributory negligence and demurrer thereto.

The treatises seem to favor the rule that the burden is on the defendant (Shear. & Red. Neg. secs. 43, 44, 47; 2 Thomp. Neg. 1175, sec. 24; Big. L. C. Torts, 725; Whart. Neg. secs. 423, 990; 1 Add. Torts, sec. 586; Gray, Com. by Tel. sec. 77). C. J. Cooley leaves it an open question (Cool. Torts, 673), which is quite significant in

view of the decisions of his State (Big. L. C. Torts, 726; Articles in 15 W. J. 399, 529; 17 *ib.* 110; Tay. Cor. sec. 376; Thomp. Car. Pas. 551, § 13; Abb. Tr. Ev. 594 *et seq.*; Underhill (Moak), Torts, 309, rule 30; see also Hammack *v.* White, 103 E. C. L. R. 588).

The author, with diffidence, suggests that there are several reasons which support the rule as laid down by the Supreme Court of the United States, and that, on principle, the point must be controlled by the pleading.[1] That is the crucial test; for if the plaintiff must prove his own due care, as a substantive fact, he must allege it in his own pleading. The following reasons are submitted in favor of the rule that the onus is with the defendant: —

1. Because no English precedent can be found in which there is an allegation of due care by plaintiff in the declaration.

2. There is a presumption that every one is careful to avoid danger, and the other rule would tend to violate such presumption.

3. It substantially calls for proof of a negative, contrary to principles governing the subject of the onus.[2]

4. The doctrine is not pretended to be based upon the capacity of parties injured to be sworn in their own behalf; and at common law, in many instances, by reason of their incompetency to testify, plaintiff must, under that rule, have failed of proof.

5. And this reason is peculiarly applicable to the modern action for the value of a life.

Identification of Passenger and Carrier. — There is one phase of this title which demands notice. It is laid down by some authorities, that although a passenger, without fault on his part, be injured by a third person, yet, if the party transport-

[1] The Supreme Court of Indiana has boldly met this argument by requiring the complainant to allege that the plaintiff was without fault (Anderson *v.* Herry, 67 Ind. 420; see observations of Duer, J., in Johnson *v.* Hudson &c. Co., 5 Duer. 21, and of Ld. Penzance, cited *supra, contra*).

[2] Since writing the above, the author's attention has been directed to an able article in 15 W. J. 399, suggesting similar views.

ing him was guilty of contributory negligence, the passenger is so identified with his own carrier as to be chargeable with the latter's contributing act (Big. Torts, 316, 317; Big. L. C. Torts, 726 *et seq.*).

This doctrine is supposed to have been first enunciated in the case of Thorogood *v.* Bryan, 8 C. B. 115 (65 E. C. L. R.); S. C., 18 L. J. C. P. 336.

In that case the facts were that the defendant, owner of a stage-coach, by his driver's negligence ran over and killed the plaintiff's intestate whilst he was alighting from another stage-coach; which latter coach, by the negligence of the driver, had stopped at an improper place for alighting.

The doctrine, it is submitted, is not consistent with either principle or common sense. It assumes that the relation of master and servant exists between a passenger and a carrier, although a vital element of that relation is wanting, namely, the *power of control.* The maxim of *qui facit per alium facit per se* is based upon the idea of control, and is but a corollary of another, *qui non prohibet cum prohibere posset jubet* (1 Black, Com. 430).

In Quarman *v.* Burnett, 6 M. & W. 499, it was held that where a livery-stable keeper hired to a party a horse and driver, and by the driver's negligence an injury was committed, such driver was not the servant of the party to whom he was hired. This case finally settled the law on this point, left open by a divided court in Laugher *v.* Pointer, 5 B. & C. 547; 8 Dow. & Ry., and has never been called in question. If, then, the driver is not a servant, how can his contributing act affect the party injured, except as the act of any stranger might have? The defendant's nonliability may be put upon the ground that the act of another, without reference to the question of service, produced or contributed to the misfortune (Big. Torts, 318). The doctrine, however, thus broached in Thorogood *v.* Bryan seems to have been followed in the later case of Armstrong *v.* Lancashire &c. Co., Law Rep. 10 Ex. 47; and in this country has been adopted or rejected as indicated below: —

Imputable Negligence.

ADOPTED IN	REJECTED IN
Massachusetts: Smith *v.* Smith,[1] 2 Pick. 621.	**New York:** Chapman *v.* N. Y. &c. Co., 19 N. Y. 341; Coleman *v.* N. Y. &c. Co., 20 N. Y. 492; Webster *v.* Hudson &c. Co., 38 N. Y. 260.
Ohio: Cleveland &c. Co. *v.* Terry, 8 Ohio, 570; Puterbaugh *v.* Reason, 9 Ohio, 484.	**Kentucky:** Danville &c. Co. *v.* Stewart, 2 Met. 119; Louisville Co. *v.* Case's Admr., 9 Bush. 728.
Pennsylvania: Lockhardt *v.* Lichtenthaler, 46 Pa. 151.	

The doctrine was expressly repudiated in the High Court of Admiralty (The Milan, 1 Lush. 388). And by the Scottish Court of Appeals (Hay *v.* Le Neve, 2 Shaw's Scotch App. 395; Brown *v.* McGregor, Hay. 10). It is also criticised by Mr. Smith (1 Smith, L. C. 220), and condemned as unsound by Judge Bigelow (Big. L. C. Torts, 728), and by Judge Thompson (Thomp. C. P. 284), and by Judge Lawson (Law. L. C. 236), and by Addison (1 Add. Torts, sec. 553).[2]

The burden of proof is dependent upon the prevalence or rejection of the doctrine supposed to be deducible from the case of Thorogood *v.* Bryan. Where that doctrine prevails, the burden of proof cannot arise, as the facts disclosing the relation of the parties demonstrate that the plaintiff has no cause of action. In those jurisdictions where the doctrine is repudiated, the burden of proof is regulated as in ordinary cases of negligence.

Imputable Negligence. — There is a discrepancy of judicial opinion on this point. Is the negligence of the parent imputable to a young child? It is so held by some authorities (Waite *v.* N. Ry. Co., El. Bl. & El. 719; Holly *v.* Boston Gas Co., 8 Gray, 123; Callahan *v.* Bean, 9 Allen, 401; Pittsburg R. Co. *v.* Vining, 2 Ind. 573; Lafayette &c. R. Co. *v.* Huffman, 28

[1] Judge Bigelow cites this case as sustaining the doctrine, but the author thinks that it can hardly be so classified.

[2] Mr. Shirley's comment is: "Such is the law!" (Shirl. L. C. 258, note).

ib. 287; Hartfield *v.* Roper, 21 Wend. 615, reported in 2 Thomp. Neg. 1121; 1 Add. Torts, sec. 567; see other authorities collected in 2 Thomp. Neg. 1184, sec. 33, and in Big. L. C. Torts, 729, and an able article in 4 Am. L. Rev. 405; Underhill (Moak), Torts, 291 *et seq.*). And denied by others (Bellefontaine &c. R. R. Co. *v.* Snyder, 18 Ohio, 399; North Penn. R. R. Co. *v.* Mahoney, 57 Pa. 187; Louisville Canal Co. *v.* Murphy, 9 Bush. 522; Robinson *v.* Cone, 22 Vt. 213, reported in 2 Thomp. Neg. 1129; Lynch *v.* Nurdin, 1 Q. B. 29, reported in 2 Thomp. Neg. 1140, and Big. L. C. Torts, 729 *et seq.*; see other authorities in 2 Thomp. Neg. 1184, secs. 33–35; see Big. Ov. Cas. title Thorogood *v.* Bryan; see also article in Am. L. Rev. *supra*). Perhaps the true rule is, that the parent's or guardian's negligence is imputable to the child when that negligence properly, *i.e.*, directly, contributed to the injury (Big. Torts, 322; 2 Thomp. Neg. 1191, sec. 37; Chapman *v.* N. Y. & N. H. R. R. Co., 19 N. Y. 341; Coleman *v.* Same, 20 N. Y. 492; Webster *v.* H. R. R. Co., 38 *ib.* 260; Danville &c. Turn. Co. *v.* Stewart, 2 Met. (Ky.) 119; The Milan, 1 Lush. 388; Brown *v.* McGregor, Hay. (Scotch) 10; 1 Smith, L. C. 220 (4 Eng. ed.). Where the doctrine prevails, its very statement, *ex vi termini*, imports that the burden of proof to show the negligence of the parent rests upon the defendant. It should be observed that the doctrine under discussion presupposes that the child should be of sufficient age and intelligence as to possess some perception of danger, so as to *contribute*, and has no place where the infant is of too tender an age to appreciate danger (2 Thomp. Neg. 1191, sec. 38).

Comparative Negligence. — It is held in some of the States that, notwithstanding, the plaintiff was guilty of negligence, yet, if the defendant was also guilty, and if it exceeded that of the plaintiff, he would be entitled to recover (Big. Torts, 312; Chicago R. R. Co. *v.* Van Patten, 64 Ill. 510; Ill. Cent. R. R. Co. *v.* Baches, 55 Ill. 379; 1 Thomp. Neg. p. 166, sec. (9), p. 381, sec. 3, p. 424, sec. 7; 2 Thomp. Neg. p. 1022, sec. 26, p. 1164, sec. 14, p. 1165, sec. 15, p. 1168, sec. 16, p. 1172,

sec. 17). And see O'Keefe *v.* Chicago &c. Co., 32 Iowa, 467. This doctrine is generally denied (2 Thomp. Neg. 1164, sec. 14). Where it does prevail, if the plaintiff makes out a case of presumptive negligence, not disclosing any contributory negligence on his part, the burden of proof will be upon the defendant to show it; and having done so, the burden is shifted to the plaintiff to show comparative negligence.

Contributory Intervening Agency. — It may be, that between the wrongful act of the defendant and the damage sustained by the plaintiff, there intervened an act of a third person or agency, which directly produced the injury. If this should be the case, and the misfortune would not have certainly followed without it, the defendant will not be liable (Big. Torts, 312; 2 Thomp. Neg. 1089, sec. 6; see also notes to Thomas *v.* Winchester, Big. L. C. Torts, 608 *et seq.*). Here, the burden of proof is clearly upon the plaintiff to show that the injury would have been sustained, even had there been no intervening agency, or that the act of the third person, by which direction was given to the original force applied, was lawful or necessary. This is well illustrated by the celebrated "squib" case of Scott *v.* Shepherd, 3 Wil. 403, reported in 1 Smith's L. C. 210. And also by the case of Thomas *v.* Winchester, 6 N. Y. 397, reported in Big. L. C. Torts, 602.

CORPORATIONS.

Existence. — There is a diversity regarding the onus, on the point of the existence of a corporation, as to whether the allegation comes from the corporation or opposing litigant. If it comes from the corporation, the burden is on it to prove its own existence; if the incorporating act should be a public law, the burden simply requires proof of organization; if private, of the law as well as organization (Bliss, Code Pl. chap. XIV., Rule 3; Thomp. Stock. sec. 407). And even when such fact is unnecessary to be pleaded, the same proof is required (Bliss, *ib.*). If the corporation be sued, it is sufficient to allege and prove that it was a corporation (*ib.* sec. 260).

Liability of Officers. — In actions based upon statutes creating a personal liability of officers of the corporation, the burden rests upon the party seeking to recover under them; and every fact, prescribed by the statute as necessary to create such liability, must be affirmatively proved (Thomp. L. of D. sec. 465, § 27).

Promoters. — The burden is with the plaintiff (*ib.* 105 *et seq.*).

Shareholders. — To charge a shareholder, under a personal liability clause, it is incumbent on the plaintiff to prove: —

1. That he has reduced his debt to judgment as against the corporation.

2. That the execution issued thereon has been returned unsatisfied in whole or part.

3. That the defendant, by virtue of a personal liability clause, became liable to a greater or less extent.

Proof that the shareholder's name appears upon the books of a stock company, as such shareholder, shifts the burden *quoad hoc* to him (Turnbull *v.* Payson, 95 U. S. 418). This is a general statement, without going into the question of parties, etc. (Thomp. Stock, chap. 20).

COVENANTS FOR TITLE.

As respects the burden of proof, it is well settled that in suing upon the covenants against incumbrances, for quiet enjoyment, or of warranty, it devolves upon the plaintiff in the first instance, who is obliged to make out the paramount title with all the particularity of a plaintiff in ejectment (Rawle, Cov. for Title, 87, 147, 201; Lathrop *v.* Grosvenor, 10 Gray, 52; Barker *v.* Hobbs, 6 Ind. 385; Green *v.* Irving, 54 Miss. 450; Kansas &c. Co. *v.* Dunmeyer, 19 Kan. 539; Crance *v.* Collenbaugh, 47 Ind. 256; Abb. Tr. Ev. 519, 520 (36, 37); 1 Leigh, N. P. 623; 2 Greenl. Ev. secs. 242, 243, 244). It is doubtful how far such a rule is applicable to actions on the covenant for seizin (Pollard *v.* Dwight, 4 Cr. 421; Le Roy *v.* Beard, 8 How. 451).

On the one hand, it would seem, that the rule as to evidence should correspond with the rule as to the pleadings, and, that the knowledge of the state of the title being supposed to rest with the defendant, he is bound, in the first instance, to maintain the affirmative of his covenant.

On the other hand, it would seem contrary to general principles that a vendor who had given a covenant for seizin should be called upon at any time after the execution of the deed, and, at the caprice of his covenantee, to make out affirmatively a perfect title, without a defect, or, some loss having been shown in the first instance.

It is probable that the true rule is to be found between these extremes, and while a plaintiff is not obliged to prove the defect with the particularity required in suing on the other covenants, he cannot throw entirely upon his vendor the burden of maintaining the perfection of the title he has conveyed (Rawle, 87, 88).

Mr. Abbott lays it down, that both as to this covenant as well as the covenant of a right to convey, the burden is with the defendant (Abb. Tr. Ev. 520 (35); see also Bull, N. P. 162).

Greenleaf, as to the covenant of seizin, lays it down that it is with the plaintiff (2 Greenl. Ev. sec. 241). The onus is also governed in an action on a covenant to some extent by the pleadings.

Greenleaf lays it down that where issue is joined on a plea of performance, the defendant assumes the burden of proof (2 Greenl. Ev. sec. 247; Scott *v.* Hull, 8 Conn. 296). Archbold takes a distinction between a traverse of a negative and an affirmative breach, holding that in the former the onus was with the defendant, but in the latter with the plaintiff (Arch. N. P. 264, 265).

CURTESY.

It is familiar learning, that curtesy is an estate for life created by the law out of the estate of inheritance of a wife, in favor of a surviving husband. The party setting up a claim thereto, upon a general denial, has the onus to establish four cardinal points, namely: 1. Marriage. 2. Seizin. 3. Issue. 4. Death.

Marriage. — The same proof is sufficient on this point as in DOWER, *q.v.* (Biss. Est. for Life, 38, 69).

Seizin. — He must prove also a seizin in deed, as it is termed; that is, an actual or virtual seizin of the wife of an estate of inheritance (Biss. Est. for Life, 38; 1 Greenl. Cruise,[1] 149, sec. 6; Abb. Tr. Ev. 708), unless the property, out of which it is claimed, consists of an incorporeal hereditament; then *impotentia excusat legem* (Biss. Est. for Life, 39).

It is immaterial whether the seizin existed before or after the birth of issue (1 Greenl. Cruise, 150, sec. 7).

Issue. — He must show that there was issue, —

a. born alive;

b. in the lifetime of the wife;

c. and capable of inheriting the realty (Biss. Est. for Life, 40; 1 Greenl. Cruise, 152, sec. 15).

Death. — He must lastly prove the death of the wife (Biss. Est. for Life, 42; 1 Greenl. Cruise, 154, sec. 24). The defendant taking the onus may show that the husband was attainted of treason or felony[2] (Biss. Est. for Life, 43; McQ. H. & W. pt. 1, 123; and see on the subject generally, notes to Robertson *v.* Norris, reported in Ewells. L. C. at p. 481; 1 Wash. R. P. 165, 178–180; 2 Black. Com. 126–129; 2 Crabb, R. P. § 1074 *et seq.*).

Divorce *a Vinculo.* — A divorce *a vinculo* unquestionably destroys this right, and is a defence (1 Wash. R. P. 182).

[1] The references are to the top paging.

[2] See remarks on this defence under title DOWER.

DAMAGE LAWS (Intoxicating Liquors).

The majority of the States have enacted laws giving an action to certain relatives of drunkards, semi-drunkards, and infants against persons supplying them with intoxicating beverages. There is such a similarity in the general scope and purview of these statutes that an approximate view as to the burden of proof is hazarded. Upon a general denial, the burden requires from the plaintiff proof, by a preponderance of the evidence and bringing his case clearly within the statute: —

1. That he is one of the relatives of the party to whom it is alleged the intoxicating beverage was unlawfully furnished. The relationship is proved in the usual way (Abb. Tr. Ev. 775, 776).

2. The furnishing of some of the kinds of intoxicating[1] liquors specified in the statute to such relation of the plaintiff, as a beverage, either by defendant or his salesman, or bar-tender, or under some of the statutes, that the defendant was interested in the establishment[2] (Abb. Tr. Ev. 776).

3. And according to some of the statutes that the liquor so furnished produced intoxication in the recipient (*ib.* 779).

4. If the act makes knowledge, by the furnisher of the moral *status* of the recipient, a prerequisite, then the scienter must be shown by direct or presumptive evidence. It is presumed that it is such an action as *ex necessitate eri* would render proof of habit admissible. The same observations as to scienter are applicable as to the age of a minor (*ib.* 778).

[1] For the benefit of Mark Twain, we will state that some courts take "judicial notice" that certain kinds of liquor (in the particular case, gin) is an intoxicating drink (Com. *v.* Peckham, 2 Gray, 514). We fail to find this principle laid down in any of the treatises on evidence; but as the decision was made in the "land of culture," we must accept it. Another court with due modesty declined to take judicial notice of the fact that one would recover from intoxication in five or six hours. This was considerate (Brannon *v.* Adams, 76 Ill. 331).

[2] This, however, is only necessary when the defendant hides behind the scenes.

The defendant may show: The contributory negligence of the plaintiff and perhaps a wider latitude of evidence, to show it, would be allowed than in cases of negligence (*ib.* 779).

DAMAGES.

Whenever there has been a loss occasioned by a violation of the legal rights of others, the law gives damages — *ubi jus ibi remedium* (Sedgwick, M. of D. 32 mar.; Ashby *v.* White, 1 Smith, L. C. 105; 1 Suth. Dam. 2, 9–16). But though there may be injury, if it falls within the maxim of *damnum absque injuria*, no action can be maintained (Sedgwick, *ib.* 30; note to Ashby *v.* White, *supra;* 1 Suth. Dam. 3–5).

If damages be recoverable at all, the plaintiff is in general entitled at least to a nominal sum, even when the action falls within the maxim of *de minimis non curat lex* (Wood's Mayne, Dam. 6, note 3; 1 Suth. Dam. 13, 14). The burden, it follows, in general lies with the plaintiff in actions at common law, to show that by reason of a recognizable wrong he has suffered more than nominal damages (1 Suth. Dam. 783).

Sometimes, indeed, substantial damages are inferrible from some act of omission, so as to devolve the burden of proof: as in an action against a sheriff for failure to make the money called for by an execution, which has been placed in his hands (Sedgwick, M. of D. 510, 511, and note *c* (7th ed.); Wood's Mayne, Dam. note *p*, 10 (1st ed.); 1 Suth. Dam. 246–7, and note 4, p. 247); though the English rule seems to require the plaintiff to show that there was property (Wood's Mayne, Dam. sec. 638). In an action against a sheriff for an escape, there is a diversity between an escape on mesne and final process. If the action is predicated upon the former, the burden is with the plaintiff throughout (1 Saund. Pl. & Ev. 482); if on the latter after the plaintiff has proved his judgment, delivery of the writ, the arrest, and the escape, he entitles himself, as damages, to the amount of the

whole debt and costs in the original action (1 Suth. Dam. 246), and the burden is with the defendant to discharge himself by showing that the escape was effected by the act of God, or the public enemy, or that it was by fraud and covin of the party really interested in the judgment, fresh pursuit and recapture, or that the party returned into custody before action brought; though in these cases it must also be shown that he was in the custody of the sheriff when the action was commenced. The sheriff may also show that the judgment was void (1 Saund. Pl. & Ev. 488, 489). These remarks as to escape on final process are applicable only to the action of debt given by the Statutes, West. 2; 1 Rich. 2, chap. 12, and incorporated into the legislation of most of the States. The common law remedy was an action on the case, wherein the burden was with plaintiff (*ib.* 484).

In an action against bail, after proof of the bond and its assignment, and such failure to comply with its terms as particular statutes may require, the plaintiff is entitled to recover the whole debt — the burden to show exoneration being with the defendant (1 Saund. Pl. & Ev. 195; 2 Leigh, N. P. 776, 779, 780).

The common law principle is well defined, namely, that even where a cause of action is shown to exist, the plaintiff must produce proof of actual damages, or will be restricted to nominal; but there are many actions given by statute in which, upon proof of a certain *status*, damages are given either *in numero* or by some approximate rule.

It is without the scope of this treatise to enumerate them, but the principle may be stated, as a governing one, that upon proof of the cause of action the damages allowed by statute are recoverable. It may be added that in several classes of actions proof of something more than nominal damages must be shown, in order to effect a recovery and carry costs, *ex. gr.*, actions founded upon the right of lateral support, slander of title, defamation alleging special damage, property in water, etc.

The injury in such cases, to constitute legal damages, must

be appreciable. See Pt. I. titles, DEFAMATION, DECEIT, DOMINANT TENEMENTS, and PROPERTY IN WATER.

See short statement as to the burden of proof, 1 Suth. Dam. 783.

DANGEROUS AGENCIES.

Statement of the Duty. — A owes to B the duty to prevent the escape of any dangerous substance, preparation, or compound, brought or made on his premises, by which B is injured; the escape being due to defects within the control, though not within the knowledge of A (Big. Torts, 252, § 1; Big. L. C. Torts, 492; Cool. Torts, 573; 1 Add. Torts, sec. 95; Wood, Nuis. secs. 107, 108, 115, 124, 134; 1 Thomp. Neg. 93 *et seq.*, 101 *et seq.*; Jutte *v.* Hughes, 67 N. Y. 267; Thomas *v.* Kenyon, 1 Daly, 132; Toole *v.* Beckett, 67 Me. 544; Baird *v.* Williamson, 15 C. B. (N. S.) 375; Pixley *v.* Clark, 35 N. Y. 520; Firnstone *v.* Wheely, 2 Dow. & L. 203; Bagnall *v.* London &c. Co., 7 H. & N. 423; S. C., 8 Jur. (N. S.) 16; 31 L. J. Ex. 121; 10 Week. Rep. 232, aff. Ex. Ch. 1 H. & C. 544, 9 Jur. (N. S.) 254; 9 L. T. (N. S.) 419; 31 L. J. (Ex.) 480; 10 Week. Rep. 802; Gordon *v.* Vestry of St. James, 13 L. T. (N. S.) 511; Phinzey *v.* Augusta, 47 Ga. 260; Harrison *v.* Great N. Ry. Co., 3 H. & C. 231; Atty. Genl. *v.* Visitors of Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146; 19 L. T. (N. S.) 290; Neal *v.* Henry, Meigs, 17; Bigelow *v.* Newell, 10 Rich. 348; Draper *v.* Sperring, 10 C. B. (N. S.) 113; 4 L. T. (N. S.) 365; Marshall *v.* Cohen, 44 Ga. 489, reported in 9 Am. Rep. 170; Cook *v.* Montagu, 7 L. R. (Q. B.) 218; 26 L. T. (N. S.) 471; Wilson *v.* New Bedford, 108 Mass. 261, reported in 1 Thomp. on Neg. 103, and 11 Am. Rep. 352; Gorham *v.* Gross, 125 Mass. 232, reported in 6 Rep. 459, and 28 Am. Rep. 224; Cahill *v.* Eastman, 18 Minn. 324, reported in 10 Am. Rep. 184; Hurdman *v.* N. E. Ry. Co., L. R. 3 C. P. Div. 168, reported to 6 C. L. J. 367; Ball *v.* Nye, 99 Mass. 582; Humphries *v.* Cousins, L. R. 2 C. P. Div. 239, reported in 1 Thomp. on Neg. 80; Crowhurst *v.* Amers-

ham Burial Board, L. R. 4 Ex. Div. 5, reported in 27 Week. Rep. 95, 7 C. L. J. 465; 18 Alb. L. G. 514, and 1 Thomp. Neg. 83).

The leading case on this subject is Rylands *v.* Fletcher, L. R. 3 H. of L. 330, S. C., 1 Thomp. Neg. 2; L. R. 1 Ex. 265.

In that case, the defendants had constructed a reservoir on land separated by intervening land from the plaintiff's colliery; mines had formerly been worked under the site of the reservoir and under part of the intervening land, and the plaintiff had lawfully opened an underground communication or tunnel between his colliery and the old tunnel in excavations under the reservoir; neither of these facts were known to the defendants, and they were not personally guilty of any negligence. The reservoir was constructed over the shafts (whose existence was also unknown to the defendants), which led to the workings, and which had been filled with marl and earth. The water burst from the reservoir, and sinking down the shafts, flowed through the underground channel into the plaintiff's mines, producing damage.

The defendants were held liable. It is noticeable that this case went from the Court of Exchequer to the Exchequer Chamber, and thence to the House of Lords, the last court affirming the judgment of the Exchequer Chamber.[1] The fullest *syllabus* of this case is to be found in Underhill (Moak), Torts, 12, 13; see also Fletcher *v.* Smith, L. R. 7 Ex. 305, aff. 2 App. Cas. 781, reported in 1 Thomp. Neg. 77; Shipley *v.* Fifty Associates, 106 Mass. 194, reported in 3 Am. Rep. 346.

General Onus. — The law on this subject is as yet in a chrysalis state, but according, at least, to the English decisions, the burden is upon the plaintiff to prove either: —

[1] The authority of this case was rejected by the Court of Appeals of New York (Losee *v.* Buchanan, 51 N. Y. 476, reported in 1 Thomp. Neg. 47), also in New Hampshire (Brown *v.* Collins, 53 N. H. 442, reported in 1 Thomp. Neg. 61, and 16 Am. Rep. 372), in New Jersey (Marshall *v.* Welwood, 38 N. J. L. 339; S. C., 20 Am. Rep. 394). These courts denied the *vinculum juris*.

1. That the thing or preparation which escaped was intrinsically dangerous.

2. That the escape was attributable to defects within the control of the owner (Big. Torts, 258, and authorities cited *supra*).

3. When damage has been caused by the explosion of steam-engines, according to the weight of authorities, the burden is enhanced by requiring proof of negligence (1 Thomp. Neg. 112, § 12).

Damages. — And that such escape produced injury to the plaintiff.

Defence *vis major*, etc. — The defendant, pleading in confession and evidence, may prove that the injury was occasioned by *vis major*, the act of God, or otherwise, without the intervention of the acts of himself or his employers (Big. Torts, 254; Wood, Nuis. sec. 127; Underhill (Moak), Torts, 12, 13; Blyth *v.* Birmingham Water Works Co., 11 Ex. 781; Ross *v.* Fedden, L. R. 7 Q. B. 661, reported in 1 Thomp. Neg. 91; Box *v.* Jubb, 27 Week. Reps. 415, reported in 1 Thomp. Neg. 89; Humphries *v.* Cousins, L. R. 2 C. P. Div. 239, reported in 1 Thomp. Neg. 80; Wilson *v.* Newbury, L. R. 7 Q. B. 31; Nichols *v.* Marsland, L. R. 10 Ex. 255, aff. L. R. 2 Ex. Div. 1, reported in 1 Thomp. Neg. 86, & 4 C. L. J. 319).

Reasonable User of Premises. — He may also show, if sued for injury occasioned by a flow of water from his mine into that of the plaintiff, that such flow was only the effect of working his own mine in a reasonable, prudent, and proper manner, his being the higher mine, and the water flowing down by the mere force of gravitation (Big. Torts, 253; Big. L. C. Torts, 494, 495; Smith *v.* Kenrick, 7 C. B. 515; Baird *v.* Williamson, 15 C. B. (N. S.) 376).

Thus expressed in the civil law: *Casus, quem humana prudentia neque prævidere, neque præcavere possit.*

Legislative Authority. — He may also, perhaps, show that the possession or use of the dangerous element or material was sanctioned by legislative authority, and that the escape

was through purely natural channels and not in consequence of his negligence. This proposition is certainly correct, if the escape was caused by the *vis major* (Big. Torts, 255; Big. L. C. Torts, 496; 1 Thomp. Neg. 95, 114; Wood, Nuis. secs. 115, 132, and chap. 23; Sabin *v.* Vermont &c. Co., 25 Vt. 363; Blyth *v.* Birmingham W. &c. Co., 11 Ex. 781; Dodge *v.* Com'rs, 3 Met. 380; Whitehouse *v.* Androscoggin R. Co., 52 Me. 208; Dunn *v.* Birmingham C. N. Co., L. R. 7 Q. B. 244, aff. in Ex. L. R. 8 Q. B. 42; 42 L. J. (Q. B.) 34; points fully stated in Thomp. Neg. 95; Vaughn *v.* Taff. &c. R. R. Co., 5 H. & N. 679; Madras Ry. Co. *v.* The Zemindar, L. R. India App. 364; S. C., 30 L. T. (N. S.) 770).

This case, however, of Hay *v.* Cohoes Co., 2 N. Y. 159, seems to be in conflict with the doctrine just above advanced.

Common Carrier. — It seems that the defendant in exoneration may also prove that he was a common carrier, and that the dangerous substance was placed with him for carriage, and that he was not aware of its dangerous character, and that there was no circumstance connected with the bailment calculated to put him on his guard, or give him notice of the fact (Parrot *v.* Wells, 15 Wall. 524, reported *sub nom.* the Nitro-glycerine case in 1 Thomp. Neg. 42).

The principle rests upon the great importance of common carriers (especially by steam) to the public.

As a matter of public policy, in order to fasten liability on such factors in the public economy, for injuries growing out of the carriage of substances, not apparently dangerous, notice of their character must be brought home to them (The Nitro-glycerine case, *supra*).

As to injuries caused by blasting, it seems that the maxim, *res ipsa loquitur* applies, so, at least, as to devolve the burden of proof on the defendant, to show due care and proper precaution (1 Thomp. Neg. 113, § 13; Wood, Nuis. sec. 142).

The industrious lawyer is referred for a masterly exposition of the law under consideration, to Judge Bigelow's notes to May *v.* Burdett (Big. L. C. Torts, 492–501; see also 1 Thomp. Neg. 80 *et seq.*).

DEATH.

Whenever the rights of a litigant are dependent upon death, the onus is with such party to prove, that death has occurred, as well as to prove, when time is material in connection therewith, the date; this principle needs no citation of authority. The mode of proving death, being foreign to the design of this treatise, will not be considered. But it may be stated as a general proposition, that a shift of burden may arise when the proof relied on consists in a presumption raised by evidence of continued absence of the party whose death is in dispute, for seven years, unheard of.

This is sufficient presumptive proof of death at the expiration of the seven years (Nepean *v.* Doe, 2 M. & W. 910; S. C., 2 Smith, L. C. 306; Moffit *v.* Varden, 5 Cr. C. C. 658; Whiting *v.* Nichol, 46 Ill. 230, Best on Pres. 191; Spencer *v.* Roper, 13 Ired. 333; Crawford *v.* Elliott, 1 Houst. 465; Stevens *v.* McNamera, 36 Me. 176; Tillery *v.* Tillery, 2 Bland, 436; Flynn *v.* Coffee, 12 Allen, 133; Smith *v.* Knowlton, 11 N. H. 191; Whiteside's Appeal, 23 Pa. 114; Hancock *v.* American &c. Co., 62 Mo. 26; Adams *v.* Jones, 39 Ga. 479; Cofer *v.* Thurmond, 1 Ga. 538; Spurr *v.* Taimball, 1 A. K. Marsh. (Ky.) 278; Stinchfield *v.* Emerson, 52 Me. 465; Newman *v.* Jenkins, 10 Pick. (Mass.) 515; Lomig *v.* Sternman, 1 Metc. (Mass.) 204; Brown *v.* Jewett, 18 N. H. 230; Forsaith *v.* Clark, 21 N. H. (1 Fost.) 409; Winship *v.* Connor, 42 N. H. 341; Wainborough *v.* Schank, 2 N. J. L. (1 Pen.) 229; Osborn *v.* Allen, 26 N. J. L. (2 Dutch.) 388; Smith *v.* Smith, 5 N. J. Eq. (1 Hals.) 484; Eagle *v.* Emmett, 4 Bradf. (N. Y.) 117; 3 Abb. Pr. 218; Burr *v.* Sim, 4 Whart. (Pa.) 450; Bradley *v.* Bradley, *ib.* 173; Primm *v.* Stewart, 7 Tex. 178; Garden *v.* Garden, 2 Houst. (Del.) 574; White *v.* White, 26 Me. 361; Merritt *v.* Thomson, 1 Hilt. (N. Y.) 550; Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Puckett *v.* State, 1 Sneed, 355; Thomas *v.* Thomas, Neb., reported in 18 Rep. 630); but if death within that period must be proved, the onus is with the party on whom the necessity is imposed, to show other facts in connection with such absence (Davie *v.* Briggs, 97 U. S. 628).

In case of death on a voyage, it has been held that a presumption of death arises at the lapse of the longest time allowed for the voyage (Gerry *v.* Post, 13 How. Pr. 118).

It is not proposed to discuss the measure of such proof at this place, the reader being referred to Pt. VI., title INTENSITY OF PROOF; but there is one point in connection with this subject, that may not be appropriately omitted; that is, the question of survivorship when deaths occur by a common calamity. The civil law and its commentators were occupied considerably with questions of this nature, and it seems to have been a general principle among them (subject, however, to exceptions) that when the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but, if above that age, the rule was reversed.

In case of husband and wife, the presumption seems to have been in favor of the survivorship of the husband (Best on Pres. 192, 3). The law of England, however, makes no presumption, but leaves the whole question as an open fact for the jury, or ecclesiastical judge (*ib.* 193); so that the party who alleges that one or another survived has the onus to establish it (*ib.* 202), and such is the tenor of the American authorities (1 Greenl. Ev. secs. 29, 30, and notes; Pell *v.* Ball, 1 Cheves (S. C.), part 2, 99; Smith *v.* Croom, 7 Fla. 81; Coye *v.* Lach, 8 Met. (Mass.) 371; Mochring *v.* Mitchell, 1 Barb. Ch. 264; Newell *v.* Nichols, 19 N. Y. Supreme Ct. 604 (12 Hun.); Stinde *v.* Goodrich, 3 Red. (N. Y.) 87), and in some States it is held, that there is a presumption that both or all died at the same moment (Russell *v.* Hallett, 23 Kan. 276; Kan. Pac. R. R. Co. *v.* Miller, 2 Col. T. 442).

DECEIT.

Independent of the actions brought against another for cheating at cards, bringing an action without authority in another's name, suffering a non-suit, and some other cases

(3 Black. Com. 165, 166; Arch. Pl. & Ev. 24), it may be stated that in an action brought to recover damages for a deceit practised, the burden is upon the plaintiff to prove: —

1. That the defendant by words or acts represented a certain condition or *status* with reference to the subject-matter, or some contract or transaction to exist.

2. Its materiality and falsity, and a knowledge thereof by defendant.

3. That the plaintiff was ignorant of such falsity, and believed the representation to be true.

4. That it was made with intent to deceive, or that it should be acted on.

5. That it was acted on by plaintiff to his damage.

6. That this damage followed proximately from the deception. Fraud without damage or damage without fraud is not actionable as a deceit (2 Leigh, N. P. 1067, 1077, 1080, 1081; 1 Arch, N. P. 440 *et seq.*; Kerr, F. & M. 325, 326; Oliphant, Horses, etc., 81; Chandler *v.* Lopus, 1 Smith, L. C. 77; Pasley *v.* Freeman, 2 Smith, L. C. 55, reported in Big. L. C. Torts, 1; 2 Greenl. Ev. sec. 230 *a*; 2 Pars. Cont. 774, 775; 2 Add. Torts, secs. 1211, 1216, 1217, 1218; Underhill (Moak), Torts, 560, Rule 62; Cool. Torts, 475, 501, 502; Notes to Pasley *v.* Freeman, Big. L. C. Torts, 20 *et seq.*; Big. Fraud, 1).

In general, mere silence is not tantamount to a representation, however censurable, morally; and to satisfy the burden something more must be shown (Underhill (Moak), Torts, 560, Rule 62; Cool. Torts, 476; Kerr, F. & M. 99, 100; 2 Pars. Cont. 777; Met. Cont. 34; Big. Torts, 12; Big. Fraud, 32).

But *silence* must not be confounded with *concealment*; for if a fact be concealed which the party was under a legal or equitable obligation to disclose, such reticence is a deceit (Kerr, F. & M. 95, 130; Cool. Torts, 478; Underhill (Moak), Torts, 561; 2 Pars. Cont. 772; Irvine *v.* Kirkpatrick, 7 Bell's Scotch App. Cas. 186, reported in 3 E. L. & Eq. Rep. 17); noticeably so in cases arising out of marine insurance (Big. Fraud, 39).

Even silence may be actionable in certain cases without

concealment (see illustrations; Cool. Torts, 478 *et seq.;* Underhill (Moak), Torts, 562, 563; 2 Pars. Cont. 776, 777, and notes; Big. Fraud, 40 *et seq.;* Kerr, F. & M. sec. 2); though perhaps with the exception of cheating by cards or false tokens, they will be found as falling within the doctrine of implied warranty or breach of contract or parol estoppel. That point, however, is not material in our inquiry. But the general rule is, that there must be a false representation either by words or such signs as are equivalent to language (Big. Fraud, 4; Kerr, F. & M. 92). "A single word," said LORD CAMPBELL, in Walters *v.* Morgan, 3 De Gex, F. & J. 724, "or even a nod or a wink or a shake of the head or a smile from one party intended to induce the other to believe the existence of a non-existing fact, which might influence the negotiations, is a fraud in law."[1] See also, to the same effect, the remarks of Lord Eldon in Turner *v.* Harvey, Jacob (4 Con. E. C. R.), 169, 178; Met. Cont. 35; Cool. Torts, 477; 2 Chitty, Pl. 679 *et seq.*

In many of the States, however, an action is sustained, as for a deceit, in the sale of property by a failure to disclose latent defects (Underhill (Moak), Torts, 561, 562), and counts for false warranty and deceit, in this sense, allowed to be be joined (Lassiter *v.* Ward, 11 Ired. 443; see form of declaration, Eaton's Forms, 81).[2]

Where silence, as thus understood, is allowed as the basis of an action, the burden will rest upon the plaintiff to show: —

1. That there was a latent defect, not discoverable by ordinary inspection (Farrar *v.* Alston, 1 Dev. 69; Brown *v.* Gray, 6 Jones, 103).

2. The non-disclosure.

3. The *scienter* (Hamrick *v.* Hogg, 1 Dev. 350; Tomlinson *v.* Payne, 8 Jones, 108).

4. The damages.

[1] This kind of silent conversation is well illustrated in Cavendish on Whist (Cavendish, 95 (12th Lond. ed.). It is also admirably shown at the Penn. R. R. Depot, where the movements of the trains are controlled by the motions of a man's arms.

[2] A collection of excellent forms.

Scienter. — Recklessly.

Let us next consider the burden in an action for false representations; and we should be careful to distinguish representations from warranty. We read in the books, of actions for false warranty, which when examined will be found to be really nothing more, substantially, than actions for a breach of contract of warranty, for in such actions the *scienter* need not be alleged, nor proved if alleged (2 Chitty, Pl. 679, note *d*). As to the action for false representation, the character of the burden has been already stated; but it may be added that, as to the representation, it must not only be false, but must have been made *with intent* to deceive; the burden is not discharged by showing facts sufficient to raise the presumption of effect from cause, formulated in the doctrine that every man is presumed to intend the necessary consequences of his own acts (Big. Torts, 18, § 3; Big. Fraud, 12). The *intent* must be an active and not merely a passive operation of the mind (Kerr, F. & M. 55, 56; 2 Add. Torts, secs. 1174, 1175; Big. Torts, 18, 19), unless as to facts strictly within knowledge (*ib.* 19), as in cases of agency (*ib.* 19, 20).

But if it be made recklessly, without an honest belief in its truth, or without reasonable grounds for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable grounds for supposing that it was meant to be acted on, and it has been acted on accordingly, such proof will discharge the burden (Kerr, F. & M. 54, note; 2 Smith, L. C. 460; 2 Add. Torts, sec. 1376; Cool. Torts, 497 *et seq.* Underhill (Moak), Torts, 519, Rule 61, and pp. 547, 548, sub-rule 1; Big. L. C. Torts, 22, 23, notes to Pasley *v.* Freeman, *supra*).

The doctrine as to proof of the *scienter* may be thus summarized. It is sufficient to prove: —

1. A false representation known to be false (Big. Fraud, 63; Big. Torts, 18, 23).

2. A false representation believed to be true, but the truth of which the declarant was bound to know (Big. Torts, 23; Big. Fraud, 63).

3. A false representation not believed to be either true or false (*ib.*).

4. A false representation believed to be true, but without any or adequate grounds therefor (*ib.*; 2 Add. Torts, sec. 1177).

As to the matter represented, in order to be actionable, it must be clear and certain (Big. Torts, 13; Big. Fraud, 11), not mere matter of opinion (Big. Torts, 14, 22; Big. Fraud, 13–27), nor of value (Big. Torts, 15; Big. Fraud, 14, 21), or according to some authorities, of what property cost or sold for (Big. Torts, 14, 15; Big. Fraud, 19), or according to a highly respectable court, statements as to the deposits in land (Holbrook *v.* Conner, 60 Me. 578), unless dishonestly made (Big. Fraud, 17; Big. Torts, 16), or as to a future state of facts or to statements looking to the future (Big. Fraud, 11, 12); the matter must be shown to be material (Big. Torts, 17; Big. Fraud, 7); mere matter of law is not sufficient (Big. Torts, *ib.*; Big. Fraud, 8); though to this proposition there may be an exception (Big. Torts, 18; Big. Fraud, 9).

Allegation as to part only of the truth will sustain the action (Big. Torts, 16, 17; Big. Fraud, 6, 7); it may be sufficient in some instances to show representations, though made without knowledge of their falsity, *i.e.*, as if made positively without knowing whether true or false (Big. Torts, 22; Big. Fraud, 61, 62, 63), unless made under a *bona fide* belief based upon presumptively reliable information (Big. Torts, *ib.*).

The next point touching the onus is the ignorance of the plaintiff as to the falsity of the representations.

This must be shown (Big. Torts, 23 (4); Big. Fraud, 4–82).

The plaintiff may show that arts were practised, by which he was thrown off of his guard (Big. Torts, 27; Big. Fraud, 68 *et seq.*), and this may be shown even when the sale is made at buyer's risk (Big. Torts, 28; Big. Fraud, 70, 71).

The next point is that it was made with intent to deceive, or to be acted on by the plaintiff (Big. Torts, 30 (5), 32 (6)), and that he was entitled to act upon it (*ib.* 33).

The rule as to proving the intent that it should be acted upon applies almost exclusively to representations of credit (*ib.* 30).

In sales, it is sufficient to show an intent to deceive, and that is sufficiently proved by showing that the vendor knows that his representation was false (*ib.* 31).

And in some cases it is not necessary to show that the defendant intended to injure the plaintiff, *i.e.*, if a person honestly professing to have authority to act for another had not such authority (*ib.* 31, 32).

Slander of Title. — The burden is upon the plaintiff to show actual malice, and that it has been accompanied with actual specific damage (*ib.* 35).

That the representations were material (*ib.*), made with knowledge of their falsity (*ib.*), with intent to deceive (*ib.*), and that some third person was thereby deceived (*ib.*), and acted upon that particular statement (*ib.*).

And see generally on this title Big. L. C. on Torts, notes to Malachy *v.* Soper, 54 *et seq.*

Trade-Mark. — In order to sustain an action of deceit for a breach of duty in the use of a trade-mark, the plaintiff must show: —

1. That the defendant knew of the existence of the plaintiff's mark when he committed the alleged wrong (Big. Torts, 36; Big. L. C. Torts, 71).

2. That he intended to palm off the goods as the goods of the plaintiff, or to represent that the business which he was conducting was the plaintiff's business, or business for which the plaintiff had a special patronage (*ib.* 36; Big. L. C. Torts, 69).

If the trade-mark used by defendant is not identical, the plaintiff must show that there was such a close resemblance that it was calculated to deceive the public (Big. L. C. Torts, 71).

3. That the public was deceived thereby (*ib.*; Big. L. C. Torts, 69, 71).

DEDICATION.

By this title is meant the acquisition of realty by parol acts or omissions.

It is familiar learning that since feoffments with livery have become obsolete, the title to realty must, in general, be in writing. However, if one is placed in a position where he ought to speak, but remains silent, — much more, if he actively induces a party to change his position to his prejudice, — equity declares that he shall not be heard to assert a title, which would be inconsistent with that induced by such silence or interference. Both instances fall technically under the head of parol or equitable estoppel, but the author conceives that they may be more appropriately handled by a segregation. The first instance is to be discussed under the title of ESTOPPEL.

The latter will now be considered. The illustration of this phase of the doctrine is found in those cases where men owning land covered, or expected to be covered, by a municipal corporate act, cause plats with contemplated streets laid down therein to be advertised to the public, sometimes with portions marked as parks or squares, and one of those plotted lots is purchased, the owner will not be allowed to close the streets or sell off the squares or parks, to the detriment of such purchaser.

The law declares that he has dedicated such property to the public, or at least, by his active efforts, has induced parties reasonably to believe that their purchases would remain intact.

Presumptively the maxim of *cujus est solum, ejus est usque ad cœlum* applies.

General Burden. — A man may presumptively do as he pleases with his own; so that, if a principle is asserted contrariant to this ordinary right of ownership, the burden rests upon the party claiming under the exception, to prove the facts which will bring his case within the principles stated *supra* (Warren *v.* Jacksonville, 15 Ill. 236; Williams *v.*

Wiley, 16 Ind. 362; Warren *v.* City, 22 Iowa, 351; Bumpus *v.* Miller, 4 Mich. 159; Vick *v.* Mayor &c., 1 Miss. 379; Rector *v.* Hartt, 8 Miss. 448; Curtis *v.* Keesler, 14 Barb. 511; Heckerman *v.* Hummel, 19 Pa. 64; Gentleman *v.* Soule, 32 Ill. 271; Bushnell *v.* Scott, 21 Wis. 451; Mayor *v.* Franklin, 12 Ga. 239; Canal Trustees *v.* Havens, 11 Ill. 554; McKee *v.* St. Louis, 17 Mo. 184; Bryant's Lessee *v.* McCandless, 7 Ohio, 135; New Orleans *v.* U. S., 10 Pet. 662; Olcott *v.* Banfill, 4 N. H. 537; Fulton Village *v.* Mehrenfeld, 8 Ohio, 440; State *v.* Trask, 6 Vt. 355; Hall *v.* McLeod, 2 Met. (Ky.) 98; Institute &c. *v.* How, 27 Mo. 211; Oswald *v.* Grenet, 22 Tex. 94; Boyer *v.* State, 16 Ind. 451; N. O. &c. *v.* Moye, 39 Miss. 374; Pope *v.* Town of Union, 18 N. J. Eq. 282; Matter 32nd Street, 19 Wend. 128; Matter 29th Street, 1 Hill, 189; *ib.* 191; Bissell *v.* N. Y. &c. Co., 23 N. Y. 61; Rives *v.* Dudley, 3 Jones (N. C.), Eq. 126; Burthe *v.* Fortier, 15 La. Ann. 9; Dummer *v.* Selectmen &c., 20 N. J. L. 86; Dubuque *v.* Maloney, 9 Iowa, 450; C. C. Court *v.* Newport, 12 B. Mon. 538; Rutherford *v.* Taylor, 38 Mo. 315; Potter *v.* Chapin, 6 Paige, 639; Huber *v.* Gazley, 18 Ohio, 18; Com. *v.* Rush, 14 Pa. 186; Banks *v.* Ogden, 2 Wall. 57; Waugh *v.* Leech, 28 Ill. 488; Doe *v.* President &c., 7 Ind. 641; Haynes *v.* Thomas, *id.* 38; Mankato *v.* Willard, 13 Minn. 13; Leffler *v.* Burlington, 18 Iowa, 361; Lewis *v.* San Antonio, 7 Tex. 288; San Antonio *v.* Lewis, 15 *ib.* 388; M. E. Church *v.* Hoboken, 33 N. J. L. (4 Vr.) 13; Baton Rouge *v.* Bird, 21 La. Ann. 244; Wilson *v.* Sexon, 27 Iowa, 15; Savannah &c. Co. *v.* Shiels, 33 Ga. 601; Hawley *v.* Baltimore, 33 Md. 270; Baker *v.* Johnston, 21 Mich. 319; Fisher *v.* Beard, 32 Iowa, 346; Preston *v.* Navasota, 34 Tex. 684; Robertson *v.* Wellsville, 1 Bond, 81; U. S. *v.* Ill. &c. Co., 2 Biss. 174; Bayard *v.* Hargrove, 45 Ga. 342; Columbus *v.* Dahu, 36 Ind. 330; Evansville *v.* Evans, 37 *ib.* 229; Yost *v.* Leonard, 34 Iowa, 9; *id.* 467; Briel *v.* Natchez, 48 Miss. 423; Wiggins *v.* McCleary, 49 N. Y. 346; Com'nrs *v.* Dayton, 17 Minn. 260; Com'nrs *v.* Lathrop, 9 Kan. 453; Livermore *v.* City, 35 Iowa, 358; Field *v.* Carr, 59 Ill. 198; Town

of Derby *v.* Alling, 40 Conn. 410; Nelson *v.* City of Madison, 3 Biss. 244; Mowry *v.* Providence, 10 R. I. 52; Warren *v.* Grand Haven, 30 Mich. 24; Ruch *v.* City &c., 5 Biss. 95; Hoadley *v.* City, 50 Cal. 265; Carter *v.* City, 4 Oreg. 339; Earle *v.* Mayor &c., 38 N. J. L. 47; Cook *v.* Harris, 61 N. Y. 448; Shanklin *v.* Evansville, 55 Ind. 240; Barney *v.* Mayor &c., 1 Hughes, 118).

Acceptance, etc. — There must be proof of acceptance of the offer (Chicago &c. *v.* Joliet, 79 Ill. 25; Morgan *v.* R. R. Co., 96 U. S. 716; Zearing *v.* Raber, 74 Ill. 409; Bartlett *v.* Bangor, 67 Me. 460; Bridges *v.* Wyckoff, 67 N. Y. 130; Hardy *v.* Memphis, 10 Heisk. 127; Price *v.* Plainfield, 40 N. J. L. 608; Bayliss *v.* Pottawattamie &c., 5 Dill. C. C. 549; Providence &c. *v.* Providence &c., 12 R. I. 348; Skrainka *v.* Allen, 2 Mo. App. 387).

The intention, says one court, must be unmistakably shown (Pierpoint *v.* Harrisville, 9 W. Va. 215).

Explainable. — It may be explained (Daniels *v.* Wilson, 27 Wis. 492).

Feme Covert. — And, it seems, that the defendant taking the burden may show that the supposed dedicator was under coverture at the time of dedication (Todd. *v.* Pittsburg, 19 Ohio, 514).

It need hardly be added that the burden is not satisfied by mere proof of a plotting, laying off of streets, etc., but that some complaining party must have purchased on the faith of such *projet*, or, as usually expressed, there must be evidence of acceptance.

DEFAMATION.

Defamation *per se*. — This consists either of slander, which is oral defamation, or of libel, which is defamation conveyed by corporeal representations, and, they may be conveniently treated together. If the only plea is justification, being in confession and avoidance, according to familiar principles, the burden will devolve upon the defendant, or indeed the same

result will follow from the adoption of any one or more defences in confession and avoidance. But assuming that the general issue is interposed, the burden will be upon the plaintiff to prove, in ordinary cases, where the alleged defamatory words are slanderous *per se* : —

The Publication. — 1. The publication of the defamatory matter (Big. Torts, 40, sec. 3; Cool. Torts, 193 *et seq.*; Cooke, Def. 135 *et seq.*; Underhill (Moak.), Torts, 127, sub-rule 3; Town. Slan. secs. 82, 364; Holt, Libel, 290 *et seq.*; Stark. Slan. 350; 2 Saund. Pl. & Ev. 811; 2 Leigh, N. P. 1393; Abb. Tr. Ev. 659; 2 Add. Torts, sec 1150).

Damages. — 2. The damages, where special damages are alleged, or more than nominal damages are expected (2 Greenl. Ev. secs. 410, 420 (5); 2 Add. Torts, secs. 1158, 1159, 1164, 1165; Town. Slan. secs. 200, 365; Stark. Slan. 321, 402; Cool. Torts, 203; 2 Saund. Pl. & Ev. 811; Abb. Tr. Ev. 668, 669).

The defamatory matter must be proved strictly as laid (2 Greenl. Ev. sec. 414 (2); Town. Slan. sec. 363; Stark. Slan. 350; 2 Saund. Pl. & Ev. 807; Abb. Tr. Ev. 660, 661; 2 Add. Torts, sec. 1159; 2 Sel. N. P. 439).

Thus, if the words are alleged to have been spoken affirmatively, it will not be sufficient to prove that they were spoken interrogatively; nor if alleged as spoken positively as a fact, will it be sufficient to show that they were spoken as a matter of belief; or if alleged to have been spoken in the second person, by words spoken in the third person and the like (2 Sel. N. P. 439; 2 Greenl. Ev. sec. 412 (2); 2 Add. Torts, sec. 1150; Town. Slan. secs. 364, 369; King *v.* Whitley, 7 Jones, 529). It must be shown to have been spoken to a third person (Cooke, Def. 135; Town. Slan. sec. 95; Big. Torts, 40, sec. 3; Stark. Slan. 350; 2 Saund. Pl. & Ev. 811; 2 Leigh, N. P. 1384, 1393; Abb. Tr. Ev. 663).

Colloquium. — 3. The colloquium must be proved by showing that in the opinion of the hearers, or those who saw the libel, that the words or signs, pictures, etc., were intended to point to the plaintiff (Cooke, Def. 145, 146; 2 Add. Torts,

sec. 1152; Big. L. C. Torts, 101; Underhill (Moak), Torts, 122, sub-rule 2; Town. Slan. sec. 385, note 2; Stark. Slan. 290; 2 Saund. Pl. & Ev. 808, 809; 2 Leigh, N. P. 1381).

Innuendo. — 4. And material innuendoes (Cooke, Def. 147; 2 Saund. Pl. & Ev. 811; 2 Leigh, N. P. 1388; but see Town. Slan. sec. 342).

Malice. — In the class of cases we are considering, malice need not be proved — being presumed (Cooke, Def. 148; 2 Add. Torts, sec. 1157; Big. L. C. Torts, 117; Underhill (Moak), Torts, 129, sub-rule 4; 2 Sel. N. P. 439; 2 Greenl. Ev. 418 (4); Town. Slan. sec. 388; Stark. Slan. 401; Cool. Torts, 209; 2 Saund. Pl. & Ev. 808; 2 Leigh, N. P. 1396; Abb. Tr. Ev. 666).

The publication of a libel may be shown by evidence, that the defendant distributed it or maliciously exposed its contents, or read or sang it, or furnished the copy to a newspaper in which it appeared, or if a picture or sign, that he painted it, or exposed it to public view, or may make the like proof as to a symbol (2 Add. Torts, secs. 1147, 1148; Underhill (Moak), Torts, 127 *et seq.*; 2 Sel. N. P. 244; Cooke, Def. 135 *et seq.*; Town. Slan. sec. 108; Stark. Slan. 350, 351; 2 Greenl. Ev. secs. 415, 416; Holt Libel, 293 *et seq.*; 2 Saund. Pl. & Ev. 809 *et seq.*; 2 Leigh, N. P. 1394; Abb. Tr. Ev. 662 *et seq.*).

The falsity of the charge is presumed (2 Greenl. Ev. sec. 414; Cooke, Def. 151; Big. L. C. Torts, 112; Town. Slan. sec. 73; Cool. Torts, 207).

As to what is the proper *criterion* to determine what constitutes defamation *per se*, and what not, there is a conflict of judicial opinion (Big. Torts, 42 *et seq.*; Brooker *v.* Coffin, 5 Johns. 188, reported in Big. L. C. Torts, 77; *ib.* 93–113; Cool. Torts, 195 *et seq.*; Town. Slan. secs. 146, 152 *et seq.*; Pollard *v.* Lyon, 91 U. S. 225; 1 Add. Torts, sec. 8; 2 Add. Torts, secs. 1118–1123; 2 Sel. N. P. 427, 428).

Touching Calling. — If the imputation be against a party touching his calling, the burden is not fulfilled by merely showing that the defamatory matter may possibly injure the

plaintiff, but it must have a *natural tendency* to affect him in that regard (Big. Torts, 46, § 6; Cooke, Def. 152; Underhill (Moak), Torts, 121; Lumby *v.* Allday, reported in Big. L. C. Torts, 87; Abb. Tr. Ev. 659).

It is also necessary, in this class of cases, to prove that at the time of the speaking of the words the plaintiff was in the actual exercise of his calling. It is not necessary to make the same proof as upon a *quo warranto*, unless, indeed, the plaintiff shall assume an uncalled-for measure of proof by his mode of allegation (2 Greenl. Ev. sec. 412 (1); Big. Torts, 48; Cooke, Def. 133, 134; 2 Add. Torts, sec. 1123; Cool. Torts, 201; Town. Slan. sec. 189; 2 Saund. Pl. & Ev. 807; 2 Leigh, N. P. 1395; Abb. Tr. Ev. 659; 2 Sel. N. P. 434).

Foreign Language. — If the words were spoken in a foreign language, the plaintiff must prove that the by-standers understood them (Cooke, Def. 147; Town. Slan. sec. 97; Stark. Slan. 85; 2 Sel. N. P. 245, 434).

Interpretation. — If the words used are susceptible of a harmless meaning, the burden is on the plaintiff to prove that they were used in a libellous sense (2 Add. Torts, sec. 1153; Town. Slan. sec. 142; Stark. Slan. 85; Abb. Tr. Ev. 664).

Where the words bear an equivocal meaning, but are well understood and known in a libellous sense, it is a matter for the jury to determine (2 Add. Torts, sec. 1153; Town. Slan. sec. 133; Big. Torts, 39, § 2; Erwin *v.* Sumrow, 1 Hawks. 472; 2 Sel. N. P. 437; Cool. Torts, 208).

Local Meaning. — If words not actionable according to their common use are defamatory when employed in a particular locality, the plaintiff must aver and prove their acceptation in such locality (Underhill (Moak), Torts, 122, 123 *et seq.*). As to say of a woman that she went to a "goose-house," which, in the locality where used, meant a brothel (Dyer *v.* Morris, 4 Miss. 214). So if it be said of a lawyer *in the North of England* that he is a "daffa-down-dilly," it is slanderous, because the daffodil in that part of England is ambidexter (7 Bac. Abr. tit. Slan. D. 2; Town Slan. sec. 133, n. 2).

Evidence of Defendant. — Under the general issue, as has been said, the burden is upon the plaintiff to make out his case. The defendant may offer rebutting testimony, but the onus is not shifted (Abb. Tr. Ev. 672). By statute in some of the States, and in England by 6 and 7 Vict. ch. 96, sec. 6; 2 Add. Torts, sec. 1172, he is allowed to give evidence tending to prove the truth of the defamatory matter, in mitigation. He may also show the general bad reputation of the plaintiff. Under the plea of justification, the burden shifts to the defendant. The onus is with him to establish the truth of the defamatory matter, and such evidence must go to the substantial truth. He must prove it, at least to the satisfaction of the jury; but whether the same intensity of proof is necessary, as would be required to convict of crime, is a subject of much diversity of judicial thought (Town. Slan. sec. 404 and note 3; Cool. Torts, 207 *et seq.*; 2 Saund. Pl. & Ev. 812; Abb. Tr. Ev. 670, 671; 2 Add. Torts, sec. 1163; see Pt. VI. title INTENSITY OF THE PROOF).

The defendant taking the burden may also show in exoneration that the publication of the alleged defamatory matter was privileged. As to what constitutes privileged communications, see Cool. Torts, 210 *et seq.*; Big. L. C. Torts, 158, 177; Underhill (Moak), Torts, 146, Rule 3 *et seq.*; 2 Leigh, N. P. 1363, sec. VII.; *ib.* 1371, sec. VIII.; 2 Add. Torts, sec. 1091.

DEMAND.

Whenever the law requires a demand to be made, the burden is on the party on whom it was incumbent to make it, to prove it; but proof of demand is not required when there is an absolute refusal to perform (Ætna Ins. Co. *v.* Maguire, 51 Ill. 342; Smith *v.* Schulenberg, 34 Wis. 41; Abels *v.* Glover, 15 La. Ann. 247), or where the defendant could not have complied with the demand (Wilstach *v.* Hawkins, 14 Ind. 341). If a statute requires a written demand, it must be made by leaving a copy (Seem *v.* McLees, 24 Ill. 192); a

demand is not necessary where the party to be charged has no right to expect, and could not have been injured by the omission of it (Randon *v.* Barton, 4 Tex. 289).

DIVORCE.

A Vinculo. — The subject of divorce was, for a long time in England, treated alone in the ecclesiastical courts, who persistently refused a divorce from the bonds of matrimony, except for causes which should have operated to prevent the junction (1 Black. Com. 440;[1] Bish. M. & D. sec. 292).

In the United States, unless some particular court is designated for that purpose, the courts of equity take cognizance of actions for divorce. There is one noteworthy point though, in this connection, namely, that bills for divorce are not allowed to be taken *pro confesso* to the extent, at least, of excusing a less quantum of proof than when *bona fide* litigated (Stew. M. & D. sec. 224). These courts, except where the statute law otherwise directs, apply the principles and practice of the English ecclesiastical courts so far as suited to our condition and the general spirit of our laws (Stew. M. & D. sec. 224).

It is not proposed to discuss the procedure in suits for divorce, as it would not subserve any useful purpose, nor to attempt a recapitulation of the different grounds for divorce and the proof necessary thereunder, as such a discussion would of itself fill quite a volume. A general statement of the cast of the burden is deemed sufficient.

It may be stated preliminarily that such a proceeding is *sui generis*. The rules of evidence, therefore, says an able writer, are not well defined (Stew. M. & D. sec. 345). We

[1] The more accurate technical idea is, that the suit is to declare a nullity of marriage (Shelf. M. & D. 365; Stew. M. & D. sec. 10), but practically it is more convenient to treat the proceeding as for a divorce. For a full and exceedingly interesting historical view of the subject, the reader is referred to McQ. H. & W. Pt. I. chap. 9.

start out with the principle that the party charged with a matrimonial offence must be presumed innocent until proved guilty, and the burden of proof is cast upon the complainant to establish his case by a preponderance of the testimony, and according to high authority, if the commission of a crime is put directly in issue in any proceeding, civil or criminal, it must be proved beyond a reasonable doubt (Steph. Ev. art. 94; Stew. M. & D. sec. 345).[1]

At any rate, the proof must in all cases be full, clear, and satisfactory, and the graver the offence charged, the stricter must be the proof required (Stew. M. & D. 345).[2]

This is the conclusion arrived at by Mr. Stewart in his incomparable little work on Marriage and Divorce. It may be further added preliminarily, that there is no instance of litigation where the rule as to the correspondence of the *allegata* and *probata* is more rigidly enforced (Stew. M. & D. sec. 346).

Marriage. — This may be proved by direct evidence of the celebration, or the contract, as the case may be; it may also, it is said, be proved by cohabitation and repute (Stew. M. & D. secs. 129, 136, 354 (2), 356).

Jurisdiction. — The complainant must also prove all the facts necessary to confer jurisdiction on the court; these are generally prescribed in the local statutes (Stew. M. & D. sec. 355).

The complainant must thereupon proceed to prove the charge made by the complaint. A good cause for divorce must be proved.

Non-Age. — Non-age may be proved as in other cases (Stew. M. & D. sec. 356).

Mental Alienation. — So as to mental alienation (*ib.*).

Impotency. — Impotency is usually proved directly by evidence of the imperfect structure or diseased condition of

[1] For an exhaustive discussion of this subject, see Part VI. title INTENSITY OF THE PROOF.

[2] As a practical question it will be found more dependent upon the characteristics of the judge than on any other consideration. If the verdict does not comport with what he esteems the very right of the litigation, he will set it aside.

the sexual organs, or indirectly, by evidence of the absence of the normal connection after due[1] trial (Stew. M. & D. sec. 356; Cuno *v.* Cuno, L. R. 2 Scotch & Div. App. 300, reported in 6 E. Rep. (Moak) 73).

Consanguinity, etc. — Consanguinity, etc., is proved directly, or as other matters of pedigree (Stew. M. & D. sec. 356).

Adultery. — Adultery must be proved either by direct knowledge or circumstantial evidence, and if by the latter, by certainly clear evidence, so as to almost exclude reasonable doubt[2] (Stew. M. & D. sec. 356).

In some few of the States[3] the proof must not only show adultery, when the action is at the instance of the wife, but habitual, and in some cases, a separation and living in adultery (Browne's Digest, 18, 41 (N. C. 2), 51 (Tex. 3)).

Prior Marriage. — Prior marriage must be proved, not by reputation merely, but by evidence of the fact[4] (Stew. M. & D. sec. 135).

With Negro, etc. — The proof of the form of marriage must be made as above stated, and that the respondent contains the *quantum* of African blood which, by the local statute, renders such marriage void (Stew. M. & D. sec. 75).

Duress. — Duress should be proved as in other contracts (Stew. M. & D. sec. 356).

Fraud. — Fraud the same.

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[1] Whatever Mr. Stewart means by this; regret that the case he cites (Lewis *v.* Hayward, 35 L. J. 105) is not at our command.

[2] The observation as to the discretion of the judge heretofore made is applicable here.

[3] To the credit of our civilization a woeful minority.

Mr. Brown in his digest states as a ground for divorce *a vinculo*, in North Carolina, "adultery coupled with separation." In this he has fallen into error — the proposition is true as concerns the adultery of the husband, but as to the wife, one act, even without separation, is sufficient. So in Texas, if committed within the State, a distinction hard to be accounted for (Browne, Dig. 51). The moral unanimity of the States, in accordance with the civilization and enlightenment of the age, puts husband and wife on the same footing in this regard. (See Browne's Dig. 1–59.)

[4] Where the common law remains intact, proof of marriage by words *in presenti*, or *in futuro* followed by sexual intercourse, is sufficient.

A Mensa et Thoro. — Adultery, besides other grounds to be considered, would authorize a divorce, *a mensa et thoro*, in the ecclesiastical courts. In the United States there are several causes for this kind of divorce, namely: —

Cruelty. — The proof must go to the extent to show as a legal conclusion that the further cohabitation of the parties would be unsafe or unbearable (Stew. M. & D. secs. 272, 356).

Desertion. — Desertion must be shown to be (1) intentional, (2) without any fixed idea of resuming cohabitation, (3) without the other's consent or justifying conduct, and (4) where a statutory period is fixed, to have been continued for that time (Stew. M. & D. secs. 259, 356).

Drunkenness. — Drunkenness must be shown to have been habitual (Stew. M. & D. sec. 356).

Failure to support. — Failure to support must be shown to be wilful, and that the husband had ability (Stew. M. & D. sec. 356).

There are doubtless other causes prescribed by local laws for divorce, but it is not deemed necessary to go into these exceptional cases (Stew. M. & D. secs. 60, 66, 232, 245, 246, 259, 272, 281, 282 *et seq.*, 344).

Defence. — Besides the denial of the act complained of and consistent with such denial, there are six defences to an action for divorce: —

1. Connivance, or the complainant's consent to the acts complained of.

2. Collusion, or the agreement of the parties to make up the case for the purpose of obtaining the divorce.

3. Condonation, or the complainant's forgiveness of the act complained of, unconditionally, or upon conditions performed.

4. Recrimination, or a cause for divorce against the complainant.

5. Lapse of time (Stew. M. & D. sec. 291, Art. VI. p. 281).

6. Prematurely brought. This is a preliminary defence, and is, so far as the author's observations extend, confined

to North Carolina, where it is necessary to annex an affidavit to the petition to the effect that the facts upon which it is predicated, existed, to the knowledge of the petitioner six months before the commencement of the action (Dickinson *v.* Dickinson, 3 Murp. 327; Taylor *v.* Taylor, 1 Jones, 528).

It is apparent that these defences being in confession and avoidance, the burden of proof rests upon the defendants to establish them. The courts, however, lean more or less favorably toward them, and require a greater or less intensity of proof, according to their characteristics. Thus the defences of connivance and collusion, conveying, *ex vi termini*, a disgraceful charge, require a stronger degree of proof than condonation, which is always favored by the courts (Stew. M. & D. secs. 295, 301, 306, 312, 317, 318).

Recrimination must be proved to the same extent as the original charge (Stew. M. & D. sec. 317).

Vacating Decree. — It may not be inappropriate to add, that if a decree be obtained by fraud, it binds until set aside upon a direct proceeding to that end. In such action the burden of proof is upon the petitioner, and in all cases great caution should be observed (Stew. M. & D. sec. 423).

DOMICIL.

Whenever it is necessary to allege a domicil, the party so alleging must prove it.

There are three kinds of domicil: —

1. The domicil of origin or birth.
2. That by operation of law.
3. That acquired by choice (Phill. Dom. 25, XXXIII.).

Birth. — The onus as to this, is satisfied by proof of the party's birth at the place alleged (*ib.* XXXVI.). This raises a presumption.

Necessity. — The burden on this head requires proof: —

1. Either that the person whose domicil is in question was under the legal control of another, and that such other

person's domicil is that contended for as to the person *non sui juris* (*ib.* 26, XXXVII.).

2. Or that in consequence of his relation to the State,[1] the party whose domicil is in question had a domicil imposed on him by the State, either (1) by virtue of the employment or office he held, or (2) by virtue of some punishment inflicted upon him (*ib.* 26).

Under the first class may be reckoned the domicil of: —

1. The wife.
2. The minor, (1) legitimate or (2) illegitimate.
3. The student.
4. The servant.

Under the latter may be reckoned: —

1. The officer employed by the State, whether civil or military.
2. The prisoner.
3. The exile.

The practical questions arise as to the domicil of origin and choice.

Upon proof of the place of nativity, a presumption of domicil of origin is shown, and that continues by legal presumption until one of necessity or choice has superseded it (*ib.* 101, LXIX.; Guier *v.* O'Daniel, 1 Binn. 349, note).

Wife. — The maxim of the Roman law and of the continental civil law as well as of England and in this country is, that as the wife takes the rank, so does she the domicil of her husband, and the widow retains it after the death of her husband (Phill. Dom. 27, XL.). So that, when proof of the husband's domicil is shown, such proof presumptively establishes the domicil of the wife. There are exceptions (*ib.* 29 *et seq.*).

Minor. — So, if it be shown that the party whose domicil is in question is a minor, it is determined, in general, by that of the parent or guardian, or by the latter's will, perhaps[2]

[1] Used in its broadest sense.

[2] There can be little doubt of the power of the party *in loco parentis* to change the domicil, if the rights of third persons would not be affected thereby.

(*ib.* chap. VII.). The acquisition of domicil by a minor may be shown by proof of marriage, according, at least, to the civil law (*ib.* 50, XC.). As to an illegitimate minor, the domicil of the mother prevails (*ib.* 53, XCVII.).

Lunatic. — The lunatic stands upon a similar footing with the minor in this regard (*ib.* 54, 55, XCIX.).

Student. — A student retains the domicil of his parents, at least, until after his majority, when a continued residence at the place where he is prosecuting his studies might, if aided by circumstances evincing an adoption of it as his home, so constitute it (*ib.* 57, XCVIII.; Putnam *v.* Johnson, 10 Mass. 492).

Servant. — In the case of a servant, according to an eminent author on the civil law, the presumption founded on experience is, that the domestic servant has abandoned his native domicil without any intention of returning to it, and has therefore acquired another domicil, which must be the domicil of the master with whom he is living (Voet. 1, tom. V. § 96), but this doctrine cannot apply to our country. The servant here is one in name only, and is as much *sui juris* as his master.

Public Officer. — In the case of a public officer, there is a distinction between those conferred for life, or during good behavior, and where limited for a term of years. In the former the officer acquires a domicil in the place to which he is accredited (Phill. Dom. 61, CXIII.); if for a temporary period or in itself revocable, the domicil possessed at appointment remains (*ib.* 62 *et seq.*).

Ambassador. — Public ambassadors do not lose their domicil appertaining to them when appointed (*ib.* 79, CXXXII. *et seq.*).

Ecclesiastic. — In the case of the ecclesiastic, his domicil is proved by showing where his functions lay (*ib.* 86, CXLIV. *et seq.*).

Prisoner. — The domicil of a prisoner is not changed by his imprisonment (*ib.* 8, IX.).

Exile. — In case of an exile, it would seem that although

not nationalized, his residence in the United States would, presumptively at least, constitute a domicil. The rule is perhaps otherwise in Europe owing to their strict notions touching denaturalization (*ib.* 88, X.). Whereas the case of the emigrant may be stated upon a different footing, as he is in the country to which he flees, presumptively, temporarily (*ib.* 90, XI.).[1]

The doctrine has been stated thus in detail, because being taken mainly from the civil law, it is so sensible that the question of the burden of proof can be easily deduced. It may be thus summarized: —

1. Domicil of origin is shown by proof of nativity.

2. Of necessity, by showing the domicil of those who had the charge of some person *non sui juris*.

3. Of choice, by a change of residence by one *sui juris*, with an intention to make such residence his home.

4. The burden as to prisoners, officers, emigrants, is easily discoverable.

The burden of proof to show a change of domicil is, of course, upon the party alleging it (Mitchell *v.* U. S., 21 Wall. 350; Desmare *v.* U. S., 93 U. S. 605).

DOMINANT TENEMENTS OR SERVITUDES.

This title, which is borrowed from the civil law, will be discussed under three divisions, namely: —

I. Lateral support.
II. Party-walls.
III. Subjacent support.

[1] The word *emigrant* is used in the books in a widely divergent sense from its popular use, as meaning one who had fled from his own country to avoid the shock of some sudden outbreak or *emeute*.

In common parlance we mean one who is voluntarily seeking his fortunes in a new land. Of course the doctrine of the books is inapplicable to such.

I. Lateral Support.

The right to lateral support to land is incident to, and flows from its ownership, and is based upon the two correlative maxims: *cujus est solum ejus est usque ad cœlum* and *sic utere tuo ut alienum non lædas.* It is sometimes termed a natural right. It does not extend to new burdens placed upon it, *qua* such erections. When claimed for them, it must be as an easement, but it is confined to the land (as generally expressed) *in its natural state*, though the more accurate definition is to the ground itself without reference to any structures erected thereon, as the right is neither enhanced nor diminished by reason of such burdens (Wash. Eas. chap. 4, sec. 1; 1 Thomp. Neg. 274 *et seq.;* Big. Torts, 220, § 2; 1 Add. Torts, secs. 79, 84, 86, 125, 165; 2 Wash. R. P. (4th ed.) 300, 324–366; High, Inj. sec. 548; 2 Greenl. Ev. sec. 467; 1 Leigh, N. P. 562; Phear, R. W. 3, 4; Big. L. C. Torts, 527, 548 in note; Underhill (Moak), Torts, 393, 410, 414, 419, 423; Bonomi *v.* Backhouse, El. B. & E. 622 (96 E. C. L. R.); S. C., 9 H. of L. 503; Thomas &c. Co. *v.* Allentown &c. Co., 28 N. J. Eq. 77, note; Gilmore *v.* Driscoll, 122 Mass. 199; Gale, Eas. 216; Wood, Nuis. chap. 5). The right does not depend upon grant or prescription (see Shirl. L. C. 286, in note to Smith *v.* Thackerah; Panton *v.* Holland, 17 John. 92, reported in Law. L. C. 220, and 1 Thomp. Neg. 249).

General Burden. — Upon the general issue at common law the burden rests upon the party claiming such right to prove: 1, the possession; 2, the fact of excavation; 3, the resultant damages (1 Add. Torts, sec. 101; Underhill (Moak), Torts, 419, Rule 48 and notes; *ib.* 422, Rule 49 and notes).

Possession. — This is sufficient to maintain the action, and the onus is the same as in trespass to realty (1 Add. Torts, sec. 101); if the action be brought by a reversioner, he must show title (*ib.*).

Excavation. — The same proof is required on this point as in trespass.

Damages. — The burden requires proof of some appreciable damage (Underhill (Moak), Torts, 419, Rule 48; Big. L. C. Torts, 553; Smith *v.* Thackerah, L. R. 1 C. P. 564, reported in Shirley, L. C. 286 (2d ed.)). If it be shown that the damage done to the dominant land is so considerable that an action would lie, had no buildings been erected, damages may be recovered for injury sustained by recently erected buildings (1 Thomp. Neg. 276; Shirl. L. C. 287; Brown *v.* Robbins, 4 H. & N. 186).

Houses. — The foregoing remarks are predicated upon a withdrawal of the support to the soil itself, without reference to a superstructure. When a building is erected near the edge of the land, and the adjacent proprietor digs away the soil of his land next thereto, and the building alone is injured, the proprietor of the building, according to the English authorities, has no cause of action, unless he further proves a grant, or that the building was erected twenty years prior to the injury (Broom, L. M. 196; 1 Add. Torts, sec. 84; 1 Smith, L. C., notes to Ashby *v.* White, 131 *c*, 131 *d*; 1 Crabb. R. P. 416, 417, § 500; Underhill (Moak), Torts, 419, Rule 49 and notes, and p. 427; Gale & W. Eas. (4th ed.) 336; Wash. Eas. (3d ed.) 542, 544, 547, 548; Big. L. C. Torts, 551, 552; 1 Thomp. Neg. 275; 2 Greenl. Ev. sec. 467; Phear, R. W. 4; 1 Smith, L. C. (5th Am. ed.) 363; Thurston *v.* Hancock, 12 Mass. 220, reported in Big. L. C. Torts, 527; Gilmore *v.* Driscoll, 122 Mass. 199, reported in 1 Thomp. Neg. 254; Smith *v.* Thackerah, Shirl. L. C. 286).

Mr. Wood criticizes the doctrine generally expressed, that the right to support is restricted to the land in its natural state, and contends, that in cases of erection, the burden is on the defendant to establish the fact that the injury would not have resulted except for such erection (Wood, Nuis. sec. 178).

The right to lateral support to contiguous buildings is not a right inherent in property, but is dependent upon grant, reservation, or prescription (Big. Torts. 223; Big. L. C. Torts, 527, 548 *et seq.*, 552; Wash. Eas. 429, 430; Gale &

W. Eas. (4th ed.) 336; Cool. Torts, 594, 595; Underhill (Moak), Torts, 422, Rule 49; 1 Add. Torts, chaps. 2 & 3, secs. 79, 84, 86, 125, 165; Shirl. L. C. 286; 1 Thomp. Neg. 275; Thomas &c. Co. *v.* Allentown &c. Co., 28 N. J. Eq. 77, note; Bonomi *v.* Backhouse, El. B. & El. 622; S. C., 9 H. of L. C. 503).

Buildings erected by same Owner. — If such buildings require mutual support, and the same be withdrawn or diminished, whereby the other is injured, the plaintiff must, if the original owner of both, show, that he conveyed the building attempted to be withdrawn to the defendant, or to those under whom he claims, and that it was at that time built up against the superstructure injured (Big. Torts, 223; Big. L. C. Torts, 553, 554; 1 Add. Torts, sec. 125; Solomon *v.* Vinters Co., 4 H. & N. 585).

The text-books lay it down, that thereupon the law presumes a reservation for support to the adjacent building (Big. Torts, 223; Big. L. C. Torts, 553; Underhill (Moak), Torts, 428 (3); 1 Add. Torts, sec. 125; Richards *v.* Rose, 9 Ex. 218), and that such right passes to a privy in estate (Big. Torts, 224; Big. L. C. Torts, 553).

But it seems that the burden is further enhanced by requiring proof of such an apparent sign of servitude as would indicate its existence to a person reasonably familiar with the subject upon inspection of the premises (Butterworth *v.* Crawford, 46 N. Y. 349; Scott *v.* Beutel, 23 Gratt. 1; but see Watts *v.* Kelson, L. R. 6 Ch. App. 166; Geoghegan *v.* Fegan, Irish Rep. 6. C. L. 139; Hamel *v.* Griffith, 49 How. (Pr.) 305). Perhaps the more accurate term would be, that the defendant would be guilty of a breach of duty (Richards *v.* Rose, 9 Exch. 218 (W. H. & G.)).

When the owner erects two connected or even adjoining buildings, what is the difference in principle between such act and filling up a valley or depression by hauling and dumping other earth upon it — in which case the ordinary right for lateral support upon a sale of one-half of such land could not be gainsaid? What difference is there in legal

effect between such addition and that of brick and mortar under the maxim of *quicquid plantatur solo, solo cedit?*

These remarks are suggested to practitioners in those localities where the point is *res integra.*

Buildings erected by Different Owners. — Where adjoining buildings have been erected by different owners, the right to support can only be acquired by grant or prescription, and in an action for an injury occasioned by the withdrawal of support, the burden is imposed upon the plaintiff, to prove either a grant or such length of occupation as, under the doctrine of prescription, would raise the presumption of a grant (Big. Torts, 224; Hide *v.* Thornborough, 2 C. & K. 250; Peyton *v.* London, 9 B. & C. 725, 736;[1] see, however, Solomon *v.* Vinters Co., 4 H. & N. 585, and Angus *v.* Dalton, L. R. 4 Q. B. Div. 162, 170; 6 App. Cas. 740).

II. Party-Walls.

General Burden. — The burden does not necessarily require proof of title, but that a wall was jointly built by plaintiff and defendant on the dividing line of their properties, and that in consequence of some act of the defendant, done in or about the wall, injury has been occasioned to the plaintiff (Big. Torts, 225 226; Big. L. C. Torts, 555, 556; Cool. Torts, 372, 373, 374; Underhill (Moak), Torts, 387, sub-rule and notes; 1 Add. Torts, sec. 415).

Of course, if the plaintiff and defendant were not the parties to the original contract for the erection of the party-wall, the plaintiff must show a derivative right to sue upon such contract, and that defendant is privy in estate with the other original contracting party.

III. Subjacent Support.

When the indefinite extent of ownership, as expressed by the maxim of *cujus est solum ejus est usque ad cœlum,* is

[1] Addison, eiting this case, holds that sueh right of support cannot be gained by prescription (1 Add. Torts, secs. 125, 165).

severed by a conveyance of a freehold interest or lease of the surface, reserving the substratum, or *vice versa*, the owner of the surface soil has a right to support of his soil as against underground excavations (Big. Torts, 227, sec. 3; Big. L. C. Torts, 556, 557; Cool. Torts, 595; Underhill (Moak), Torts, 353; 1 Add. Torts, sec. 85; Phear, R. W. 4–6; Wood, Nuis. secs. 194, 207).

General Burden. — If the plaintiff was in actual possession when the excavation took place (or constructively where constructive possession is sufficient to maintain trespass by the *lex fori*), proof of the acts of apparent trespass, in the excavation or tunnelling, would satisfy the burden so as to make out a *prima facie* case (1 Add. Torts, sec. 197), and devolve the burden of proof upon the defendant without showing any sinking of the surface earth; but, if the defendant has a valid right to the substratum, upon making such proof, the onus would be shifted to the plaintiff to make proof that such excavation had caused an injury to the surface soil, *ex. gr.*, by causing it to sink or otherwise.

There is said to be a distinction between the right of the owners of buildings to subjacent support and lateral support. In the case of the former, the right is clear, however recently before the title of the lower owner began and excavation made, the building was erected; whereas, with regard to the latter, we have seen that, in general, the building must have been "ancient"[1] (Big. Torts, 228; Big. L. C. Torts, 556; Richards *v.* Jenkins, 17 W. R. 30; S. C., 18 L. T. (N. S.) 437). Mr. Wood places both in the same category (Wood, Nuis. secs. 194, 201, 209), so does Judge Thompson (1 Thomp. Neg. 281).[2]

[1] Addison lays down the reverse of this proposition, but fails to cite the case of Richards *v.* Jenkins (1 Add. Torts, sec. 85).

[2] Judge Thompson only cites the case of Rogers *v.* Taylor, 2 H. & N. 828. It is true that, in that case, a prescription for twenty years was set up, but the court expressly reserve the question whether such prescription was necessary.

The Defence.

The following remarks are common to all the subjects discussed under this title.

General Burden. — Besides the defences common to all actions, the defendant may show that he had acquired a right to remove the support by: —

Grant. — 1. Grant (Big. Torts, 220; Big. L. C. Torts, 549; 1 Add. Torts, sec. 86; Rowbotham *v.* Wilson, 8 H. L. Cas. 348; S. C., 6 Jur. (N. S.) 965; 30 L. J. Q. B. 49).

License. — 2. Or by permission (Big. Torts, 221; 1 Add. Torts, sec. 132).

Defective Construction. — 3. Or in case of building, that the walls were so improperly constructed, that they gave way on that account, and not in consequence of the excavation (Big. Torts, 222; Big. L. C. Torts, 552; Cool. Torts, 373, 374; Hunt *v.* Peake, 29 Law J. (Ch.) 787; Dodd *v.* Holme, 1 Ad. & E. 493; Richart *v.* Scott, 7 Watts, 460).

Tenants in Common. — 4. Or in case of party-walls, that defendant and plaintiff are tenants in common, and that the pulling down of the wall, etc., was done for the purpose of rebuilding (Wash. Eas. 588 (3d ed.); Big. Torts, 227; 1 Add. Torts, sec. 415; Steadman *v.* Smith, 8 El. & B. 1).

Heavy Structures. — In defence to an action for subjacent support, he may show that the building erected thereon was unnecessarily weighty for the ordinary uses to which the property might be dedicated (Big. Torts, 229), or that the building fell without the act of the defendant (Big. Torts, 229, note 1).

Notice. — If the gravamen be the negligent conducting of the excavation, upon proof thereof, the defendant must show that he gave notice to shore up or protect (1 Thomp. Neg. 276, 277).

Contractor. — In those cases where the plaintiff has not a *right* to support, but the gravamen of his action is that the excavation was done negligently, the defendant may show that he let out the work to a competent, independent con-

tractor of good repute (1 Thomp. Neg. 278, § 3; Gayford *v.* Nicholls, 9 Exch. 702 (W. H. & G.); see generally Article in 2 C. L. J. 655).

DOWER.

Upon the assumption that by the pleading the right of dower is denied, there are several points necessary to be proved to entitle a widow to dower.

Marriage. — She must first establish the marriage, and this, besides direct proof by eye-witnesses and the record, may be done by reputation in the family, or by the conduct of the alleged husband and wife, and the conduct of the community toward them by way of recognition of such relation, the joining in deeds as such, baptism of their children, and acknowledgment of their legitimacy (2 Scrib. Dow. 205 *et seq.*; Park, Dow. chap. II.).[1]

In this connection it may become important, with respect to liens, etc., to prove the exact time of the contracting of the relation (2 Scrib.; *ib.* 211).

Seizin. — The demandant must also prove a seizin of an estate of inheritance in her husband. Besides fuller proof, she may discharge the burden, in this regard, by showing that her husband was in possession during the coveture, claiming an estate of inheritance, or that he was in receipt of the rents from a person in possession (2 Scrib. Dow. 213; Park, Dow. chap. III.); she is not required to prove a seizin in deed, but only a seizin in law (2 Black. Com. 131; Alex. Br. Stats. 4; 1 Greenl. Cruise, R. P. Tit. 6, chap. 1, sec. 19; Park, Dow. 31). Seizin for a transitory instant only, when the same act which gives the husband the estate, conveys it also out of him, is not sufficient (2 Black. Com. 132; 1 Greenl. Cruise, R. P. Tit. 6, chap. 1, sec. 24; Park, Dow. 42, 43; Alex. Br. Stats. 4); but if the title abide in him for a

[1] It is laid down in Cruise, that the fact of marriage cannot be tried by jury, but only by the bishop's certificate upon the plea of *ne unques accouplé in loyal matrimony* (1 Greenl. Cruise, R. P. Tit. 6, chap. 1, sec. 14).

single moment, it seems that the wife would be entitled to dower (*ib.*).

Under the doctrine of trusts, the widow of the *cestui que trust* was not entitled to dower, which Mr. Adams terms an anomaly (Adams, Eq. 153; Lamb, Dow. 33; 1 Greenl. Cruise, Tit. 6, chap. 2, secs. 24, 25; Park, Dow. 125, 126). This has doubtless been remedied in some of the States by statute (Lamb, Dow. 45 *et seq.;* Alex. Br. Stats. 5). And under the North Carolina statutes, allowing dower in equitable estates, it is held that she is entitled to it when the husband claimed under articles, and had not paid the purchase-money — of course, subject to vendors' rights (Thompson *v.* Thompson, 1 Jones, 430; see Alex. Br. Stats. 6 *et seq.*). The estate, however, of the husband must have been such, that any issue which the wife *might have had* might by possibility have been heir thereto (2 Black. Com. 131; Booth, R. A. 170).

There is another subtle qualification of the widow's right, which is: that the husband must not only be seized, but seized *simul et semel* (2 Crabb. R. P. 158, § 1168; Park, Dow. 56; 4 Kent, Com. 39; 1 Greenl. Cruise, R. P. Tit. 6, chap. 2, sec. 17; 1 Scrib. Dow. 231, par. 8), so that, if land be conveyed to the husband to such uses as he shall appoint, and in default of appointment, to him for life, and on the determination of his estate, in his lifetime, to a trustee and his heirs for the life of the husband, in trust for him, and on the determination of that estate, to the husband and his heirs, the widow would be barred of dower (Whart. Conv. 58, 63; Cornish, P. D. 32, Precedent II.; Fearne, Rem. 347, note; Park, Dow. 85).[1]

[1] The formula observed in deeds drawn to bar dower was this: —

To such uses, upon such trusts, and to and for such ends, intents, and purposes as the said purchaser shall by any deed or deeds, with or without power of revocation, from time to time direct, limit or appoint; and for default of and until such direction, limitation, or appointment, and so far as every or any such direction, limitation, or appointment, if incomplete, shall not extend, to the use of said purchaser and his assigns during his life, without impeachment of waste; and from and after the determination of that

Death. — If death is denied, this fact is an essential ingredient in making a widow's claim for dower. There is a presumption in favor of the continuance of life, and the onus is with the demandant to prove the death of her husband (1 Scrib. Dow. 649; Park, Dow. chap. XII.).

This fact may be proved by eye-witnesses, by documentary evidence, etc.: illustrations will be found in Scribner.

The English and American courts differ as to the effect of letters testamentary and of administration, and, the English temporal and ecclesiastical courts, as between themselves. The English temporal courts reject such evidence (Hubb. Ev. Suc. 160), whereas, the ecclesiastical courts and American courts generally receive it (1 Greenl. Ev. secs. 41, 550; 2 *ib.* secs. 278 *d*, 355).

His death may be proved by family reputation, though, in order to admit such evidence, it ought to be preliminarily shown that diligent and ineffectual search had been made for documentary evidence.

The fact may be also shown by his absence for, at least, seven years, unheard of during that period.

However, the formation of this presumption thus raised by silent absence, may be accelerated by proof of age, state of health, mode of life, etc.

There are besides the defences, involved in the principles above stated, others that are applicable to an action for dower *unde nihil habet*, or analogous remedies: —

Title Paramount. — Thus it may be shown that the fee has been evicted by title paramount (1 Greenl. Cruise, R. P. Tit. 6, chap. 2, sec. 26).

Remitter. — Or that the seizin of the husband was wrongful,

estate by forfeiture or otherwise, in his lifetime, to the use of said A. B. (trustee), and his heirs, during the life of said purchaser, in trust for said purchaser and his assigns during his life, and to prevent any wife of the said purchaser from being entitled to her dower out of or in the premises or any part thereof, and immediately after the determination of the estate hereinbefore limited to the said A. B. (trustee) and his heirs during the life of the said purchaser, to the use of the said purchaser, his heirs and assigns forever.

and the heir remitted (*ib.*). This is only applicable to estates tail discontinued.

Breach of Condition. — Or that the grantor has entered for breach of condition (*ib.*; Park, Dow. 153).

Base Fees. — Or that the husband was only seized of a base or qualified fee, and that the estate has ceased, by the terms of the deed creating it (1 Greenl. Cr. *ib.*).

Elopement. — Or, as the statute West. 2, chap. 34, has been generally re-enacted, at least in the older States (Alex. Br. Stats. 138; Mart. Coll. Br. Stats. 33; 1 Greenl. Cruise, R. P. Tit. 6, chap. 4, sec. 4, note 2; 2 Scrib. Dow. 535),[1] the tenant may show that the demandant eloped from the husband, and lived with an adulterer. The weight of authority is, that the eloping must be shown to have been voluntary (2 Scrib. Dow. chap. 18; able note to Alex. Br. Stats. 138; Park, Dow. 223 *et seq.*; 1 Greenl. Cruise, R. P. Tit. 6, chap. 4, sec. 4 *et seq.*), or that, although taken away against her will, she afterwards consented and remained with her adulterer (*ib.*).[2]

It has been held in England that adultery was a bar to dower, although committed after the husband and wife had separated by mutual consent (Hetherington *v.* Graham, 6 Bing. (19 E. C. L. R.) 135).

Detention of Title-Deeds. — The tenant must show that the charters to the particular land are withheld by the demandant (1 Greenl. Cruise, R. P. Tit. 6, chap. 4, sec. 11; Park, Dow. 294), but the defence itself can only be asserted by the heir claiming by descent, not purchase (1 Greenl. Cr. *ib.*; 2 Scrib. Dow. 102).

Conveyance with Privy Examination. — The tenant may also show that the demandant joined her husband in a deed for the same lands containing a release of her dower, and was thereto privily examined according to the mode pointed out

[1] Mr. Scribner states that the provisions of this statue have been recognized as a part of the American common law in some of the States where it was not re-enacted (2 Scrib. Dow. 535).

[2] *Sponte virum mulier fugiens, et adultera facta,*
Dote suâ careat, nisi sponsi sponti retracta (1 Inst. 32 *b*).

by the local law[1] (1 Greenl. Cruise, R. P. Tit. 6, chap. 4, sec. 14; 2 Scrib. Dow. 288 *et seq.*).[2]

Devise. — While a devise ordinarily imports a bounty, and does not operate to bar dower, yet, if the devise was expressed to be in satisfaction of dower, the tenant may show that the demandant accepted it with knowledge of the terms by which it was conveyed, and thus elected to relinquish her dower (1 Greenl. Cruise, R. P. Tit. 6, chap. 4, sec. 24).[3]

Jointure. — It is believed that the English statute of jointure 27 Hen. 8, chap. X. secs. 6, 7, 8, and 9, has been declared in force in several of the States (Alex. Br. Stats. 292; Mart. Coll. Br. Stats. 208).

In order to sustain this defence, as against a claim for dower, it behooves the tenant to make the following proof: —

1. Her jointure by the first limitation is to take effect for her life in possession or profit presently upon the death of her husband.

So that, if the husband convey to the use of himself for life, then to the use of A for life, and then to the use of the wife for life in satisfaction of her dower, although A should die during the husband's life, and the widow should enter after her husband's death, this is no bar of dower, but the widow shall have dower also.

2. It must be for the term of her own life, or a greater estate, for an estate to her for the life of another or others,

[1] This, in England, was formerly effected by a fine or common recovery; but provision is made in all the States for effectuating this object by deed and privy examination (Swan's Rev. chap. 28; 2 Scrib. Dow. 283; Park, Dow. 192).

[2] There is much diversity in the States as to whether the wife should join or execute simultaneously the deed releasing dower, and as to the formalities requisite on these points, the local practitioner will inform himself from the local statutes and decisions.

[3] In many of the States statutes have been passed, which, by requiring widows to dissent from, or be bound by, the terms of the husband's will shift the burden of proof to the demandant, to prove that she did dissent as the law directs (Alex. Br. Stats. 306 *et seq.*); other provisions have also been enacted (1 Greenl. Cruise, R. P. Tit. 6, chap. 4, sec. 24, note 1).

or for a thousand years, though expressly in satisfaction of dower, will be no jointure within the statute.

3. It must be made to herself, and to no other for her — for an estate in trust is no bar to dower.

4. It must be made in satisfaction of her whole dower, and not a part of it.

5. It must be expressed to be in satisfaction of her dower, and therefore a devise, unless it be so expressed in the will, is no bar to dower.

6. It must be made before marriage (Alex. Br. Stats. 301; 1 Greenl. Cruise, R. P. Tit. 6, chap. 7, *passim*).

It is apprehended that this statute has been greatly modified in the different States, and it would uselessly consume space to recapitulate the various departures (see 1 Greenl. Cruise, R. P. Tit. 6, chap. 7, sec 38, note 1).

Previous Assignment. — The tenant may also show a previous assignment of dower in other lands equal to dower in the whole (Booth, R. A. 169; 2 Scrib. Dow. 101).

Too Young. — The tenant may also show that the demandant was not nine years old at the time of the death of her husband (Booth, 169; Park, Dow. 18, 19).

Disseizin. — He may also show that the demandant entered and disseized the tenant before her writ brought and still is seized by disseizin (Booth, 170).

Attainder. — The attainder of the husband for treason, and of the wife for treason or felony, was a bar to dower by statute 5 and 6 Ed. 6, and the common law (Park, Dow. 217, 222), but as to the husband in this country, the Constitution of the United States and most, if not all, of the several States restricts forfeitures on attainder to the life of the convict[1] (Const. U. S. Art. 3, sec. 3, cl. 2), so that this defence is practically confined to the attainder of the wife, and operates to *divest*, not, technically, to *prevent* dower.

[1] It would be highly technical to hold that because the property of the convicted husband is forfeited during his life, that he, in consequence, did not even have a legal seizin sufficient to support dower. It should never be forgotten that life, liberty, and dower are the three favorites of the common law.

Joint Tenancy. — At common law there could be no dower in an estate held in joint tenancy (Booth, R. A. 170); but it is apprehended that in nearly all of the States this rule has been abrogated by the abolition of the *jus accrescendi* (1 Greenl. Cruise, R. P. Tit. 18, chap. 1, sec. 2, note 1; Park, Dow. 38).

Divorce. — In England, only a divorce *a vinculo*, granted *by a court*, or more accurately speaking, a sentence of nullity, operates as a bar to dower; unless, in point of law, it be a sentence of nullity, dower was not barred (Park, Dow. 19, 20). It is sometimes very loosely put, that a divorce *a vinculo* bars dower (Bissett, Est. for Life, 70; Roll. Abr. 680, pl. 13), but the authorities are all the other way (Bissett, Est. for Life, 70). McQueen expressly states that, in parliamentary divorces *a vinculo* for adultery, there is a property clause inserted, and that, but for such property clause, the wife would be entitled to dower (McQ. H. & W. Pt. I., 210, sec. II.).

As to the law of this country, there is a great discrepancy of judicial thought; in some States the matter is regulated by statute.

The subject is fully discussed by Mr. Scribner, without, however (which is to be regretted), any opinion advanced by the author (2 Scrib. Dow. 551–558). Mr. Bishop is decidedly of opinion, that she is barred by a divorce *a vinculo* (Bishop, M. & D. (3d ed.) sec. 661).

Of like opinion is Mr. Stewart (Stew. M. & D. sec. 446); so Professor Greenleaf (1 Greenl. Cruise, R. P. Tit. 6, chap. 1, sec. 16, note 1); and Mr. Schouler (D. R. sec. 221 (3d ed.)).

With great respect for the views of such eminent writers, the author is, however, compelled to dissent therefrom.

In many of the decisions the criterion adopted is, that the demandant must answer the character of wife at the time of the husband's death (2 Scrib. Dow. 553, 554), but we have seen that McQueen lays down the contrary doctrine with regard to parliamentary divorces.

All the writers agree that, upon marriage and seizin,

the wife becomes inchoately entitled to dower (2 Scrib. Dow. 551).

It is one of the favorites of the law; why is it not a vested estate?

No title to the land can be passed without a release of it; it comes within a covenant against incumbrances (2 Scrib. Dow. 3); why, then, is it not a vested right, — a right *in presenti* to be enjoyed *in futuro?*

It was so held, as to the inchoate rights of the husband, by the Court of Appeals of New York (Westervelt *v.* Gregg, 2 Kern, 202), and that inchoate dower comes within that provision permeating all of the constitutions, that no person shall be deprived of his property but by the law of the land (*ib.;* 2 Scrib. Dow. 22, 551).

Would not the position that a decree dissolving a status should have the effect, *proprio vigore*, to divest property rights, present an unparalleled anomaly?

And, in the case of the God-given wife, the innocent victim of a debased husband, seeking, mayhap, after fruitless efforts to reform him, and a thousand condonations, a divorce from such bonds, and obtaining it, would not the law instead of presenting an instance of "the perfection of reason," be as obnoxious as any that DRACO ever made, if it were to allow the separation so justly prayed for to have the effect of a deprivation of her marital right of dower?

We have seen that in parliamentary divorces for adultery, a clause is always inserted precluding the wife from claiming dower, and Mr. McQueen states that the apparent intention of such clause is to deprive the divorced wife of the rights which (but for the act) would accrue to her as the widow out of her husband's property (McQ. H. & W. Pt. 1, p. 211). If the author be in error, however, as to this point, the tenant has the onus to prove the divorce, in like manner as other records are proved.

Indeed, in all the defences above stated the onus is with the tenant.

Reply to Elopement. — Upon proof of an elopement, as stated

above, the demandant, taking the onus, may show a reconciliation (2 Scrib. Dow. 532, 534, 539; Alex. Br. Stats. 141).

It must be shown to have been voluntary and without coercion on the husband, and it will be presumed from sharing the same bed (Alex. Br. Stats. 141; 1 Greenl. Cruise, R. P. Tit. 6, chap. 4, secs. 9, 10).

DURESS.

The books specify two particulars under this defence: —

Per Minas. — *Firstly.* Duress *per minas*, and under this plea the burden rests upon the party asserting it to prove that the act complained of was procured to be done by threats so severe and violent, as that they would be sufficient to intimidate a man of moderate firmness (1 Sel. N. P. 455; 1 Saund. Pl. & Ev. 445; 2 Greenl. Ev. sec. 301; Abb. Tr. Ev. 788).

By Imprisonment. — *Secondly.* Under the defence in this form, the burden is upon the party pleading it, (1) to show that he was unlawfully restrained of his liberty, until he would execute the instrument to which the defence is addressed (2 Greenl. Ev. sec. 302; 1 Saund. Pl. & Ev. 445), or (2) that while under lawful arrest, unlawful force, constraint, or severity, was inflicted upon him, by reason of which the instrument was executed (*ib.*).

EASEMENTS.

Essential Elements. — The essential elements of easements are: —

1. That they are incorporeal.
2. That they are imposed on corporeal real property.
3. That they confer no right to a participation in the profits arising from such property.
4. That they are imposed for the benefit of such property.

5. That there must be two distinct tenements:[1] the dominant, to which the right belongs; and the servient, upon which the obligation rests (Wash. Eas. 3; Gale & Whatley, Eas. 3–7, 12, 38, 52, 62).

General Burden. — In general the party claiming it must show user of the right claimed, adversely, and, as of right: —

1. For twenty years,
2. or by grant,
3. or partly by grant and partly by prescription,
4. or by reservation,
5. or by covenant,
6. or by custom

(Wash. Eas. 7, 23, 24, 25, 84, 85; Gale & Whatley, Eas. 3, 4, 5, 6, 7, 12, 38, 52, 62).

EJECTMENT.

This title is adopted, though not known, *eo nomine*, where the code system prevails, as conveying to the legal mind, with sufficient accuracy, the idea of the mode of litigation prescribed to try title to realty.

Whatever may be the form of action, the burden of proof is upon the plaintiff to show on "not guilty" under the old system, and a general denial under the new, a *prima facie* title good against all the world, or as against the defendant by estoppel, and this is also applicable to a petitory action under the code of Louisiana (Compton *v.* Mathews, 3 La. 128, reported in 22 Am. Dec. 167), also to show, if the action be ejectment proper, that he had a right of entry at the date of the demise laid in the declaration, or under the code system, at the time of the commencement of his action; and he must also show that at the time of the commencement of the action, the defendant was in possession, unless he should have been allowed to be made defendant on his own motion, as landlord or otherwise, under the local practice (Tyler on Ejc. 471, 482 *et seq.*, 802).

[1] The word *tenement* should be understood as taken from the civil law.

It is not proposed to enter into a disquisition as to the extent of proof required, except as illustrative of the subject of this treatise, referring the reader to the appropriate titles, such as PURCHASER AT EXECUTION SALE, ETC. If the plaintiff should claim more than nominal damages, the burden is also upon him to prove them.

Having discharged the onus, the same is then devolved upon the defendant to meet and overcome, if he can, the *prima facie* case made, by either rebutting testimony or by proving a better title in himself than that shown by plaintiff.

When plaintiff sues as landlord, the burden is merely to show the lease, its expiration or forfeiture, and the unlawful holding over.

The defendant assuming the burden, may then show acceptance of rent for a time subsequent to and after the expiration of lease, as in cases of tenancies from year to year; or give rebutting testimony, or show that his landlord's title had expired (Taylor, L. & T. sec. 629).

The onus would then be shifted to the landlord to break the force of such proof by proving mistake, etc. (Tyler on Ejc. 549 *et seq.*).

The defendant may show an outstanding title superior to the plaintiff, and of course has the onus; but if he and the plaintiff both claim under the same person, the onus carries him beyond that proof, and requires him to further show that he has acquired the same (Hitchcock *v.* Carpenter, 9 John. 344; Hitchcock *v.* Harrington, 6 *ib.* 290; Collins *v.* Torry, 7 *ib.* 278; Love *v.* Gates, 4 D. & B. 363; Norwood *v.* Marrow, *ib.* 442).

And the defendant may show under a plea *puis darreign continuance* that the plaintiff has taken possession since the commencement of the action (Johnson *v.* Swain, Busb. 335).

If the action be brought by a tenant in common, he has not only the ordinary burden of proving title to his moiety, but he must also prove an actual *ouster* by his co-tenant (Tyler on Ejc. 476).

Where an act of Congress, confirming a claim to land, con-

tains a proviso that the confirmation shall not include lands occupied by the United States for military purposes, it is incumbent upon one claiming the land by patent from the United States, issued after the passage of the act, to show that the land claimed was occupied for military purposes at the time of the passage of the confirmatory act (Whitney *v.* Morrow, 112 U. S. 693).

If a party offers in evidence an instrument concerning real estate which has been properly admitted to registration and read in evidence, the burden of proof is on the party denying its validity (Gay *v.* Parpart, 106 U. S. 679, 685).

ESTOPPEL.

This subject is generally distributed under three heads: —

1. Estoppel by record.
2. Estoppel by deed.
3. Estoppel by matter *en pais.*

In whatever form, or under whatever division it is asserted, the onus is throughout upon the party alleging it. He must prove all the facts from which, as a matter of principle, the estoppel arises (Big. Est. 592). Where a judgment is pleaded, which presumptively includes the same litigation, and proof thereof adduced, the burden of proof is shifted to the other party, to meet and overthrow it, by showing that the subject-matter of the former judgment was not identical with that embraced by the action in which the estoppel is pleaded (Big. Est. 593). When a foreign judgment, or judgment of an inferior court is pleaded as an estoppel, the burden extends to proving the jurisdiction also (Big. Est. 598); and not only must the party relying on such estoppel show that the former action covered the point embraced in the second action, but he must also show that it was the *very point* (Rogers *v.* Ratcliff, 3 Jones, 225; Big. Est. 22). When an estoppel by deed is claimed, the onus is with the party pleading it to prove the execution of the deed, and to show

that it embraces the subject-matter of the pending action. It is not proposed to discuss what does or not amount to an estoppel by deed. It suffices to state that having shown the execution of a deed as above stated, the burden is shifted to prove that the deed is for any reason void, or if the estoppel is claimed upon the principle that when the interest accrues it feeds the estoppel (Fortescue *v.* Satterthwaite, 1 Ired. 566; Doe *v.* Oliver, 2 Smith, L. C. 417 and notes), to show that when the deed was executed some interest passed, or to encounter it by another instrument of equally high rank, inconsistent with the deed, and made between the same parties, upon the maxim that an estoppel against an estoppel sets the matter at large (Big. Est. 293).

As to estoppel upon tenants, the onus is with the party claiming to be landlord, to show by some of the various means recognized for that purpose, that the relation of landlord and tenant subsisted, or to show facts from which that conclusion might be inferable or inferred (Big. Est. 372 *et seq.*); but the person thus shown to be, presumptively, tenant, if by proof of matters strictly *en pais*, as attornment and the like, may take the onus to explain it (Big. Est. 384–386), to show that it was done through fraud or *mistake*. Tenancy being established, the tenant may show that the estate of his landlord has expired (Big. Est. 386, 387). The reader may profitably consult, in this connection, Bigelow on Estoppel, chap. 15.

As between bailor and bailee the ordinary rule is, that the bailee is estopped to deny the bailor's title; but there are cases where he may show title in a third person (Big. Est. 416–421; Thompson *v.* Andrews, 8 Jones, 125).

The doctrine of the onus as to commercial paper will be considered *infra*,—see Part I. title NEGOTIABLE INSTRUMENTS.

In suits against corporations on bonds, the onus, in general, is with the plaintiff to the extent of proving the execution of the bonds, the corporation being estopped from denying its organization (Big. Est. 461 *et seq.*); at least, such seems to be the decided weight of authority (*ib.* 466).

The onus, with reference to the subjects of agency and partnership, is considered elsewhere. See Part I. titles AGENCY, PARTNERSHIP.

If any may be so termed, the doctrine of estoppel by conduct, as Mr. Bigelow calls it, is the most important in practice. It is not proposed to discuss this subject in its various ramifications, as the illustrations are kaleidoscopic, and may arise out of all the transactions of life.

There are, however, certain general *criteria* by which the doctrine is governed, which, being applied to facts as they arise, will guide the intelligent lawyer, not only to a correct conclusion as to the law itself, but as well to the burden of proof in such cases. Mr. Bigelow thus states them: —

1. There must have been a representation or concealment of material facts.

2. The representation [or concealment] must have been made with knowledge of the facts.

3. The party to whom it was made must have been ignorant of the truth of the matter.

4. It must have been made with the intention that the other party should act upon it.

5. The other party must have been induced to act upon it (Big. Est. 480; People *v.* Brown, 66 Ill. 1). There are, doubtless, modifications of these *criteria* in some of the statal courts.

Thus, the Supreme Court of North Carolina held, that, where a party was present at a judicial sale of realty, having an interest therein, under an unregistered deed not affected by the decree of sale, and failed to disclose his interest, he was estopped from afterwards claiming the land, and was compelled to convey to the purchaser at the judicial sale, upon payment of the price he had given for it (Sanderson *v.* Ballance, 2 Jones, Eq. 322); also that where a party was present at a sale made by a trustee, under a deed in trust, of the *interest* of the bargainor, such party being, as it afterwards turned out, the owner, though, at the time of the sale he believed, under the advice of eminent counsel, that he was

not, and failed to make known his claim, and though admitted to be a gentleman of the highest integrity and acquitted of any intentional wrong, he was estopped from afterwards setting up his title (Mason *v.* Williams, 66 N. C. 564). This latter case has been repeatedly followed in the same court (Biggs *v.* Brickell, 68 N. C. 239; Gill *v.* Denton, 71 *ib.* 341; East *v.* Dolihite, 72 *ib.* 562; Kerchner *v.* Reilly, *ib.* 171). The courts of Missouri have also held that when the heirs are present at a void sale of their ancestor's land, made no objection while the purchaser made improvements and conveyed the land in good faith to another, they were estopped (Jones *v.* Manly, 58 Mo. 559; Landrum *v.* Union Bank, 63 *ib.* 48; Collins *v.* Rogers, *ib.* 515; Evans *v.* Snyder, 64 *ib.* 516). So it has been held in Pennsylvania and Illinois, that it is not essential that there should have been intentional fraud (Hill *v.* Epley, 31 Pa. 334; Kinnear *v.* Mackey, 85 Ill. 96; Cairncross *v.* Lorimer, 3 McQ. H. of L. 829; Swann *v.* Australian Co., 7 H. & N. 603; Miller's Appeal, 84 Pa. 391, S. C., 4 Weekly Notes, 405), the last case deciding that if the owner of land by a *positive act* induces another to purchase land from a third person, such owner is estopped from setting up title thereto; see also Chapman *v.* Chapman, 59 Pa. 214; Cornish *v.* Abington, 4 H. & N. 549; Pickard *v.* Sears, 6 Ad. & El. 469; Gregg *v.* Wells, 10 *ib.* 90; Woodley *v.* Coventry, 2 H. & C. 164; Buchanan *v.* Moore, 13 S. & R. 304; Com. *v.* Moltz, 10 Barr. 530. So in New York and New Jersey it is held with the qualification, that the act must have been expressly designed to influence the conduct of another (Manufacturers &c. Bank *v.* Hazard, 30 N. Y. 226; Storrs *v.* Barker, 6 John. Ch. 166; Welland Canal Co. *v.* Hathaway, 8 Wend. 480; Finnegan *v.* Carraher, 47 N. Y. 493; Wilcox *v.* Howell, 44 *ib.* 398; Brown *v.* Brown, 30 *ib.* 541; Kuhl *v.* Jersey City, 8 C. E. Green, 84; well considered article in 12 C. L. J. 29; 7 *ib.* 403; 10 *ib.* 201). As to further *criteria* of this kind of estoppel, see Carr *v.* London &c. Co., L. R. 10 C. P. 307; reported in 10 C. L. J. 202. It is an essential element of the doctrine, that the party claiming an estoppel

should himself have been ignorant of the facts, when he purchased (Crest *v.* Jack, 3 Watts, 238; Hepburn *v.* M'Dowell, 17 S. & R. 383; Ferris *v.* Coover, 10 Cal. 509; Casey *v.* Juloes, 1 Gilm. 430; Lawrence *v.* Brown, 1 Seld. 394; Hill *v.* Epley, 7 Casey, 231; Goodson *v.* Beacham, 24 Ga. 150; Parker *v.* Barker, 2 Met. 423; Knouf *v.* Thompson, 4 Harris, 361; Robbins *v.* Magee, 69 Ind. 41; Brant *v.* Virginia &c. Co., 93 U. S. 326; Grensburg Co. *v.* Sidener, 40 Ind. 424; Fletcher *v.* Holms, 25 Ind. 438; Bach *v.* Lendel, 72 Ind. 475; Hudson *v.* Dinsmore, 68 Ind. 391; Stewart *v.* Hartman, 46 Ind. 331).

In the case of Brant *v.* Virginia &c. Co., *supra*, the court declares that there are undoubtedly cases where a party may be concluded from asserting his original rights to property, in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting . . . but such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced. So far as the burden of proof is concerned, this distinction is immaterial, for the onus is with the party, in either case, claiming the estoppel or equity, to show, as the law of the forum may have settled it, silence when there should have been speech, or fraudulent representations, and that in consequence of one, or other, or both, the party in ignorance of the true *status* paid out his money (De Laney *v.* Cumming, 48 Wis. 113).

EXPERT TESTIMONY.

The rules governing the onus, with respect to expert testimony are few and simple, and so clearly stated by Mr. Rogers as well as Judge Lawson in their excellent treatises, that the author contents himself with quoting mainly from them.

The burden lies on the party who proposes to offer this kind of testimony to show: —

1. That the subject-matter of inquiry is within the range

Criterion.

of the peculiar skill and experience of the witness. It is a matter for the court.

2. That it is one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts (Rogers, Ex. Tes. 18; Manke *v.* People, 17 Hun. 410; S. C., 78 N. Y. 611). It is a matter for the court (Dillard *v.* State, 58 Miss. 368).

In order to render such evidence competent, it must appear that the subject-matter to which it is proposed to address such testimony, is one requiring for its acquisition and mastery a special education; facts, about which all may have a knowledge, are not embraced in this category; thus the identity of foot-prints of man or of animals, weight, measurement and the like, do not fall within this class (Law. Ex. Ev. 195 *et seq.*).[1]

With regard to handwriting, it depends upon the manner in which the knowledge is acquired. If the witness states that he knows the handwriting in controversy, by having often seen the party write, or having had an extensive correspondence, it is not expert testimony; but if the witness, never having seen the party write, is prepared, by his skill in the comparison of handwriting, to give an opinion, that would be expert testimony (Law. Ex. Ev. 279; Hess *v.* State, 5 Ohio, 5, reported in 22 Am. Dec. 767; Moody *v.* Rowell, 17 Pick. 490, reported in 28 Am. Dec. 317).

In a metaphysical sense, all evidence consists in belief or opinion, knowledge being a conventional term; but, in law, there is a clear line of demarcation between evidence, though expressed in the form of opinion which is based upon an experience, open, if not common, to all, and that which is predicated upon skill in some art, occupation, or science, which cannot reach us through the medium of personal experience and observation, or, if at all, to an almost inap-

[1] It sometimes becomes important to ascertain whether the track is fresh. Thousands of persons can testify on this point. Robinson Crusoe's excitement when he saw the "print of a man's naked foot" was doubtless caused by his recognition of it as a "fresh track."

preciable extent. Or, as it has been otherwise well expressed, the difference between an expert and a non-expert is, that the former gives the result of a process of reasoning which can only be understood by those specially skilled in those matters; the latter, by a process of reasoning familiar to every one, and which a jury of average ability can comprehend (Article by *A. G. McKean*, 15 Cent. L. J. at p. 6; Concord R. R. *v.* Greely, 23 N. H. (3 Fost.) 237).[1]

The most ignorant negro reads with unerring accuracy the track made in the forest, *as that* of the animal which made it, while the savant, who may have discovered the circulation of the blood, or the law of gravitation, might stand by in mute wonderment. Indeed, this opinion-knowledge, as to the common affairs of life, is often in inverse proportion to the ratio of intelligence.[2]

The criterion for determining between expert testimony and belief founded on experience may be thus stated: The expert speaks in the abstract, and the other witness in the concrete.

Proof of handwriting is a clear illustration. The common witness testifies that he knows the controverted writing by having often seen the party write, or having had an extensive correspondence with him. His experience, *pro hac vice*, enables him to identify the handwriting as he would the familiar face of an acquaintance.[3] Sometimes, especially with very common witnesses, they assign as the foundation of their knowledge, the peculiar mode of forming certain letters.[4]

[1] This distinction is admirably illustrated by Gaboriau, in his novel "Monsieur Lecoq."

[2] The author once assisted in the defence of a prisoner charged with the murder of his wife. The evidence was wholly presumptive, and the scale was turned against him by the evidence of a common farmer, who testified that while ploughing in his field he heard, a half-mile off, the crack of a rifle and "it sounded like shooting a beef."

[3] See Law. Ex. Ev. 277.

[4] In a celebrated will-suit, — script caveated as forged, — a large number of witnesses testified to the habit of testator in writing his "y," and this evidence was corroborated by ninety-nine out of the hundred of genuine letters pro-

The criterion which we have suggested may be thus illustrated: Suppose the action is based upon a stock transaction; a member of the Stock Exchange could be called upon to explain such terms as "long of stocks," "covering a short scale," "a corner," "a call loan," "a put," "a lame duck," "hedging," "a straddle," and the like (for meaning, see Hickling & Co.'s Men and Idioms; Reed *v.* Hobbs, 3 Ill. (2 Scamm.) 297), but it would not be permissible to allow a witness to give his opinion that the words "more or less" would include a deficiency of eight or nine feet in a city lot (Wylly *v.* Gazan, Ga., reported in 15 Rep. 331; S. P. Ives *v.* Hamlin, 5 Cush. 534).

This much has been said, as it bears upon the degree of the burden. In all cases of opinion-evidence, the onus is with the party offering it, to lay a sufficient foundation, according to the distinction above stated, for its introduction. The most perplexing instance is that of reputation, or character, as it is generally termed.

The average witness rarely comprehends the nature of the question, "Do you know the general character or reputation of A?" He confounds his own opinion with the general opinion of the community, and cannot comprehend how he can *know* what others *think*. He frequently answers, having in his mind the characteristics of the individual rather than his reputation. In some States, too, the burden is enhanced by requiring proof of general reputation in all respects, and excluding the question of reputation with regard to the very matter in controversy, thus excluding, for instance, evidence of reputation for chastity, where the want of it is the gravamen of the litigation, which might possibly be adduced, although for truth and honesty it might be bad. It is laid down in the text-books, that the expert witness cannot be asked his opinion respecting the *very* point which the jury

duced, but an expert, a stranger to the jury and unknown to the community, subjected to a searching cross-examination of two days, swept away the evidence of the caveators, and though standing alone, so convinced the jury that they rendered a verdict in a few minutes in favor of the will.

are to determine (2 Taylor, Ev. sec. 1278; 1 Greenl. Ev. sec. 440; Broom, L. M. 898); but there are cases where the opinion and ultimate fact are so intimately interwoven as to demand an exception to this rule, *ex. gr.*, when the *very* point is forgery, the witness is excluded, unless he can give his opinion as to whether or not it is a forgery. The rule, however, is undoubtedly correct when the opinion is predicated upon facts testified by other witnesses. In such instances, he must be examined by questions assuming hypothetically the facts in testimony (Browne, Med. Jur. Ins. secs. 499, 500, 501; Ray, Med. Jur. Ins. sec. 607 *et seq.;* Sills *v.* Brown, 9 C. & P. 604, per Coleridge, J.; Fenwick *v.* Bell, 1 C. & K. 312, per Coltman, J.; Beckwith *v.* Sidebotham, 1 Camp. 116; U. S. *v.* McGlue, 1 Curt. C. C. 1; Malton *v.* Nesbitt, 1 C. & P. 70, per Abbott, C. J.). In the celebrated case of the Com. *v.* Rogers, 7 Met. 500, reported in Bennett & H. L. Cr. Cas. 87, and 41 Am. Dec. 458, the court said that the proper question to be put was this: "If the symptoms and indications testified to or by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion the party was insane." The subject is so ably and exhaustively treated by Messrs. Lawson and Rogers in their works, as to supersede further examination.

FALSE IMPRISONMENT.

General Burden. — The burden of proof upon the general issue[1] is upon the plaintiff to show a total or substantial restraint of his freedom of locomotion (2 Sel. N. P. 112; Cool. Torts, 169; Bull. N. P. 22; 2 Leigh, N. P. 1437; 2 Saund.

[1] It is stated by Judge Abbott that under a denial of the allegation, that the imprisonment was without warrant, the defendant may justify under legal process under the general issue (Abb. Tr. Ev. 657). This may be sustained upon the doctrine of pleading, at common law, unnecessary averments necessitating proof. The precedents contain no such negative averment (2 Saund. Pl. & Ev. 517; 2 Chitty, Pl. 857; Eaton's Forms (1st ed.) 103) in the *narr.*

Pl. & Ev. 520; Underhill (Moak), Torts. 177, Rule 8; 2 Add. Torts, secs. 798, 799, 843).[1]

Upon this proof being made, it will be presumed that it was against the plaintiff's will (2 Saund. Pl. & Ev. 516). It is held in New York that the plaintiff must, as part of his onus, show want of probable cause (Abb. Tr. Ev. 657), though why such a principle is applicable to this action and not to that for an assault and battery it is difficult to perceive (2 Add. Torts, sec. 843).

Want of Probable Cause. — This proof, if necessary, is made by evidence of the restraint itself, it being a negative averment and the means of justification more peculiarly within the possession or knowledge of the defendant. It would be idle to attempt to offer secondary evidence if made under color of a paper-writing, as there would be no basis of the knowledge of the contents of the original. This view seems to be supported by Mostyn *v.* Fabrigas, 1 Smith, L. C. 340, where the evidence is recited.

Damages. — Upon making out a *prima facie* case, the plaintiff entitles himself to some damages, but he cannot recover special damages unless laid in the declaration, and then they must be proved as laid, at least, under the common-law system (2 Saund. Pl. & Ev. 520; 2 Leigh, N. P. 1430, 1431), and cannot be proved under the *alia enormia* (2 Leigh, N. P. 1430); though matters of aggravation, as distinguished from grounds of special damage, may be proved though not pleaded (Abb. Tr. Ev. 657; Stanton *v.* Seymour, 5 McLean, 267; Hatchell *v.* Kimbrough, 4 Jones, 163; 2 Add. Torts, sec. 845).

Justification. — The defendant may show under the general denial, that the plaintiff attended before the court of his own accord, or that he (defendant) was not the party who made the arrest, and if he relies upon the general issue alone, the

[1] Judge Bigelow adds to the definition "against his will and without authority of law" (Big. Torts, 113, § 2); but is it not presumed to be against his will? The precedents allege "without probable cause" (see authorities cited *supra*).

burden of proof remains with the plaintiff; but if he justifies the imprisonment, he confesses and avoids the cause of action, and the burden is imposed upon him to substantiate his defence by proof. There are various grounds of justification, both at the instance of officers and private persons, but as it falls without the province of this treatise to enumerate them, the reader is referred to the following authorities therefor (2 Saund. Pl. & Ev. 521; Big. Torts, 115 *et seq.*; Cool. Torts, 170 *et seq.*; 2 Leigh, N. P. 1432 *et seq.*; Abb. Tr. Ev. 627; Underhill (Moak), Torts, 188 *et seq.*; Big. L. C. Torts, 275 *et seq.*; 2 Add. Torts, secs. 835, 841; 2 Sel. N. P. 123 *et seq.*).

FALSE REPRESENTATION.

See title DECEIT *ante*.

FELLOW-SERVANTS.

Under this title will be considered the doctrine of the right of a servant to sue his master for an injury caused by the negligence of a fellow-servant.

The subject has assumed such importance as to require separate discussion. The principle is, that a servant when he engages to serve a master undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risks of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty, as servant of him who is the common master of both (Smith, M. & S. 192; 2 Thomp. Neg. 969, sec. 1).

Supposing that the relation of fellow-servant shall be established, the burden is upon the plaintiff to show that his case falls within some of the exceptions to the general rule (2 Thomp. Neg. 1053, sec. 48).

These exceptions may be classified thus: —

1. That the injury was occasioned to the plaintiff by the act of another servant, when the servant injured was not at

the time acting in the service of his master (Smith, M. & S. 192).

2. That the master failed to take care not to expose his servants to unreasonable risks (Smith, M. & S. 192; Priestly *v.* Fowler, 3 M. & W. 1, reported in 2 Thomp. Neg. 919; *ib.* 972, sec. 3 (1); *ib.* 976, sec. 6): —

(1) Through the negligence of a vice-principal or middleman.

(2) By the use of defective appliances.

(3) By the employment of incompetent servants, or their retention in service after notice of such incompetency (Underhill (Moak), Torts, 45, Rule 14; Laning *v.* N. Y. &c. Co., 49 N. Y. 521, reported in 2 Thomp. Neg. 932; S. C., 10 Am. Rep. 417; Gibson *v.* Pacific R. R. Co., 46 Mo. 163, reported in 2 Thomp. Neg. 944 and 2 Am. Rep. 497; Holmes *v.* Clarke, 7 H. & N. 937, reported in 2 Thomp. Neg. 953, 970, sec. 2).

Let us first consider the meaning of the term "common employment." That *status* must be shown to exist, either on plaintiff's case, or on defendant's, and, as the other questions we propose to discuss cannot arise without such proof, it is deemed best to state, in the first place, the law on this branch of the subject.

What is a "common employment" has been invariably treated as a legal conclusion dependent upon the proof of certain facts, and there is much diversity of opinion as to what facts constitute "common employment" and what do not. It would be wholly foreign to the design of this treatise, to recapitulate the many instances in regard thereto which are to be found in the reports; it is, however, deemed best to state some of the general principles deducible from the authorities. It is thus defined: It is not necessary, in order to constitute a common employment, that it should be shown that the servant causing and the servant sustaining the injury should both be engaged in precisely the same or similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be fairly included

in the risks which have to be considered in his wages (Underhill (Moak), Torts, 52, sub-rule).

Other definitions can be found, but none so comprehensive and satisfactory as that just above stated (see Wood, M. & S. sec. 435; Big. L. C. Torts, 710; Cool. Torts, 544, note 1; 2 Thomp. Neg. 1026, sec. 31). While the courts generally agree on the definition, there has been some conflict of judicial opinion as to its applicability to cases where the party injured and the tort-feasor are both servants of a common master, though not in the *same branch of service;* but a current of authorities, amounting to a moral unanimity, has settled the doctrine, that the rule is applicable to all servants, whether in the same branch of service or not (Cool. Torts, 545; Farwell *v.* Boston &c. R. R. Co., 4 Met. 49, reported in Big. L. C. Torts, 688, 710, note; Wood, M. & S. secs. 425, 435; 1 Add. Torts, sec. 565; 2 Thomp. Neg. 1034, sec. 37; Underhill (Moak), Torts, 52 *et seq.;* Big. Torts, 304). The cases holding the minority view, that is, that the employment to be common must be *ejusdem generis*, are all collected in notes to 2 Thomp. Neg. 1026-1029. The weight of authority, likewise, has settled that persons serving the same master are fellow-servants within the principles of law applicable to the torts or negligence of one servant producing injury to another, although not in the same grade of service (2 Thomp. Neg. 1028, sec. 33; Cool. Torts, 544, note 1; Wood, M. & S. sec. 425, 435; Underhill (Moak), Torts, 50; Story, Agency (Green's ed.), sec. 453, note *d*; Big. Torts, 304). But it is equally well settled that when the injury is occasioned by the negligence of, what is termed, indifferently, a vice-principal or middle-man, such negligence is treated as that of the master (2 Thomp. Neg. 1028, sec. 34; Cool. Torts, 561, 562; Wood, M. & S. secs. 436, 438; Underhill (Moak), Torts, 56 *et seq.;* Flike *v.* Boston &c. Co., 53 N. Y. 549, reported in 5 Am. Ry. Rep. 392; Hofnagle *v.* N. Y. Cent. R. R. Co., 55 *ib.* 608, reported in 6 Am. Ry. Rep. 233; Lewis *v.* St. Louis &c. Co., 59 Mo. 495, reported in 8 Am. Ry. Rep. 450).

Presumptively, then, when a servant brings his suit against

his master for injuries received through the negligence of a fellow-servant, if the relationship between such servants shall appear in the testimony of plaintiff he must fail, unless he, taking the burden of proof, shall be able to show that such fellow-servant occupied the grade of middle-man or vice-principal.

As to what character of duties constitute a servant a middle-man or vice-principal, the reader is referred to the authorities just cited and Whart. Neg. sec. 229; for to enumerate all the instances in which the question has been discussed would unnecessarily swell the size of this volume. It may be stated, however, that a mere foreman is not a middle-man, nor a conductor of a railway train, yard-master, and the like, unless he is invested with the right to employ and discharge servants, and control the affairs of his master (Dobbin *v.* R. & D. R. R. Co., 81 N. C. 446). In other words, the true criterion deducible from the authorities, or at least the weight of them, is, that he must be invested with such functions as to be constituted an *alter ego*. But the master must not expose his servants to unnecessary risks, whether occurring through the fault of a middle-man or ordinary employee. This may consist in furnishing defective appliances, or an insufficient force of co-laborers, or in carelessly selecting an incompetent servant, or retaining such an one after notice of of his incompetency; but the burden is on the plaintiff to show the fact (2 Thomp. Neg. 981, secs. 10, 11, 12; *ib.* p. 1053, sec. 48, 992, sec. 12; *ib.* p. 970, secs. 2, 3 (1), 4 (2); Underhill (Moak), Torts, 56, Rule 15; Cool. Torts, 549, 556–560; notes, Big. L. C. Torts, 709, 710; Smith, M. & S. 192; 1 Add. Torts, 605, note 1; Lewis *v.* St. Louis &c. Co., 59 Mo. 495, reported in 8 Am. Ry. Rep. 450; Davis *v.* Detroit &c. Co., 20 Mich. 105; Columbus &c. Co. *v.* Troesch, 68 Ill. 545, reported in 18 Am. Rep. 578; Laning *v.* N. Y. C. Co., 49 N. Y. 521, reported in 10 Am. Rep. 417 and 2 Thomp. Neg. 932; Gibson *v.* Pacific &c. Co., 46 Mo. 163, reported in 2 Am. Rep. 497 and in 2 Thomp. Neg. 944).

If such proof be made, the defendant may assume the onus,

and show that the servant has waived the risks (2 Thomp. Neg. 1008, sec. 15, 1147, sec. 2; 1 Add. Torts, sec. 255), and according to some authorities, that he expressly assumed them when entering service (2 Thomp. Neg. 1025, sec. 28; Wood, M. & S. sec. 415). If equivocal or presumptive evidence of waiver be shown, the plaintiff may retake the burden, and prove that he was induced to remain by promises of amendment in the particulars complained of (2 Thomp. Neg. 1009, sec. 16; Wood, M. & S. sec. 352).

Servants of Different Masters. — It may not be improper to state, that the doctrines discussed under this title are not applicable as between servants employed by a contractor and others employed by a proprietor, unless indeed in the case of the servants of a contractor and sub-contractor (2 Thomp. Neg. 1040, sec. 41; Wood, M. & S. sec. 435, p. 839 note), nor, perhaps, to servants of different railway companies having running connections (2 Thomp. Neg. 1043 (2); Wood, M. & S. 841, note), though the contrary is held, and it would seem, as to the particular facts, on sounder principle, by at least two courts (Mills *v.* Alexandria &c. R. Co., 2 McAr. (Dist. of Columbia), 314; Cruty *v.* Erie R. Co., 3 T. & C. (N. Y. S. C.), 244).

FIRE INSURANCE.

It may be stated generally that the insured is charged with the burden of proving all matters which form conditions precedent to a recovery (Wood, Fire Ins. sec. 507; Ellis, Ins. 93; May, Ins. sec. 183 (2 ed.)).

The execution of the policy, unless admitted, must be established by the assured, by proving the signatures, including the countersigning (Abb. Tr. Ev. 477; 2 Phil. Ins. sec. 2114; May, Ins. sec. 584). The onus in this also includes delivery, but is satisfied (without opposing proof) by possession of the policy (Abb. Tr. Ev. 478; May, Ins. sec. 60).

With regard to the application, when competent and put in evidence, there is a presumption that the applicant under-

stood its contents when signed by him; still, if the alleged false warranty constitutes an ambiguous answer, the plaintiff may show *bona fides*, the onus being upon him (Abb. Tr. Ev. 479).

The onus is with the assured to prove the authority of an agent, before his declarations become competent (Abb. Tr. Ev. 480; Wood, Fire Ins. secs. 399, 500).

The burden is upon the insurer to show non-payment of the premium (May, Ins. sec. 359; Abb. Tr. Ev. 481), and if payment has been made to an agent after his authority has been cancelled, the onus is with the insurer to show that the party insured had, before payment, received actual notice of such revocation (May, Ins. sec. 362; Braswell *v.* Am. L. Ins. Co., 75 N. C. 8).

If it be alleged that the insurer has waived payment or time of payment or performance of any condition, the onus is with the assured (May, Ins. secs. 360 *et seq.;* Abb. Tr. Ev. 481, 491; 2 Phil. Ins. sec. 2122; McCraw *v.* Old North State Ins. Co., 78 N. C. 149; Ferebee *v.* N. C. &c. Ins. Co., 68 *ib.* 11; Hambleton *v.* Home Ins. Co., 6 Biss. 91; Witte *v.* Western Mut. &c. Co., 1 Mo. App. 188; Garlick *v.* Miss. &c. Co., 44 Iowa, 553; Mound City &c. Co. *v.* Twining, 19 Kan. 349; Georgia Home &c. Co. *v.* Kinnier, 28 Gratt. 88; Eagan *v.* Ætna &c. Co., 10 W. Va. 583; Kelly *v.* St. Louis &c. Co., 3 Mo. App. 554; Butler *v.* American &c. Co., 42 N. Y. Super. Ct. 342).

In ordinary cases the plaintiff satisfies the burden cast upon him at the outset, by proving the policy, the renewal receipts if any, relied on, and the loss, the giving proof of loss as required by the policy, and if on property not valued, the value of the property destroyed (Wood, Fire Ins. sec. 507; Abb. Tr. Ev. 482; Geib *v.* International Ins. Co., 1 Dill. C. C. 443; Mut. Benefit L. Ins. Co. *v.* Robertson, 59 Ill. 123; S. C., 14 Am. Rep. 8; Whitehurst *v.* N. C. &c. Ins. Co., 7 Jones (N. C.), 433). The assured may also prove the value of articles inadvertently omitted from the preliminary proofs (Wood, Fire Ins. sec. 427; Com. Ins. Co. *v.* Huck-

berger, 52 Ill. 464; Lester *v.* Piedmont &c. Co., 55 Ga. 475; 2 Phil. Ins. secs. 2114, 2123, 2127, 2144, 2150), and in life insurance, when on the life of another, his interest (Guardian &c. Co. *v.* Hogan, 80 Ill. 35), but such proof is not required as to a valued policy (Wood, Fire Ins. sec. 41 *et seq.*; Roos *v.* Merchants &c. Co., 27 La. Ann. 409; 2 Phil. Ins. sec. 2123), also the plaintiff's interest in the property and title to sue (Wood, Fire Ins. sec. 251; Farrell *v.* Ætna &c. Co., 7 Baxt. 542; S. P. 8 Baxt. 563), and compliance with warranties and conditions precedent[1] (Ellis on Ins. 27, 28; Wood, Fire Ins. sec. 507; May, Ins. sec. 156; 2 Saund. Pl. & Ev. 603; 2 Phil. Ins. sec. 2123), unless waived (2 Phil. Ins. sec. 2122).

The burden in ambiguities, if latent, is upon the party who avers that the description fits the thing, or if patent, upon him who claims a different meaning than that ordinarily attributable to the language employed (Wood, Fire Ins. sec. 508; Abb. Tr. Ev. 483, 484).

If a circular purporting to be from the insurer is relied on, the onus will be on the plaintiff to prove as against the insurer that it was issued by him (Abb. Tr. Ev. 484), but to affect the insured it must also be shown that the beneficiary had knowledge thereof and acted upon it (*ib.*; Wood, Fire Ins. sec. 502; Steel *v.* St. Louis &c. Co., 3 Mo. App. 207, reported in 5 C. L. J. 158).

When reformation of a policy is demanded, the onus is with the plaintiff to prove the facts entitling him to that relief (Abb. Tr. Ev. 485; Wood, Fire Ins. sec. 480; McKenzie *v.* Coulson, L. R. 8 Eq. Cas. 368).

When a party claims that the ordinary import of the language employed should be controlled by usage, the onus will lie with him to show that such usage of it has prevailed, or that the parties intended in adopting it, to convey a spe-

[1] The text-books generally agree that strict (some say literal) compliance with warranties must be shown whether material or immaterial, past or promissory, acted on by the underwriter or not, and even though it should require proof of a negative (Wood, Fire Ins. sec. 507; Ellis on Ins. 28; May, Ins. sec. 156).

cial or technical meaning (Abb. Tr. Ev. 485; Wood, Fire Ins. sec. 501; Lawson, Usages, 97, 403–405; Winthrop *v.* Union Ins. Co., 2 Wash. 7; Coit *v.* Com. Ins. Co., 7 Johns. 385; N. Y. &c. Co. *v.* Washington Ins. Co., 10 Bosw. 428; Norris *v.* Ins. Co., 3 Yeates, 84; 4 Phil. Ev. 506; 2 Arch. N. P. 208).

When a statute dispenses with the necessity of stating the facts showing performance of a condition precedent, the plaintiff may prove it on the trial (Russell *v.* State Ins. Co., 55 Mo. 585; Union Ins. Co. *v.* McGookey, 33 Ohio, 555).

When the name of the party really interested in the policy does not appear, the onus is with the plaintiff to show, as a latent ambiguity, that he is the party insured (Abb. Tr. Ev. 487; 2 Phil. Ins. secs. 1958, 1966, 2072, 2073; Georgia Home &c. Co. *v.* Kinnier, 28 Gratt. 88).

The onus is also with the assured to show, if preliminary proofs of loss are required, substantial and timely compliance or waiver by the insurers (Wood, Fire Ins. secs. 422 *et seq.*; Abb. Tr. Ev. 489; 2 Phil. Ins. chap. 22; Ocean &c. Co. *v.* Francis, 2 Wend. 64; S. C., 19 Am. Dec. 549; Edgerly *v.* Farmers Ins. Co., 43 Iowa, 587; Blossom *v.* Lycoming &c. Co., 64 N. Y. 162; Aurora &c. Co. *v.* Kranich, 36 Mich. 289; Birmingham *v.* Farmers Ins. Co., 67 Barb. 595; Young. *v.* Hartford &c. Co., 45 Iowa, 377; Hibernia &c. Co. *v.* Meyer, 39 N. J. L. 482; Home Ins. Co. *v.* Duke, 43 Ind. 418). A mere notice will not discharge the onus (Wood, Fire Ins. sec. 428; O'Reilly *v.* Guardian Mut. &c. Co., 60 N. Y. 169).

The preliminary proofs are competent for plaintiff not to show thereby the loss sustained, but that he has complied with a term of the policy (Wood, Fire Ins. secs. 424, 506; Knickerbocker &c. Co. *v.* Gould, 80 Ill. 388; 2 Phil. Ins. secs. 2099, 2122); and being in evidence, the insured will be bound by them as his declaration, and the onus of showing that the representations therein contained were made under a misapprehension, is with the insured (Wood, Fire Ins. sec. 427; Abb. Tr. Ev. 490; McMaster *v.* Ins. Co., 64 Barb. 536). And if the insurer rely only upon defects in

the proofs, the onus is upon him to show that he notified the assured of such defects within a reasonable time (May, Ins. sec. 468; Killips *v.* Putnam &c. Co., 28 Wis. 472; State Ins. Co. *v.* Maackins, 38 N. J. L. 564; Patterson *v.* Triumph &c. Co., 64 Me. 500; Charleston &c. Co. *v.* Neve, 2 McMul. 237; Lewis *v.* Monmouth &c. Co., 52 Me. 492; Winnesheik Co. *v.* Shueller, 60 Ill. 465; Post *v.* Ætna Ins. Co., 43 Barb. 351; O'Conner *v.* Hartford &c. Co., 31 Wis. 160), and otherwise show *bona fides* in regard thereto (Harris *v.* Phœnix &c. Co., 35 Conn. 310), as by indicating to assured defects alleged to exist (May, Ins. sec. 468, and cases there cited). But service in due time is not necessarily waived by merely retaining the proofs, but the assurer is entitled to explain delay (Wood, Fire Ins. sec. 506; Knickerbocker &c. Co. *v.* Gould, 80 Ill. 388).

And when proofs, on being tendered, are refused on the ground of non-liability, formal objections will not be entertained (Wood, Fire Ins. sec. 417; Lycoming Ins. Co. *v.* Dunmore, 75 Ill. 41; Merritt *v.* Cotton States &c. Co., 55 Ga. 103; Whittle *v.* Farmville Ins. Co., 3 Hughes C. C. 421).

Concealment must be shown by the insurer (Wood, Fire Ins. sec. 223; Abb. Tr. Ev. 493; Elkins *v.* Janson, 13 M. & W. 655; Northrup *v.* Miss. Valley &c. Co., 47 Mo. 435, reported in 4 Am. Rep. 337; Bliss, L. I. secs. 377, 379; Fiske *v.* N. E. M. Ins. Co., 15 Pick. 310), and its materiality (Folsom *v.* Mercantile &c. Co., 8 Blatch. 170; Smith *v.* Ætna &c. Co., 5 Lans. 545; Smith *v.* Ætna &c. Co., 49 N. Y. 211; notes to 1 Smith Ld. Cases (5 Am. ed.) 641). The onus to show materiality of any statement to the risk, is with the insurer (Wood, Fire Ins. sec. 506).

When the defence consists of a charge of crime, while the burden is upon the insurer — as to whether the fact should be proved beyond a reasonable doubt, the greater number of American authorities hold that such measure of proof is not required. Whether a mere preponderance of evidence is sufficient, or whether the jury should be instructed to consider the gravity of the charge, and the legal presumption of

innocence and that the evidence must be such, as taken together clearly satisfies them, is still disputed[1] (Wood, Fire Ins. sec. 101; Abb. Tr. Ev. 495, and cases cited in notes; Kane *v.* Hibernia &c. Co., 39 N. J. L. 697, reported in 23 Am. Rep. 239 and 17 Alb. L. J. 226). Note the distinction between a condition precedent and a promissory warranty; see Bliss, sec. 49, as to whether there is any distinction between them (1 Smith, L. C. 638, 639, top). The burden is on the party for whose benefit an action is brought on a policy effected by another "for whom it may concern" to prove it to have been intended for his benefit (2 Phil. Ins. secs. 20, 72; Wood, Fire Ins. secs. 127, 128). So the plaintiff must prove authority to effect, or his adoption of, an insurance procured by another, of which he claims the benefit (2 Phil. Ins. secs. 20, 73; Wood, Fire Ins. secs. 127, 128). In an action by an assignee, he must aver and prove the assignment (Granger *v.* Howard Ins. Co., 5 Wend. 200). In an action on a policy requiring notice to be given forthwith, such notice must be averred and proved by the plaintiff to have been given with due diligence (Inman *v.* Western Ins. Co., 12 Wend. 452; Wood, Fire Ins. sec. 414). When the insured pleads that the property has, since the issuance of the policy, been incumbered, it should also be averred and proved that the incumbrance was without his assent, and the onus is with him (Peoria &c. Ins. Co. *v.* Lewis, 18 Ill. 553; see Orrell *v.* Hampden Ins. Co., 13 Gray, 431). The burden of proving payment of the premium is sufficiently discharged, so as to shift the onus, by showing that pursuant to instructions of the agent, the amount thereof in money was deposited in the express office properly directed (Whitley *v.* Piedmont &c. Co., 71 N. C. 480), or by letter properly mailed (Edwards *v.* Miss. Valley &c. Co., 1 Mo. App. 192). When in a policy covering drugs and medicines there is a stipulation against keeping saltpetre, the onus is with the assured, to show that it was kept merely as a drug (Collins *v.* Ins. Co., 79 N. C. 279). And the same court held, that when the policy forbids the keeping of benzine,

[1] See the point fully discussed under Pt. VI. title Intensity of the Proof.

camphine, or "any explosive," the onus is with the insurer to show whether, under all the circumstances, alcohol was explosive (Willis *v.* Germania &c. Co., 79 N. C. 285; see similar case, Buchanan *v.* Exchange Ins. Co., 61 N. Y. 26). And if a policy authorizes the keeping of kerosene of a certain quality, the onus is also with the insurers, to show: (1) that the kerosene kept was not of the quality specified, and (2) that the fire originated or was influenced by the kerosene kept (*ib.*) Where the defence to an action is that, the plaintiff set fire to the property, the onus is with the insurer (American &c. Co. *v.* Anderson, 33 N. J. L. 151). To support a defence alleging an alienation of the property insured, the onus is cast upon the insurer (Clay &c. Ins. Co. *v.* Wusterhausen, 75 Ill. 285). When it is necessary for the insured to procure the notice of other insurances taken upon the same property, to be indorsed upon the policy, or otherwise acknowledged by the insurer in writing, the onus to show that this condition has been complied with is with the insured (Meyers *v.* Germania Ins. Co., 27 La. Ann. 63).

When the plaintiff denies that he made the representation contained in the application, the onus is with him (Hartford Life Ins. Co. *v.* Gray, 80 Ill. 28). When the policy uses the phrase "as interest may appear," the burden is upon the assured to show what his interest is (Dakin *v.* Liverpool &c. Co., 77 N. Y. 600). Although there may be an over-valuation sufficient to avoid the policy, yet, if the insurer or his agent examined the premises and recommended the risks, such fact is competent evidence to rebut the inference arising from over-valuation — the onus to establish it being with the assured (Dacy *v.* Agricultural Ins. Co., 21 Hun. 83). So, though misrepresentation may be shown, it is competent for the assured — the burden for that purpose being on him — to prove that he gave correct answers, but that they were inaccurately written down by the agent of the insurer (Dahlberg *v.* St. Louis Mut. &c. Co., 6 Mo. App. 121; Smith *v.* Farmers &c. Co., 89 Pa. 287; Conn. Genl. L. Ins. Co. *v.* McMurdy, 89 Pa. 363).

Even when by the terms of the policy the application is declared to be a part thereof and a warranty, it was held that it meant such a warranty as was stipulated in the application itself; that the clause "so far as the same are known to the applicant" qualified the preceding clause, changing it from an absolute covenant, namely, "that all the answers were true," to a covenant, that they were true "so far as known," and that the policy could not be held void merely because the application contained some false statements, but that the onus was with the insurer to prove that they were known to be false, and were material to the risk (Redman *v.* Hartford Ins. Co., 47 Wis. 89). The burden of proving a cancellation is upon the party contending that the contract has been terminated (Runkle *v.* Citizens &c. Co., 6 Fed. Rep. 143).

FIXTURES.

When a superstructure is annexed, fixed, and attached to the soil, the presumption is that it is ceded, and the maxim *quicquid plantatur solo, solo cedit* applies.

Hence the onus is with the party claiming such superstructure to be personal property, to show such to be the legal fact (Ewell on Fix. 32). Mr. Ewell inclines to the opinion that the rule is reversed when the articles are not otherwise attached to the soil than by their own weight (*ib.* 32); but it occurs to the author that the true rule in such cases is dependent upon the fact as to whether such article had been used in connection with the soil. Take the case of a steam-engine which had been used for mining purposes, so heavy as to need nothing to keep it in place, *cui bono*, screw or fasten it down? Why should not this shift the burden of proof to show that it was not intended to be ceded, *ex. gr.*, that it was put there by a tenant, etc.? If the proof be that an engine had been, as it were, "dumped" on the land, but had never been put in position, the onus would certainly be with the party claiming it to be a fixture. The onus is de-

pendent, also, to a great extent, upon intention, the situation of the parties, etc., so that no very accurate rule can be laid down. See Ewell on Fixtures, Chap. III.

FOREIGN LAWS.

Whenever it becomes necessary in judicial proceedings to base a title, right, or an estate upon a foreign law, the onus lies with the party so claiming to prove the existence and pertinency of such law as a fact. As to whether it should be passed on, as a fact, by the court or jury, or as to the mode and measure of proof, see 1 Greenl. Ev. sec. 486 *et seq.* Such is the rule of the common law. Statutes have been enacted in perhaps all of the States, providing for the mode of proof as to foreign statutory law, by the statute books of the foreign State, and perhaps some of the statutes may give to the foreign statutory law the like force as their own.

FRAUD.

The elementary and general principle is, that he who imputes fraud must prove it (Bump, Fr. Con. 581; Kerr, F. & M. 382; Hubbard *v.* Turner, 2 McL. 519; Hager *v.* Thomson, 1 Black, 80).

But to this general rule, there are a number of well-defined exceptions. These exceptions are in the main considered under the titles FIDUCIARIES and SHIFT OF THE BURDEN, to which the reader is referred.

But there is a class of cases, the fraud therein arising on instruments alleged to be fraudulent within 13 Eliz., which may be properly noticed here. Ordinarily the onus is with the impeaching creditor to show that the deed or other transaction was made with intent to defraud him; but the instrument may show this intent upon its face. It may disclose such intent so manifestly as to cause the court to declare it fraudulent by force of an irrebuttable presumption. There is

yet an intermediate class of cases, where the terms of the instrument are such that the court cannot apply the irrebuttable presumption, but will *hold* that *upon the face* of the instrument there is a presumption of fraud; a *presumptio juris* as contradistinguished from the *presumptio juris et de jure*. In such cases the onus is devolved upon the party whose interest it is to sustain the instrument (Clements *v.* Moore, 6 Wall. 299; Hardy *v.* Skinner, 9 Ired. 191; Hardy *v.* Simpson, 13 Ired, 132; Cheatham *v.* Hawkins, 76 N. C. 335; Holmes *v.* Marshall, 78 N. C. 262; Bump, Fr. Con. 582; Kempner *v.* Churchill, 8 Wall. 362).

ILLEGAL CONSIDERATION.

If an agreement is founded upon an illegal consideration, whatever may be the form of the contract or security, it vitiates it. This is the general principle. It is proposed to discuss the subject in its various aspects. It is a matter of defence, and before the new rules, was not required to be specially pleaded (2 Saund. Pl. & Ev. 576; 1 Chitty, Pl. 477), unless in an action on a specialty (*ib.*). It seems to be necessary under the codes of remedial justice (Abb. Tr. Ev. 789); the onus is consequently upon the defendant throughout. Illegal contracts are generally divided into two classes: —

I. Those illegal by the common law.

II. Those made so by statute [1] (Smith Cont. 122).

Of these in their order: —

I. Illegal by Common Law.

Restraint of Trade. — It is not every contract made in restraint of trade that is vitiated.

A contract to that end may be good if: —

1. There was a consideration.

[1] See more technical divisions, Pol. Prin. Cont. 243, 244.

2. And the restraint a reasonable one.

So that the burden of proof requires the defendant in support of this defence to show that the contract exacts an unreasonable restraint of trade.[1] The instances are numerous, and are to be found in the text-books (Mitchell *v.* Reynolds, 1 P. Wms. 181, reported in 1 Smith, L. C. 172, Shirl. L. C. 124, and Law. L. C. 101 and notes; Alger *v.* Thacher, 19 Pick. 51, reported in 31 Am. Dec. 119, and Law. L. C. 98; Pol. Prin. Cont. 309 *et seq.;* 1 Add. Cont. secs. 270, 272; 2 Par. Cont. 747–753; 2 Saund. Pl. & Ev. 577; 1 Leigh, N. P. 638, 639; Smith, Cont. 125 *et seq.;* Bish. Cont. secs. 28, 478).

Restraint of Marriage. — So, too, the burden in this instance requires proof of a general restraint of marriage (Smith Cont. 130, 131; Lowe *v.* Peers, 4 Burr. 2225, reported in Shirl. L. C. 127 and notes, and Law. L. C. 102; 1 Add. Cont. sec. 255; 3 *ib.* sec. 1348; 2 Par. Cont. 73, 74; 1 Leigh, N. P. 635; Pol. Prin. Cont. 306 *et seq.*). The illustrations are to be found in the authorities just cited.

Marriage Brokage Contracts. — The defendant must show, in support of this defence, that the consideration for the contract was the procurement of the consummation of a particular marriage (3 Add. Cont. sec. 1349; Smith, Cont. 131, 132; Pol. Prin. Cont. 306; 2 Par. Cont. 74; Shirl. L. C. 129, note; Crawford *v.* Russell, 62 Barb. 92, reported in Law. L. C. 103).

Future Separation. — The burden, in this case, requires the defendant to prove that the consideration for the contract consisted in an agreement for *future* separation (Smith, Cont. 131; 1 Add. Cont. sec. 254; Pol. Prin. Cont. 273; Shirl. L. C. 129, note; 1 Par. Cont. 359; Adams, Eq. 44), or, according to a late decision of the English Court of Equity, it will be sufficient to prove that although the deed provides for an immediate separation, it was a mere device, and that, in fact,

[1] This is the contract that caused Judge Hall to lose his religion, and swear on the bench (Year Book, 2 Hen. 5, *fol. quinto*).

no separation took place (Pol. Prin. Cont. 273; Shirl. L. C. note 129, 130, citing Bindley *v.* Mulloney, L. R. 7 Eq. 343).[1]

Impeding Justice. — The instances of this class of illegal consideration are so multiform, that a recapitulation would occupy too much space. It may suffice to say that the onus is with the defendant to show that the consideration of the contract was the contemplated performance or non-performance of some act, the performance, or non-performance (as the case may be) whereof, would operate in derogation of the jurisdiction, power, or dignity of the courts or of the legislature. A full line of illustrations will be found in the authorities cited (1 Add. Cont. sec. 258; Pol. Prin. Cont. 292 *et seq.*; Scott *v.* Avery, 5 H. L. C. 511, reported in Shirl. L. C. 121 and notes).

Maintenance; Champerty. — Under the English law, if the consideration of a contract was maintenance, it was vitiated. Maintenance is not entirely in accord with our institutions, and it is doubtful whether, at this day, any force would be allowed to these defences (Alex. Br. Stats. 321, note).

As to both, the codes of remedial justice have substantially abrogated their force as to contracts, by expressly allowing the assignment of a thing in action, and by requiring suit to be brought by the real party in interest. In some States, even by sanctioning the conveyance of title to realty, held at the time adversely (N. C. Code (1883), sec. 177; Bish. Cont. sec. 477; note *a*, Pol. Prin. Cont. 301; Ryall *v.* Rowles, 2 W. & T. L. C. (4th Am. ed.) 1631; Perrine *v.* Dunn, 3 Johns. Ch. 508, 519; State *v.* Chitty, 1 Bail. 379, 401; Sherley *v.* Riggs, 11 Hump. 53, 57).

Commission of Crime. — The defendant, under this defence, may show that the consideration for the contract was an agreement to commit a crime (Pol. Prin. Cont. 244); or

[1] Mr. Pollock uses the word *device*, but it is not employed in the opinion in the case cited of Bindley *v.* Mulloney. The Supreme Court of North Carolina deny any validity to a deed even contemplating and followed by immediate separation. Corrected by Statute (Code, sec. 1831).

even that a crime was contemplated as the ulterior result of the thing contracted to be done (Pol. Prin. Cont. 246).

Commission of Civil Injury. — Or he may show that the contract contemplated the commission of a civil injury (Pol. Prin. Cont. 246 *et seq.*).

Composition Creditor. — Or, being a debtor, he may show that his creditors (the plaintiff being one) had agreed to compound their debts, and that the consideration of the contract sued on was an agreement, kept secret from the other creditors, to pay to the plaintiff the amount specified in the contract sued on as a bonus (Pol. Prin. Cont. 247 *et seq.*).

Bankrupt's Discharge. — So he may show that the consideration for the contract was a secret agreement by the plaintiff to withdraw his opposition to a composition or to the discharge in bankruptcy of his debtor (Pol. Prin. Cont. 248).

Prejudice of Surety; Agent's Dealings; Fraud on Marital Rights. — These subjects hardly fall within the scope of the discussion now progressing, but may as well, perhaps, be disposed of under this title as elsewhere.

1. If a surety be sued, he may show[1] that without his consent the terms of the contract were materially varied by the creditor and principal debtor (Pol. Prin. Cont. 250).

2. A principal may show in an action against his agent that the contract was made by his agent in the course of his business, for his own emolument, without acquainting him with all the material surroundings (Pol. Prin. Cont. 251, 252).

3. Fraud upon the marital rights, as technically understood, consists in the making of a settlement by the intended wife before the marriage, clandestinely. The husband, plaintiff, in order to upset such conveyance, must prove (1) that he was the intended husband at the date of the settlement, *i.e.*, that there was then a complete contract to marry, which continued until the consummation of the marriage;

[1] This is stated without reference to the forum. Under the new codes there is no trouble. Under the former system, some courts drove the surety to his injunction.

(2) that the settlement was not known to him until after the marriage[1] (Pol. Prin. Cont. 255 *et seq.*; Logan *v.* Simmons, 3 Ired. Eq. 487).

Sexual Immorality. — The defendant may show that the consideration of the contract was future[2] illegal cohabitation (Pol. Prin. Cont. 267 *et seq.*).

Improper Publication. — He may show that the consideration of the contract was an agreement to publish a blasphemous, seditious, or indecent article or picture (Pol. Prin. Cont. 274). The burden, however, it would seem, is not satisfied but by proof showing that the publication was of such a character as to be indictable by the local law (Pol. Prin. Cont. 275).

Wagers. — Ordinary wagers were not illegal at common law, but while holding this doctrine, the courts have been astute to wrench away particular cases from the general principle. It would be an idle task to enumerate the various instances in which such illegality has been declared. They will be found enumerated in the authorities (Pol. Prin. Cont. 276 *et seq.*). It may be stated that in order to satisfy the burden under such defence, the defendant must show that the wager itself would have a tendency to wound the feelings of another, to corrupt public morals, to cause some infraction of law, or actually contemplated such a result, *ex. gr.*, at common law a wager on a horse-race was not illegal, but whenever the legislature saw fit to forbid horse-racing, any such wager thereafter made became such *ipso facto* (*ib.*). There

[1] In a case where it appeared that marriage articles were never mentioned to the intended husband until the parties were standing up to be married, and was then executed by him, it was held that it was incumbent upon parties claiming under such instrument, to prove that it was executed by the husband deliberately and without surprise or imposition (Taylor *v.* Rickman, Bush. Eq. 278).

[2] A parol agreement to pay a sum in consideration of past cohabitation is invalid, not as importing an illegal consideration, but because it lacks the elements of any consideration (Pol. Prin. Cont. 267, 268; Beaumont *v.* Reeve, 8 Q. B. 8 A. & E. (N. S.) 483, reported in Law. L. C. 37 and Shirl L. C. 7). It is otherwise if the contract therefor had been under seal (authorities just *supra*).

is also a class of contracts, not wagers in form, but which may or not, according to circumstances, be tantamount to wagers, which, as it is looming up into great importance, it is deemed advisable to treat separately under the title of WAGERING CONTRACTS.

Nurture of Offspring. — If a contract be made by a parent to divest himself of the control and nurture of his children (except, indeed, in the case of apprenticing), the consideration is against the policy of the law, and if not apparent upon the face of the instrument, evidence *dehors* may be given to show it[1] (Pol. Prin. Cont. 303 *et seq.*).

Influencing Testator. — If it be alleged that the consideration for an agreement was to exercise influence on a testator in favor of a particular object or person, the burden is upon the promisor to show that fact (Pol. Prin. Cont. 308).

II. ILLEGAL BY STATUTE.

Illegal by Statute. — An agreement made in consideration of the violation of any criminal or penal law is void, as well as when the consideration contemplated, and which is the only support to the agreement, is expressly denounced *eo nomine* by statute. Their name is legion, and it would require a considerable volume to classify and discuss them. Suffice it to say then, that the burden of proof rests upon the promisor to prove that, the agreement sued on was based upon the consideration calling for the performance of some act forbidden, or the neglect of some duty enjoined by positive law. Where there are several considerations, some valid and some illegal, it was formerly held that there was a distinction between illegal consideration at common law and by statute; that as to the former, the common law would eliminate the vicious, and like a "nursing father," uphold the valid; but that if part of the consideration was opposed to a statute, it came like "a tyrant," and destroyed the whole. But this

[1] Misconduct, or rather such a moral *status* as might tend to corrupt by association, may form a ground for exception, as when, for instance, the enforcement of such provisions, in separation deeds, is asked for.

distinction no longer obtains. There is a distinction, however, between a consideration and the performance of an illegal covenant. As we have said, if any part of a consideration is unlawful, the whole agreement is void (Pol. Prin. Cont. 318); but if there are several independent acts or conditions to be performed, and they are, in their essence, severable, the contract will be upheld as to those which are valid (Brannock *v.* Brannock, 10 Ired. 428).

INFANCY.

This is generally the subject of defence. The burden of proof is upon the party making the defence (Tyler, Inf. & Cov. sec. 146; 1 Greenl. Ev. sec. 81). However, if to a plea of infancy, the plaintiff replies that the goods furnished were necessaries, the burden is shifted, and cast upon the plaintiff to prove necessaries (Tyler, Inf. & Cov. sec. 74; Ewell, L. C. Infancy &c. 63). However, if the infant should bring an action for property which would have been barred, as against an adult, the burden is upon him to prove his infancy and remove the bar (Tyler, Inf. & Cov. sec. 117; Jackson *v.* Whitlock, 1 John. Cases. 213; Hyde *v.* Stone, 7 Wend. 334; St. John *v.* Turner, 2 Vern. Ch. 418; Calhoun *v.* Baird, 3 A. K. Marsh. 169). And it may be stated generally, that whenever an infant must sue, as infant, upon a plea of the general issue, the onus is with him to establish his infancy (Orchard *v.* Williamson, 6 J. J. Marsh. 558; S. C., 22 Am. Dec. 102).

If ratification of a contract after defendant became of age constitutes the gravamen of the action, the onus is not with the plaintiff to prove that he was of age when he ratified, but the burden of disproving that fact will lie on the defendant (1 Tay. on Evd. sec. 343; 2 Greenl. Ev. sec. 362, 367).

INSANITY.

Sanity being the normal condition is presumed, and the burden of proof as to mental alienation is upon him who alleges it. This is the almost universal doctrine (2 Saund. Pl. & Ev. 650; Browne, Med. Juris. Ins. (2 Am. ed.) sec. 519).

The question is generally presented — though not always in the form, yet by way of defence — to a civil or criminal action. It is not proposed to discuss the mode or measure of the proof. The contract of an insane person is voidable, and not void; hence, upon proof of insanity, the plaintiff may take the laboring oar, and offer proof of sanity; in such case the onus remains with the alleged insane person throughout, unless there has been an inquisition of lunacy, which would at least devolve the burden of proof (1 Whart. Cr. Law, sec. 60, and cases cited; Ewell, L. C. Inf. &c. 574, 588; Rogers *v.* Walker, 6 Pa. 371, reported in 47 Am. Dec. and notes, 470; Gangwere's Estate, 14 Pa. 417, reported in 53 Am. Dec. and notes, 554). But in some States, *after* office found, such contracts are deemed absolutely void (Ewell, L. C. 588). This question can only be solved by reference to statutory local law.

On principle, the inquisition being *ex parte*, and not an estoppel, would only create a presumption of insanity, and shift the burden (Browne, Med. Juris. Ins. sec. 92), and such is the English doctrine (Faulder *v.* Silk, 3 Camp. 126; Sergison *v.* Sealey, 2 Atk. 412; Tarbuck *v.* Bispham, 2 M. & W. 2; Bell *v.* Mannin, 3 Bligh, N. S. 1; see also Parker *v.* Davis, 8 Jones. 460).

The creditor may show in reply to proof of insanity, that the contract was for necessaries (Browne, Med. Juris. Ins. sec. 27; 1 Add. Cont. sec. 192; Chitty, Cont. 152; 1 Story, Cont. sec. 27; Met. Cont. 78, 79; Smith, Cont. 227 *et seq.;* Ewell, L. C. 632–635; 1 Pars. Cont. 385), even if note be given therefor (McCormick *v.* Littler, 85 Ill. 62, reported in 28 Am. Rep. 610).

So the creditor may, taking the burden, reply to evidence of insanity that the contract was made during a lucid interval (Met. Cont. 81; 1 Chitty, Cont. (11 Am. ed.) 191; Ewell, L. C. 697, 715, n.). If a chattel mortgage be made by a person apparently sane, and is attacked on the ground that the mortgagor was insane, the burden is on the attacking party (Fay *v.* Burditt, 81 Ind. 433, reported in 42 Am. Rep. 142). Or in reply to the defence of insanity, it may be shown that such insane person, being apparently of sound mind, and not known to be otherwise, entered into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo* (Molton *v.* Camroux, 4 Ex. (W. H. & G.) 17, reported in Ewell, L. C. 614; see notes to this case, p. 626; 1 Pars. Cont. 383–386; Caldwell *v.* Ruddy, 1 Pac. Rep. 339; Young *v.* Stevens, 48 N. H. 133, reported in 2 Am. Rep. 202).

As to deeds, the English doctrine as finally settled (Thompson *v.* Leech, 3 Salk. 300, reported in Ewell, L. C. 564; 4 Cruise, Dig. chap. 2, sec. 19; Sugden, Pow. 402, 403) is, that a feoffment with livery, by *non compos*, was voidable by the heir, but that every other species of deed was void (Sugden, *ubi supra;* 4 Cruise, Dig. chap. 6, sec. 25, & chap. 7, sec. 49; Shelford, Lun. 257–259; and see Sugden's Criticism upon the text of Blackstone; Sug. Pow. 403). There is much conflict in the American cases on this question, some holding with the English authorities that the deed of a *non compos* is void (Estate of Desilver, 5 Rawle, 111, reported in Ewell, L. C. 566; Dexter *v.* Hall, 15 Wall. 9; Millison *v.* Nicholson, Conf. Rep. (N. C.) 499; dissenting opinion of Cole, J., in Allen *v.* Berryhill, 27 Iowa, 504; Farley *v.* Parker, 6 Oreg. 105, reported in 5 Cent. L. J. 287; Bensell *v.* Chancellor, 5 Whart. 371, reported in 34 Am. Dec. 561; Wall *v.* Hill, 1 B. Mon. 290, reported in 36 Am. Dec. 578); others that the deed is voidable only, and not void (Allis *v.* Billings, 6 Met. 415, reported in 39 Am. Dec. 744, and in Ewell,

569 to 572; Met. Cont. 80, 81; 1 Pars. Cont. 384; 2 Kent, Com. 451; Eaton *v.* Eaton, 37 N. J. 108, reported in 18 Am. Rep. 716; Allen *v.* Berryhill, 27 Iowa, 504, reported in 1 Am. Rep. 309).

Perhaps it may not be inappropriate, as the reason for the distinction taken by the English courts does not seem to have been fully appreciated in the latter class of cases, to state it. The reason given for sustaining a feoffment with livery is inaccurately stated as being on account of the solemnity of the livery. Even Sir Edward Sugden so lays it down (Sug. Pow. 403); and as the statutes in most of the States have given to a deed, enrolled or registered, the force and effect of a feoffment with livery, it was, perhaps, rather hastily assumed that our deeds were equivalent thereto; but the true reason for the distinction is this: because the livery being formerly made before the *pares curiæ*, their solemn attestation of the change of possession could not be defeated by the feoffor himself, it being presumed that they were competent judges of the feoffor's ability to make the feoffment (4 Cruise, Dig. Vol. IV. chap. 6, sec. 22).

The force and effect prescribed as to a registered deed under American statutes — although the term is general — should be referred to the acquisition of seizin analogous to deeds operating under the statute of Uses, without transmutation of possession. Indeed, were the matter *res integra* in those States where the statute of Uses has been re-enacted or adopted, the statute authorizing or requiring registration might have been treated as a substantial re-enactment of the statute of Enrollments, 27 Hen. 8, with the exception therein contained omitted, which gave rise to the lease and release.

There is a notable discrepancy to be observed between the reasoning that construes our American deeds as if livery had actually been made, and that, which led our courts to hold that deeds operating under the statute of Uses are innocent conveyances.

The force and effect of a feoffment by one who had no title was to create a tortious fee; and if our deeds are to have

all the force and effect of a feoffment with livery upon registration, by parity of reasoning they ought to create a tortious fee, and yet, neither in England nor America is such a doctrine held.

This much has been premised as, owing to the conflict of authority on this point, the practitioner in those States where the question is yet *res integra* may have the authorities *pro* and *con*, as the question of the shift of burden cannot arise if the deed be held void, and may arise if held voidable. If held voidable, the opposite party may take the burden of proving a ratification, as in case of an infant's deed (notes to Ewell, L. C. 573, citing Gibson *v.* Soper, 6 Gray, 79; Arnold *v.* Richmond Iron Works, 1 Gray, 434).

The weight of authority is in favor of the proposition, that as to executory contracts made by persons *non compos* they are voidable, and not void (Carrier *v.* Sears, 4 Allen, 336, reported in Ewell, L. C. 574; Ewell, L. C. notes, 587, 588; Browne, Med. Juris. Ins. sec. 27). But in New Hampshire it is held that the endorsement of a person *non compos* is void (Burke *v.* Allen, 29 N. H. 106, reported in Ewell, L. C. 576). If a contract is procured from a man who was so drunk as to be incapable of understanding what he was about, it may be avoided, the onus, of course, being upon the drunken party (Browne, Med. Juris. Ins. sec. 361; Barrett *v.* Buxton, 2 Aiken (Vt.), 167, reported in Ewell, L. C. 728; Gore *v.* Gibson, 13 M. & W. 623, reported in Ew. L. C. 734, and notes at p. 738; Met. Cont. 81, 82; Smith, Cont. 233, notes *a* and 1 (3 Am. ed.); 1 Pars. Cont. 384; Joest *v.* Williams, 42 Ind. 565, reported in 13 Am. Rep. 379 and notes).

The contract of marriage of one *non compos* is void (Browne, Med. Juris. Ins. sec. 25; McQueen, H. & W. Pt. I. 12; 2 Pars. Cont. 81; Bishop, M. & D. sec. 176 *et seq.*; Inhabitants &c. *v.* Inhabitants &c., 12 Mass. 363, reported in Ewell, L. C. 600; Wightman *v.* Wightman, 4 John. Chan. 343, reported in Ewell, L. C. 602, and notes at p. 609).

The rule as to the burden of proof in such case may be thus stated: when the fact of a marriage between parties of

suitable age is established, the law presumes them to have been capable of giving a valid consent, and he who alleges insanity must prove it. But when a permanent condition of insanity is once shown, the burden shifts, and he who claims a lucid interval must prove it. If the insanity, however, is temporary, depending on some exciting cause which is not in perpetual action, the rule is different, and the burden still remains with the party alleging insanity to prove that it or its cause was in operation at the very time of marriage (Bishop, M. & D. sec. 184).

We propose next to discuss the question of the burden of proof in relation to criminal actions. Sanity being presumed, as in accordance with the usual course of nature, it would seem, on principle, that insanity would be a defence, and that the burden of proof would rest upon the defendant. The English law treats it purely as a defence, and imposes the burden of proof upon the defendant (1 Hale, P. C. 33; Arch, Crim. Pl. 14; 1 Greenl. Ev. sec. 34; 2 Greenl. Ev. sec. 373; 1 Whart. Cr. L. sec. 60; 2 Bish. Cr. Pro. sec. 533; U. S. *v.* Lawrence, 4 Cranch, C. C. 514; U. S. *v.* McGlue, 1 Curt. 1; Browne, Med. Juris. Ins. sec. 520; 1 Allison, Cr. Law, 49; 1 Russell, Crimes, 614–616, n. 1; Whart. Am. L. Hom. 458; Foster, Cr. L. 255).

And such may be regarded as the current American doctrine (1 Whart. Cr. L. sec. 60, citing a number of decisions; Law. Cr. Def. notes to p. 513 *et seq.;* notes to State *v.* Redemier, 71 Mo. 173, reported in 36 Am. Rep. 462; 1 Cr. L. Mag. 465; and Law. Cr. Def. 424). Perhaps as the great majority of the States hold this principle, it will be sufficient to call attention to those decisions which take the opposite view.

The various American cases may be divided into three classes: —

First. Those that hold that the defendant must prove his insanity beyond a reasonable doubt.

Second. Those that hold to a preponderance of testimony.

Third. Those that hold, that if on the whole evidence there should be a reasonable doubt as to the alleged insanity, there must be an acquittal.

The last-named view is tantamount to placing the burden of proof on the prosecution when any evidence of insanity is introduced, and is held in the States of Kansas, Indiana, Illinois, Mississippi, New York, Tennessee, Michigan, Vermont, New Hampshire, Nevada, Nebraska, the District of Columbia, and by the Supreme Court of the United States (State *v.* Crawford, 11 Kan. 32, reported in 2 Green's Cr. Rep. 638, Law. Cr. Def. 459, and 14 Am. Law. Reg. (N. S.) 21; State *v.* Mahn, 25 Kan. 182; State *v.* Pike, 49 N. H. 399, substantially reported in Law. Cr. Def. 311 *et seq.;* State *v.* Bartlett, 43 N. H. 224, reported in Law. Cr. Def. 480; State *v.* Jones, 50 N. H. 369, reported in 9 Am. Rep. 242, and Law. Cr. Def. 64; Polk *v.* State, 19 Ind. 170; Stevens *v.* State, 31 Ind. 485, reported in Law. Cr. Def. 87; Bradley *v.* State, 31 Ind. 492, reported in Law. Cr. Def. 114; Guetig *v.* State, 66 Ind. 94, reported in 32 Am. Rep. 99, and in Law. Cr. Def. 455; Granley *v.* State, 60 Ind. 141; McDougal *v.* State, 4 Crim. L. M. 509, pushes this view to the verge of the law; Hopps *v.* People, 31 Ill. 385, reported in Law. Cr. Def. 444; Chase *v.* People, 40 Ill. 352; Pollard *v.* State, 53 Miss. 410; Cunningham *v.* State, 56 Miss. 269, reported in 31 Am. Rep. 360, and in Law. Cr. Def. 470; People *v.* McCann, 16 N. Y. 58, reported in Law. Cr. Def. 490; Wagner *v.* People, 4 Abb. App. Dec. 509; People *v.* Kleim, 1 Edm. Sel. Cas. 13; People *v.* Devine, *ib.* 594; People *v.* Robinson, 1 Park. Cr. C. 649; People *v.* Tripler, 1 Wheeler, Cr. C. 48). After vacillating upon this question for years, it was finally settled in New York that the burden was on the prosecution throughout (Brotherton *v.* People, 75 N. Y. 159, reported substantially in Law. Cr. Def. 529; O'Connell *v.* People, 87 N. Y. 377, reported in 41 Am. Rep. 379, and Law. Cr. Def. 499; Coffee *v.* State, 3 Yerg. 282; Mitchell *v.* State, 5 Yerg. 356; Dove *v.* State, 3 Heisk, 348, reported in Law. Cr. Def. 502; Stuart *v.* State, 1 J. Baxt. 178; Lawless *v.* State, 4 Lea (Tenn.), 179; People *v.* Garbutt, 17

Mich. 9, reported in 7 Am. L. Reg. (N. S.) 554, and Law. Cr. Def. 463; People *v.* Findley, 38 Mich. 482, reported in Law. Cr. Def. 140; State *v.* Patterson, 45 Vt. 308; Smith *v.* Com., 1 Duv. (Ky.) 224, reported in Law. Cr. Def. 669; Jane *v.* Com., 2 Met. (Ky.) 30;[1] State *v.* Waterman, 1 Nev. 343; Wright *v.* People, 4 Neb. 407, 414, reported in Law. Cr. Def. 477; Hawe *v.* People, 11 Neb. 537, reported in 38 Am. Rep. 375, and Law Cr. Def. 16; Chaffee *v.* U. S., 18 Wall. 517, is claimed under this rule; Sickles' trial (pamphlet); U. S. *v.* Guiteau, 10 Fed. Rep. 161; 1 Mackey, 498; 16 W. Jur. 409; 3 Cr. L. Mag. 347; Law. Crim. Def. 163; U. S. *v.* Lunt, 1 Sprague, Dec. 311; note to Queen *v.* Millshire, 20 Am. L. Reg. (N. S.) 723).

The courts holding this doctrine do not pretend that it is incumbent on the prosecution to prove sanity in the first instance before resting; but that if the defendant (a *prima facie* case having been made out by the prosecution) offers testimony "tending to engender a doubt of the sanity of the prisoner" (Cunningham *v.* State, 56 Miss. 299, reported in 31 Am. Rep. 360, and Law. Cr. Def. 470), the burden is cast upon the State to remove the doubt and establish the sanity of the prisoner. The other class of cases seems to confound the distinction, a clear one, between the burden of proof and the degree or intensity of proof. On that grand principle which permeates Anglo-Saxon jurisprudence, that to warrant conviction for crime, guilt must be established beyond a reasonable doubt, it looks like yielding the substance to the shadow to assume as the logical result of the other view would require, that although *upon the whole case* the jury has a reasonable doubt of the prisoner's guilt, yet they must convict because he has failed to cause the testimony, bearing on his line of defence, to preponderate.

A revolution in judicial thought has set in, and courts are rapidly wheeling into the line of this last class of decisions (see exhaustive opinion of HENRY, J., in State *v.* Wingo, 66

[1] Such, at least, seems to be the gist of the Kentucky decisions. So understood by Mr. Ewell (L. C. 719, in note).

Mo. 181, reported in 27 Am. Rep. 329; dissenting opinion of HURT, J., in Webb *v.* State, 9 Tex. Ct. App. 490, reported in note, 35 Am. Rep. 32, and in Law Cr. Def. 835; able dissenting opinion of HENRY, J., in State *v.* Redemier, cited *supra*, which gives the key-note to the solution of the question, in saying "that it simply reverses the order, not the burden of proof." See also notes to State *v.* Marler, 36 Am. Dec. 410; 1 Bish. Crim. Pro. sec. 534; art. by Dr. Ordronaux, 1 Cr. L. M. 431; notes to Redemier's case, *ib.* 468; art. 16 C. L. J. 282; art. in 14 Am. L. Reg. (N. S.)).

As pertinently said by Mr. Bishop, "insanity is not an issue by itself to be passed on separately from the other issues, but like any other matter of rebuttal, it is involved in the plea of not guilty; the jury to convict or not, according as, on the whole showing, they are satisfied or not beyond a reasonable doubt of the defendant's guilt" (Jones *v.* State, 15 Rep. 27).

Indeed, if we recur to the law governing a civil action, we shall find that to an action against an insane person, he may give evidence of his insanity under the general issue (2 Saund. Pl. & Ev. 650; 1 Chitty, Pl. 476, 477). Now suppose that there was a conflict of evidence on this point, would not the judge be bound to instruct the jury that the plaintiff must make out his case by a preponderance of testimony? If so, what difference in principle can be suggested between such a case and a criminal action when not guilty is pleaded?

The doctrine of the measure of proof, assuming any burden to be upon the defendant, falls more properly under the title of INTENSITY OF THE PROOF, and will be there considered.

Wills. — The question as to the burden of proof on the probate of wills has given rise to much contrariety in judicial thought, and is not free from difficulty. There seems to be an irreconcilable discrepancy in the English cases.

It is laid down by a number of authorities that there is a presumption of sanity, and that the burden is upon the caveator (Shelf. Lun. 50, 274; Swin. Wills, 77, Pt. II. sec. 3; Worthington, Wills, 25; 3 Phil. Ev. 292, 293; Parsons, Wills, 5; Rosc. Ev. 345; 3 Stark. Ev. 1702; Browne, Med. Juris. Ins.

sec. 517; 6 Cruise, Dig. 14; 1 Jar. Wills, 72; 2 Saund. Pl. & Ev. 939; Tamlyn, Eq. Ev. 189; 1 Red. Wills, 31, 32, sec. 4; Bac. Abr. F. Tit. Idiots; Peakes, Ev. (Norris) 583; Lovelass, Wills, 15, 142; Tucker *v.* Phipps, 3 Atk. 359, 361; Groom *v.* Thomas, 2 Hagg. 434; Tatham *v.* Wright, 2 Russ. & Myl. 1); by others that it is upon the propounder (Barry *v.* Butlin, 1 Curt. Ecc. Rep. 637; S. C., 2 Moo. P. C. 480, per PARKE, B.; Harris *v.* Ingledew, 3 P. Wms. 93; Hindson *v.* Kersey, 4 Burns, E. L. 102; Wallis *v.* Hodgeson, 2 Atk. 56; Townsend *v.* Ives, 1 Wils. 216; Ogle *v.* Cook, 1 Ves. Sr. 177; Bootle *v.* Blundell, 1 G. Coop. 136; Jackson *v.* Hesketh, 2 Stark. 518); and the case of Barry *v.* Butlin was fully sanctioned on this point so late as 1872 (Fulton *v.* Andrews, L. R. House of L. 448; S. C., 12 E. R. (Moak) 76; Sutton *v.* Sadler, 3 C. B. (N. S.) 87; Powell, Dev. 70; Hodges *v.* Holder, 3 Camp. 366; 1 Wms. Ex. (6 Am. ed.) 23 *et seq.*; Flood, Wills, 385 *et seq.*).

There exists a like discrepancy in the American decisions.

The courts of the following-named States hold that the onus is with the propounder: —

Arkansas (Jenkins *v.* Tobin, 31 Ark. 306).

Connecticut (Comstock *v.* Hadlyme Soc., 8 Conn. 254, reported in 20 Am. Dec. 100).

Georgia (Potts *v.* House, 6 Ga. 324, reported in 50 Am. Dec. 329; Ragan *v.* Ragan, 33 Ga. Supp. 106; Stancil *v.* Keenan, 35 *ib.* 103; Evans *v.* Arnold, 52 *ib.* 169; Welter *v.* Habersham, 64 *ib.* 193).

Illinois (Rigg *v.* Wilton, 13 Ill. 15; Potter *v.* Potter, 41 *ib.* 84; Holloway *v.* Galloway, 51 *ib.* 159; Trish *v.* Newell, 62 *ib.* 196; Tate *v.* Tate, 88 *ib.* 42).

Iowa (under statutory regulations. Veiths *v.* Hagge, 8 Clarke, 163; Matter of Will of Convey, 52 Iowa, 197, reported in 1 Am. Prob. Rep. 90).[1]

Maine (Gerrish *v.* Nason, 22 Me. 438, reported in 39 Am. Dec. 589; Cilley *v.* Cilley, 34 *ib.* 162; Robinson *v.* Adams, 62 *ib.* 369, reported in 16 Am. Rep. 473).

[1] See Stephenson *v.* Stephenson, 17 N. W. Rep. 456.

Massachusetts (Brooks *v.* Barrett, 7 Pick. 94; Phelps *v.* Hartwell, 1 Mass. 71; Buckminster *v.* Perry, 4 *ib.* 593; Crowninshield *v.* Crowninshield, 2 Gray, 524; Baxter *v.* Abbott, 7 Gray, 71; Baldwin *v.* Parker, 99 Mass. 79, reported in 39 Am. Dec. 589).

Michigan (Beaubein *v.* Cicotte, 8 Mich. 9; Taff *v.* Hosmer, 14 *ib.* 309; McGinnis *v.* Kempsey, 27 *ib.* 363).

Missouri (Withington *v.* Withington, 7 Mo. 589; Garvin *v.* Williams, 44 *ib.* 465; Tingley *v.* Cowgill, 48 *ib.* 291; Harris *v.* Hays, 53 *ib.* 90; Benoist *v.* Murrin, 58 *ib.* 321).

New Hampshire (Perkins *v.* Perkins, 39 N. H. 163; Judge of Probate *v.* Stone, 44 *ib.* 593; Boardman *v.* Woodman, 47 *ib.* 120; Hardy *v.* Merrill, 56 *ib.* 227, reported in 22 Am. Rep. 441, and 3 Am. L. T. (N. S.) 374; though the earlier case of Pettes *v.* Bingham, 10 N. H. 515, looks the other way).

New York (Delafield *v.* Parrish (Parrish Will case), 25 N. Y. 9; Taylor Will case, 10 Abb. Pr. (N. S.) 300, overruling the case of Jackson *v.* Van Dusen, 5 Johns. 144, reported in 4 Am. Dec. 330).

Texas (Renn *v.* Lamon, 33 Tex. 760).

Vermont (Williams *v.* Robinson, 42 Vt. 658, reported in 1 Am. Rep. 359).

West Virginia (McMechin *v.* McMechin, 17 W. Va. 683, reported in 41 Am. Rep. 682).

Virginia is so classed (Riddell *v.* Johnson, 26 Gratt. 152, reported in 3 Am. L. T. (N. S.) 171; but while the syllabus looks that way, it will be discovered on an examination of the case that this was not the point, and the reasoning of the court was directed to the onus probandi with reference to undue influence).

In several of these States the subject is regulated by statute, and in Massachusetts and West Virginia the decisions are put upon a supposed requirement contained in 34 & 35 Hen. 8.

The American text-books favoring this view are Redfield, Wills, 29, 30; Abt. Tr. Ev. 113, 114; 6 Wait, A. & D. p. 383; but favors the other view on p. 385; Redfield, L. & Prac. Sur. Courts, 106.

The courts of the following-named States hold that sanity is presumed, as in other cases, and that the burden is upon the caveator: —

Alabama (Saxon *v.* Whitaker, 30 Ala. (N. S.) 237; Stubbs *v.* Houston, 33 *ib.* 555).

Delaware (Chandler *v.* Ferris, 1 Harr. 454; Duffield *v.* Robeson, 2 *ib.* 375; Jamison *v.* Jamison, 3 Houst. 108).

Indiana (Rush *v.* Megee, 36 Ind. 69; Turner *v.* Cook, *ib.* 129).

Kentucky (Hawkins *v.* Grimes, 13 B. Mon. 257; Milton *v.* Hunter, 13 Bush. 163, reported in 1 Am. Prob. Rep. 521, overruling the earlier decisions of Hayden *v.* Hayden, 6 J. J. Marsh. 48, and Rogers *v.* Thomas, 1 B. Mon. 390).

Maryland (Higgins *v.* Carlton, 28 Md. 141; Taylor *v.* Creswell, 45 *ib.* 422).

North Carolina (Mayo *v.* Jones, 78 N. C. 402; Syme *v.* Broughton, 85 N. C. 367).

New Jersey (Trumbull *v.* Gibbons, 2 Zab. 117, reported in 51 Am. Dec. 253; Sloan *v.* Maxwell, 3 Green Chan. (3 N. J. Eq.) 563; Turner *v.* Cheesman, 15 N. J. Eq. 243).

Ohio (Runyan *v.* Price, 15 Ohio (N. S.), 1; Meers *v.* Meers, *ib.* 90, under statutory regulations).

Oregon (Greenwood *v.* Cline, 7 Oreg. 17).

South Carolina (Lee *v.* Lee, 4 McCord, 183, reported in 17 Am. Dec. 722).

Tennessee (Puryear *v.* Reese, 6 Cold. 21; Frear *v.* Williams, 7 Baxt. 550, reported in 1 Am. Prob. Rep. 85; Key *v.* Holloway, 7 J. Baxter, 575, reported in 1 Am. Prob. Rep. 360; Bartee *v.* Thompson, 8 Baxt. 508).

This doctrine is also held in the Circuit Court of the United States (Stevens *v.* Van Cleve, 4 Wash. C. C. 262; Harrison *v.* Rowan, 3 *ib.* 585; Lessee of Hoge *v.* Fisher, 1 Pet. C. C. 163).

The American text-books favoring this view are Ewell's Lead. Cases, note at p. 720; 2 Greenl. Ev. sec. 689; 6 Wait's A. & D. at p. 385; Iredell on Executors, 9 (13), a capital treatise, which, it is to be regretted, is nearly out of print.

The author suggests with diffidence, that, on principle, the onus should rest with the caveators; unless, indeed, in those jurisdictions where sanity is required to be proved by express words, or necessary implication of a statute.

There is nothing in the English statutes of Wills, 32 Hen. 8 & 29 Ch. 2, that expressly or impliedly requires that sanity should be proved by the propounders; and the latter statute has been generally re-enacted in the United States *in ipsissimis verbis*, though the statute explanatory of the statute of Wills, 34 & 35 Hen. 8, declares that wills made by insane persons shall not be taken to be effectual.

Possibly this negative provision gave rise to the practice of requiring proof from the propounders.

The statute of 29 Ch. 2, was passed in consequence of numerous frauds that had been perpetrated on testators, and *ex abundanti cautela* the courts, as a mere matter of practice to guide their consciences, required formal proof of sanity.

But a man is always presumed to be sane; it is the normal condition; and to require proof of that which the law presumes, is repugnant to all the analogies. Why require such proof as to a will, when not required as to any other transaction?

There is another phase of the burden of proof in this connection, which merits attention. It is this: That if general insanity—as contradistinguished from delusional or partial insanity—has been shown to exist, it is presumed to continue, and the burden is then devolved upon the propounder to prove that the script propounded as a will, was executed during a lucid interval.

On this question the text-books and decisions all point one way, and a brief reference to the leading authorities is considered sufficient (1 Jar. Wills, 65 *et seq.;* Worthington, Wills, 25; 2 Greenl. Ev. sec. 689; 1 Wms. Ex. 17–30; Ray, Med. Jur. Ins. chap. 14, secs. 230–246; Roberts, Wills, 30; Browne, Med. Juris. Ins. sec. 395; Swinburn, Pt. 2, sec. 3; Godolphin, O. L. Pt. 1, chap. 8, sec. 2; Shelford, Lun. 275; 1 Red. Wills, chap. III., sec. 13 (8); Cartwright *v.* Cartwright,

1 Phill. 90; 6 Cruise, Dig. 13, 14, note by Greenl.; 2 Saund. Pl. & Ev. 939; Abb. Tr. Ev. 114; Ewell, L. C. 691–718, and notes citing many authorities, and reporting Atty. Genl. *v.* Parnther, 3 Brown's Chan. Rep. 441, one of the leading cases; Clark *v.* Fisher, 1 Paige Chan. 171, reported in 19 Am. Dec. 402, and notes, p. 408; Jackson *v.* Van Dusen, 5 John. 144, reported in 4 Am. Dec. 330; Case of Cochran's will, 1 T. B. Monroe, 264, reported in 15 Am. Dec. 116 and notes; Whart. & Stille, Med. Juris. Ins. sec. 254 *et seq.;* Will of Cole, 49 Wis. 147, reported in 1 Am. Prob. Rep. 339; 3 Phil. Ev. 293; Iredell, Ex. 8 (7); Hall *v.* Warren, 9 Ves. 611; White *v.* Wilson, 13 Ves. 88; Prinseps *v.* Dyce Sombre, 10 Moo. P. C. 232, 245; Titlow *v.* Titlow, 54 Pa. 216; S. C., 7 Am. L. Reg. 319; Nichols *v.* Freeman, 1 Swab. & Trist. 239; Smith *v.* Tebbett, L. R. 1 Pro. & Div. 398; Breed *v.* Pratt, 18 Pick. 115; Saxon *v.* Whitaker, 30 Ala. (N. S.) 237).

A like doctrine was applied to a deed (Ballew *v.* Clark, 2 Ired. 23) and a mortgage (Ripley *v.* Babcock, 13 Wis. 425). The only case looking contrariwise is Kingsbury *v.* Whitaker, 32 La. Ann. 1055, reported in 36 Am. Rep. 278; and 1 Am. Prob. Rep. 245; *obiter dictum* of Ld. Eldon in McAdam *v.* Walker, 1 Dow. 178.

It will be observed that the term "general insanity" is used rather inaccurately by most of the text-writers; Browne, with his usual precision, uses the more pointed and accurate expression "habitual" (Browne, Med. Juris. Ins. sec. 395), though even that term may not be fully accepted by the medical profession.

"Continuity" seems rather to form the medical idea (Whart. & Stille, Med. Juris. Ins. sec. 254 and note).

As to delusional insanity, or, as it is sometimes termed, partial insanity, the rule is not rigidly applicable. There is no presumption of its continuance, as in case of habitual.

The burden in such cases would extend not only to proving delusional insanity on a particular subject, but that the script was made under its direct and immediate operation (Worth. Wills, 28, 29; Tittel's Estate, Myrick's Prob. (Cal.)

12; Shel. Lun. 48; Mod. Prob. Wills, 118; Worth. Wills, 28, 29; Potts *v.* House, 6 Ga. 324, reported in 50 Am. Dec. 329; Dew *v.* Clark, 1 Add. E. Rep. 279, reported in Ewell, L. C. 660, and see editor's notes to this case, 673 *et seq.*; 1 Red. Wills, chap. III. sec. 11 (9); Lee *v.* Lee, 4 McCord, 183, reported in 17 Am. Dec. 722; Pidcock *v.* Potter, 68 Pa. 342, reported in 8 Am. Rep. 181 and notes; Cotton *v.* Ulmer, 45 Ala. 378, reported in 6 Am. Rep. 703; Robinson *v.* Adams, 62 Me. 369, reported in 16 Am. Rep. 473; notes to Cochran's will, 15 Am. Dec. 117; *Re* will of Cole, 49 Wis. 147, reported in 1 Am. Prob. Rep. 339; see the subject elaborately analyzed in Browne's Med. Juris. Ins. sec. 149 *et seq.*; Kingsbury *v.* Whitaker, 32 La. Ann. 1055, reported in 36 Am. Rep. 278, and 1 Am. Prob. Rep. 245; Leech *v.* Leech, 21 Pa. 67; S. C., 4 Am. J. N. S. 179; that it is the "direct offspring," see Iredell, Ex. 8 (9)).

Some doubt was at one time cast upon the view as above stated by Ld. Brougham in the case of Waring *v.* Waring, 6 Moo. P. C. 349; S. C., 12 Jur. 947, and by Ld. Penzance in Smith *v.* Tebbett, L. R. 1 P. & D. 398, holding that proof of delusional insanity incapacitated the party affected from making a will; but these cases are overruled and the doctrine of the text established in the late case of Banks *v.* Goodfellow, L. R. 5 Q. B. 549, reported in notes to Ewell, L. C. 678 *et seq.*

Delirium may produce incapacity to make a will (1 Red. Wills, chap. III. sec. 11, par. 12 (2)). The burden here is unquestionably with the caveator.

The proof, as in case of delusional insanity, must point to the time of the execution of the will, for while evidence of delirium existing before would be admissible, such proof is not aided by the presumption applicable to that of habitual insanity (Browne, Med. Juris. Ins. sec. 384).

Drunkenness in connection with the making of wills may also perhaps be appropriately considered now. The author does not purpose in this connection, to discuss the measure of proof (see title Rescission and Cancel.), but merely to state the principle in this behalf governing the onus probandi. The

burden is undoubtedly upon the contestants (1 Red. Wills, chap. 5, sec. 12, sub-sec. 7; Shelf. Lun. 276; 1 Jar. Wills, 55; note to Estate of Johnson, 2 Am. Prob. Rep. 526; notes to Ayery *v.* Hill, 2 Add. 206, reported in Ewell, L. C. 746; notes at p. 759; Worth. Wills, 32).

But in this kind of incapacity as well as delusional (often incorrectly termed "partial") insanity and delirium, there is no presumption of continuance, so that the evidence must directly or indirectly be addressed to the condition of the supposed testator's mind at the very time of making the script (Ewell, L. C. *ubi supra;* 1 Red. Wills, chap. 5, sec. 12, sub-sec. 7; Shelf. Lun. 276; Browne, Med. Juris. sec. 518; State *v.* Reddick, 7 Kan. 143, 151; Carpenter *v.* Carpenter, 8 Bush. 283, 287; Hix *v.* Whittemore, 4 Met. 545; Halley *v.* Webster, 21 Me. 461). The principle is also applied to contracts (Lewis *v.* Baird, 3 McLean, 56; People *v.* Francis, 38 Cal. 183, 189; Thornton *v.* Appleton, 29 Me. 298; notes to McMechen *v.* McMechen, 41 Am. Rep. at 686).

If, however, the requisite evidence be adduced, the burden to show that the script was made during a lucid interval is shifted upon the propounder (Browne, Med. Jur. sec. 385).

Care must be taken to distinguish between eccentricity, whether consisting in action or opinion, and delusional insanity. BROWNE, with his usual keen discrimination, puts it thus: "The line between these two conditions cannot be drawn, and it would seem that it is only when a man is more mad than sane that we call him a lunatic, and when he is more sane than mad we call him a man of sense and sanity" (Browne, *ib.* sec. 146). The possession of the most absurd theories does not incapacitate (Browne, *ib.* sec. 296; 1 Red. Wills, 81–84, 89, 90 (3d ed.); Lee *v.* Lee, 4 McCord, 183, reported in 17 Am. Dec. 722; Potts *v.* House, 6 Ga. 324, reported in 50 Am. Dec. 329; Shelf. Lun. 48; Kinne *v.* Kinne, 9 Conn. 102, reported in 21 Am. Dec. 732). Such as a belief in spiritualism — so-called (Brown *v.* Ward, 53 Md. 376, reported in 36 Am. Rep. 422; *Re* Smith's will, 52 Wis. 543, reported in 38 Am. Rep. 756; Robinson *v.* Adams, 62 Me. 369, reported

in 16 Am. Rep. 473), or metempsychosis (Bonard's will, 16 Abb. Pr. (N. S.) 128), or witchcraft or necromancy (Austin *v.* Graham, 8 Moo. P. C. 493; S. C., 1 Spinks. 359; Kingsbury *v.* Whitaker, 32 La. Ann. 1055, reported in 36 Am. Rep. 278). The distinction is clear, but the difficulty consists in making the application.

When the Dutch ambassador told the king of Siam that at certain seasons of the year the waters in Holland became so hard that loaded wagons could be driven over them, he was probably regarded as insane.

So the expression of Puck in Midsummer Night's Dream "I'll put a girdle round about the earth in forty minutes" doubtless caused our ancestors to smile with incredulity, yet the cable has verified the expression.

The believers in "spiritualism" are deceived by appearances, and reason on false premises. So the pious Mohammedan who saw his prophet's body ascend to the ceiling of the temple, believed that it was the effect of a miracle, yet he would be competent to make a will.

On the other hand, if the testator was possessed with a delusion that some stranger was his son, when from any cause he could not possibly be such, and his will was influenced by such delusion, the will ought not to be allowed to stand.

As to senile dementia, as it is called, arising from extreme age or enfeebled powers, there is no presumption that such an effect is either the necessary or usual course of nature, and therefore, if the will be attacked upon this ground, the burden of proof is upon the contestants (1 Red. Wills, 93, 94 (3d ed.), chap. 3, sec. 12; Browne, Med. Juris. Ins. chap. 13; Mod. Prob. Wills, 140; Worthington, Wills, 32; Shelf. Lun. 276).

As to idiots, if by that term we imply one born without any intellect, it is quite plain that they cannot make a will, but owing to the presumption of sanity, in those jurisdictions where the burden is cast upon the caveator to prove insanity, it is likewise devolved upon him to prove idiocy (1 Red. Wills, 58–67 (3d ed.); Mod. Prob. Wills, 91; Shelf. Lun. 274; 1 Jar. Wills, 55).

There remains but one other proof in this connection, and that is, the effect upon the onus of an inquisition. They are not conclusive in their nature, and merely raise a presumption of the truth of the fact found, and devolve the burden of proof upon the party alleging sanity after office found (Shelf. Lun. 63 *et seq.;* 1 Red. Wills, 122 (3d ed.); 1 Jar. Wills, 78; 2 Greenl. Ev. sec. 690; Browne, Med. Juris. Ins. sec. 92; 2 Saund. Pl. & Ev. 586; Abb. Tr. Ev. 119; Estate of Johnson, 57 Cal. 529, reported in 2 Am. Prob. Rep. 524 and notes; Lewis *v.* Jones, 50 Barb. 645).

In some of the States provision has been made in certain cases where persons are accused of crime, and the defence interposed is insanity, to try that isolated issue before a jury; the burden in such case would presumably rest upon the accused (see U. S. *v.* Lancaster, 7 Biss. 440, reported in Law. Cr. Def. 897).

It may be added that an insane person is liable civilly for a trespass (Shelf. Lun. 407), and perhaps for other torts (1 Saund. Pl. & Ev. 348; Browne, Med. Juris. Ins. sec. 155; Ewell, L. C. 635–642 and notes); consequently, in such cases, the settlement and shift of the burden would be regulated as in actions between sane litigants.

JUDGMENTS.

General Burden. — The onus lies with the plaintiff, upon *nul tiel record* pleaded, to show the judgment declared on. If there be a pleading in confession and avoidance also (permissible under the local law), as payment, release, etc., the onus to establish these defences is with the defendant.

These positions are applicable, whatever may be the form of litigation, to enforce payment, whether by action, *sci. fa.* or notice. It is not proposed to discuss the mode of proof whether by exemplification or otherwise, as that is dependent upon collateral considerations and the local law.

Foreign Judgments. — The measure of proof necessary to establish foreign judgments (other than those of a State of

the American Union) is sometimes regulated by local statutes; but in the absence of a statute, it is necessary for the plaintiff to prove the judge's handwriting, and also the seal of the court or to show that the court has no seal; upon making this proof, he establishes a *prima facie* case (1 Sell. Prac. 448; 2 Phil. Ins. sec. 2050; 1 Arch. Pr. 162; Abb. Tr. Ev. 550; 2 Phil. Ev. 130 *et seq.*).

FREEMAN lays it down that the judgments are authenticated (1) by an exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate, must itself be properly authenticated (Free. Judg. sec. 414). Other modes may be sufficient (*ib.*), but it should be borne in mind that it is proved as a question of fact (as *nul tiel record* is an inadmissible plea), and the traverse concludes to the country (Walker *v.* Witter, 1 Doug. 1; 1 Arch. N. P. 244).

It is not the purpose of this treatise to discuss the conclusiveness of foreign judgments, as that only affects the measure of proof. *Nil debet*, or *non assumpsit*, or a general denial of its existence under the code system, casts the onus on the plaintiff to prove the judgment.

If, then, being proved, it is from its subject-matter or otherwise conclusive, the defendant, if he has also pleaded in confession and avoidance, then takes the onus; but the party relying upon it must assume the burden of showing that the court which rendered it, had jurisdiction of the subject-matter and the parties (2 Phil. Ins. sec. 2104).

Judgments, rendered in the courts of record of the different States, when sued in another State, are, by virtue of the constitutional provision, Art. IV. Sec. I. imbued with like force and effect as they possessed in the State where they were rendered, subject to the qualification that they are open to inquiry, as to the jurisdiction of the court rendering them, and as to notice to the defendant, the judgment not reversed nor set aside, being conclusive in the courts of all other States where the subject-matter of the controversy is the same (Christmas *v.* Russel, 5 Wall. 290; Carter *v.* Wilson, 1 D. & B. 362).

All inquiry into the subject-matter is precluded (M'Elmoyle *v.* Cohen, 13 Pet. 312), also that the record shows that the cause was not tried by jury, and does not disclose a waiver of such trial (Maxwell *v.* Stewart, 21 Wall. 71), nor to show that an attorney of the court entering a general appearance, had no authority (Hill *v.* Mendenhall, 21 Wall. 453); nor fraud (Maxwell *v.* Stewart, 22 Wall. 77).

The only matter inquirable into is, the jurisdiction of the court rendering the judgment sued on, as to either the person or subject-matter (Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gas Light Co., 19 Wall. 58; Hall *v.* Lanning, 91 U. S. 160).

So that the onus is on the plaintiff to the same extent and no more, in suing in a State other than that in which the judgment was rendered, as if he had sued in the latter. And all questions as to the onus probandi are solvable on that principle, with this difference, perhaps, that in the domestic forum the court might take notice of jurisdictional defects, if dependent upon local law *ex mero motu*, whereas, the foreign tribunal might require affirmative proof of the law of the State wherein the judgment was rendered, upon which the jurisdictional defect was predicated. This rather goes to the quantum of proof, however.

The defendant, as in ordinary actions on judgments, has the onus as to any defence arising since the rendition of the judgment sued on. Recital of facts to give jurisdiction contained in the record of a territorial court is *prima facie* evidence thereof (Comstock *v.* Crawford, 3 Wall. 396). However, whoever claims under a sentence of condemnation must show that the same was pronounced by a court possessing jurisdiction to that end (La Neyreda, 8 Wh. 108).

Judgments of Inferior Courts, or Courts not of Record.— Although courts may be "inferior" relatively, or have only a confined jurisdiction, it is apprehended that, if they are, by the laws of their constitution, courts of record, their judgments will stand upon the same footing as those of courts of superior jurisdiction (Free. Judg. secs. 122, 517), and of

course their judgments, when sued on in another State, will have the like force and effect there, as where rendered. If it should appear, from the exemplification, to be an inferior court, or one of limited jurisdiction, it is apprehended that, on principle, the onus to show the conclusiveness of the judgment would be with the plaintiff (see question discussed in Free. Judg. sec. 518). For, a statement in the exemplification that such court is a "court of record," is the bare statement of the party authenticating, as no such statement would presumably appear on the record, and, there being no way to pertinently assert such fact in the exemplification, if not allowed to be proved *aliunde,* the law would be untrue to itself (but see Freeman, *ib.* sec. 123).

At all events, if, by the law of the State, a conclusive effect is given to the judgment of any court of inferior or limited jurisdiction when sued upon in another State, the plaintiff has a constitutional right to claim for it there, the same effect attributed to it in the tribunal of the State in which it was rendered. Then how can this constitutional right be enjoyed, if evidence *aliunde* be disallowed?

He says substantially to the court: "I am ready to prove by the constitution or laws of the State where the judgment was rendered, that the court which rendered the judgment I have offered in evidence, although called an inferior court, is essentially a court of record."

With what propriety could the court say, "I will not hear it"? Such would be, it is apprehended, though an indirect, a substantial denial of a constitutional right. The difficulty experienced by some of the courts in passing on this question has doubtless arisen from a too close adherence to English authority, and by failing to give sufficient importance to the fact that, in England, all inferior courts, or courts of limited jurisdiction, are courts "not of record."

If we stick in the letter of the law, few, if any of our courts are, according to the definition, "courts of record" (3 Black. Com. 24; Free. Judg. sec. 122), as their proceedings are not "enrolled on parchment."

It has even been decided that a court of chancery was not, technically speaking, "a court of record" (Post *v.* Neafie, 3 Cai. T. R. 22).[1] And yet in that very case (being an action brought in New York on a decree in chancery rendered in New Jersey), it appears, from the report, that the court received evidence *aliunde*, to show the character and grade of the court of chancery. What distinction, in principle, can be suggested between such a case, and where such evidence is offered as to the conclusiveness of any other judgment under the law of the State where rendered? And if it be enacted by any State, that the judgment of any specified court shall be conclusive, why ought not the courts of another State, when an action is brought upon it, give to it the like force? And how can they refuse, in the cases of presumptively inferior courts, without hearing the law of the other State?[2] But when an action is brought upon a judgment of a court of an inferior jurisdiction, the onus is with the plaintiff to show the book containing the judgment, or, if not entered in books, to show the memorial sustaining it (Free. Judg. sec. 410), and the onus is with him to show, also, every fact necessary to confer jurisdiction upon such court; in opposition to which, the defendant may show, by any satisfactory means of proof, that the authority of the court did not extend over the matter in controversy, nor over the parties to the suit (Free. Judg. sec. 518).

Judgments rendered by Justices of the Peace. — The same considerations, expressed with reference to inferior courts, are applicable to courts of justices of the peace. The like burden is on the plaintiff, and the like evidence in rebuttal is allowed to the defendant (*ib.* sec. 53 *et seq.*).

Judgment recovered. — Defence of judgment recovered (commonly styled former judgment).

[1] Kent (afterwards Chancellor) put his dissenting opinion on the ground that the action of debt would not lie on a decree in chancery, and says that "a court in chancery, on its equity side, is not, strictly speaking, a court of record."

[2] Mr. Freeman, a most thorough lawyer, seems not to have carefully considered the case of Post *v.* Neafie.

The onus, of establishing the estoppel alleged in this pleading, is upon the party pleading it, and it occurs mainly under two heads. 1. Those cases in which, from the record alone, no intimation is given whether a particular fact has been determined or not. 2. Those cases in which, from the record, it appears that a particular question was probably determined. In all cases coming under the first class, it is incumbent upon the party alleging that a question has been settled by a former adjudication, to support his allegation by evidence *aliunde.*

But in relation to the second class, there appears to be a radical difference of opinion (*ib.* sec. 276). The better rather seems to be, that there is no estoppel.

A judgment is conclusive between parties and privies as to those facts only, which it directly establishes, but does not tend to prove those which merely may be inferred from it (Bennett *v.* Holmes, 1 D. & B. 486; Rogers *v.* Ratcliff, 3 Jones, 225).

If to an action the plea of judgment recovered shall be interposed, it is held by our highest tribunal that the burden of proof is upon the defendant (Bank *v.* Beverly, 1 How. 134; Humes *v.* Scruggs, 94 U. S. 22).

Recognizances. — Recognizances are in all respects, with reference to the cast of the burden of proof, similar to judgments *nisi.*

As to the measure of proof, nothing need be said, as that is governed by local law. No burden is put on the plaintiff, unless the existence of the recognizance is denied; but if denied, the onus is with him to prove it according to the law of the forum.

Judgments *Nisi.* — Judgments *nisi* are governed by the same principle as ordinary judgments, with reference to the cast of the onus probandi, with the difference, that the defendant may plead and prove matter of excuse, to invalidate the judgment, it being taken, as its name imports, *ex parte.*

LIENS.

Stoppage *in transitu.* — This is a right of a vendor to regain possession of goods sold before delivery as against an insolvent purchaser. Whether as plaintiff or defendant he must show: —

1. That at the time of the sale the vendee was solvent.

2. That before actual and complete delivery the purchaser became insolvent.

3. That he seized the goods before delivery (Cross, L. L. 361; 1 Par. Cont. 595-608; Smith, Cont. (3d Am. ed.) App.[1] 339; Russ. F. & B. 218; Bell. Cont. Sales, 113 *et seq.;* 2 Ross, Com. L. 92 *et seq.;* Blck. Sales, 202 *et seq.;* 2 Tud. L. C. 647 *et seq.;* Smith, Mer. L. 667-687).

The purchaser or party claiming under him in defence may show: —

Indorsement of Bill of Lading. — That the consignee had indorsed the bill of lading before seizure (*ib.*).

Delivery to Consignee. — Also a delivery to the consignee (*ib.*).

Pledges; Pawns. — Pledges and pawns have been considered, and also other liens arising under the law of bailments, see Pt. I. title BAILMENTS. There are other liens at common law, resting upon particular usages, which do not prevail in this country. The VENDOR'S LIEN, SALVAGE, etc., are treated elsewhere.

Specific Liens. — In the case of a specific lien at common law, the party asserting it must show: —

1. That chattels were delivered to him to perform some work upon.

2. That he performed the work, either according to particular directions, or, if without directions, that the work conferred additional value to the article. If the other party claims that he has paid the price, he must show that fact (Cross, L. L. 24 *et seq.;* see Randel *v.* Brown, 2 How. 406, 424).

[1] It is extraordinary that the valuable appendix by Mr. Symons should be omitted from the later editions.

Factors. — The factor as plaintiff or defendant has the burden to show: —

1. That the goods upon which he has a lien were consigned to him.

2. That he holds them as security for any balance due to him (2 Tud. L. C. 686 *et seq.*).

Innkeepers. — Innkeepers have a right of lien upon the baggage of their guests,[1] also of a horse, carriage, etc., as security for their bill (Cross, L. L. 343 *et seq.*; 2 Tud. L. C. 687).

Carriers. — The principles governing the liens of innkeepers are altogether analogous to those relating to common carriers. Each must receive, and the law, which is never untrue to itself, gives the correlative right of lien. The lien of the carrier is for the unpaid freight-bill. It does not, even in England, cover a general balance like a factor's, unless pursuant to a general custom, and it is exceedingly doubtful whether any such custom could arise in this country. It is true that both LAWSON and HUTCHINSON lay down the English doctrine, that usage may control, but the former cites no American decisions, and the latter only one. The tendency of the cis-atlantic courts is averse to making law (Law. Usages, sec. 100; Hutch. Carriers, sec. 477).

The view here presented seems to have been sanctioned by at least two American authorities (Leonard *v.* Winston, 2 Grant, Cas. 139; Travis *v.* Thompson, 37 Barb. 236). The burden requires of the carrier proof: —

1. That the goods were transported by it.

2. That the consignee failed to pay the freight charges thereon, after notice.

Mechanics. — It is not clear whether the remedy to enforce this, and other statutory liens, is a proceeding *in rem* or *in personam*. It is not a very material inquiry, and they are therefore treated in the latter light (Phil. Mech. Liens, 445). It is eminently *sui generis*. And in whatever form the lien

[1] Title is immaterial, provided the innkeeper was not aware of the lack; this extends even to stolen property (2 Tud. L. C. 687).

is, or should be attempted to be enforced, the burden rests upon the lienor to prove: —

1. The contract for work.
2. That it was performed upon or about realty.
3. That he filed his lien within the time, and in the place and manner prescribed by the local law.

The statutes point to the place where, the time when, and the mode in which the lien shall be filed. They are liberally construed by the courts *propter simplicitatem laicorum* (Phil. Mech. Liens, chap. 40; Abb. Tr. Ev. 767).

Sub-Contractors; Laborers; Material-Men, etc. — The same general principles govern the cast of the burden in these instances, as in the case of mechanics, commonly termed contractors, and need not be repeated. There are, doubtless, statutes conferring liens on personal property, in favor of livery-stable men, stallion-putters, etc.; but the onus probandi is so easily discoverable as to them from what has already been stated, that it is deemed unprofitable to go into a further discussion touching them.

LIFE INSURANCE.

After the lapse of seven years, a party insured having been absent and not heard of, there is a presumption of death, devolving on the insurer the burden of proving that the assured is in life (Bliss, L. Ins. sec. 200).

It may be here stated, that, in general, insurers will be held bound by mis-statements contained in applications, made or written, by or under the advice of their agents, authorized to solicit insurance and take applications (Plumb. *v.* Cattaraugus &c. Co., 18 N. Y. 392; Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Am. L. Ins. Co. *v.* Mahone, 21 Wall. 152; Baker *v.* Home &c. Co., 64 N. Y. 648; Minor *v.* Phœnix &c. Co., 27 Wis. 693; S. C., 9 Am. Rep. 479; Bliss, L. Ins. chap. 9).

Where an agent sent a blank application to an examining physician of the company, with request to fill the blanks,

which were filled in by him and signed by the assured without having read them, the court of appeals of New York held that, although the application was a warranty, and some of the answers not strictly true, yet, as they were dictated and written by the examiner with full knowledge of the facts, the burden was cast upon the insurer to show the extent of its agents' powers (Flynn *v.* Equitable &c. Co., 78 N. Y. 568; S. C., Ins. L. Jour., Feb., 1880, p. 97).

If, to a declaration in assumpsit on a policy of insurance, the general issue only be pleaded, the plaintiff has the burden of proving the execution of the policy. The plaintiff, under the general issue, has the onus, also, if he sues upon a policy on the life of another, to show such interest in that life as, by law, is recognized as insurable (1 Arch. N. P. 292).

If there be a warranty or condition inserted in the policy, and upon which the right of recovery must from the very terms of the policy depend, the onus is with the plaintiff under the general issue in assumpsit, to prove the truth of the warranty or compliance with the terms of the conditions; whereas, if the policy be under seal and debt is brought, the general issue only requires proof of the factum or, if covenant, only that, on *non est factum;* but on a special plea in covenant, putting in issue the non-performance thereof by plaintiff, the onus is with him. And in an action of covenant, all special matter of defence must be pleaded (Marine Ins. Co. *v.* Hodgson, 6 Cranch, 206; but in Tennessee the courts seem to hold otherwise; Phœnix Ins. Co. *v.* Munday, 5 Cold. 547). He must also prove the death of the insured. So the books should be understood in laying down the measure of proof required from plaintiff (2 Saund. Pl. & Ev. 602). The new rules, H. T. 4 Will. IV., materially changed the rules of pleading, and greatly narrowed the form and effect thereof, especially, of the general issue in assumpsit. Hence we find a form of special traverse of compliance with warranties on policies of insurance (1 Arch. N. P. 223). This treatise was written since the adoption of the new rules, and prepared with reference to them. If the policy should not contain a war-

ranty, as there would then be no necessity for such allegation, there would, of course, be no necessity for proof. Under the general issue in assumpsit at common law, every matter of excuse or exoneration which tends to prove that the plaintiff never had a cause of action, can also be given in evidence by the defendant; and while for some time the rule was unsettled as to whether such defences, as admitted that the plaintiff once had *a cause of action*, could be shown under this plea, it was finally determined that most matters of this kind could be (1 Chitty, Pl. 477–478). Under this plea, where the action is brought on a policy upon the life of a party dead, the onus would lie on the plaintiff, to show that he fills the character of the party to whom, by the terms of the policy, it, when due, becomes payable; thus, if payable to the personal representative, to show his letters; if to the widow, that she is such (2 Saund. Pl. & Ev. 602). In actions brought under the code system, so generally prevalent, to ascertain the cast of the onus probandi, we must carefully consider the particular system of pleading in each forum. Where the statute allows averments, necessary to be expressed at common law (not purely formal) to be implied from other language, the onus may still remain with the plaintiff, though apparently devolved on the opposite party, or the statute may *proprio vigore* dispense with proof required at common law: the mere devolution of proof being clearly within the constitutional competency of the legislature. In the efforts to solve such questions, perhaps the new rules (1 Chitty, Pl. 738) may furnish a substantial analogy. The pleader, in cases of doubt, by virtue of a provision almost invariably found in the several codes of remedial justice, may apply to cause the pleading, if indefinite, to be made definite (Pomeroy, Rem. Rights, sec. 549), and thus may bring into bold relief the cast of the onus at the *nisi prius* trial, and obtain an advantage in doubtful cases, which, under the indisposition of the courts of highest resort to interfere in matters of discretion, unless the abuse be plain, might otherwise be lost to him. Indeed, as issues under this system are not *produced* by the pleadings, but

eliminated by the court, their frame will, in general, determine the cast of the onus (Pom. Rem. Rights, secs. 506, 657–683). If it is necessary or preferable to bring debt or covenant on the policy (it being under seal), SAUNDERS lays it down that, "as the defendant must, in general, plead all defences specially, plaintiff will have to prove only the issues raised by the pleas" (2 Saund. Pl. & Ev. 602). In cases where the statements made in the application are incorporated expressly, or in legal effect, into the policy, and it is there substantially set forth that the policy-holder agrees that they are true, it is difficult to perceive, on principle — as when made, the underwriter is satisfied of their truth, and, in view of the presumption, in favor of truth and innocence, and the great length of time that must often elapse between the date of the application and the death, and the further fact, that the person only cognizant, or mainly cognizant, of the proof to sustain the statements therein made, is dead, — why the plaintiff should be called upon to allege and prove them to be true, any more than to recite all the various conditions contained in the policy, and aver performance, or negative the doing of the matters specified; yet the authorities seem to require a statement either by setting out the policy, or by recapitulating the different conditions, alleging performance or negativing breach, in such manner as to show the liability of the underwriter (2 Chitty, Pl. 208 *et seq.;* Mass. &c. L. Ins. Co. *v.* Kellogg, 82 Ill. 614); and when framed in assumpsit, the general issue puts in issue every material fact alleged in the declaration (2 Chitty, Pl. 208, note *p*; 2 Saund. Pl. & Ev. 602). Under the new rules, the plea of non-assumpsit operates "only as a denial, in fact, of the express contract or promise alleged, or of the matter of fact, from which the contract or promise alleged may be implied in law" (1 Chitty, Pl. 742), and "all defences in confession and avoidance must be especially pleaded, and in debt or covenant, *non est factum* shall only operate as a denial of the execution of the specialty; in point of fact, all other defences to be specially pleaded" (*ib.* 743). If these rules

furnish a proper analogy for the pleading under the code system, then, perhaps, much of the doctrine to be stated will be found inapplicable in those States where that system prevails. And the circumstance that, under this system, all the facts not denied are admitted for the purposes of the action should not be lost sight of, and perhaps may be availed of to so frame the complaint as to force an answer in confession and avoidance, *ex. gr.*, suppose in an action predicated on a life-policy, the plaintiff sets forth: —

1. That defendant executed a policy, setting it forth in full.

2. That the premiums had been paid.

3. The death of the party whose life was insured (Wackerle *v.* Mutual &c. Co., 14 Fed. Rep. 23).

4. That the plaintiff is the proper person to sue.

5. Notice and failure to pay the amount specified in the policy on a proper demand.

If a denial is interposed as to each of these allegations, the onus would be with the plaintiff to prove them; having done so, or, in case they are admitted by the answer, why would not the plaintiff be entitled to judgment? It would seem that to escape such a predicament, the defendant would be driven to some answer in confession and avoidance, thus devolving on him the onus probandi of his defence. Indeed, it has been held by a very respectable court, that a count in an action of assumpsit, which alleged that the defendant in consideration of certain promises, then and there promised the plaintiff to insure $1000 on his dwelling, is sufficient (Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20). The doctrine of the application of the onus probandi is, however, thus stated: the onus is with the plaintiff, in an action on a life policy to prove: —

1. The policy, unless admitted.

2. The interest of insured.

3. The plaintiff's right to sue.

4. Compliance with the warranties and conditions of the policy; and

5. The death of the person whose life was insured [as to this last point, see title DEATH] (2 Saund. Pl. & Ev. 602).

In reading the following extract, the distinction between the effect of the general issue in assumpsit (the action mainly applicable) before and after the new rules, should be carefully borne in mind: "Should any dispute arise, upon the death of the insured, as to the correctness of the statements made in the declaration, the burden of proof, it is said, will fall upon the plaintiff, with whom it will rest, before requiring the insurers to produce any evidence to impugn them, to make out by evidence their truth, which is in fact the basis of the action, and a condition precedent to any right to recover. In like manner, the onus rests with the assured to prove the due fulfilment of the conditions of the policy.

"This rule has been thus broadly stated, in text-books, by way of warning to persons effecting insurances; but it is remarkable, that in the reported cases this apparent burden has been claimed by both parties as involving in itself the privilege of the right to begin, or of first addressing the court, and to reply. . . . The general rule is, that the right to begin will rest with that party upon whom the affirmative of the issue, or the burden of proof is cast. From this it follows that this further touchstone presents itself, namely, that he is entitled to begin, against whom the verdict would go, if no evidence were offered on either side. And, again, when the presumption of law is on either side, the right to begin will rest with that party upon whom the necessity of rebutting that presumption rests. Thus, for example, if the defendant pleaded that the person assured was not dead, as the presumption of law is in favor of life, the burden of proof would rest with the claimant; but if, on the other hand, the defendant place upon the record a plea amounting to a plea of fraud, as the presumption is against fraud, the onus would rest with the defendant; or if the defendant plead that notwithstanding a warranty against some specified malady, such as the gout, the assured has been afflicted therewith, as the presumption is in favor of health, the onus would rest with the defendant. It

is also material to observe that the substance and not the form of the issue is to be regarded, and hence, cases may occur in which each party may contend that on their side, the affirmative really rests.

"In an action on a life policy, the declaration, setting out the policy and the proposal as embodied in it, avers the truth of the statements made therein, and alleges generally the performance of all conditions precedent to the right to recover upon it. To this the defendants either plead the general issue, denying the making of the policy, or specifically traverse the averments against which they rely,[1] and upon this issue is joined. Where they omit to plead the general issue, but plead only one or more special pleas setting forth the statements made by the assured in his proposal, and denying their truth by alleging facts inconsistent therewith, or setting out the conditions of the policy, and asserting that they have not been fulfilled, the right or obligation of beginning will generally rest with them. In the earlier cases it seems to have been considered that the plaintiffs, in setting forth the claim, were bound to give some evidence in support of their statements, and the affirmative, thereupon, in the first instance, was on their side; but in the more recent decisions, and particularly since the new rules of pleading have been in force, the statement of the law which we have made appears correct. Thus in a late case the declaration had set forth the policy, which referred generally to the proposal made to the company, and then averred that in it there was no untrue or fraudulent statement; thereupon the defendant replied that it was alleged in the declaration that the habits of the assured were sober and temperate, but that the contrary was true. The learned judge (Parke, B.) ruled that the defendants had the right to begin, on the ground, first, that the plaintiff did not show what were the statements made in the proposal, but that they were set out in the plea, and consequently must be proved by the defendants; secondly, that the allegations in the plea were allegations of falsehood amounting to fraud in

[1] *i.e.*, plead in confession and avoidance.

the assured, and must, therefore, be proved by the party making them, the presumption being always in favor of innocence and against fraud, and that, therefore, as, supposing no evidence were given in support of the plea, the plaintiff would be entitled to recover, the defendant ought to begin. The court in Banc considered that the learned Judge at Nisi Prius had been right in his ruling, and that the test as to who should begin is, to consider who would be entitled to the verdict in the event of no evidence on the other side being offered, the right being with the party on whom rested the burden of proof, — in this case the defendant; and a rule for a new trial was refused" (Bliss, L. Ins. (1st ed.) sec. 374; (2d ed.) sec. 365, citing Bunyon, 84).

"Subject to the limitations thus set forth, it is true, that all express warranties, and all affirmative averments are in the nature of conditions precedent to the plaintiff's right to recover, and therefore must be strictly proved. In case of a warranty, the burden of proof is upon the party seeking indemnity, to establish a case in all respects in conformity with the terms under which the risk was assumed; but in case of a representation, the burden is cast upon the defendant to set forth and prove the collateral facts upon which he relies. It is sufficient for the plaintiff to show fulfilment of all the conditions of recovery, which are made such by the contract itself. The burden is then thrown upon the defendant to set forth and prove the collateral matters upon which he relies. But the burden of proving a compliance with a promissory warranty is upon the assured, and the burden of proving a breach of such a warranty is not upon the insurers; otherwise as to a mere representation. In support of these views it has been held in an action upon a life policy, where the plaintiff produced evidence of the truth of the statements of the declaration, and those accompanying the policy, respecting the health of the assured at the time of effecting the assurance, and the defendants by pleas averred that the assured was not a sound or insurable life, that the burden of proof was upon the defendants to establish the truth

of the pleas; for though the general rule undoubtedly is, that the party who alleges the affirmative of any proposition must prove it, another general rule is, that fraud is not to be presumed, and where the defence rests upon allegations, amounting to charges of fraud, in the absence of any proof either way, the presumption of innocence will entitle the plaintiff to a verdict. But where fraud is shown, evidence of good character is not admissible to rebut it. The defence of concealment being nearly allied to the charge of fraud, the burden of proof is upon the insurers to establish both the existence of the fact concealed, and its materiality to the risk, though the latter may be inferred from the nature of the fact. If it were a matter of general notoriety in the place of residence of the assured, this may be shown to the jury as tending to prove that the assured had knowledge of the fact" (Bliss L. Ins. (1st ed.) secs. 375, 376).[1]

"Where the defence is death in the violation of law, the burden is on the company to satisfy the jury that the act of the deceased which occasioned his death was a voluntary criminal act. The company must prove that the insured died while engaged in a criminal act, known by him at the time to be a crime against the law of the country where he was. But it will be presumed, not only that acts which are criminal by the common law and the laws of all civilized countries are criminal in any State, but, that the deceased knew that they were so.

"Where the defendants pleaded that at the time of the declaration as to health, the habits of the person were immoderate and intemperate, and he was addicted to excessive drinking, and the reply was a denial of this, it was held that the plaintiff should begin. So where the defence sought to avoid the policy on the ground of false representations of the habits of the insured at its date, and of his death being caused by intemperance in the use of intoxicating liquors, it was held that the defendant had the affirmative of the issue" (Bliss, L. Ins. (1st ed.) sec. 377; (2d ed.) sec. 366).

[1] It is trusted that no apology is needed for these full quotations, as the subject is so lucidly and elegantly expressed by Mr. Bliss.

"Where the defence is suicide, the defendants are entitled to begin, as the onus is on them to prove that the death was by suicide. Having proved that fact, if the plaintiff claims that at the time of the suicide the deceased was insane, the burden is upon him to show it, because there is a presumption in favor of sanity.

"In Terry *v.* Life Ins. Co. (1 Dill. C. C. 403; S. C., 15 Wall. 580) in the United States Court, District of Kansas, Justice Miller of the Supreme Court of the United States charged the jury, that where sanity is alleged to prevent a policy from being avoided by self-destruction, it devolves on the plaintiff to prove such insanity on the part of the deceased as will relieve the act of taking his own life from the effect of the general terms of the policy (Wilkinson *v.* U. M. &c. Co., 2 Dill. C. C. 570).

"Where a policy by its terms was to cease upon the failure to pay at maturity a premium note, the burden is on the insurers to prove non-payment" (Bliss L. I. (1st ed.) secs. 378, 380; (2d ed.) secs. 367, 370; Hodsdon *v.* Guardian L. Ins. Co., 97 Mass. 144).

Even at common law, a distinction seems to have prevailed between "representations" and "warranties." The former being collateral to the contract, were not noticed in the declaration, but only by a plea in confession and avoidance, and the onus as to their falsity and materiality rested with the defendant, whereas, it was held that warranties formed part of the contract. Even when representations were formal, and it was stipulated in the policy that "if the statements made by or in behalf of, or, with the knowledge of the said insured, to said company, as the basis of or in the negotiations for this contract, shall be found in any respect untrue, this policy shall be null and void" it was held by the Supreme Court of Massachusetts, followed by other courts, that the onus was with the defendant (Simmons *v.* Ins. Co., 8 W. Va. 474; Price *v.* Phœnix &c. Co., 17 Minn. 497, reported in 10 Am. Rep. 166; 1 Phil. Ins. secs. 871, 893; Campbell *v.* N. E. Mut. L. I. Co., 98 Mass. 381). As to this distinction, see also Bliss, L. I.

chap 3, *passim;* but see *contra* Kelsey *v.* Universal Co., 35 Conn. 225; Security &c. Co. *v.* Bronger, 6 Bush. 146.

Warranties are treated as conditions precedent, so that their truth must be pleaded by the assured, upon whom of course the burden of proving the same rests; whereas the falsity of representations is matter of defence to be pleaded and proved by the insurer (2 Phil. Ins. sec. 2122; Price *v.* Phœnix &c. Co., *supra;* Wilson *v.* Hampden Ins. Co., 4 R. I. 157, 159; Campbell *v.* N. E. &c. Co., *supra;* McLoon *v.* Com. &c. Co., 100 Mass. 474, reported in 1 Am. Rep. 129; Herron *v.* Peoria &c. Co., 28 Ill. 235, 238; Leete *v.* Gresham &c. Co., 7 E. L. & Eq. 578; Southern &c. Co. *v.* Booker, 9 Heisk. 606, reported in 24 Am. Rep. 344; Bobbitt *v.* Liverpool &c. Co., 66 N. C. 70). In this last case the stipulation though contained in the application, was treated by the court as a warranty, the court assuming that if it had been a mere representation, the onus would be with the defendant (1 Arch. N. P. 276 *et seq.;* Whitehurst *v.* Fayetteville &c. Co., 6 Jones (N. C.), 352; notes to Carter *v.* Boehm, 1 Smith, L. C. (5 Am. ed.) 638, 639, top; Grangers &c. Co. *v.* Brown, 57 Miss. 308). And the leaning of the courts is to hold a stipulation to be a representation rather than a warranty (Daniels *v.* Hudson &c. Co., 12 Cush. 424; Price *v.* Phœnix &c. Co., *supra;* Wilson *v.* Conway &c. Co., 4 R. I. 143; Bliss, L. I. sec. 53). Great uncertainty seems to exist as to what shall be deemed *warranties*, and what *representations;* and it appears to be very difficult, in some instances, to place the distinction upon any very sound basis. It does not follow, because they are inserted in the application or policy, that they are warranties. It is said that their character will depend upon the form of expression used, the apparent purpose of their insertion, and sometimes upon their connection or relation to the other parts of the instrument (Bliss, L. I. sec. 43 *et seq.*, sec. 50 *et seq.;* Southern L. I. Co. *v.* Booker, *supra*). Unquestionably a representation, although on a separate paper, may be referred to in such terms in the policy as to become in law a part thereof. And, on the other hand, if contained in the application, although there be a clear

warranty, if there be no distinct reference made thereto in the policy, the statements contained in the application, even if referred to in the policy, are to be treated as representations and not as warranties (Conover *v.* Mass. M. L. Ins. Co., 3 Dill. C. C. 217; Bliss, L. I. sec. 57); at least, they do not thereby necessarily become warranties. The true criterion, it is suggested, is this: If the words employed to convey either one idea or the other amount unqualifiedly to a condition or dependent covenant, it is a warranty, and should be averred and proved as any other condition in other cases; but, if the language used, from its subject-matter or context, can be seen to have been only employed, as a measurable safeguard, and to amount to the expression of knowledge of a present or past fact, or belief as to a past or future fact, the present or past fact being susceptible of correction, it is a representation only; not but that any such facts might not possibly form the subject of a warranty in express terms. Thus a court of the highest standing holds that a declaration "that he does not now nor will practise any pernicious habit which tends to shorten life" does not warrant against a subsequent formation of a habit of drinking ardent spirits to excess (Knecht *v.* Mutual &c. Co., 90 Pa. 118, reported in 35 Am. Rep. 641); but otherwise, had the word "guarantee" been used instead of "declare" (Knight *v.* Mutual &c. Co., Pa. (1881) cited in notes, 35 Am. Rep. at p. 643).

So when the word "declare" was used with a warranty containing declarations (Schultz *v.* Mutual &c. Co., 6 Fed. Rep. 672). If men will self-impose burdensome conditions upon themselves, courts can only construe,—they cannot make new bargains (Swick *v.* Home L. Ins. Co., 2 Dill. C. C. 160). The Supreme Court of the United States holds that the answers in an application may become warranties if so declared by the terms of the policy (Piedmont &c. Ins. Co. *v.* Ewing, 92 U. S. 377). This matter has thus been dwelt upon, because it gives rise to the only serious question as to the cast of the onus, and the practitioner can, by determining this question according to the lights furnished by the deci-

sions of his forum, generally settle for himself with whom the onus probandi lies. As to the onus, even in cases of *warranties strictly*, that thorough-paced lawyer, Judge Dillon, held, that it was with the defendant (Swick *v.* Home Ins. Co., 2 Dill. C. C. 160), saying, "It is for the defendant to show that there has been a breach, and not for the plaintiff to prove that there was no breach," p. 166. The same doctrine was also promulgated in Holabird *v.* Insurance Co., 2 Dill. C. C. 166, note. These cases were at law, but no reference is made to applying the statal rules of pleading. The authorities in the different States on the subject of the burden of proof will now be given so far as they have come under our observation.

If the defendants, in an action upon a life policy, set up as a defence false representations as to the habits of the insured at its date, they will hold the affirmative of that issue (N. Y. Life Ins. Co. *v.* Traham, 2 Duv. (Ky.) 506). In an action on a life policy the declaration averred that the statements accompanying the policy with regard to the health of the assured were true. Defendant pleaded; (1) the general issue; (2) that said statements were not true; (3) fraud by the insured in making said statements. At the trial plaintiff proved the truth of the statements in the declaration, and of those accompanying the policy. It was held that it was not erroneous to charge the jury that under the pleadings and proofs offered by the plaintiff, the burden was on the defendant to prove the truth of their pleas (Trenton Ins. Co. *v.* Johnson, 24 N. J. L. 576). An application presented to a life insurance company, when the policy is effected, is no part of the plaintiff's cause of action, and need not be set forth in the declaration (Jacobs *v.* National L. I. Co., 1 McArth. 632). In Illinois, it is held that an omission in the declaration to set out the conditions precedent, will be such a variance as to exclude the contract as evidence (Rockford Ins. Co. *v.* Nelson, 65 Ill. 415; Mass. &c. L. Ins. Co. *v.* Kellogg, 82 Ill. 614). The Supreme Court of the United States, in the case of Piedmont and Arlington Life Insurance

Company *v.* Ewing, *supra*, held, that when certain answers contained in the application as to health, etc., were pleaded to be untrue, the burden of proving the truth of such answers does not rest on the plaintiff in the action. The court says: "The number of questions in this application which require an answer are from thirty to fifty in every case. They relate to matters occurring in childhood, or which concern the health or habits of the ancestors of the assured, and to other matters rather of opinion than fact, which it would be almost impossible to prove. To establish the truth of the answer would, in many cases, require the party to prove a negative. 1. Take the points raised in the case. How can a man who has lived forty or fifty years prove that he never had dyspepsia or diarrhœa or any disease of the heart or bowels? and how can he prove that his habits of life have always been correct, and that he never drank ardent spirits to the extent of intemperance? While it may be easy enough to prove the affirmative of any one of these questions, it is next to impossible to prove the negative. The number of the questions now asked of the assured in any application for a policy, and the variety of subjects and length of time which they cover, are such, that it may be safely said that no sane man would ever take a policy, if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, such proof to be made only after he was dead and could render no assistance in furnishing it. On the other hand, it is no hardship, that, if the insurer knows or believes any of the statements to be false, to hold that he shall furnish the evidence on which that knowledge or belief rests." The same court has also held when such defence is set up by the insurer, and the evidence is conflicting, that it is error to direct the jury to find a verdict for the defendant (Moulor *v.* Am. L. Ins. Co., 101 U. S. 708). The Court of Appeals of New York hold the same view (Jones *v.* Brooklyn Life Ins. Co., 61 N.Y. 79). In the ninth circuit, it was held, that when, by the express terms of the policy, the proposals, answers, and declara-

tions made by the applicant, are made part of the policy, they should be stated in the complaint (Bidwell *v.* Conn. M. I. Co., 3 Sawyer, 261). The Supreme Court of Mississippi holds that where the defence is a false representation, the onus is with the insured (Grangers L. I. Co. *v.* Brown, 57 Miss. 308). The rule, says the Supreme Court of Louisiana, is well settled that all defences founded on fraud must be specially pleaded (Pino *v.* Merchants &c. Ins. Co., 19 La. Ann. 214; and see Insurance *v.* Woodruff, 26 N. J. L. 541). And if not pleaded, evidence of it is not admissible (Flynn *v.* Merchants Ins. Co., 17 La. Ann. 135). Even when warranties are proved or admitted, it seems that, in New York, the plaintiff is not bound to prove their truth, unless it is put in issue (Abb. Tr. Ev. 482, citing Boos *v.* World Mut. F. I. Co., 6 S. Ct. (T. & C.) 364; Jones *v.* Brooklyn L. I. Co., 61 N. Y. 79). A literal and strict compliance with the warranty must then be proved by the assured (Abb. Tr. Ev. 483). The burden of proving the breach of a promissory warranty is not upon the insurer; on the contrary, the burden of proving compliance therewith is upon the assured (Wilson *v.* Hampden &c. Co., 4 R. I. 159). In actions in which the defence is that the insured committed suicide, the onus is with the insurer (Bliss, L. Ins. sec. 378; Terry *v.* Life Ins. Co., 1 Dill. C. C. 403; S. C., on writ of error, 15 Wall. 580; S. C., C. L. News, Sept. 30, 1871; Hiatt *v.* M. L. Ins. Co., 2 Dill. C. C. 572, note; C. L. N. Sept. 30, 1871); but, if the reply to such defence is that the insured committed the act while insane, the burden is upon the plaintiff (Terry *v.* Life Ins. Co., *supra*). In this case in the United States Court, District of Kansas, Justice Miller of the Supreme Court of the United States charged the jury that "where insanity is alleged to prevent a policy from being avoided by self-destruction, it devolves on the plaintiff to prove such insanity on the part of the deceased as will relieve the act of taking his own life from the effect of the general terms of the policy."[1] It is often prescribed in policies that no action shall be brought on it ex-

[1] This repetition, it is hoped, will be excused, as it is too pertinent here to be omitted.

cept within a given time; and upon the question of the burden of proof there is some conflict of decision, but the great preponderance is in favor of the condition. There is also a conflict where the doctrine is admitted as to which party has the onus.

When the defence to an action on a policy is the untruthfulness of the representations made by the insured, the burden of proof is on the company (in the instance)[1] to show that at the time of making such representations: 1. The insured was insane. 2. That his insanity was hereditary. 3. That it was known to the insured (Ins. Co. *v.* Gridley, 100 U. S. 614; National Bank *v.* Ins. Co., 95 U. S. 673).

LOYALTY.

Whenever it shall become material in a litigation, depending before a court of claims, to ascertain whether any person did or did not give aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person is required to prove affirmatively, that such person did, during such rebellion, consistently adhere to the United States, and did not give any aid or comfort to persons engaged in such rebellion; and the voluntary residence of any such person, in any place where, at any time during such residence, the rebel forces or organization held sway, is *prima facie* evidence that such person did give aid and comfort to such rebellion and to the persons engaged therein (Rev. Stat. U. S. sec. 1074).

MALICIOUS PROSECUTION.

Plaintiff's Burden. — In order to maintain this action, the burden is upon the plaintiff, upon the general issue, to prove the following propositions: —

[1] The policy provided that "if any of the statements or declarations in the application for this policy, and upon the faith of which it is issued, shall be found in any material respect untrue, then . . . this policy shall be null and void."

1. That the prosecution complained of had terminated before action brought.

2. That it was instituted without probable cause, and the charge or demand was false.

3. And maliciously.

4. And when the charge prosecuted would not have been actionable *per se*, had it been published merely *in pais*, the actual damages sustained.

The prosecution complained of may have been either a civil or criminal action (Big. Torts, 70, 71).

Termination of Action. — *First.* Then, as to the termination of the preceding action (proof of that is a *sine qua non*), and of course, that it should have terminated favorably to the then defendant, now plaintiff (Big. Torts, 72, § 2; 1 Arch. N. P. 446; 2 Leigh, N. P. 1294; 2 Saund. Pl. & Ev. 658; Abb. Tr. Ev. 654; Underhill (Moak), Torts, 170; 3 Black. Com. 126, note 14 by Chitty; Big. L. C. Torts, 196; 2 Greenl. Ev. sec. 452; 2 Sel. N. P. 237 *et seq.*; Cool. Torts, 181, 186; 2 Add. Torts, sec. 874).

As to what circumstances constitute a termination, the reader is referred to the text-books cited, and particularly to the copious note of Mr. Moak to Underhill, cited *supra*. It suffices to state here, that a termination *by compromise* will not discharge the burden (2 Leigh, N. P. 1295; Wilkinson *v.* Howell, M. & M. 495; Abb. Tr. Ev. 654, citing Mills *v.* McCoy, 4 Cow. 406; Big. L. C. Torts, 196); and there is a conflict of judicial opinion as to the effect of a *nolle prosequi* (Moak's note, *supra;* see also Cool. Torts, 186; 3 Black. Com. 126; 2 Sel. N. P. 237 *et seq.*); such proof is not necessary in peace warrants (Hyde *v.* Greuch, Md. (1884), reported in 19 Rep. 279).

Want of Probable Cause. — *Second.* The plaintiff under his onus must next prove that the action so terminated, was instituted without probable cause, and that the charge or demand made thereby was false (Big. Torts, 77, § 3; 2 Saund. Pl. & Ev. 658; 2 Leigh, N. P. 1300; 1 Arch. N. P. 446; 3 Black. Com. (Chitty) 126, note 14; Abb. Tr. Ev.

653; Underhill (Moak), Torts, 163, Rule 5, 170, III.; Kerr, Act. Law, 62; Big. L. C. Torts, 197; Cool. Torts, 184; 2 Add. Torts, secs. 853, 880; 2 Sel. N. P. 252, 253).

It is, perhaps, deducible from the English authorities, that mere proof of a verdict for defendant in the original action and judgment thereon, or any other judgment in his favor upon the merits, will not of itself discharge the burden, but there must be evidence *aliunde* (Big. Torts, 82; Abb. Tr. Ev. 653; 2 Leigh, N. P. 1300; 2 Saund. Pl. & Ev. 663; 2 Greenl. Ev. sec. 454; 2 Add. Torts, 880; 2 Sel. N. P. 251 *et seq.*); but an acquittal may amount to *prima facie* evidence under peculiar circumstances (Williams *v.* Taylor, 6 Bing. 183 (19 E. C. L. R. 90); see Stewart *v.* Sonneborn, 98 U. S. 187; 2 Add. on Torts, sec. 852). There is a discrepancy in the American authorities on this point (Big. L. C. Torts, 202, 203; 2 Greenl. Ev. sec. 455; Abb. Tr. Ev. 653, note 13; Cool. Torts, 184, 186). The burden is not discharged by merely showing a judgment in a civil action of *non pros.*, or as in case of nonsuit or other judgment not based upon the merits (Big. L. C. Torts, 203; 2 Saund. Pl. & Ev. 659), but a discontinuance may so operate under peculiar circumstances (Nicholson *v.* Coghill, 4 B. & C. 21 (10 E. C. L. R. 464). So a discharge by a committing magistrate (Bornholdt *v.* Souillard, La. Ann. (1884), reported in 18 Rep. 653).

Malice. — *Third.* The plaintiff must also show that the action was instituted through malice. In general, upon proof of the negative averment of want of probable cause, malice may be inferred (though not a necessary deduction) by the jury (1 Arch. N. P. 446; Big. L. C. Torts, 203; 2 Saund. Pl. & Ev. 662; 2 Leigh, N. P. 1300; Abb. Tr. Ev. 654; Underhill (Moak), Torts, 163, sub-rule 1, 164 (5); 3 Black. Com. (Chitty) 126, note 14; Cool. Torts, 185; 2 Add. Torts, sec. 853, note 1, and sec. 880). In some instances of malicious prosecution of a civil action, it is necessary that express *malice* should be shown (3 Black. Com. (Chitty) 126, note 14; 2 Saund. Pl. & Ev. 659). When the prosecution is by criminal action, it should also be shown that the defendant

was the prosecutor (2 Saund. Pl. & Ev. 662; Abb. Tr. Ev. 652, 653; 2 Leigh, N. P. 1298; Cool. Torts, 187; 2 Add. Torts, sec. 877).

Damages. — Upon making the proof, as above stated, the plaintiff entitles himself to damages, and the jury are not restricted to nominal damages (2 Greenl. Ev. sec. 456; 3 Black. Com. (Chitty) 126, note 14; Tripp *v.* Thomas, 2 B. & C. 427), but it must appear that some damage was sustained, either to the person by imprisonment, to the reputation by the scandal, or to the property by expense (2 Saund. Pl. & Ev. 663; 2 Leigh, N. P. 1301; 2 Sel. N. P. 1026; 2 Add. Torts, sec. 882). If the charge, upon which the prosecution was based, was of the commission of such a crime, as being untrue, would, according to the decisions of the local tribunals, constitute defamation, had the words been published unprotectedly, then, upon the proof above stated being made, the plaintiff becomes entitled to damages (Big. Torts, 87, § 5), and there need not be any proof of special damage (*ib.;* 2 Add. Torts, sec. 882), otherwise there must be, as to actions founded upon such causes, proof of actual damages (*ib.;* 3 Black. Com. (Chitty) 126, note 14; 2 Add. Torts, sec. 882). If predicated upon an imprisonment, the plaintiff must prove it (2 Saund. Pl. & Ev. 663; 2 Greenl. Ev. sec. 456; 3 Black. Com. (Chitty) 126, note 14), or expenses incurred (*ib.*).

A very learned author thus puts it: There are several distinct classes of cases, commonly embraced under the head of malicious prosecution, which may be thus enumerated: —

1. Where the declaration charges an indictment for an offence involving scandal; in which case it is necessary for the plaintiff to prove malice, want of probable cause, and the termination of the prosecution.

2. Where the indictment was for a misdemeanor, or an offence not involving scandal; in which case the plaintiff must prove, in addition to the three facts just mentioned, special damages.

3. Where the action is for a malicious abuse of process; in which case the plaintiff need only prove malice and special damage.

4. Where the action is for malicious issuance of a search-warrant; in which case it would seem that the plaintiff need only prove malice and want of probable cause, since the charge would involve scandal (Big. L. C. Torts, 205, 206; Big. Torts, 89, 90).

Malicious Abuse of Process. — In an action brought for an abuse of the process of the court, the burden does not require proof of the determination of the action, or that the process was sued out without probable cause (Granger *v.* Hill, 4 Bing. N. C. 212 (33 E. C. L. R. 328), reported in Big. L. C. Torts, 184, and see illustrations given by Judge Bigelow, p. 206, in note; 2 Add. Torts, sec. 868); but in the older books it is laid down that both of these facts must be proved (2 Sel. N. P. 253).

Analogous Remedies. — If the prosecution fails because of want of jurisdiction, or because the warrant or indictment was defective, the cast of the onus becomes more difficult of solution. The authorities are conflicting, whether the plaintiff should sue in slander or malicious prosecution, and upon the determination of that question, the point as to the quantum of proof requisite, hinges; nor is the difficulty obviated under the codes of remedial justice; the burden is the same under either system of judicature (Big. Torts, 88, § 6). The author respectfully suggests that this kind of action falls with the strictest propriety, under the head of malicious prosecution. One criterion suggested is: —

Suppose that an action should be brought before the termination of the prosecution, either as for slander or malicious prosecution, *quacunque via data*, would a court undertake collaterally to decide a question of jurisdiction which another tribunal must pass on? (See 2 Add. Torts, sec. 881). Again, suppose the action be as for slander, could not the action be defended on the ground that the language being used *bona fide* before a judicial tribunal, should be privileged?

The Defence. — The burden on plaintiff then having been discharged, and a *prima facie* case established, the defendant must, if he can, rebut it, by showing the truth of the charge,

or demand, or probable cause, or the absence of malice (2 Leigh, N. P. 1300; Abb. Tr. Ev. 655; 2 Greenl. Ev. sec. 457; 2 Add. Torts, 881; 2 Sel. N. P. 257), or in some aspects the general bad character of the plaintiff (2 Add. Torts, sec. 881).

MARINE INSURANCE.

The onus as to proof of the policy, is the same, as stated with reference to fire and life insurance.

The plaintiff also has the onus to prove: —

1. His interest in the ship or goods. As to how this is to be proved, and what constitutes an insurable interest, being foreign to the purpose of this treatise, it will not be discussed.

It suffices to state, that he must prove such an insurable interest as is required by the *lex loci contractus* (Bliss, L. I. (1st ed.) sec. 369; 2 Saund. Pl. & Ev. 596; 1 Phil. Ins. chap. 3; 2 *ib.* chaps. 14, 29), also if made "to whom it may concern" (Hooper *v.* Robinson, 98 U. S. 528).

2. Also to prove the inception of the risk (2 Saund. Pl. & Ev. 596; 1 Phil. Ins. chap. 11, sec. 1; 2 *ib.* sec. 2129).

3. The burden is also upon him to prove the loss (unless he sues on a valued policy) of the thing insured, — the ship or freight, if either be the subject of insurance; or if the policy be on goods, then the value of the goods according to the invoice, the cost of shipment, the amount of the premium[1] of insurance, and commission, if any (2 Arch. N. P. 208; 2 Saund. Pl. & Ev. 596).

4. Compliance with warranties, and when necessary the license (1 Phil. Ins. chap. 11, sec. 1; 2 *ib.* chap. XXIX. sec. XII.).

Warranties and the onus devolved upon the plaintiff in proving them impliedly extend to: —

a. Seaworthiness of the ship (1 Phil. Ins. sec.[2] 695), and extends to qualities and defects of the vessel, known as well as unknown (*ib.* sec. 697).

[1] In England, for the reasons, see 1 Phil. Ins. sec. 507.

[2] Sections referred to, unless otherwise noted, are those in Arabic (4th ed.).

b. It is also an implied stipulation of the policy, that the vessel should be navigated, and the adventure conducted, according to the laws of the country to which the vessel belongs, the treaties subsisting between that and other countries, and the laws of nations (*ib.* sec. 736).

c. It is also implied that the insurers are not answerable for any loss consequent upon neglect of the assured himself, in preserving and manifesting the national character of neutral property, which is insured by the policy, though it is not described as neutral in the policy (1 Phil. Ins. sec. 742).

d. The warranty also embraces the time of sailing (*ib.* sec. 772).

e. Also may embrace the sailing with a convoy (*ib.* sec. 780).

f. Also that the ships or goods are neutral (*ib.* sec. 783).

Under this subdivision the plaintiff must prove: (1) that his ship carried the neutral flag (*ib.* sec. 804), (2) the bill of sale must correspond to the warranty (*ib.* sec. 803), (3) he must show certificate of the national character (*ib.* sec. 805), (4) the register (*ib.* sec. 806), (5) charter-party, instructions to the master, shipping-paper, muster-roll and log-book must show, as far as they exhibit any proofs, that the vessel is of the national character warranted (*ib.* sec. 807), (6) the cargo must be accompanied by proof of its national character and the invoices, bills of lading, the letters relating to the goods, and the certificates of consuls or other officers must all be consistent with and confirm the warranty (*ib.* sec. 808).

5. Loss within the terms of the policy (2 *ib.* sec. 2130), and amount of loss (1 Saund. Pl. & Ev. 601; 2 Phil. I. secs. 2132, 2144).

6. And when stipulated, notice (2 *ib.* 2150).

7. Adjustment, if any (2 *ib.* chap. 21; sec. 2151).

The burden is then devolved upon the defendant to show any matter of defence, as: —

1. Misrepresentation (2 Saund. Pl. & Ev. 604; Tidmarsh *v.* Washington Ins. Co., 4 Mass. 439).

2. Fraud or gross misconduct by officers of the ship (Saund. *ib.*; 1 Phil. Ins. secs. 1046, 1047, 1051, 1095 *c*).

Defendant's Burden.

3. Undue concealment (2 Saund. Pl. & Ev. 604).

4. The illegality of the voyage (2 Phil. I. sec. 2154).

5. Want of interest (2 Saund. Pl. & Ev. 604).

6. Non compliance with warranties and representations (*ib.*).

The same observations as to warranties and misrepresentations are applicable to this species of insurance as to life and fire insurance.

7. Alien enemy (1 Phil. I. sec. 147).

Under the defence, the burden will embrace these and perhaps other subjects-matter.

Ex. gr. : —

a. Concealment of papers (*ib.* sec. 809).

b. Covering belligerent property as neutral (*ib.* sec. 810; Ocean &c. Co. *v.* Francis, 2 Wend. 64, reported in 19 Am. Dec. 549).

c. Resistance to search, legally demanded (*ib.* sec. 818).

d. The secreting or disguising of property by a neutral, for the purpose of infringing upon, evading or preventing the exercise of the rights of either belligerent as such (*ib.* sec. 819).

e. The employment of a neutral vessel in a service auxiliary to the hostile operations of a belligerent (*ib.* sec. 825).

f. Carrying despatches for a belligerent (*ib.*).

g. Attempting to carry property to or from a blockaded port, having knowledge of the blockade (*ib.* sec. 830).

h. Sailing for a blockaded port, knowing it to be such, with the intent to enter it (*ib.* sec. 831).

i. Sailing into a port not blockaded, when the charter-party was signed, but after the master had notice that it had been blockaded (*ib.* secs. 838, 839).

j. Lingering near a blockaded port, with intention to enter, after notification (*ib.* sec. 841).

k. Carrying unlawful goods when warranted against (*ib.* secs. 846, 847).

l. That ship was not well (*ib.* sec. 848; 2 *ib.* sec. 2152) — though doubtful whether the onus is not with the assured,

depending to a great extent upon the terms of the policy (2 *ib.* 2152).

m. Failure to prosecute claims for the property (1 *ib.* sec. 856).

n. Other insurance (*ib.* secs. 857, 864).

o. Failure to give orders not to cruise (*ib.* sec. 859).

p. Failure to obtain a passport (*ib.* sec. 860).

q. Remaining too long on coast (*ib.* sec. 862).

r. Failure to comply with orders given for stores and repairs (*ib.* sec. 863).

s. Deviation from the voyage (*ib.* sec. 930; chap. 12; 2 *ib.* sec. 2157; Tidmarsh *v.* Washington Ins. Co., 4 Mass. 439).

t. Barratry (1 *ib.* chap. 13, sec. III.).

u. Intrinsic defects (*ib.* sec. 1089).

v. That there was not a peril (*ib.* chap. 13, sec. VIII.).

w. Failure to begin or prosecute a voyage as agreed on (*ib.* sec. 1113; 2 Arch. N. P. 216, 251).

x. Carrying contraband goods, if excepted (1 Phil. Ins. chap. 13, secs. XI., XVI.).

y. Perils not *ejusdem generis* (*ib.* sec. 1126).

z. Or too remote (*ib.* chap. 13, sec. XIV.).

aa. Not within the period of the risk (*ib.* chap. 13, sec. XV.).

bb. To claim founded on general average, that the damage was caused by collision (2 *ib.* sec. 1272, 1416).

cc. Or in average founded on jettison, or where hypothecation is resorted to, that the goods were carried on deck (*ib.* sec. 1282).

dd. Or lightening goods, merely to save them (*ib.* sec. 1289).

ee. Or spontaneous combustion (*ib.* sec. 1305).

ff. Or unnecessary stranding (*ib.* sec. 1313).

gg. Or that it was not done purposely (*ib.* sec. 1311, 1327).

hh. Or laches in making demand for contribution (*ib.* sec. 1351).

ii. Or that the adjustment was not conformable to the laws of the place to which the jurisdiction belongs (*ib.* sec. 1413).

When total loss is alleged: —

a. That the vessel has been heard from (*ib.* sec. 1496).

b. Damaged vessel, repaired and bottomried (*ib.* sec. 1498).

8. Return of the premium (*ib.* chap. 22).

9. Goods not loaded (2 Arch. N. P. 209).

10. Fraud in procuring the policy (*ib.* 236).

11. Illegality of the policy, voyage, trade, etc. (*ib.* 254).

12. Payment, release, etc. (*ib.* 269), and other matters of defence available in the action of *assumpsit.*

13. Set-off and counter-claim under the reformed procedure (2 Phil. Ins. sec. 2170).

14. Action not brought within the time stipulated (*ib.* sec. 2171).

There are perhaps many other minute points touching abandonment, salvage, etc., which are scarcely worth the repetition, as they are fully treated of in the works on insurance.

Warranties. — Some writers and courts have used the term "promissory" warranties, but it is not easily apprehended what exact idea is conveyed by the term.

It is submitted that this distinction will be found to reconcile the cases, and be sustained by the general current of authority, namely: —

The term *warranty* is not so apt an expression as *condition;* it smacks of the layman, not the lawyer. It can, in legal effect, mean nothing more or less than condition, and by using the latter word the legal mind grasps more readily its true bearing.

Then this condition relates either: —

1. To a past or future event or *status.*

2. And in either case may express affirmatively that a matter or thing has been done, or, a certain status exists, or, will be done, or, shall exist, or negatively, that such matter or thing has not been done, or, such status does not exist, or, that the same will not be done or shall not exist.

The burden will then rest with the assured, as to the first class, to prove that the matter or thing has been done, or

that the status exists; and also as to the second class, the matter or things to be done, or status to be established, has been done or established; but, as to such conditions as amount to an agreement *not to do* certain things, or *not* to accomplish a certain *status*, being insusceptible of proof, the onus to establish the breach will rest with the insurer.

Another view must be kept steadily in mind, and that is, that the breach of such conditions, however slight or unintentional, is a forfeiture of the policy, if so thereby declared; whereas, a representation must, in order to work such a result, be as to a material particular, and must be fraudulent as well as false.

Waiver. — It may be stated, generally, that whenever by the local law there may be a waiver of any rights of the insurer (for the principles whereof reference is made to May on Insurance), the onus is with the assured.

MARITAL CONSORTIUM.

I. Criminal Conversation.

Marriage. — The first point incumbent on the husband, is to prove his marriage with the woman alleged to have been debauched. He must prove an actual marriage[1] (1 Saund. Pl. & Ev. 396; 1 Sel. N. P. (4 Am. ed.) 11, 12; Abb. Tr. Ev. 684; 2 Greenl. Ev. sec. 49; 2 Leigh, N. P. 1456; Underhill (Moak), Torts, 334).

Identity. — Also, in connection therewith, he must prove his and her identity (1 Saund. Pl. & Ev. 396; 1 Sel. N. P. 17; 2 Leigh, N. P. 1457).

Crim. Con. — He must next prove the adultery, which may be done by circumstantial evidence, *ex. gr.:* a discourse between the wife and defendant, letters written to her by defendant, indecent familiarities, elopement, passing as man and wife (1 Saund. Pl. & Ev. 397; 1 Sel. N. P. 18; Abb. Tr.

[1] Reputation and cohabitation are insufficient.

Ev. 685; 2 Leigh, N. P. 1461; Underhill (Moak), Torts, 328 *et seq.;* Frank *v.* Carson, 15 U. C. C. P. 135).

Damages. — The plaintiff upon making such proof, becomes entitled to at least nominal damages for loss of services (Yundt *v.* Hartrunft, 41 Ill. 10), which may be enhanced by proof that he and his wife lived on terms of the most cordial affection; that the defendant was admitted as a friend and took undue advantage of the confidence reposed in him; also that the wife had borne a good character previous to her fall (1 Saund. Pl. & Ev. 397; 1 Sel. N. P. 19, 20; Abb. Tr. Ev. 685; 2 Leigh, N. P. 1461, 1462; 2 Greenl. Ev. sec. 55); and the pecuniary condition of the defendant (2 Greenl. Ev. *ib.;* Cool. Torts, 224; Wood's, Mayne, Dam. chap. 35).

The defendant taking the burden may show: —

Plaintiff's Misconduct. — The turpitude of the plaintiff in consenting to or conniving at the wife's criminal conversation, or that he gave her license to conduct herself as she pleased with men generally, or that he had totally and permanently given up all advantage to be derived from his wife's society (1 Saund. Pl. & Ev. 379; Abb. Tr. Ev. 686; Underhill (Moak), Torts, 330 *et seq.;* Big. Torts, 158).

Separation. — The defendant may also show that an actual separation between the parties had taken place, and that the criminal conversation occurred thereafter (1 Saund. Pl. & Ev. 398; Weedon *v.* Timbrell, 5 T. R. 357;[1] Bartelot *v.* Hawker, Peak's Rep. chap. 11).

[1] It is stated in Big. Ov. Cas. and Greenl. Ov. Cas. title Weedon *v.* Timbrell, that that case was overruled by Chambers *v.* Caulfield, 6 East. 244; but it will be seen by reference to the latter case, that it was not overruled, but distinguished from the then principal case, and has been repeatedly cited since in the text-books.

Saunders holds that where the adultery was committed after a separation, such separation not being pursuant to the terms of a deed, the trustees not having given their assent thereto, that such separation was not a ground of defence, citing Chambers *v.* Caulfield, *supra:* —

Whereas, Judge Bigelow lays it down that upon a separation by articles of agreement, the husband, having voluntarily parted with his wife's *consortium*, cannot maintain an action for criminal conversation (Big. Torts, 157), citing

Condonation. — These defences are admissible under a general denial, and the defendant may, other than by way of confession and avoidance, show a condonation [1] by the husband after the fact and with knowledge thereof (Abb. Tr. Ev. 686; 2 Greenl. Ev. sec. 53), besides any other collateral matter applicable alike to this as to other actions.

Damages; Mitigation. — In mitigation of damages, he may also show the previous bad reputation of the wife, as well as her previous bad conduct; that she made the first advances; the husband's gross negligence or inattention to his wife's conduct; and, in general, any circumstances tending to nega-

for his position Harvey *v.* Watson, 7 M. & G. (49 E. C. L. R.) 644. It will, however, be seen from an examination of that case, that the point was not decided. The question arose simply on a rule *nisi* to be allowed to file a plea embracing such facts, — a question of frivolity in the plea, — and the court expressly says, "If there is any reasonable doubt as to this plea, it ought to be allowed, *leaving the plaintiff to demur*. I do not say that the plea is good, etc." It is noticeable that in Jacob's Fisher's Digest (4 Vol. tit. H. & W. XI. 2 *d*), the same view is taken as by Saunders, and the case of Harvey *v.* Watson is nowhere cited.

Saunders by his faulty punctuation and careless arrangement of his *syllabus* of Chambers *v.* Caulfield, implies that the adultery was not committed pursuant to the terms of the deed nor with the consent of the trustees!

[1] There is a great discrepancy in the authorities as to whether evidence of condonation is admissible, even in mitigation of damages. See note 11 to Abbott cited *supra*, and cases there cited.

In addition to those cited in the negative, see McMillan *v.* Jelly, 17 U. C. C. P. 702; Verholf *v.* Van Houwenlengen, 21 Iowa, 429; Stumm *v.* Hummell, 39 *ib.* 478; Clouser *v.* Clapper, 59 Ind. 548; Wilson *v.* Webster, 7 C. & P. 198; Big. Torts, 158: whereas, it was held in a late English case to be a bar (Norris *v.* Norris, 30 L. J. (Mat. Cases) 111).

On principle, it would seem that it is not a defence either in bar or mitigation.

The cause of action having already arisen, how can the conduct of the husband toward the wife, being *qua* the defendant, *res inter alios acta*, constitute in legal contemplation either a defence or mitigation? Morally, it might, under peculiar circumstances, be considered such an act of heroism as to warrant an enhancement of his damages.

Possibly, if the circumstances attending the condonation were such as that from it a previous assent was fairly inferrible, it should go in mitigation.

It is not presumptive evidence (Stumm *v.* Hummell, 39 Iowa, 478).

But to the legal apprehension it seems incomprehensible how in any case it could be regarded as a bar.

tive the affection and domestic happiness of the husband and wife before the alleged wrong (Abb. Tr. Ev. 686; 2 Greenl. Ev. sec. 56; 1 Saund. Pl. & Ev. 398; Underhill (Moak), Torts, 333 *et seq.;* Cool. Torts, 224, 225 and note; Bull. N. P. 27).

In England the subject is regulated by a recent statute, 20 & 21 Vict. chap. 85, sec. 33 (Underhill (Moak), Torts, 326).

II. Enticing and Harboring.

Under the first branch of this title the plaintiff must prove: —

Marriage. — The marriage in the same way as in divorce (Abb. Tr. Ev. 681).

Seduction. — That the defendant induced the wife to leave her home (Schoul. D. R. (1 ed.) 57 *et seq.;* Cool. Torts, 224; Big. Torts, 156; Gilchrist *v.* Bale, 8 Watts. 355, reported in 34 Am. Dec. 469), or that he took her away knowing that she was then abandoning her husband (Big. Torts, 156).[1] If the defendant's conduct was the controlling cause, the burden is satisfied (Hadley *v.* Heywood, 121 Mass. 236).

Harboring. — As to harboring, the plaintiff must make the same proof as to marriage, and that the defendant received the wife into his household, knowing that she has, or that she is, in so doing, separating from her husband (Big. Torts, 155), or if after having innocently received her, he shall have

[1] Judge Bigelow (Bigelow, Torts, 154) says that if the enticement is by a parent of the wife, the plaintiff must also show "bad motives," *i.e.*, ill will toward the husband, and that it was not done *bona fide*. The only case he cites for the position is Hutcheson *v.* Peck, 5 Johns. 196, but it will be discovered upon an examination of the facts of that case, that it was not a case of *enticing* but of *harboring*, and there are substantial grounds of difference between the two.

Judge Spencer says: "She came to the defendant's house by the consent of her husband." The author submits that an action for enticing, against the father, stands upon the same footing as against a stranger, but it is perhaps otherwise as to harboring. Judge Bigelow was perhaps misled by the headnote. Mr. Schouler qualifies the exoneration of parents in this way (Schoul. D. R. (1 ed.) 58). And see Bennett *v.* Smith, 21 Barb. 439, 442; Campbell *v.* Carter, 6 Abb. (N. S.) 151; Smith *v.* Lyke, 13 Hun. (S. C., 20 N. Y.) 204.

ascertained that she has abandoned her husband's bed and board, and still harbors her (*ib.*). One case is to be found where the wife having left the husband and gone to live with her mother, and having continued to live there with the written assent of the husband, on demand for her surrender, the same was refused, it was held that an action would lie against the mother and her husband, the step-father of the wife (Barbee *v.* Armsted, 10 Ired. 530). It will be observed by reference to that case, that no stress is laid upon the fact that the defendants were the step-father and mother of the wife.

Damages. — Judge Bigelow says that the *gist* of the action is the loss of *consortium*, not the loss of assistance (Big. Torts, 153).

It is elementary learning that the husband is entitled to the earnings of his wife (McQ. H. & W. Pt. 1, 44). Now, as by the act of the defendant, presumptively wrongful, he has been deprived of these earnings, it seems to the author that whatever may be the technical ground of action, the loss of such earnings should form a part of the damages. Unquestionably such damages are recoverable in actions for injuries to the person (form of declaration, 2 Saund. Pl. & Ev. 570; Sedg. L. C. Dam. 709, note). The same injury is wrought to the husband, whether the wife is enticed or harbored (Reeve, D. R. 63).

The defendant taking the burden may show as to the harboring: —

Parent. — That he is the father of the wife, and that he acted on information, such as, if true, would have entitled the wife to a divorce (Big. Torts, 157). The father's house becomes then her proper sanctuary (Hutcheson *v.* Peck, 5 Johns. 196, per Kent, C. J.).

Stranger. — Or if by a stranger, that the husband had been guilty of such treatment towards his wife as would have entitled her to a divorce (Philp *v.* Squire, Peake, N. P. C. 82; Big. Torts, 157). Or that surrender of her person to the husband would have endangered her life, or exposed her to enormous bodily harm.

Judge Abbott lays it down, that *if it appear* that defendant aided her to leave, at her request, upon her complaint of ill-usage, the burden of proof is upon the plaintiff to prove an unlawful motive or design on the defendant's part, by which is to be understood, that if such proof should be developed, the burden would be shifted (Abb. Tr. Ev. 681, citing Barnes *v.* Allen, 1 Keyes, 390, *q.v.*).

III. Alienating Affection.

Judge Bigelow lays it down that it is actionable to corrupt the mind and affections of one's consort (Big. Torts, 153, sec. 6). If the cases on which he relies be deemed as authorities to that extent (Heermance *v.* James, 47 Barb. 120; Bromley *v.* Wallace, 4 Esp. 237; see also Cool. Torts, 225), the onus will be with the plaintiff to show: —

Marriage. — The marriage, in the usual way.

Insinuations. — And that the defendant, by false[1] insinuations against the plaintiff, or by other insidious wiles, so prejudiced and poisoned the mind of his wife against him, and so alienated her affections from him, as to induce her to desire and seek to obtain, without just cause, a divorce, and by such insinuations and wiles succeeded in persuading

[1] Judge Bigelow also lays it down that a like action lies even if the charges are true, citing the case *supra* from Espinasse; but while the case of Heermance *v.* James is the initial, and so far as the author's researches have extended, it is the *only* case where the principle contended for by Judge Bigelow has been asserted.

The text-books, ancient and modern, within the author's reach, are silent on the point, and he cannot discover that the case of Heermance *v.* James has ever been noticed in any of them, except in notes to Underhill (Moak), Torts, 334. It is not digested by Mr. Wait in his Actions and Defenses (a New York work), and the doctrine seems to have been confined to the courts of New York.

It will be also observed that the case was decided by the Supreme Court, which does not mean *supreme*, as it is subordinate to the Court of Appeals. It has also been held by the same court, with much more plausibility, that if a druggist clandestinely sells to a wife opiates in large quantities, by the effect of which her moral structure is undermined, the husband may maintain an action (Hoard *v.* Peak, 56 Barb. 202).

the wife to refuse to recognize the plaintiff as her husband (Big. Torts, 153) whether an actual separation followed or not.

Mala Fide. — And according to some authorities done from improper motives (Schuneman *v.* Palmer, 4 Barb. 225; Hutcheson *v.* Peck, 5 John. 196).

IV. Injuries to the Wife's Person, etc.

At common law, in an action for personal injuries done to the wife, it was, in general, optional with him to join his wife or not.

The burden of proof would, of course, be the same as in actions for assault and battery, defamation, etc. The only additional fact requiring proof, being that of marriage, which is shown by reputation (2 Saund. Pl. & Ev. 571).

MASTER AND SERVANT.

Apprentices: Enticing and Harboring. — The plaintiff must prove the apprenticeship by the indentures, in the usual way of proving deeds, though perhaps, where the binding is done by a *court of record*, the mere production of the indentures, or order of binding and indentures, would be sufficient (1 Saund. Pl. & Ev. 92; 1 Tay. Ev. sec. 124 *a*). It must be shown, if executed under the provisions of the statute, that it was made in accordance therewith (St. Nicholas *v.* St. Botolph, 12 C. B. (N. S.) 645). It should also be proved by the plaintiff that the defendant knew of the apprenticeship at the time of the enticement or harboring (*ib.*; Kerr, Act at Law, 66; Arch. Pl. & Ev. 25; 2 Parsons, Cont. 52, 53); but in some courts, in cases of seduction,[1] proof of knowledge is dispensed with (see cases cited, note (*c*), 2 Par. Cont. 52; Tyler, Inf. &c. 156; Wood, M. & S. secs. 233, 235, 238, 240;

[1] If by the seduction it is meant to be implied that the party seducing knew what relation the party seduced bore to the plaintiff, proof of *scienter* would be superfluous; but if it only means a hiring, the *scienter* is certainly as important as in case of harboring: see Underhill (Moak), Torts, 335, Rule 33.

Underhill (Moak), Torts, 335; Smith, M. & S. 86; 2 Add. Torts, sec. 1272; Cox *v.* Muncey, 6 C. B. (N. S.) 375; note to Lumley *v.* Gye, 20 E. L. & Eq. Rep. at p. 199.

Damages. — Also the damages; this proof devolves the burden on the defendant, who, if he cannot safely meet the plaintiff on the fact of the enticement, or harboring, or *scienter*, may show that the indentures are for some cause void (see Wood, M. & S. secs. 47, 60), in the sense that the plaintiff was incapacitated to take them (*ib.* 60), or the lack of some vital statutory prerequisite (In the Matter of Ambrose, Phil. 91; Ferrell *v.* Boykin, Phil. 9), or otherwise.

Or, that in case of a private binding, the child, when bound, was under twelve years of age (Musgrove *v.* Kornegay, 7 Jones, 71). But not that the bond is defective (Jones *v.* Mills, 2 Dev. 540).

Custody. — The right to custody, if claimed by one as master, may be resisted if the indentures are void, the burden being on the defendant, unless the defect appears on the face of the paper (Wood, M. & S. sec. 60). See Part VI. title PRACTICE AT CHAMBERS.

APPRENTICES.

Action on Bond. — In an action on the indentures by the master, besides the usual proof of execution, he must, in Massachusetts at least, show the expressed consent of the apprentice to the binding (Harper *v.* Gilbert, 5 Cush. 417; Wood, M. & S. sec. 43); the burden is also upon him to show desertion by the apprentice, and the resulting damages, or his ill behavior in any other respect, as covenanted against in the indentures. This is certainly the English law, and no good reason can be assigned why the like law should not prevail here (2 Par. Cont. 51; Wood, M. & S. secs. 48–58; Smith, M. & S. 6, 7, note *k*; 2 Add. Cont. sec. 904), though perhaps a contrary doctrine is held in some of our courts (see 2 Par. Cont. 52, note (*a*); but see Tyler, Inf. &c. 155, 156).

If the action be brought by the apprentice, after emancipation, he must show that the master failed to perform his covenants.

If a *prima facie* case be made, the defendant, in exoneration, may show either that the apprentice deserted his service so that he could not perform them (2 Par. Cont. 51; Wood, M. & S. sec. 48).

Or, if the breach assigned be a failure to teach the apprentice, according to the English view the burden is on the plaintiff to show that the apprentice was ready and willing to be taught (Raymond *v.* Minton, L. R. 1 Ex. 244); according to the American view that it is upon the master to show that proper means were taken to that end, and that the apprentice was incapable of learning (Wyatt *v.* Morris, 2 Dev. & Bat. 108; Wood, M. & S. sec. 49; Wright *v.* Brown, 5 Md. 37; Barger *v.* Caldwell, 2 Dana (Ky.), 131; Clancy *v.* Overman, 1 Dev. & Bat. 402).

Or, refused to be taught (Raymond *v.* Minton, L. R. 1 Ex. 244, reported in Langdell's L. C. Cont. 615).

Or, in an action against the personal representative of the master, he may show the death of his intestate so long before the period of apprenticeship would have expired, as to have enabled him, had he lived, to have performed the covenant (Goodbread *v.* Wells, 2 Dev. & Bat. 476).

It is proposed to discuss, under this title, the rights and obligations of master and servant *inter sese* (except as to the negligence of fellow-servants, which forms a separate title, — Fellow Servants), as well as the rights and obligations of the master as to third persons.

Other Classes of Servants.

Action by Servants. — An action by a servant for his unpaid wages is, in the main, governed by the rules laid down as to contracts; but if a servant's contract is to perform labor for a certain period, he must show that he did the work for the time specified; and certainly, according to the English doctrine and weight of American decisions, not even death will discharge the burden (Wood, M. & S. sec. 84; Smith, M. & S. 47, 115; Stark *v.* Parker, 2 Pick. 267, reported in 13 Am. Dec. 425; Jennings *v.* Lyons, 39 Wis. 553, reported

20 Am. Rep. 57; Cutter *v.* Powell, 2 Smith, L. C. 1 (6 T. R. 320); Lilly *v.* Elwin, 11 A. & E. (N. S.) 742), though in England custom has probably established a different rule with regard to domestic servants (Smith, M. & S. 112). Wood says that such is not the rule in this country, and cites some American cases (Wood, M. & S. sec. 84). And he says, that a recovery may be had though the servant be *rightfully discharged* (*ib.*; see *contra* Smith, M. & S. 114); but the weight of authority, if to be determined by the greater number of adjudged cases, is decidedly in favor of the doctrine as enunciated in Cutter *v.* Powell, *supra* (2 Par. Cont. 36 *et seq.*); perhaps if the ground of discharge be long-continued negligence, although rightfully discharged, the servant would be entitled to his wages up to the time of his discharge (Schoul. D. R. sec. 473).[1] But this doctrine is not applicable when the contract is severable (Wood, M. & S. sec. 85).

And even, where a servant is wrongfully dismissed before the term for service has expired, the burden will be discharged by proof of such fact and of his readiness and ability to proceed with his work (Wood, M. & S. secs. 85, 132; Smith, M. & S. 96; Fereira *v.* Sayres, 5 W. & S. 210, reported in 40 Am. Dec. 496), and his right of action accrues immediately upon his dismissal (Wood, M. & S. sec. 85; Fuller *v.* Rowe, 59 Barb. 344; Brinkley *v.* Swicegood, 65 N. C. 626; Cutter *v.* Powell, 2 Smith, L. C. 20, notes); and he may then pursue one of two remedies (2 Add. Cont. 897). He may elect to treat the contract as continuing, the burden then being upon him, also, to show readiness and willingness to continue in his master's service; but he need not prove an offer (Smith, M. & S. 95, 96; Wood, M. & S. sec. 125; Schoul. D. R. sec. 472). Or he may elect to treat the contract as *rescinded*, and only recover wages for the period during which he has actually served, as on a *quantum meruit* (Smith, M. & S. 99; Wood, M. & S. sec. 125; Schoul. D. R. sec. 472).

If he elects to treat the contract as continuing, he may sue

[1] References are to 3d ed.

immediately upon his discharge and join a count in *indebitatus assumpsit* for wages already earned (Smith, M. & S. 94, 95; Smith *v.* Hayward, 7 A. & E. 544; 1 Cr. Mee. & Ros. 20). Mr. Smith, in his notes to Cutter *v.* Powell (2 Smith, L. C. 20) says, "He may wait till the termination of the period for which he was hired, and may then *perhaps* sue for his whole wages in *indebitatus assumpsit*," and relies mainly upon the case of Gandall *v.* Portigny, 1 Stark, 198; S. C., 4 Camp. 375; but that case has since been substantially overruled, and the doctrine so doubtingly suggested been exploded (Smith, M. & S. 94, note *g*; Snelling *v.* Lord Huntingfield, 1 Cr. Mee. & Ros. note *d* at p. 26; Wood, M. & S. sec. 125). But Parsons re-states the doctrine of Smith, and cites quite a number of American authorities (2 Pars. on Cont. 34, note *d*), but supports the view above stated in note *s*, p. 41. Practically, and especially under the reformed pleading, Mr. Smith was not far wrong.

Indebitatus assumpsit, it is true, can never be supported on a fiction such as constructive service, as it accrues *ex equo et bono*, but the plaintiff could undoubtedly wait until the term of service expired, and then *sue in assumpsit*, treating the contract as continuing, and declare in two counts, one on the special contract and the other on the common count for the work or labor performed (see form, 2 Chitty, Pl. 326; 1 Cr. Mee. & Ros. 20; and Goodman *v.* Pocock, 15 A. & E. (N. S.) 576).

Now suppose, being hired by the year, he was improperly discharged during the year, and at the end of the year he brought suit as above stated, he would be presumptively entitled to recover the difference between the sum he should have received under the contract, and that which he has, or it is shown, might have received elsewhere (Sedgwick, M. of D. (7th ed.) 352, note *a*; Smith, M. & S. 47).

The burden, if required at all, to show that the servant has not used reasonable efforts to secure employment elsewhere, is upon the defendant (Wood, M. & S. sec. 125). Wood assumes that the servant should diligently seek other

employment, but this is not a part of his case; it only goes to the question of damages (Schoul. D. R. sec. 472).

If the servant claims damages for work not within the contemplation of the contract, he must also prove a special request (Wood, M. & S. sec. 86; Smith, M. & S. 101).

The servant, even in the case of an entire contract, as it is termed, may show that he rightfully quit the service, as that he was ordered to perform unnecessary labor on Sunday (Wood, M. & S. sec. 87). This, in view of the general statutory provisions touching the observance of Sunday, is unquestionably good law, but the case from Barnwell & Creswell hardly supports the text of Wood.

Or, that he was ordered to perform service which he had not contracted for (Wood, M. & S. sec. 89).

Unless perhaps in case of an emergency (Reg. *v.* St. John, Devizes, 9 B. & C. 896; Graddon *v.* Price, 2 C. & P. 610).

Or, that his duties were fulfilled by a substitute with the consent of the master (Wood, M. & S. sec. 92).

Or, that the contract was terminated by consent (Wood, M. & S. sec. 98; Schoul. D. R. sec. 464).

Or, he may, in aid of his action, show a modification by custom (Lawson on Usages, 276–279, 394–398). When the action is not founded upon a special contract as to price, the servant must also show the value of his services (Wood, M. & S. sec. 100). If the action be for the earnings of the servant received by the master, the burden is upon the servant to show: —

First. That as a conclusion reasonably flowing from the contract of service, he was entitled to some leisure, and

Second. That the earnings accrued from labor performed during such leisure time (Wood, M. & S. sec. 101; Schoul. D. R. sec. 488; though see Smith, M. & S. 80 *et seq.*).

If the action be by a *feme covert*, it must at common law have been brought, if no express promise made to the wife, by the husband alone, or if in his name, joining his wife, he must show an express promise to her; but if she is a free-trader under statutory provisions, or is otherwise entitled

under local law to sue alone, the action may be brought in her name alone (Wood, M. & S. sec. 102).

As to the question of damages, if a servant has been improperly discharged, the burden is upon the master to show in reduction of damages that the servant has not used reasonable efforts to secure employment elsewhere (Wood, M. & S. sec. 125).

Or, the servant, suing before the term of service has expired, must show that the contract of service was determinable by either party at option, and that he had elected to end the same (Wood, M. & S. sec. 131).

Or, he may show that he was prevented from performing the service by the act of the master (Wood, M. & S. sec. 132; 2 Add. Cont. secs. 882, 895).

If a contract for services to be rendered is made conditional upon the happening of an event or the doing of some act by the servant before the service begins, it is incumbent upon the servant suing for breach of such contract, to show that such event has happened, or such act has been performed (Wood, M. & S. sec. 133). Where no express contract is relied on, the servant suing for wages must show, presumptively, that he has served for one year — at least, according to the English authorities (Wood, M. & S. sec. 134; see Schoul. D. R. sec. 458). Unless he is able to rebut such presumption (Wood, M. & S. sec. 134).

It seems, though, that according to the weight of American authority, that there is no presumption, and that the hiring is at will (Wood, M. & S. sec. 134, p. 272; see Schoul. D. R. sec. 458). If the contract be to work for part of the earnings, he must show that there was money made in the enterprise (Wood, M. & S. sec. 156). Or, he may sue for extra work done, the burden being upon him to show either an express or an implied contract to pay for it (Smith, M. & S. 102, 103; Schoul. D. R. sec. 475). Or, he may sue, as upon an implied indemnity, for any damages recovered against him, in consequence of acts done by him in the course of his master's service, which he was bound to perform (Schoul. D. R. sec. 470).

Or, for refusing, after making a contract, to receive him into his service (Schoul. D. R. sec. 471).

There are many other instances which are more properly referable to the relation of principal and agent. See title AGENCY.

Supposing that the servant has made only a *prima facie* case by proof of service and its value, the master taking the burden may show: —

That there was an express entire contract, and that the plaintiff did not fulfil its terms. Here, if this fact had appeared on plaintiff's case, it would have been ground for non-suit; but, he having confined himself to proof, as upon a *quantum meruit*, the burden is devolved upon the defendant (2 Par. Cont. 522).

Or, he may show, in response to a *prima facie* case, that the servant wrongfully quit the service (Wood, M. & S. secs. 135, 145, 147; Smith, M. & S. 47; Schoul. D. R. secs. 474, 477). Or, that the servant so misbehaved himself or was so unskilful as to require his dismissal (Wood, M. & S. sec. 155; Smith, M. & S. 70; 2 Add. on Cont. sec. 897; Schoul. D. R. sec. 477).

Or, that he neglected to obey regulations, in which case the burden extends to proving the servant's knowledge of such regulations (Wood, M. & S. secs. 94, 401; Smith, M. & S. 70; Schoul. D. R. sec. 478).

Or, that he was discharged by virtue of a term of the contract (Wood, M. & S. sec. 143; Smith, M. & S. 43).

Or, he may show a lengthened sickness incapacitating the servant from labor (Wood, M. & S. sec. 115). Or, refusal to obey proper orders (Smith, M. & S. 70, 71; Schoul. D. R. sec. 462).

Or, gross moral misconduct (Smith, M. & S. 70; Schoul. D. R. sec. 462). Or, habitual negligence in business (Smith, M. & S. 70; Schoul. D. R. sec. 462).

But the burden, it seems, is upon the master to show that he knew of the misconduct, as ground of discharge, when he discharged the servant (Schoul. D. R. sec. 463; Cussons *v.*

Skinner, 11 M. & W. 161). Unless a plea of misfeasance be traversed by the replication *de injuria* (Spotswood *v.* Barrow, 1 Welsb. H. & Gor. 804).

Actions by Master against Servant. — The master is entitled to the earnings of his servant, but the burden is on him to prove that the earnings were acquired during the time of labor (Wood, M. & S. sec. 101; Smith, M. & S. 80 *et seq.*).

Or, he may sue the servant for wrongful acts committed by him in his service, but he must show that, although done in the course of the employment, they were done in violation of regulations or orders (Wood, M. & S. sec. 324; Smith, M. & S. 65, 66).

Or, he may sue him for breach of the contract of service (Wood, M. & S. sec. 135; Smith, M. & S. 65).

The servant is not a tenant of premises assigned, and on the termination of the relation he must surrender them (Schoul. D. R. sec. 465); and if the servant claims a legal right of continued occupancy, the burden is upon him to show it (*ib.;* 1 Add. Torts, sec. 391).

Actions by Masters against Third Persons. — As the master has a property in the labor of the servant, if any act of a third person, directed towards the servant, causes a diminution in the value of such services, or the capacity of the servant to perform his work, an action lies by the master, and the burden then, besides showing the injury done to the servant, and the relation of master and servant, extends to proving that such injury caused a loss of service (Wood, M. & S. sec. 224; 1 Chitty, Pl. 60, 61; Smith, M. & S. 77 *et seq.;* 2 Add. Torts, sec. 1272; Underhill (Moak), Torts, 335, Rule 33; Cool. Torts, 229, 241; Big. Torts, 140; Schoul. D. R. sec. 486).

Under this head, too, may be classed actions for abducting, enticing or harboring servants, in which the burden is upon the master to show, not only the relation of master and servant, but also that the defendant knew that the party so abducted, enticed, or harbored, was such servant (Wood, M. & S. secs. 230, 238, 240; 2 Chitty, Pl. 645 and note *i*; 2

Add. Torts, sec. 1272; Big. Torts, 141; Schoul. D. R. sec. 487, p. 682, note 4; 3 Black. Com. 142; Winsmore *v.* Greenbank, Willes, 577; Fawcet *v.* Beavres, 2 Lev. 63; Fores *v.* Wilson, Peak, N. P. 55; Norris, Peak's Ev. 545). Where the reason is given why the *scienter* is required in this class of cases, and not in cases of seduction (Smith, M. & S. 77 *et seq.*).

The Action for Seduction. — The plaintiff in this action, must show that the relation of master and servant existed between himself and the party[1] seduced, as the action itself is predicated upon the loss of service (Wood, M. & S. sec. 242).

Loss of Service. — The burden therefore rests upon the plaintiff to show such loss (Wood, M. & S. sec. 242; Smith, M. & S. 86, 87; 2 Add. Torts, secs. 1280, 1282; Underhill (Moak), Torts, 339 (rule 34), 341; Schoul. D. R. (3d ed.) sec. 261; Ogborn *v.* Francis, 15 Vroom, 441, reported in 43 Am. Rep. 394).

This part of the burden is sufficiently discharged in case of a father plaintiff, by showing that he had a right to control the services of the daughter (Wood, M. & S. sec. 246; 2 Add. Torts, sec. 1282; Underhill (Moak), Torts, 340, 341).

There is a discrepancy between the English and American authorities as to whether it needs to be shown that the person seduced was in the actual employ of the father. The English authorities point in the affirmative (2 Add. Torts, secs. 1275, 1281, 1282; Smith, M. & S. 88; Big. Torts, 146; Hedges *v.* Tagg, L. R. 7 Exch. 283, reported in 2 E. R. (Moak) 679; Cool. Torts, 231).

While some respectable American authorities point the other way (Wood, M. & S. sec. 249, citing Martin *v.* Payne, 9 Johns, 387, reported in 6 Am. Dec. 288 and Bigelow L. C. Torts, 286; notes to Weaver *v.* Bachert, 44 Am. Dec. at p. 166; Lavery *v.* Crooke, 52 Wis. 612, reported in 38 Am. Rep. 768; Coon *v.* Moffett, 2 Penn. 583, reported in 4 Am. Dec. 392).

Our reprints of the English reports are generally so meagre

[1] This colloquialism has become so thoroughly imbedded in our language as a *nomen generalissimum* that the author has employed it in several instances.

that it is difficult to ascertain always, with exact precision, the reason of the adjudications.

It is laid down that the loss of service is the *gist* of the action. Then if a daughter is working out on wages *payable to the father*, the author is not aware of any English case which has held him debarred from maintaining the action.

In England there are several statutes touching the hiring out of servants, one passed in the reign of Elizabeth; and, perhaps, if critically examined, many, if not all of the decisions which hold that, when the daughter is out at service the action cannot be maintained, would be found to turn upon the legal result of hiring, namely, that the father was not entitled to the wages. The hiring under these statutes is analogous to the binding of apprentices, in which all the authorities agree that the father cannot support the action; see Terry *v.* Hutchinson, L. R. 3 Q. B. 599, reported in Shirl. L. C. 291; Rist *v.* Faux, 4 Best & S. 409.

True Criterion. — The author conceives that the true criterion is given by Mr. Moak in his note to Hedges *v.* Tagg, *supra*.

If the daughter be a minor, and the plaintiff has a right to *command* the services *at any time*, as if she be in the temporary employment of another, with the parent's assent, the action lies; see note 1 to sec. 1274, 2 Add. Torts; Schoul. D. R. sec. 261, note citing Mohry *v.* Hoffman, 86 Pa. 358; Blagge *v.* Ilsley, 127 Mass. 191, reported in 34 Am. Rep. 361. Let it be borne in mind that, although the action is *founded* on the relation of master and servant, yet the *gist* is the loss of service. Now suppose a female child to be hired for an indefinite period, and that she becomes pregnant; if that be a good ground for discharge (and it is so laid down in Smith, 72; Wood, sec. 116, and note 2, p. 211, citing Rex. *v.* Brampton, Cald. 11), and should she be discharged immediately on her becoming so, on whom falls the loss of service during the pregnancy?

The technical master cannot sue, because her services have not been diminished, and according to the authorities, the father cannot, because she was out at service when de-

bauched. So here we would have the case of a wrong without a remedy. On *principle*, the loss of service, *i.e.*, the loss of the value of her labor, being the gist of the action, and as the father loses that because of the seduction, inducing the discharge, he ought to be entitled to maintain the action. And, if so, where hired for an indefinite time, why not if hired for a week, month, or year, and discharged? See Sargent *v.* ———, 5 Cowen, 106 fully stated in Big. L. C. Torts, 295, *et seq.*

The recent case of Rist *v.* Faux, 4 B. & S. 409, seems to be a relaxation of the ancient rule; there the daughter assisted in domestic duties at home during the night, and during the day was hired out, the seduction taking place during the day; it was held that the father could recover. The reasoning of the court in McDaniel *v.* Edwards, 7 Ired. 408, reported in 47 Am. Dec. 331 leans in this direction. These views are merely thrown out as flowing from an examination of the subject.

Right of Mother. — But all agree that, in such case, the mother, plaintiff, cannot recover (Wood, M. & S. sec. 251; see also Cool. Torts, 231; Big. Torts, 149; Bartley *v.* Richtmyer, 53 Am. Dec. 338, in note 349).

Inveigled. — But the English doctrine is not applicable, where the person with whom she is living inveigled her away from home into a pretended service, for the purpose of seducing her (2 Add. Torts, secs. 1275, 1276; Smith, M. & S. 88; Cool. Torts, 232; Big. Torts, 146; Schoul. D. R. sec. 261).

So, if the father has a right to her services when he sees fit to command them (2 Add. Torts, and note 1 to sec. 1275, citing Martin *v.* Payne, *supra;* Mulvehall *v.* Milward, 11 N. Y. 343; Stiles *v.* Tilford, 10 Wend. 338).

All the authorities agree that the action cannot be maintained, if she was out on service, under a binding contract (Wood, M. & S. secs. 250, 257; 2 Add. Torts, secs. 1275, 1281; Cool. Torts, 231, 232). Where the mother sues, she must prove the actual relation of mistress and servant as between herself and daughter (Wood, M. & S. sec. 251;

Schoul. D. R. sec. 261): in such case as guardian and ward or other persons standing in *loco parentis* there is not that presumption that there is in case of the father. However, see Smith, M. & S. 89; note 2, p. 482, Wood, M. & S.

Temporarily Absent. — Where the right to the daughter's service is established, or where actual residence, under her parents' roof at the time of the seduction is shown, even though she be temporarily absent, if it be further shown, that she is capable of rendering any service, the burden is satisfied (Wood, M. & S. sec. 257; 2 Add. Torts, sec. 1275; Smith, M. & S. 88; Big. Torts, 146).

Pregnancy. — The plaintiff must prove some loss of service. The case of Eager *v.* Grimwood, 1 Wells. H. & Gord. 61, has been cited as deciding that there must be proof of pregnancy; but, a careful examination of that case will hardly bear out so general a proposition. The true doctrine seems to be, that the onus as to loss of service is sufficiently discharged by proof of any illness tending to incapacitate the female from doing as much work as she had been accustomed to perform (Schoul. D. R. sec. 261; Cool. Torts, 233; Big. L. C. Torts, 293, note; Manvell *v.* Thomson, 2 C. & P. 303 (12 E. C. L. R.); note to Weaver *v.* Bachert, 44 Am. Dec. 169; Kelly *v.* Riley, 106 Mass. 339, reported in 8 Am. Rep. 336; Moak's notes to Hedges *v.* Tagg, 2 E. R. 684; White *v.* Nellis, 31 N. Y. 405).

Defendant's Burden. — The defendant, taking the burden, may show: —

That the female was not the plaintiff's servant for any of the causes, and subject to the modifications before stated (Wood, M. & S. sec. 257; Smith, M. & S. 90; 12 Add. Torts, sec. 1281; Cool. Torts, 231, 232; Big. Torts, 145).

Or, that the father or other person standing in *loco parentis* consented to or connived at the seduction or, it seems contributed thereto as by allowing "bundling."[1] (Wood, M. &

[1] A custom for the male and female to be wrapped up separately, tightly, and put to bed together. It is confined to the Dutch settlements, and perhaps might call for Hamlet's exclamation that "it is a custom more honored in the breach than the observance" (Hollis *v.* Wells, 3 Penn. L. J. Rep. 169; Lawson Usages, 38, sec. 30).

S. sec. 256; 2 Add. Torts, sec. 1281; Underhill (Moak), Torts, 90, 345, Rule 35; Big. Torts, 151, 152; Big. L. C. Torts, 301, note 1).

He may show other matters in mitigation of damages, but, this does not strictly concern the *onus probandi.*

The industrious lawyer may also consult on this subject the following authorities: Kennedy *v.* Shea, 110 Mass. 147, reported in 14 Am. Rep. 584; Furman *v.* Van Sise, 56 N. Y. 435, reported in 15 Am. Rep. 441; White *v.* Murtland, 71 Ill. 250, reported in 22 Am. Rep. 100; Brown *v.* Barnes, 39 Mich. 211, reported in 33 Am. Rep. 375; 36 Am. Rep. 767, 793; Wallace *v.* Clark, 2 Overt. (Tenn.) 93, reported in 5 Am. Dec. 654; Nickelson *v.* Stryker, 10 Johns, 115, reported in 6 Am. Dec. 318; Mercer *v.* Walmsley, 5 H. & J. 27, reported in 9 Am. Dec. 486; Logan *v.* Murray, 6 S. & R. 175, reported in 9 Am. Dec. 422; Hurnketh *v.* Barr, 8 S. & R. 36, reported in 11 Am. Dec. 568; Knight *v.* Wilcox, 14 N. Y. 413; Emery *v.* Gowen, 4 Greenl. 33, reported in 16 Am. Dec. 233; Clark *v.* Fitch, 2 Wend. 459, reported in 20 Am. Dec. 639; Moritz *v.* Garnhart, 7 Watts, 302, reported in 32 Am. Dec. 762; Fernsler *v.* Moyer, 3 W. & S. 416, reported in 39 Am. Dec. 33; Boyd *v.* Byrd, 8 Blackf. 113, reported in 44 Am. Dec. 740; Palmer *v.* Oakley, 2 Doug. 433, reported in 47 Am. Dec. 41; Vossel *v.* Cole, 10 Mo. 634, reported in 47 Am. Dec. 136; Bartley *v.* Richtmyer, 4 N. Y. 38, reported in 53 Am. Dec. 338; Griffiths *v.* Teetgen, 28 E. L. & Eq. Rep. 371.

Enticing a Contractor. — The principle, that the master has a right of action for enticing his servant, has been extended to the case of the enticement of a contractor, *i.e.*, of a person who had contracted to perform labor, but was not, when enticed, in the actual service of the plaintiff; or, in popular phrase, persuading one to break his contract to serve (Schoul. D. R. sec. 487; Wood, M. & S. secs. 232, 233; 1 Add. Torts, secs. 17, 41; 2 *ib.* secs. 1272, 1286; Cool. Torts, 279; Underhill (Moak), Torts, 335, Rule 33; Big. Torts, 142; Lumley *v.* Gye, 2 E. & B. 216, reported in Big. L. C. on Torts, 306, and

Shirl. L. C. 328; Haskins *v.* Royster, 70 N. C. 601, reported in 16 Am. Rep. 780, and note to Wood, M. & S. p. 462; 20 E. L. & Eq. Rep. 168; Broom, L. M. 191 *et seq.*; 2 Par. Cont. 48).

The same burden of proof rests upon the plaintiff in this as in actions for enticing ordinary servants.

Actions against Servants. — Of course the servant, committing a tort, although by command of his master, is liable personally to an action therefor, but, as this is not distinguishable from any other action of tort, the burden need not be discussed. The servant, professing to act as such, is not liable on contracts made for his master, unless in fraud (Smith, M. & S. 194).

Actions against Masters. — Contracts. — The master is bound by a contract made by his servant in the course of his employment, and fairly flowing therefrom. As if the servant be permitted to buy goods for the master upon tick (Schoul. D. R. sec. 489; Wood, M. & S. chap. 12, *passim*; 1 Add. on Cont. sec. 68; Smith, M. & S. 122 *et seq.*).

This subject falls more properly under the head of AGENCY. See that title.

In actions against the master upon contracts, the burden will be upon the plaintiff to show: —

1. The contract.

2. The relation of master and servant, or a general or special agency.

3. That the contract was authorized by the scope of the employment, or by acts of the master amounting to an estoppel, or that it was adopted or ratified by him.

4. The breach and damages (*ib.*).

Torts. — The master is likewise responsible for the torts of his servant, committed in the course of his employment (Cool. Torts, 531, 564; Underhill (Moak), Torts, 30, Rule 10; 2 Thomp. Neg. 862, 884 *et seq.*; Smith, M. & S. 151 *et seq.*; 1 Add. Torts, secs. 36, 98, 105, 283, 377, 422, 520, 550; 2 *ib.* 1309, 1312; Schoul. D. R. sec. 490; Wood, M. & S. chap. 13, *passim*; Broom, L. M. 810 *et seq.*; notes to Knight *v.* Fox, 1 E. L. & Eq. at p. 480).

In such actions the burden is upon the plaintiff to show:—

1. The tort or fraud.

2. That the relation of master and servant existed between the defendant and the actual tort feasor (2 Thomp. Neg. 892, sec. 12 *et seq.*

3. That the injury was done in the course of the employment.

4. The damages sustained (see the authorities last cited).

It is obvious that the defence in such actions will mainly turn upon whether the relation of master and servant subsisted, or, if so, whether the act was done within the scope of the employment.

Contractor or Independent Calling. — The defendant, then, taking the burden, may show that the servant was acting without the scope of his employment, or he may show that the person who committed the injury was only a contractor to do some work, or pursued an independent calling as jobmaster and the like (1 Add. Torts, chap. 8, sec. II.; *ib.* sec. 283; Cool. Torts, 546 *et seq.;* Hillard *v.* Richardson, Big. L. C. Torts, 636; Schoul. D. R. sec. 491; Smith, M. & S. 160, 161, 166, 168; Underhill (Moak), Torts, 39, Rule 12, citing Pearson *v.* Cox, L. R. 2 C. P. D. 369, reported in 21 E. R. (Moak) 327, 332, note; Wood, M. & S. secs. 312, 314; Broom, L. M. 819 *et seq.*, and a large number of cases cited, note 2, p. 820; Big. on Torts, 305; Knight *v.* Fox, 5 Wels. H. & Gord. 721, reported in 1 E. L. and Eq. Rep. 477; Quarman *v.* Burnett, 6 M. & W. 499; Rapson *v.* Cubitt, 9 M. & W. 710; Milligan *v.* Wedge, 12 A. & E. 737; Allen *v.* Hayward, 7 A. & E. (N. S.) 960; Reedie *v.* N. W. Ry. Co., 4 Wels. H. & Gord. 244, reported in 6 Rail Cases, 184; Overton *v.* Freeman, 11 C. B. (73 E. C. L. R.) 873, reported in 8 E. L. & Eq. Rep. 481; Steel *v.* S. Ry. Co., 16 C. B. (81 E. C. L. R.) 350, reported in 32 E. L. & Eq. Rep. 366; Eaton *v.* E. & N. R. R. Co., 59 Me. 520, reported in 8 Am. Rep. 430; Peachey *v.* Rowland, 13 C. B. (76 E. C. L. R.) 187, reported in 16 E. L. & Eq. Rep. 442; dissenting opinion of Ruffin, C. J., in Wiswall *v.* Brinson, 10 Ired. 554; 2 Thomp. Neg. 899, sec.

22; King *v.* N. Y. Co., 66 N. Y. 181, reported in 23 Am. Rep. 37).

Unless it appears in the evidence in support of this defence (which would render the defence itself unavailing) the plaintiff may in reply show: —

1. That the contract was to do an illegal act, or to do a legal act in an improper manner (Underhill (Moak), Torts, 39, 41; Wood, M. & S. sec. 314, citing Ellis *v.* Sheffield Gas Co., 2 El. & Bl. 767; 23 L. J. Q. B. (N. S.) 42; Cool. Torts, 547, 548; Wood, M. & S. sec. 312; 1 Add. Torts, sec. 283; Big. L. C. on Torts, 650, 654 *et seq.;* 2 Thomp. Neg. 900, sec. 23, 902, sec. 25).

2. Or, that the employer retained control over the contractor as to the method and means to be used, and personally interfered (Underhill (Moak), Torts, 41; Smith, M. & S. 168, 169; Wood, M. & S. secs. 312, 315; 1 Add. Torts, sec. 581; Big. L. C. on Torts, 654 *et seq.;* Cool. Torts, 548, 549; 2 Thomp. Neg. 909, secs. 35, 913, sec. 40).

3. Or, that a legal duty was incumbent on the employer, and that the contractor either omits or imperfectly performs it (Underhill (Moak), Torts, 41; Smith, M. & S. 170, 171; Wood, M. & S. sec. 316; Big. L. C. Torts, 645, 654 *et seq.;* 2 Thomp. Neg. 904, secs. 27, 906, sec. 28).

4. Or, that the contract directly requires the performance of work intrinsically injurious or dangerous, however skilfully performed (Underhill (Moak), Torts, 42; Smith, M. & S. 170, 172; Wood, M. & S. secs. 313, 314; 1 Add. Torts, sec. 580; Cool. Torts, 547, 548; Big. L. C. on Torts at pp. 649, 650; 2 Thomp. Neg. 901, secs. 24, 907, sec. 29). The early case of Bush *v.* Steinman, 1 B. & P. 404, was to the contrary; that was this case: A contracted with B to repair his house, which was situated by the roadside; B contracted with C to do the work; C with D to furnish the materials; the servant of D brought a quantity of lime wherewith to repair the house, and placed it near the house in the road, and plaintiff's carriage was overturned against the pile. It was held that A was liable. This case gave rise for a time to some

conflict in the decisions, but it has been so thoroughly overruled in England and denied in the United States as to be no longer regarded as an exposition of the law (see Greenl. Over. Cases, and Big. Over. Cases, title Bush *v.* Steinman; and to the list of overruling cases there cited may be added Knight *v.* Fox, 7 Wels. H. & Gord. 721, reported in 1 E. L. & Eq. Rep. 477; and Reedie *v.* N. W. Ry. Co., 4 Wels. H. & Gord. 244, reported in 6 Rail. Cases, 184; 2 Thomp. Neg. 902, sec. 25).

Sub-Contractor. — The principle upon which the employer is exempted from liability for the negligence of his contractor prevails, as between the contractor and his sub-contractor, under the same circumstances (Big. L. C. on Torts, at p. 657, citing Rapson *v.* Cubitt, 9 M. & W. 710; Knight *v.* Fox, *supra;* Overton *v.* Freeman, *supra*, and Cuff *v.* Newark Co., 6 Vroom, 17; Underhill (Moak), Torts, 39, Rule 12; Wood, M. & S. sec. 312; 1 Add. Torts, sec. 581; 2 Thomp. Neg. 909, sec. 34).

The burden of proof to show the relation, if the same is not disclosed in plaintiff's case and he makes out a *prima facie* or presumptive case of master and servant, will be, of course, upon the defendant.

Servants under double Masters. — The plaintiff may in some instances take the burden in reply, and show that the tort-feasor, although a servant of a contractor, was also a servant of the employer *quoad hoc* (Big. L. C. Torts, note at p. 658).

NEGLIGENCE.

Whenever negligence is alleged as the gravamen of an action, though it be a negative averment, the burden of proof is upon the plaintiff to show such a state of facts as will authorize the legal inference of negligence.

These facts are so kaleidoscopic, depending upon the relation of the parties, and so many diverse circumstances, as to preclude any sufficient analysis (1 Saund. Pl. & Ev. 166, 167).

Definitions have been frequently attempted. See 1 Thomp. on Neg. pp. 45, 135, 483.

The burden of proof is so intimately connected with the correct idea of what constitutes negligence, as to induce the author to give (which he does with great diffidence) what he conceives to be a definition in this aspect. It is the failure of a contracting party to properly perform a duty assumed, or of a stranger to regulate his conduct with a due regard to the rights of others.

Every one being presumed to do his duty, it is incumbent upon him who alleges a state of facts inconsistent with such presumption, to prove his charge.

Keeping in view the definition above advanced, the subject may, so far as the onus probandi is concerned, be conveniently divided into two general divisions, viz.: 1. Where there is privity. 2. As between strangers, or, according to the ancient nomenclature, when it arises *ex contractu* and *ex delicto*.

I. Where there is Privity.

Common Carriers of Goods. — Common carriers, by virtue of their calling, *proprio vigore*, assume with the public to carry passengers or goods, or both; if such carrier fails to transport safely, he violates his contract and may be sued, either on the contract or on the custom of the realm for *breach of duty*, growing out of his calling and failure (1 Sel. N. P. 349; 1 Leigh, N. P. 534; 1 Chitty, Pl. 134).[1]

If sued on the contract, the burden is upon the plaintiff to show: —

1. The contract express or implied.
2. A delivery of the goods to the carrier.
3. And the defendant's breach of promise.

[1] Dr. Wharton states that as to this point there has been doubt in England (Whart. Neg. sec. 547); but the author thinks that an examination of the cases only go to show that *case* is maintainable even where *assumpsit* could not be, *ex. gr.*: in the case of the carriage of a servant, the fare being paid by the master, the servant may maintain *case* although he could not maintain *assumpsit*. The liability is not *necessarily* dependent on contract (Marshal *v.* York, Newcastle &c. Co., 11 C. B. 655).

When the contract is express, it will generally supersede the necessity for proof of the calling, but, if it does not disclose it, or is implied, and the nonfeasance is such, as being a common carrier, he has become responsible for all consequences, except the act of God or the public enemy; proof must also be made that the defendant is a common carrier (1 Saund. Pl. & Ev. 328 *et seq.;* 1 Leigh, N. P. 535; Chitty, Car. 140, 141; 1 Arch. N. P. 79, 80; 2 Greenl. Ev. secs. 208, 211 *et seq.;* Abb. Tr. Ev. 563 *et seq.;* Whart. Neg. sec. 422; 1 Add. Torts, secs. 698, 699).

Under the third subdivision no proof of negligence is required, although averred; it being sufficient to show a non-delivery of goods to devolve the onus upon the defendant, of proving the delivery, or an excuse for non-delivery (Chitty, Car. 141, 142; 1 Leigh, N. P. 535; Red. Car. sec. 38, note 11; Whart. Neg. sec. 422; Sh. & Red. Neg. secs. 12, 13, 13 *a*; 1 Add. Torts, *supra*).

If the action be predicated upon *the duty*, the burden will rest upon the plaintiff to prove: —

1. The delivery and his property in the goods.
2. That the defendant is a common carrier, and his duty.
3. The breach of duty in failing to deliver (1 Saund. Pl. & Ev. 328 *et seq.;* 1 Leigh, N. P. 536, 537; Abb. Tr. Ev. 563 *et seq.;* Whart. Neg. sec. 422; Sh. & Red. Neg. secs. 12, 13, 13 *a*; 2 Greenl. Ev. sec. 213; 1 Add. Torts, sec. 698).

Perils of Navigation. — But when the plaintiff's case discloses a peril of navigation or *casus*, within the exception of a bill of lading, or a case otherwise amounting to a defence, then the plaintiff is bound to negative the exception before the defendant is compelled to offer proof (Whart. Neg. sec. 422; Chitty, Car. 233, 234; Clark *v.* Barnwell, 12 How. 272; Trans. Co. *v.* Downer, 11 Wall. 134; See, however, Whitesides *v.* Russell, 8 W. & S. 44; Hays *v.* Kennedy, 41 Pa. 378; Graham *v.* Davis, 4 Ohio, 362).

Delay. — Ordinarily the burden is upon the plaintiff to show that the delay in delivery was occasioned by negligence (Chitty, Car. 140, 309).

Damages. — To recover more than nominal damages, it is also incumbent on plaintiff to prove the value of the goods lost (1 Saund. Pl. & Ev. 331; 1 Leigh, N. P. 536; Red. Car. secs. 30, 31; Sh. & Red. Neg. secs. 597, 598, and notes; 1 Add. Torts, secs. 702, 704).

In this connection it should be stated that there is a discrepancy in the authorities as to the point upon whom is the burden of proof, to show that the *status* of carrier had ceased and that of warehouseman begun. Quite a number hold, that the burden is on the carrier to show that the consignee had reasonable opportunity to remove the goods; while others (and perhaps entitled to more consideration) hold, that when unloaded and warehoused at the point of destination, the onus of mere *casus* is shifted to the consignee (Whart. Neg. sec. 571, and authorities cited in notes; see, also, Cool. Torts, 641, 642; Abb. Tr. Ev. 576; Red. Car. secs. 108, 109, 110; 1 Add. Torts, sec. 668).

Carriers of Passengers. — The burden of showing negligence, *i.e.*, a lack of reasonable care, is ordinarily upon the plaintiff (2 Thomp. Neg. 1232, § 4, 1233, § 6; Abb. Tr. Ev. 582; 1 Add. Torts, sec. 586; Sh. & Red. Neg. sec. 13; Red. Car. sec. 370).

Res Ipsa Loquitur. — But if any injury is shown to have been produced by a failure to perform a statutory duty, the maxim *res ipsa loquitur* applies, and the burden of exonerative proof lies upon the defendant (2 Thomp. Neg. 1232, § 5, 1235, § 8; article in 10 C. L. J. 261, by Judge Thompson; Steamboat "New World" *v.* King, 16 How. 469).[1]

So, where a duty arises out of contractual relation to safely carry, and an injury happens to a passenger in consequence of the inadaption of the vehicle, roadway, or other appliances owned or controlled by the carrier, and used by him in making the transit, the plaintiff satisfies the burden of proof, and makes out a *prima facie* case for damages by showing the contract of carriage; that the accident happened in consequence of the inadaption; and damages sustained in conse-

[1] This case was decided on the Act of July 7th, 1838 (5 Stat. at Large, 306), repealed by Act of Feb. 28th, 1871, 16 Stat. at Large, 440.

quence thereof (Thomp. Car. Pas. 210; 2 Thomp. Neg. 1227, § 3; Chitty, Car. 259, 309; Readhead *v.* Mid. R. Co., Shirl. L. C. in note, p. 251 (2d Am. ed.); Pink *v.* Melbourne &c., 6 Victorian L. R. (Law) 186; Fern *v.* R. R. Co., and McCormick *v.* Same (Ct. Sess. Sct.), reported in 1 Am. L. Rec. 337; Stokes *v.* Saltonstall, 13 Pet. 181).

To this extent the maxim above quoted applies. It does not apply to accidents not arising out of contractual relations, except where the facts disclose gross negligence (1 Add. Torts, sec. 586; see 17 E. R. (Moak) 299, note, and an interesting article on this subject in 10 Central L. J. 261; and a great many cases *pro* and *con* in Underhill (Moak), Torts, 314, 315).

Contract, Mail Agents, etc. — He must prove the contract of carriage, or that he travelled as mail agent, or express messenger, or the like, wherever the defendant was under contract to carry free (Abb. Tr. Ev. 577; Thomp. Car. Par. 45, § 5; Whart. Neg. sec. 641; 1 Add. Torts, sec. 692; Red. Car. sec. 343, and note 10; 2 Red. Rail. sec. 251, Pl. 5; Sh. & Red. Neg. secs. 261, 263; Chitty, Car. 260). At least he must show that he was riding in the defendant's vehicle (Thomp. Car. Pas. 51, § 9).

II. By Strangers.

The burden throughout is upon the plaintiff.

Trespassers. — As to the right of a trespasser to recover at all, or in case that he has such right, to what extent of diligence the defendant is bound, there is a conflict of judicial opinion (Whart. Neg. sec. 354; Thomp. Car. Pas. 43, sec. 3; Sh. & Red. Neg. secs. 263, 264; Chitty, Car. 277).

The intelligent lawyer must take the onus of preparing his proof after solving for himself, upon a review of the authorities, the question of liability and intensity of the proof requisite.

Damages. — Upon making a *prima facie* case, the plaintiff suing in tort, or in contract involving a tort or breach of duty, entitles himself to nominal damages at least, and to such

general damages as he may be able to prove, such as loss of time, incurable hurt, bodily and mental suffering, etc., but if he goes for special damages, they must be alleged (to prevent surprise) and proved (Thomp. Car. Pas. 550, § 12, also pp. 189, 319, 561, 564, 565, 567, 568, 569, 570, 571, 572, 577, 579, 580, 581, 582, 583, 584; Sh. & Red. Neg. sec. 606; 1 Add. Torts, secs. 702, 704).

If exemplary damages are claimed, the plaintiff must also prove the element of either fraud, malice, reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness or other causes of aggravation, in the act or omission causing the injury (Thomp. Car. Pas. 573, § 27; Sh. & Red. Neg. sec. 600 and note; 2 Add. Torts, sec. 1392.

NEGOTIABLE INSTRUMENTS.

If the suit is between the immediate parties, and the execution of the paper is not denied, the onus is upon the defendant to establish any affirmative defence. If, however, the action is brought by an indorsee, certain defences, available as against the payee are inadmissible, and as to any which are permitted, the onus lies with the defendant; though in some instances, after taking the onus, by making certain proof, it is shifted to the plaintiff.

The limitations of the rules governing the onus in actions on negotiable instruments will now be discussed.

It is sufficient for the holder, where execution is not denied, to show possession; and if indorsee, indorsement or other sufficient assignment, *i.e.*, according to the *lex loci;* such proof imports that he acquired the paper, for value, before maturity, in the regular course of business and without notice of any defences available as between the original parties, and casts the onus upon the defendant to avoid this *prima facie* case (1 Dan. N. I. sec. 812 and cases there cited; 1 Pars. B. & N. 255, 380 and cases cited; 2 *ib.* 9, 280 and cases cited; Atlas Bank *v.* Doyle, 9 R. I. 76, reported in 11 Am. Rep. 219; Abb. Tr. Ev. 404). When payable to bearer

the holder stands on the same footing as an indorsee (Atlas Bank *v.* Doyle, *supra;* 1 Dan. N. I. sec. 812). Mere proof that there was no consideration or a failure of consideration, as, that it was accommodation paper, or intended as a gift, or given for a supposed balance when in fact none was due, or for what was erroneously supposed to form a sufficient consideration, will not operate to shift the burden of proof (1 Par. B. & N. 184, 185, 186; 2 *ib.* 438 and cases cited; 1 Dan. N. I. sec. 165). To avail himself of lack or failure of consideration, a double burden is imposed upon him, not only to show this lack or failure of consideration, as between the original parties, but also as permeating all of the indorsements (1 Dan. N. I. 165). But, if the defendant shows that the instrument was originally obtained by fraud or duress[1] (Atlas Bank *v.* Doyle, *supra;* 1 Dan. N. I. sec. 812), or has been fraudulently obtained from an intermediate holder, or has been lost or stolen, or has been in any way the subject of fraud or felony, or was founded in illegality, the onus will be shifted to the plaintiff to show that he gave value for it (1 Par. B. & N. 188; 2 *ib.* 280, 438 and cases cited; Miller *v.* Tharrell, 75 N. C. 148; Chitty, B. 648; Whitaker *v.* Edmunds, 1 M. & Rob. 366; 1 Dan. N. I. secs. 165, 812–819); and in some states, that he purchased before maturity (1 Par. B. & N. 189, note). So where the paper was given for a distinctly illegal consideration (*ib.* 189).

As stated, there is a presumption that an indorsee has acquired title before maturity, and that the onus to rebut it is with the defendant (2 *ib.* 9); if, however, the time of indorsement is material to the plaintiff's case in any other respect, the onus seems to be with the plaintiff (*ib.* 10). This proof of value having been offered, if the promisor would defend, the burden is shifted to him to show that the transfer to the plaintiff was fraudulent (2 Par. B. & N. 280 and notes).

These principles are applied also in actions upon lost or stolen notes (*ib.*). But with respect to the burden of proof,

[1] But as to duress, see *infra.*

a broad distinction has been drawn in some cases between bank-bills, and other negotiable paper, lost or stolen. For, as to ordinary commercial paper, on proof that it was lost, stolen, or fraudulently dealt with, the onus is upon the plaintiff to show that it came into his possession honestly (*ib.*; Chitty, B. 254, 255 and notes; Kellogg *v.* Curtis, 69 Me. 212, reported in 31 Am. Rep. 273). But it is said that no such burden is cast upon the holder of a stolen bank-bill (2 Par. B. & N. 281). They have no ear-marks, and to adopt any other rule with regard to them, would shake commerce to its foundation. In an action by drawer on an acceptance, wherein want of consideration is pleaded and good consideration replied, the onus is with the defendant (Chitty, B. 649). In order to cast upon the holder, in accommodation bills, the onus of proving a consideration, the defendant must first make out a case of fraud or suspicion (Chitty, B. 649; Middleton Bank *v.* Jerome, 18 Conn. 443; Thompson *v.* Shepherd, 12 Met. 311; Knight *v.* Pugh, 4 W. & S. 445; Hascall *v.* Whitmore, 19 Me. 102; Bush *v.* Peckard, 3 Harr. 385).

Nor is the fact of a bill having been accepted in order to raise money for the acceptor, and of the payee having appropriated the money so realized to his own use, sufficient to cast upon a subsequent indorsee the onus of showing that he gave value for it (Chitty, B. 649). But when the immediate indorser of a bill to the plaintiff parted with the bill in violation of good faith, want of consideration as between him and the plaintiff is presumed, so as to cast on the plaintiff the onus of proving consideration (Smith *v.* Braine, 3 Eng. L. & E. 379; 15 Jur. 287; Bailey *v.* Bidwell, 13 M. & W. 73; White *v.* Springfield Bank, 1 Barb. 225; Vallet *v.* Parker, 6 Wend. 615; Boyd *v.* McIvor, 11 Ala. 822; Vathir *v.* Zane, 6 Gratt. 246). So upon evidence of suspicious circumstances, the onus may be devolved upon the holder of a note payable to bearer, to show how he came by it (Jones *v.* Westcott, 2 Brev. (S. C.) 166; Russell *v.* Ball, 2 Johns. 51).

But, in order to cast such onus upon him, the circumstances must amount to clear proof that the possession is fraudulent (Stoddard *v.* Burton, 41 Iowa, 582).

The effect of taking over-due bills does not apply to accommodation paper, if the endorser's title is unimpeachable (1 Dan. N. I. sec. 786). The acceptance implies an unclouded obligation; but, if one purchase accommodation paper with knowledge that the terms, on which the accommodation was predicated, have been violated, he is not a *bona fide* holder, with respect to the party who lent his name. The onus, however, is with the defendant (1 Dan. N. I. sec. 790). He must show knowledge of the diversion. In New York, upon diversion, merely, being shown, the onus is shifted to the plaintiff (1 Dan. N. I. sec. 791), and it seems that such is the rule in Indiana, Arkansas, and South Carolina (Greer *v.* George, 8 Ark. 131; Phelps *v.* Younger, 4 Ind. 450; Prior *v.* Coulter, 1 Bail. 517).

There is a manifest distinction between holders for value, before and after dishonor. For, while the defence as to fraud, illegality, etc., is alike applicable to both, yet, as to equities or equitable defences, there is a glaring discrepancy. He who purchases negotiable paper before maturity (and, according to an eminent author, in demand bills before dishonor, by too great delay in making demand (1 Par. B. & N. 261)) for value, is presumptively, and so termed, a *bona fide* holder, and holds the instrument insubjectible to equitable defences existing between the original parties, the onus, in such case, being with the defendant to prove actual knowledge; whereas, when purchased after maturity, the purchaser holds subject to such equities, on the idea that he was put upon inquiry and purchased at his peril, and the onus is then with the defendant, merely to show the existence of the equitable defence. In the latter case, while the onus is with the defendant to establish his equity, having done so, the law presumes knowledge of some defence; whereas, in the other case, no such presumption can arise, and the onus of its proof is superadded to that of the defence relied on (1 Par. B. & N. 274, 275). As to other defences, available as between the immediate parties, and which may or not shift the burden of proof, there is also a clear distinction, which is this: if the

defence goes to the essence of the paper, its vitality, such as forgery, material alteration, usury (where it avoids the instrument), force in obtaining signature, and according to the better reasoning, duress[1] (1 Par. B. & N. 276; Benj. Chal. Dig. Arts. 94, 95; 1 Dan. N. I. secs. 857, 858; Big. B. & N. 539, § 2), infancy, coverture, lunacy, non-agency, indeed, to almost if not quite all of the defences founded on the *factum* — the onus is with the defendant (1 Par. B. & N. 275–277), and generally remains with him throughout. When, however, it can be shown, in reply to the defence of forgery, that the party whose signature was forged had been accustomed to pay similar drafts, the onus of such proof is with the plaintiff (2 Par. B. & N. 594); so, where to a defence of infancy, ratification is replied (1 Par. B. & N. 72 and notes), or to coverture, that the drawer is a free-trader under statutory regulation (Kirkman *v.* Bank of Greensboro, 77 N. C. 394). In all these instances, a purchase for full value, and even before maturity, will not avail as against the party entitled to make such defences. But, where the defence is illegality of consideration, or fraud, that the paper was lost or stolen, or fraudulently obtained from an intermediate holder, or has been since its execution the subject of fraud or felony, after taking the onus and making proof, the defendant shifts the burden of proof to the plaintiff, to show that he is a purchaser for value and without notice (1 Par. B. & N. 188; 2 *ib.* 267, 280, 433; 1 Dan. N. I. secs. 165, 812–819; Whitaker *v.* Edmunds, *supra*). So as to misapplication of the instrument (1 Dan. N. I. sec. 814).

There are several classes of cases, wherein the line of demarcation — between the fraud which does or does not affect a *bona fide* holder for value, and that which vitiates the instrument into whosesoever hand it may pass — is narrow and perhaps refined, and may be thus stated: —

1. Where the instrument is complete, except by delivery

[1] The case of Duncan *v.* Scott, 1 Camp. 100, cited in Byles, is scarcely an authority, as, although the bill had been obtained by duress, it had not been indorsed to plaintiff.

or issuance, the onus of the defence is upon the defendant. Having made such proof, the onus is shifted to the plaintiff, to prove that he purchased for value and without notice (1 Dan. N. I. secs. 836–840).

2. Where an instrument, signed with an important blank unfilled, has been stolen, and the blank filled,—this is forgery (1 Dan. N. I. secs. 841, 842).

3. The betrayal of a trust. As, if an instrument is complete except as to the sum, and is entrusted to an agent to fill up, but with a maximum limit. Proof under defendant's onus being made of these facts, the plaintiff has the onus to show that he purchased for value and without notice of the limited authority (1 Dan. N. I. secs. 843, 844). Indeed, this is applicable to all commercial papers bearing blank signatures. They constitute, presumptively, *carte blanche.*

4. This doctrine, however, is not applicable to blank signatures not so intended or delivered, made for another purpose, or negligently or idly, as upon the fly-leaf of a book to denote ownership; hence such cases are governed by the same principles as paper forged (1 Dan. N. I. secs. 845, 846).

5. Nor where the signature was procured by false reading to an illiterate person. This goes to the *factum* (1 Dan. N. I. secs. 847, 848, 849).

6. The sixth class of cases are those in which the party possesses the ordinary faculties and knowledge, and is betrayed into signing the paper by false representations as to its character. The onus of such proof is of course with the defendant. There is a painful conflict of authority upon the point whether the plaintiff can, in such cases, protect himself by showing a purchase for value and without notice (1 Dan. N. I. 850, 851, 851[a], 852, 853). Whenever he is allowed to make the proof, the onus is shifted, and is with him for that purpose. Perhaps the right of the *bona fide* holder may be solved by a consideration of the reason which gives him protection in other instances.

The doctrines of the *lex mercatoria* were imported from the civil and engrafted upon the common law by the mental

force of Ld. Mansfield. The principles which govern courts of equity with regard to purchasers are likewise derived from the same source. The purchaser, in order to be shielded, must come in, in the *post*, not merely in the *per*, that is, he must have clothed himself with the legal title, — the *tabula in naufragio*, — and then, having paid value, whereby he shows an equal equity, the court declares that between equal equities it will not interfere; the analogy in the law merchant permeates every branch thereof; if the instrument is void for any cause, the holder does not acquire the legal title; but, if (the factum being perfect) there is any equitable defence collateral thereto, as illegal consideration, etc., he does acquire the legal title, and, having paid value, has an equal equity. So, where value is lacking, he cannot claim protection, as he only takes in the *per*. It seems that this shield in equity becomes a shield at law, for the onus of the defence constitutes the defendant substantially an actor, and the defendant by and through such defence makes a presumptive case against the plaintiff; he, not having, in the first instance, shown value, at last, substantially defends by proof of a positive equity superadded to his legal title. Hence, we find that the same measure of protection is not afforded to a holder not clothed with the legal title, or, who, being so clothed, has not paid value, as to him who fills both of these requisites. It occurs to the author that a very reasonable criterion may be established by considering whether, with reference to other contracts, the proposed defence could only be made available in the courts of equity; for the principles governing the defences to contracts ought to be the same, whether administered in one forum or another.

But it should be borne in mind that the technical rules of the common law were never, in their strictness, applied to commercial paper, and that a certain amount of equitable ingredients were early incorporated into the *lex mercatoria*, and, this may account for the allowance of this apparently equitable ground of defence.

And, there seems to exist a distinction as to cases where

the maker can read, and negligently fails to do so, and delivers commercial paper in consequence of a misrepresentation as to its character, in which case he can not set up the defence, provided: —

1. The holder be *bona fide*, and
2. It is commercial paper;

but may do so, as against the person improperly procuring its execution, when the rights of no other person have intervened (note to Patterson *v.* Luckley, 14 Eng. Rep. (Moak) 579).

Apply this test to the sixth class.

Suppose an action at law upon a single bill.[1] The defendant could not plead that it was obtained by false representations.

That defence could alone be asserted in a court of equity (Logan *v.* Simmons, 1 Dev. & Bat. 13; Reed *v.* Moore, 3 Ired. 310; Gant *v.* Hunsucker, 12 Ired. 254). And if asserted there against an indorsee (when negotiable, as in some States), he could make a complete defence by proving himself a purchaser for value and before maturity.

7. Where bills have become perfect in form or signed in blank, and handed to some one to deliver upon the happening of some contingency.

Upon proof to this effect by defendant, the onus cast on plaintiff is discharged, by showing that he is a purchaser for value and without notice (1 Dan. N. I. secs. 854, 855, 856).[2]

It may be stated here, that the fraud which shifts the onus must be one perpetrated upon the maker. Fraud against the payee or any subsequent indorsee, is insufficient (1 Dan. N. I. sec. 818).

When the payee of a partnership bill or note sues on it, upon proving the *factum*, if denied, he establishes a *prima facie* case, devolving upon the defendants the burden of showing (if such be the defence) that it was given for a

[1] A contract under seal to pay money absolutely.

[2] There is, however, a conflict of authority upon this point; see Daniel *ubi supra*, and Bigelow, L. C., on Bills and Notes, 571, note.

private debt of one of the co-partners, or otherwise in violation of the articles of co-partnership; then the onus would be shifted to the plaintiff to show the assent of the other co-partners (Williams *v.* Walbridge, 3 Wend. 415; Rogers *v.* Batchelor, 12 Pet. 299; Taylor *v.* Hillyer, 3 Blackf. 433; 1 Dan. N. I. secs. 369, 662; 1 Par. B. & N. 125 *et seq.*). And if a bill or note be executed by a co-partner in violation of the partnership agreement, and that fact be proved, the onus is upon the plaintiff, if indorsee, to prove value and innocence (1 Dan. N. I. sec. 369 and cases cited; 1 Par. B. & N. 125 *et seq.*).

When the business of a co-partnership is conducted in the name of one of the partners, and his name is the firm-name, the burden of proof is with the plaintiff at the outset, if he sues the firm, to establish that a bill or note drawn in such name, was so drawn as a partnership transaction (1 Dan. N. I. secs. 363, 364).

The burden of proof is with the holder, who relies upon the fact that the payee is a fictitious person (2 Par. B. & N. 448).

It has been held that the onus is with the plaintiff to show that an assignment was made before the discount or set-off pleaded accrued, as well in a single-bill as in a negotiable note (*ib.* 610), or before the notice thereof (Harris *v.* Burwell, 65 N. C. 584; Martin *v.* Richardson, 68 *ib.* 255). In an action by payee on a note, where lack of consideration is relied on, and there is conflicting evidence, it was held in Maine that the jury must be satisfied of the fact, by a preponderance of the whole evidence (Small *v.* Clewley, 62 Me. 155, reported in 16 Am. Rep. 410). The Supreme Court of North Carolina, however, hold that the onus, when the action is by an indorsee, is with the defendant (McArthur *v.* McLeod, 6 Jones, L. 475). The court, in Small *v.* Clewley, hold that production of the paper makes a *prima facie* case, and without evidence from defendant, entitles the plaintiff to recover; but, that if defendant offers evidence, and plaintiff counter-evidence, the burden is not

shifted to the defendant. It is difficult to comprehend why a *prima facie* case does not shift the burden of proof, but this case, and others to the same effect, are adopted by Mr. Daniel (1 Dan. N. I. sec. 164); see also 2 Par. B. & N. 493.

A new note given in renewal of an old is presumed to be a novation, and if the plaintiff alleges the contrary, the onus is with him to show it by clear and satisfactory evidence (Piper *v.* Wade, 57 Ga. 223). A person not a party to a bill, endorsing same, is presumptively a guarantor, and if it be alleged that he signed in any other capacity, the party so contending has the onus of proving it (Boynton *v.* Pierce, 79 Ill. 145). Delivery of the bill or note is essential, and the onus to prove it, is with the plaintiff (1 Par. B. & N. 48). The onus is satisfied by production of the paper, nothing more appearing (Big. B. & N. 292, notes). The onus lies with the plaintiff to prove presentment, both for acceptance and payment when both are required, as these are essential elements of his case (1 Dan. N. I. sec. 452; 2 *ib.* sec. 1586; 2 Par. B. & N. 71; Cox *v.* Boone, 8 W. Va. 500, reported in 23 Am. Rep. 627; Purcell *v.* Allemong, 22 Gratt. 739; Harker *v.* Anderson, 21 Wend. 372), unless waived, and the burden to show such waiver is on the holder (Compton *v.* Gilman, 19 W. Va. 312, reported in 42 Am. Rep. 776), also to prove demand, when that is necessary. The onus is also with him to prove notice of non-acceptance or non-payment, as also, when necessary, to prove protest and notice (2 Dan. N. I. 1050; 1 Par. B. & N. 414, 516; Big. B. & N. 338 *et seq.*; Long *v.* Stephenson, 72 N. C. 569). As to when and under what circumstances these several matters are required to be shown, we do not propose to discuss the points, but it may be stated as a general proposition, that whenever they are required to be proved, the onus lies with the plaintiff (2 Dan. N. I. sec. 1047 *et seq.*). It may be added, however, that the notice while correct in form may be attacked as insufficient, because applicable equally to each of several bills or notes; in such case after plaintiff shall have made proof of the notice, the onus to show its insuffi-

ciency lies with the defendant (1 Par. B. & N. 473, note *u*; also 475, and cases cited; Cook *v.* Litchfield, 5 Sand. 330). The loss of a bill sent to a bank for collection casts the onus upon the bank to show exculpatory circumstances (Chicopee Bank *v.* Philadelphia, 8 Wall. 641).

NOTICE.

Actual Notice. — Whenever, in the course of litigation, it becomes necessary to affect a party with notice of a fact, the burden is with the party alleging notice (Wade, Notice, secs. 6, 7).

It is not proposed to discuss what may or not be sufficient facts to constitute notice, but whatever may be the measure of proof, it devolves upon the party alleging it (*ib.* chap. 1).

Constructive Notice. — As to constructive notice, little need be remarked, except that, it devolves upon the party alleging it to show the *status* from which it becomes inferrible — as in case of registered instruments, the registry; *lis pendens*, exemplification of the record, etc. The onus is with the litigant alleging constructive notice to prove the facts and the other party's relation to them, from which, as a matter of legal inference, the law affects him with such notice. Being so shown, however, the inference or presumption is in most cases insusceptible of explanation or rebuttal (Le Neve *v.* Le Neve, 2 White & Tudor, Ld. Cases, Pt. I. 21, American notes; Perry, Trusts, sec. 223).

Some authors claim a distinction between constructive notice and implied notice, referring the former to matters of registration or matters of record and the like, and the latter to questions of possession, notice to an agent, facts to put on inquiry and the like (Story, Eq. Juris. sec. 410, note *a*); while others hold, that the distinction is not well founded, but, that on proof of the facts upon which the notice is founded, it becomes to all intents constructive notice (Article on Constructive Notice, 17 Am. Law Rev. 849). How-

ever this may be, there is a manifest distinction to be taken between the two classes with reference to the onus probandi.

As to notice growing out of the registration or recording of instruments or law proceedings constituting *lis pendens*, etc., required or allowed to be registered or recorded: upon proof of the registry or record, an irrebuttable presumption of notice arises; whereas, in the other class of cases upon proof of possession, etc., while a presumption of notice is raised, it merely shifts the burden of proof of lack of notice to the other party, such being, thus again, distinguished from actual notice, wherein the onus remains throughout with the party alleging it. Thus, take the case of notice from possession: possession is sufficient to put upon inquiry, and if such inquiry would necessarily lead to knowledge of title in the possessor, it becomes constructive notice and is irrebuttable; but, if the inquiry does not go to that extent, the proof of possession only, devolves the onus upon the party charged with notice (Wade, Notice, chap. 2, sub-chap. III.).

As to the doctrine tritely stated, that notice to an agent is notice to the principal; with great deference to the learned writer in the American Law Review cited *supra*, it can hardly be maintained that notice to the agent is necessarily *constructive* notice to the principal, for that would operate to deprive the principal, in many cases, of a right to rebut the inference of notice to his agent, when such right would be unquestioned if the same degree and character of notice were fastened upon himself (*ib.* sec. 672).

So, as to notice of facts sufficient to put upon inquiry, notice of every fact that diligent inquiry would furnish is presumed, but unless the facts which would have been thus developed would amount unequivocally to some kind of title, it would not be deemed constructive notice, but might operate to shift the burden (*ib.* secs. 276, 279).

The doctrine of constructive notice arising from *lis pendens* is mainly applied to the assertion, by whatever form of litigation the local law may prescribe, of some equitable claim (*ib.* sec. 342).

And a judgment IN REM binds the *res* without a personal notice to the parties interested (Freeman, Judg. sec. 611). And so, by statute, in perhaps all of the States, notice may be given by publication.

The onus is with the litigant, averring notice, to prove the filing of a bill in equity or other statutory equivalent therefor, to show an exemplification of the record of the judgment *in rem*, and if of a foreign court, its jurisdiction, and, in the last instance above stated, to show that publication was made as required by the local law.

NUISANCE.

As to what constitutes a nuisance, the reader is referred to the text-books, and particularly to Wood on Nuisances, chaps. I. & II.; Big. Torts, chap. XIII.; Underhill (Moak), Torts, 113, 116, 229 *et seq.*; Cool. Torts, 565 *et seq.*; Big. L. C. Torts, 454 *et seq.*; 1 Thomp. Neg. 2, 51, 74, 96, 99, 106, 108, 245; 1 Add. Torts, secs. 71 and note, 217, 230 and note, 234, 279, 295, 297; 2 *ib.* sec. 1072.

General Burden. — The plaintiff must establish his title to the right affected (2 Saund. Pl. & Ev. 688; 2 Saund. R. 114 *c*; 4 Mod. 421). If the action be for an injury to real property corporeal, at the suit of a party in possession, he need only prove his possession (2 Saund. Pl. & Ev. 689; 2 Sel. N. P. 303, 305; 2 Greenl. Ev. sec. 470; Abb. Tr. Ev. 640; 1 Add. Torts, sec. 290; Wood, Nuis. sec. 841, 843).

When the action is at the suit of a reversioner, his title to the reversion must be proved (2 Saund. Pl. & Ev. 689; 2 Sel. N. P. 303; 2 Greenl. Ev. sec. 470; 1 Add. Torts, sec. 290; Wood, Nuis. sec. 841).

If the property injured be incorporeal, he must prove his title by express proof or presumptive evidence (2 Saund. Pl. & Ev. 689; 2 Greenl. Ev. sec. 471; Wood, Nuis. sec. 843; 2 Sel. N. P. 305).

In an action for disturbance of a ferry, it is sufficient to

prove that the plaintiff was in possession of the ferry (2 Saund. Pl. & Ev. 689; Wood, Nuis. sec. 843).

Injurious Acts. — Plaintiff must also prove the erection of something offensive so near his premises as to render them useless or unfit for habitation (2 Saund. Pl. & Ev. 689; 2 Greenl. Ev. sec. 470; Abb. Tr. Ev. 642; Wood, Nuis. sec. 841).

And in such case by a reversioner, he must prove the nuisance to be of such permanent character, as to effect his reversionary interest (2 Saund. Pl. & Ev. 689; Wood, Nuis. sec. 841).

Defendant's Acts. — The plaintiff must show that the defendant committed the nuisance (2 Saund. Pl. & Ev. 689, 690; Wood, Nuis. sec. 841; 2 Sel. N. P. 304; 2 Greenl. Ev. sec. 472).

If it is sought to charge a landlord of demised premises, as for a nuisance thereon, the burden is also upon the plaintiff to show that the nuisance existed at the time of the execution of the lease (1 Add. Torts, sec. 290; Broom's L. M. 827).

It must, in general, be shown that the defendant is the occupier, or had the use of the obnoxious thing (1 Add. Torts, sec. 290; Wood, Nuis. sec. 841), or that he controlled the premises or authorized the injurious act (1 Add. Torts, sec. 290; Wood, Nuis. sec. 841).

If the nuisance be alleged to have been created by the falling of ruinous buildings, the burden will be satisfied by the proof that the defendant was in the actual or constructive possession of the property at the time of the injury (1 Add. Torts, sec. 290).

If the action be predicated upon acts of non-feasance, the facts creating the duty must be proved, and the defendant's neglect established (*ib.*).

If the injury arose from the dangerous condition of the premises on which the plaintiff was employed, it must be shown that the danger was latent and unknown to the plaintiff (*ib.*).

If the action be based upon the dangerous condition of the premises to which the plaintiff was invited as a guest, he must show that the danger was of an unusual and unexpected character, the existence of which was wholly unknown to the plaintiff and known to the defendant (*ib.*).

Damages. — He must also show damages (2 Saund. Pl. & Ev. 690; 2 Greenl. Ev. secs. 470, 474; Abb. Tr. Ev. 643).

And it has been held, that for an injury occasioned by a nuisance in a public highway, there must be evidence of special damage (2 Sel. N. P. 300; Abb. Tr. Ev. 643; Big. L. C. Torts, 472, 473; Underhill (Moak), Torts, 6–9; *Per Cur.* Carth. 191); and as to the required proof of special damage, see 2 Sel. N. P. 301; Wood, Nuis. sec. 829.

Defence.

Grant. — Except in public nuisances, the defendant may show a right to create, maintain, or employ the nuisance, by grant (Wood, Nuis. sec. 842).

Prescription. — Whenever he might defend by evidence of a grant, he may also prescribe for the privilege (Wood, Nuis. sec. 842; Abb. Tr. Ev. 643; 2 Greenl. Ev. 475; 1 Arch. N. P. 426; 1 Smith, L. C. (5th Am. ed.) 363, top).

License. — Or he may show a license therefor (Wood, Nuis. sec. 842; 2 Saund. Pl. & Ev. 689; 2 Greenl. Ev. sec. 475).

Mitigation. — Or except, when special damages are claimed, he may show facts in mitigation (Wood, Nuis. sec. 842; Abb. Tr. Ev. 644).

Any of the foregoing defences before the New Rules, and independent of statute, may be shown under the general issue (2 Sel. N. P. 305).

Statutory Authority. — So, the defendant may show that the injurious act was done under legislative authority, and that the power or duty could not, reasonably, be well executed without causing the annoyance complained of (Abb. Tr. Ev. 643, 644; Hull *v.* Managers &c., 40 L. T. R. (N. S.) 467).

OPTIONS.

Optional contracts are sometimes confounded with wagering contracts (7 Wait, A. & D. 85), but while an optional contract may constitute, under certain conditions, a wagering contract, it is neither necessarily nor presumptively the case. So far from it, a sale conveying an option is presumptively a legal, and consequently a binding contract, and the burden to show it to be wagering is on him who alleges it (Abb. Tr. Ev. 314; article in 10 C. L. J. 221; article in 17 Fed. Rep. 831 notes *et seq.*; *Re* Chandler, 6 C. L. N. 229; 9 Bank Reg. 514; 13 Am. L. Reg. (N. S.) 310; Wolcott *v.* Heath, 78 Ill. 433; Lehman *v.* Strassberger, 2 Woods, 559, reported in 3 C. L. J. 134 and notes; Kingsbury *v.* Kirwan, 77 N. Y. 612, reported in 6 C. L. J. 228, note; *ib.* 229; Bigelow *v.* Benedict, 70 N. Y. 202, reported in 6 C. L. J. 324; Kent *v.* Mittenberger, 12 Mo. App. 433, reported in 16 C. L. J. 433; Murray *v.* Ochiltree, 59 Iowa, 435, reported in 15 C. L. J. 434; Union &c. Bank *v.* Carr (C. C. Iowa), reported in 29 Int. Rev. Rec. 118, and 15 Fed. Rep. 438; Cobb *v.* Prell (C. C. Kan.), reported in 16 C. L. J. 453, and 15 Fed. Rep. 774; Gregory *v.* Wattowa, 57 Iowa, 711, reported in 12 N. W. Rep. 226; Gregory *v.* Wendell, 39 Mich. 337; S. C., 40 *ib.* 432, reported in 8 C. L. J. 115; Brown *v.* Hall, 5 Lans. 177; Story *v.* Solomon, 71 N. Y. 420; Hentz *v.* Jewell (C. C. Miss.), 20 Fed. Rep. 592; Kirkpatrick *v.* Adams (C. C. Tenn.), *ib.* 287; First Nat. Bank &c. *v.* Oskaloosa &c., Iowa, reported in 17 C. L. N. 321).

There is no doubt that a bare promise to do something, which requires performance alone from the promisor, is a *nudum pactum;* there must be a consideration. This doctrine is peculiarly applicable to optional contracts, but in its application, there is a distressing conflict of authority. As the burden of proof depends upon the correct application of this cardinal principle, it is deemed that a discussion of the principle itself will be a sufficient exposition of the law touching the onus probandi. The leading English case is Cooke *v.* Oxley, 3 T. R. 653, reported in Shirl. L. C. 8, and Lang. S. C. 3.

In that case the facts were gathered from the *narr* on a motion in arrest of judgment. They were, that the defendant proposed to sell to the plaintiff certain personal property at a certain price, whereupon the plaintiff desired the defendant to give him time to accept or reject the offer, until four o'clock of the same day, to which defendant agreed; and thereupon the defendant proposed to sell and deliver the same upon the terms aforesaid, if the plaintiff would agree to purchase it upon the terms aforesaid, and would give notice thereof to the defendant before the hour designated; that the plaintiff did agree to purchase said property upon the terms aforesaid, and did give notice thereof to the defendant, before the said hour; also that he requested the defendant to deliver to him the said property, and offered to pay for the same. The judgment was arrested, the court holding the agreement as set forth in the *narr*, to be *nudum pactum*, or, as it is otherwise misleadingly put, that a mere proposal may be revoked at any time before acceptance. The case of Cooke *v.* Oxley has been followed in several other cases in England, and is approved in the English text-books, and may be regarded as the settled law of that country (Shirl. L. C. 9, note; Benj. Sales, secs. 64–66; Poll. Prin. Cont. 8; 1 Add. Cont. sec. 20;[1] Routledge *v.* Grant, 4 Bing. (13 E. C. L. R.) 653, reported in Lang. S. C. 6; Dickinson *v.* Dodds, L. R. 2 Ch. Div. 463; Head *v.* Diggon, 3 M. & R. 97, reported in Lang. S. C. 11).

The case of Cooke *v.* Oxley has been denied as law by Prof. Bell, an eminent Scotch lawyer (Bell, Cont. Sales, 35); also by 2 Kent, Com. 477, note *d*; 1 Duer. Ins. 118; Story, Sales (2d ed.), sec. 127; Met. Cont. 19 *et seq.*; 2 Am. Jur. (N. S.) 17 *et seq.*; Boston &c. Co. *v.* Bartlett, 3 Cush. 324, reported in Lang. S. C. 94, and Law. L. C. 3; Hallock *v.* Com. Ins. Co., 2 Dutch. 268, 282; Kentucky &c. Co. *v.* Jenks, 5 Ind. 96, 100.[2]

Mr. Parsons takes a novel view, contending that the promisee becomes bound; but this view operates as a destruc-

[1] Addison does not cite Cooke *v.* Oxley, but states the principle, and cites the confirmatory cases which follow and approve it.

[2] Bishop upholds the English doctrine (Bish. Cont. secs. 174, 180).

tion of the doctrine of unilateral or optional contracts (1 Par. Cont. 450, 451).

So able a writer as Mr. Shirley, in his comment on Cooke *v.* Oxley, concedes "that if Cooke had given Oxley *sixpence* for keeping the offer open, there would have been a consideration for Oxley's promise, and he would have been bound by it" (Shirl. L. C. 9). It occurs to the author that the real point in controversy is as to whether there was a consideration to support Oxley's promise. In order to determine this question properly, we should recur to principle.

Let us first ascertain what is a consideration. It may be defined to be "either some detriment to the plaintiff sustained for the sake or at the instance of the defendant, or some benefit to the defendant moving from the plaintiff" (Byles, Bills, 90). Why does not Cooke *v.* Oxley fall within the first branch of this definition?

Adequacy is out of the question.

Suppose A says to B, "If you will take off your hat, I will give you five dollars," and B takes off his hat, can it be contended that B could not recover upon that agreement? Suppose A says to B, "If you will come to New York next month, I will give you one hundred dollars," and B does travel to New York the next month, can he not recover on this promise? Suppose he says to B, "If you will pay me such a price for a certain named property, by four o'clock this afternoon, I will let you have it," and B goes to him before four o'clock, and offers to pay the price, and A refuses to comply, would he not be liable for a breach of contract? (Des Moines &c. Co. *v.* Graff, 27 Iowa, 99, reported in 1 Am. Rep. 256). Was not this substantially the contract made by Oxley with Cooke? It is not even necessary that the consideration should be beneficial to the promisor, for if it moves to a third person, by his desire or acquiescence, that is sufficient (Sowerby *v.* Butcher, 2 C. & M. 368; S. C., 5 Tyr. 320).

The author conceives that the "reason of the thing" is with the American view, and hence that the burden of proof, in such cases, only requires evidence of an unilateral contract, and the offer of the party, having an option, to comply

with its terms at or before the time agreed upon (See Bell, Cont. Sales, 33, 34, 37; articles in 15 West. Jur. 95, 145). It is to be observed that the case of Richardson *v.* Hardwick, 106 U. S. 252, reported in 5 Morr. Tr. 341, was for specific performance.

These contracts, however, seem to be subject to the right of the promisor, by a kind of *locus pœnitentiæ*, to revoke them before compliance on the part of the promisee (Lang. S. C. 13, n. (2), 51, n. (1), 128–132, 140, 141, 144; Met. Cont. 15; 1 Add. Cont. sec. 20; Poll. Prin. Cont. 8; Shirl. L. C. 9, note; 1 Par. Cont. 451; Bish. Cont. 180; Boston &c. Co. *v.* Bartlett, 3 Cush. 224, reported in Lang. S. C. 94).[1] But to make such revocation effectual, it must be notified to the promisee (Poll. Prin. Cont. 10 *et seq.;* Shirl. L. C. 9, note; Lang. S. C. 51, note (1); Thomson *v.* James, 18 Dunlop, 1, reported in Lang. S. C. 117). Some authorities, following Cooke *v.* Oxley, substantially emasculate the principle by holding that a sale to another is a communicated revocation (Bish. Cont. sec. 181).[2]

See Part I. title PAROL CONTRACTS, sub-title *Auction Sales*, and *Contracts by Advertisement.*

[1] The American authorities are all agreed upon this point, but it seems to the author, on principle, as quite illogical. If the contract was binding, so as to be actionable upon non-performance, how can the promisor have a *locus pœnitentiæ?* Yet the doctrine is too firmly imbedded in our law to be questioned.

[2] Mr. Bishop only cites for the position, Dickinson *v.* Dodds, L. R. 2 Ch. Div. 463; that case does not sustain his broad position, that a sale to another, *proprio vigore*, amounts to a revocation, but that a sale, which came to the knowledge of the promisee, did. The qualification, however, hardly changes the sense.

It would seem though, that if the promise can be revoked arbitrarily, a communicated sale would be a substantial revocation, whether the knowledge thereof came directly from the promisor, or accidentally. It all turns at last upon whether there was a consideration.

Mr. Shirley says that if Cooke had paid *sixpence*, Oxley would have been bound, and, of course, could not have sold or otherwise revoked. If the trouble of Cooke in preparing the money, going at or before four o'clock to Oxley, and proffering to comply, was not a detriment to him, then there was no consideration, and the promise was *nudum pactum.*

PAROL CONTRACTS.

I. Special Contracts.

In all parol contracts, by which is meant all not of record or under seal (and excepting commercial instruments), the onus is with the plaintiff to show the agreement, the consideration, the breach, and unless they be liquidated by the contract, the damages sustained, provided he does not merely claim nominal damages (1 Arch. N. P. 80).

That much he must prove, and there may be instances, where, from the nature of the special contract, or by the local law, he may be required to prove more.

He must prove all the material averments of his declaration, and, if he omits essential ingredients, he will fail on the ground of variance, *ex. gr.*, such as conditions precedent, readiness, ability, request, demand, etc. (2 Greenl. Ev. sec. 106; Martin *v.* Leggett, 4 E. D. Smith (N. Y.), 255; Smith *v.* Smith, 1 Sandf. 206; Harris *v.* Storey, 2 E. D. Smith, 363; Kerstler *v.* Raymond, 10 Ind. 199; Springer *v.* Stewart, 2 Greene, (Iowa) 390; Portland *v.* Brown, 43 Me. 223; Caldwell *v.* Harrison, 11 Ala. 755; Gray *v.* Gardner, 17 Mass. 188; Cowper *v.* Saunders, 4 Dev. 283; McNeely *v.* Carter, 1 Ired. 141; Grandy *v.* McCleese, 2 Jones (N. C.), 142; 3 *ib.* 8).

1. *Contracts by Mail.*

The only point in this connection necessary to be discussed is, as to the time when an offer by mail becomes, by acceptance, a completed contract. The burden only requires of the plaintiff, (1) evidence, that, upon receiving a proposition through the post, he, of course within a reasonable time, wrote and mailed an acceptance thereof, (2) and the time when he mailed his reply; as the authorities are generally

agreed, that the contract becomes a *fait accompli* from the time of the mailing of the reply[1] (1 Par. Cont. 483 and note,

[1] The doctrine cannot be said to be firmly established.

The weight of authority coincides with the assumption contained in the text, which was necessary to be stated in order to discuss the question as to the burden of proof.

It seems to the author that the view taken by him is the correct doctrine.

For, as well put by the Court in Adams *v.* Lindsell, *infra*, "it is argued, that till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then, the defendants had retracted their offer by selling to other persons. If that were so, no contract could ever be completed by the post, for if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification, that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*."

This language was quoted with approval by LD. COTTENHAM in advising the House of Lords in Dunlop *v.* Higgins, 1 H. of L. 381, reported in Lang. S. C. Cont., 24, 35, and notes, L. C. Law. Lib. Oct., Nov., Dec., 1848, p. 72. This language is also quoted with approval by the Supreme Court of North Carolina in Crook *v.* Cowan, 64 N. C. 743, 748. And Parsons, quoting it also, strongly advocates this view (1 Parsons, Cont. 483).

It is not to be gainsaid, however, that there are first-class authorities to the contrary (McCullock *v.* Eagle &c. Co., 1 Pick, 278, reported in Langdell, 50, but see the note of the reporter thereto; Countess of Dunmore *v.* Alexander, 9 Shaw & Dunlop, 190 (Scotch), reported in Langdell, 112; Br. & Am. Tel. Co. *v.* Colson, L. R. 6 Ex. 108; 40 L. J. Ex. 97).

This last case, however, decided in 1871, has been disapproved in Harris' Case, L. R. 7 Ch. App. Cases, 587; 41 L. J. Ch. 621; Household &c. Co. *v.* Grant, L. R. 4 Ex. Div. 216; S. C., 41 L. T. R. (N. S.) 298, reported in Law. L. C. 14; 16 Am. L. Reg. (N. S.) 180, and 9 C. L. J. 89, 271; Walls' Case, L. R. 15 Eq. 18.

It is true the V. C. in the latter case speaks of "Harris'" Case as throwing "cold water" upon the "Colson" Case, but L. J. JAMES, in delivering the opinion in "Harris'" Case, says (alluding to the decision of the V. C. appealed from, and then under review): "That decision seems to me to be entirely in accordance with the great number of cases in this court and to be utterly undistinguishable, in principle or in fact, from Dunlop *v.* Higgins, a case *binding upon us*, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. . . . Against this current of authority there is the case of the British & American Telegraph Company *v.* Colson &c.," p. 592.

In America, we call this an overruling (see article in 12 C. L. J. 365), and it is almost so called in Byrne *v.* Van Tienhoven, 5 L. R. C. P. Div. 344, 49 L. J. C. P. Div. 316, 42 L. T. (N. S.) 37 reported in 10 C. L. J. 451. Addi-

citing many cases; 1 Duer. Ins. 116–131; Benj. Sales,[1] secs. 44–46, 68, 69, 74, 75, 271, note (*o*); Leake, Dig. Cont. 18, 19; Gray, Com. by Tel. secs. 110, 111; Bishop, Cont. sec. 182; 1 Wait, A. & D. 86; 1 Add. Cont. sec. 22; Met. Cont. 17 *et seq.*; Poll. Princ. Cont. 11; Shaw, Obl. 12; Chitty, Cont. 10–13; Story, Agency, sec. 493, note 3; 2 Kent, Com. 477 *mar.*, note 2; Long, Sales (Rand's ed.), 6, 183, 199; Shirley's L. C. 9, note; Holmes, C. L. 305–307; Story, Cont. sec. 398; Abb. Tr. Ev. 289; articles in 10 C. L. J. 63; 7 Am. Law Rev. 433; 5 Alb. L. J. 272; 16 W. J. 337; Adams *v.* Linsdell, 1 B. & Ald. 681, reported in Law. L. C. 11; Tayloe *v.* Merchants' Ins. Co., 9 Howard, 390, reported *ib.* 12; Household &c. Co. *v.* Grant, L. R. 4 Ex. Div. 216; reported *ib.* 14; 16 Am. Law. Reg. (N. S.) 180; and 9 C. L. J. 89, 271; Vassar *v.* Camp, 11 N. Y. (1 Kern) 441, reported in Lang. S. C. 102; Tomson *v.* James, 18 Dunlop, 1; Potter *v.* Sanders, 6 Hare, 1; Mactier *v.* Frith, 6 Wend. 103; S. C., 21 Am. Dec. 262; Harris' Case, L. R. 7 Ch. App. 587, reported in 3 E. R. (Moak) 529; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80; Halls *v.* Gatier, 9 Port. 614; Stevenson *v.* McLean, L. R. 5 Q. B. Div. 346; S. C., L. J. 49 Q. B. Div. 701; 42 L. T. (N. S.) 897; 28 W. R. 916; Bonnewell *v.* Jenkins, L. R. 8 Ch. Div. 70; S. C., 47 L. J. Ch. Div. 758; 38 L. T. (N. S.) 81; 26 W. R. 294; Branson *v.* Stammers, 28 W. R. 180; Townsend's Case, L. R. 13 Eq. 148; Stocken *v.* Collin, 7 M. & W. 515; Hobbs' Case, L. R. 4 Eq. 9; Walls' Case, L. R. 15 Eq. 18, reported in 5 E. R. (Moak) 686, and see notes thereto; Dunlop *v.* Higgins, 1 H. of L. C. 381, 398, reported in Notes to Leading Cases, Law Lib. Oct., Nov., and Dec., 1848, p. 72; see also Lang.

son suggests this, as perhaps the true rule: if the person making the offer has expressly or impliedly authorized the receiver of the offer to send an answer by post, he is bound when the letter containing the acceptance is posted, on the ground that he has constituted the post-office his agent to receive his acceptance; but, that, when no such authority is expressed or implied, the person making the offer is only bound when the acceptance actually reaches him (1 Add. Cont., note *x* to sec. 22). The case of Br. & Am. Tel. Co. *v.* Colson was overruled by Household &c. Co. *v* Grant, *supra*.

[1] 2d Eng., 1st Am. ed. therefrom by Perkins.

S. C. on Cont. where the greater number of the foregoing cases are reported; Wheat *v.* Cross, 31 Md. 99, reported in 1 Am. Rep. 28; Moore *v.* Pierson, 6 Iowa, 279; Ferrier *v.* Storer, 63 Iowa, 484, reported in 50 Am. Rep. 752 and 18 Rep. 300; Brisban *v.* Boyd, 4 Paige, 17; Hallock *v.* Ins. Co., 2 Dutch. 268; Potts *v.* Whitehead, 5 C. E. Green, 55; Abbott *v.* Shepard, 48 N. H. 14; Stockham *v.* Stockham, 32 Md. 196; Craig *v.* Harper, 3 Cush. 158; Johnston *v.* Fessler, 7 Watts, 48; Taylor *v.* Steamboat &c., 20 Mo. 254, reported in All. Tel. Cas. 24; Durkee *v.* Vermont &c. Co., 29 Vt. 127, reported *ib.* 59; Leonard *v.* N. Y. &c. Co., 41 N. Y. 544, reported in 1 Am. Rep. 446, and All. Tel. Cas. 500; Rommel *v.* Wingate, 103 Mass. 327; McClay *v.* Harvey, 90 Ill. 525, reported in 32 Am. Rep. 35, and 9 C. L. J. 145; Levy *v.* Cohen, 4 Ga. 1; Bryant *v.* Booze, 55 Ga. 438; Darlington &c. Co. *v.* Foote (C. C. N. Y.), reported in 16 Fed. Rep. 646; Hugh *v.* Brown, 19 N. J. L. 111; Martin *v.* Black, 21 Ala. 721; Beardsley *v.* Davis, 52 Barb. 159; Hamilton *v.* Ins. Co., 5 Barr. 339; Chiles *v.* Nelson, 7 Dana, 281; Bethel *v.* Hawkins, 21 La. Ann. 620; Clark *v.* Dales, 20 Barb. 42; Myers *v.* Smith, 48 Barb. 614; Tucker *v.* Haughton, 9 Cush. 350; Britton *v.* Phillips, 21 How. Pr. 111; Beckwith *v.* Cheever, 21 N. H. (1 Fost.) 41; Kentucky Ins. Co. *v.* Jenks, 5 Ind. 96; Lungstrass *v.* German &c. Co., 48 Mo. 201; Washburn *v.* Fletcher, 42 Wis. 152; Chase *v.* Hamilton &c. Co., 20 N. Y. 52; McIntyre *v.* Parks, 3 Met. 207; Routledge *v.* Grant, 4 Bing. (13 E. C. L. R.) 653; Franklin *v.* Habord, 26 Vt. 452; Barton *v.* Shotwell, 13 Cush. 271; see note to Eskridge *v.* Glover, 5 Stew. & P. (Ala.) 264, reported in 26 Am. Dec. 344).

So it is sufficient to show to an offer by letter, an acceptance by telegram, or *vice versa* (1 Wait, A. & D. 88).

2. *Contracts by Telegram.*

Such a contract is altogether analogous to one by mail, and the generally received doctrine is, that the proposal made by the sender of a telegram becomes a completed contract when a properly directed message of acceptance

shall have been delivered to a telegrapher by the sendee or wiree for transmission to the offerer, provided, such message be delivered before the offer is revoked, either expressly or by lapse of time (1 Wait, A. & D. 87, 88; Gray, Com. by Tel. secs. 112, 113, 114; article in 12 C. L. J. 365; Abb. Tr. Ev. 289; Met. Cont. 18; 2 Red. Rail. (4th ed.) chap. 28; Prosser *v.* Henderson, 20 U. C. (Q. B.) 438, reported in All. Tel. Cas. 170; Coupland *v.* Arrowsmith, 18 L. T. (N. S.) 755, reported in All. Tel. Cas. 412; Henkel *v.* Pape, L. R. 6 Ex. 7, reported in All. Tel. Cas. 567; McBlain *v.* Cross, 25 L. T. (N. S.) 80, reported in All. Tel. Cas. 691; Verdin *v.* Robertson, 10 Court Sess. (Scotch) 3d series, 35, reported in All. Tel. Cas. 697; Trevor *v.* Wood, 36 N. Y. 307, reported in All. Tel. Cas. 330; Beach *v.* R. &c. Co., 37 N. Y. 457, reported in All. Tel. Cas. 380; Stevenson *v.* McLean, L. R. 5 Q. B. Div. 346; S. C., L. J. 49 Q. B. Div. 701; 42 L. T. (N. S.) 897; 28 W. R. 916; Bonnewell *v.* Jenkins, L. R. 8 Ch. Div. 70; S. C., L. J. 47 Ch. Div. 758; 38 L. T. (N. S.) 81; 26 W. R. 294; Branson *v.* Stammers, 28 W. R. 180; Baker *v.* Holt, 56 Wis. 100; Minn. &c. Co. *v.* Collier &c. Co., 4 Dill. C. C. 431; Durkee *v.* Vermont Cent. Ry. Co., 29 Vt. 127, reported in All. Tel. Cas. 59; Vassar *v.* Camp, 11 N. Y. 441; Mactier *v.* Frith, 6 Wend. 103, 117).

It is held by a court of the highest standing, that a telegraphic authority to draw at thirty days for $2500 constitutes a valid acceptance (Central &c. Bank *v.* Richards, 109 Mass. 413). The Court of Appeals of Maryland, while holding that such a telegram did not amount to an acceptance, yet held that it was equivalent to a promise to accept and pay, and actionable as such (Franklin Bank &c. *v.* Lynch, 52 Md. 270, reported in 36 Am. Rep. 375). So it is sufficient to show to an offer by letter an acceptance by telegram, or *vice versa* (1 Wait, A. & D. 88).

3. *Contracts by Telephone.*

These contracts do not differ in their essential legal elements from ordinary contracts by word of mouth.

The party relying on a contract alleged to have been consummated through this novel and wonderful agency, must make such proof as will convince the jury. And the whole matter resolves itself into a question of credibility.

Was it "the voice of Jacob"?[1]

4. *Auction Sales.*

The principles of the English law governing optional sales, are applicable to sales by auction.

The plaintiff must prove (1) a bid, and (2) that the hammer fell before another was made. The same principle, as to the *locus pœnitentiæ*, is also applied (Bab. Auct. 30, 42; Shirl. L. C. 9, note; Met. Cont. 14, 15; Benj. Sales, sec 42; Poll. Prin. Cont. 179; 1 Par. Cont. 479, 480; Payne *v.* Cave, 3 T. R. 148, reported in Lang. S. C. 1, and Law. L. C. 5; Warlow *v.* Harrison, 1 El. & El. (102 E. C. L. R.) 295; S. C., 29 L. J. Q. B. 14).

So, it may be shown that the bid was by letter, and was the highest made, and accepted as such (Tyree *v.* Williams, 3 Bibb, 365, reported in 6 Am. Dec. 663). If the sale be of a number of articles of personal property, with option to purchaser to choose, from a quantity, a specific amount, it is incumbent on the purchaser to prove that he made his selection forthwith (Coffman *v.* Hampton, 2 Watts. & S. 377, reported in 37 Am. Dec. 511). It is said, *arguendo*, in Warlow *v.* Harrison,[2] *supra*, by Martin, B., delivering the opinion in the Exchequer Chamber, "upon principle, it seems to us, that the highest *bona fide* bidder at an auction sale may sue the auctioneer, as upon a contract, that the sale should be without reserve." To the same effect are Walsh *v.* Barton, 24 Ohio, 28, 46, 47; Towle *v.* Leavitt, 23 N. H. 360; but see Coryolles *v.* Mossy, 2 La. 504.

[1] See a curious illustration of a contract by telephone in the argument of Merlin, which occured in the Court of Cassation, A. D. 1813 (7 Am. L. Rev. 446; reported as S—— *v.* F——, Lang. S. C. 155).

[2] See this *dictum* commented on in Poll. Prin. Cont. 179. It is cited and italicized by Benjamin, sec. 472.

5. *Contract by Advertisement.*

In these unilateral contracts, it is sufficient, for the person suing upon them, to prove that (in the case of advertised goods) he tendered, or at least offered to pay the advertised price; or, if upon an advertisement offering a reward for the doing of some act, or procuring of some matter or thing, that he did the act, or procured the matter or thing (Shirl. L. C. 9, note; Poll. Prin. Cont. 173 *et seq.;* Abb. Tr. Ev. 383; Leake, Dig. Cont. 13; Williams *v.* Cardwine, 4 B. & Ad. 621, reported in Lang. S. C. 13, and Law. L. C. 22; Denton *v.* G. N. R. R. Co., 5 El. & Bl. (85 E. C. L. R.) 864; see other English cases in Pollock, 175 *et seq.;* Shuey *v.* U. S., 92 U. S. 73; Gilmore *v.* Lewis, 12 Ohio, 281; Symmes *v.* Frazier, 6 Mass. 344; Wentworth *v.* Day, 3 Met. 352; Loring *v.* Boston, 7 Met. 409; Crawshaw *v.* Roxbury, 7 Gray, 374; Jenkins *v.* Kebren, 12 Gray, 330; Besse *v.* Dyer, 9 Allen, 151; Kincaid *v.* Eaton, 98 Mass. 139; Harson *v.* Pike, 16 Ind. 140; Dawkins *v.* Sappington, 26 Ind. 199; Hayden *v.* Songer, 56 Ind. 42; Pilie *v.* New Orleans, 19 La. Ann. 274; Salvadore *v.* Ins. Co., 22 La. Ann. 338; Goldsborough *v.* Cradie, 28 Md. 477; Furman *v.* Parke, 1 Zab. 310; Bank *v.* Bangs, 2 Edw. Ch. 95; Jones *v.* Bank, 8 N. Y. 228; Fitch *v.* Snedaker, 38 N. Y. 248; Howland *v.* Lounds, 51 N. Y. 604, reported in 10 Am. Rep. 654; Cummings *v.* Gann, 52 Pa. 484; Clanton *v.* Young, 11 Rich. L. 546; Stamper *v.* Temple, 6 Humph. 113; Bank *v.* Hart, 55 Ill. 62; Janvrin *v.* Exeter, 48 N. H. 83; Marvin *v.* Treat, 37 Conn. 96; Matter of Kelly, 39 Conn. 159; Russell *v.* Stewart, 44 Vt. 170; Eagle *v.* Smith, 4 Houst. 293; Ryer *v.* Stockwell, 14 Cal. 134; Lee *v.* Flemingsburg, 7 Dana, 28; Morrell *v.* Quarles, 35 Ala. 544).

Tickets of common carriers fall under this title; illustrated by the case of Denton *v.* R. R. Co., cited *supra.*

There is an irreconcilable conflict of judicial opinion between the English and some of the American courts, upon the point whether the reward is recoverable at all, if the party suing for it did not act upon the advertisement. The Eng-

lish cases holding that, nevertheless, the action lies; whereas, according to several American decisions in such case, the action does not lie (Howland *v.* Lounds, 51 N. Y. 604, reported in 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248, reported in Lang. S. C. 110; Hayden *v.* Songer, 56 Ind. 42, reported in 26 Am. Rep. 6; Stamper *v.* Temple, 6 Humph. 113; Lee *v.* Flemingsburg, 7 Dana, 28).[1] There are, however, several American cases which follow the English rule (Eagle *v.* Smith, 4 Houst. 293; Auditor *v.* Ballard, 9 Bush. 572, reported in 15 Am. Rep. 728: Russell *v.* Stewart, 44 Vt. 170; Dawkins *v.* Sappington, 26 Ind. 199).

The defendant, taking the burden, may show that the advertisement was revoked by an equally public announcement; and the same will be an effectual defence, even as against a plaintiff who afterwards acted on the faith of the original proposal, without knowledge of the revocation (Shuey *v.* U. S., 92 U. S. 73; Abb. Tr. Ev. 383).

II. Common Counts.

In actions upon the common counts, the onus is upon the plaintiff, not only to show the fact constituting the gravamen of the action, *ex. gr.*, that certain work was performed, etc., but he must also show a request (1 Greenl. Ev. sec. 107; 1 Arch. N. P. 5–11), though the evidence may be slight and inferential, and, sometimes the inference is made even contrary to the fact (1 Greenl. Ev. sec. 108).

The new rules adopted at H. T. 4 Will. IV. have materially changed the cast of the burden, by greatly narrowing the scope of the general issue (Newhall *v.* Holt, 6 M. & W. 662).

An action by a physician for his fees can only be maintained on an actual contract (in England), and hence the onus is on him to prove a special contract (Veitch *v.* Russell, 3 A. & E. (N. S.), 928 (43 E. C. L. R. 1041)).

[1] The editor of the American Reports (note to pp. 6, 7, 26 Am. Rep.) shows that all of these cases were based upon peculiar circumstances, or that the point did not necessarily arise, except in Howland *v.* Lounds, which is based upon one of the others.

Illustrations.

In an action for services by a child, who, after arrival at age, continues to remain a member of his father's family, the onus is on the plaintiff to show an express agreement (Prickett *v.* Prickett, 20 N. J. Eq. 478).

In an action for damages for breach of a contract, which is executory as to both parties, the plaintiff must aver and prove an offer to perform on his part (Bruce *v.* Crews, 39 Ga. 544).

Where a contract is silent as to the place of payment, the burden of proof, to show that a place, other than the place of business or residence of the party to be paid was agreed on, is upon the party by whom the money is to be paid (King *v.* Ruckman, 20 N. J. Eq. 316). And not only must the consideration be proved, but it must be proved as laid (Knox *v.* Martin, 8 N. H. 154).

In an action upon contract to recover for an injury to a passenger, the plaintiff must prove the liability of all the persons sued (McCall *v.* Forsyth, 4 W. & S. 179).

When a plaintiff seeks to support his claim on a decedent's estate, by the will of the deceased, he must show that it is made a debt by the terms of the will (Richards *v.* Richards, 46 Pa. 78).

In an action for goods sold and delivered to a third party, the plaintiff must prove that they were so delivered at the defendant's request, and that credit was given to him alone (Walker *v.* Richards, 41 N. H. 388).

But when the contract was made with defendant, and the charges entered against a third party, the onus is upon the plaintiff to show that the entries were so made at the request and for the convenience of defendant (Pecker *v.* Hoit, 15 N. H. 143).

In an action against a collecting agent of a debtor to plaintiff, when it is charged that certain collections when made were to be appropriated to plaintiff's debt, the onus is upon the plaintiff to show that the defendant received the money under an agreement to appropriate the same in whole or part to the plaintiff's debt (Fitch *v.* Chandler, 4 Cush. 254).

Continued.

When the time of doing a thing is material, the onus is with the plaintiff to prove it as laid (Jordan *v.* Cooper, 4 S. & R. 576; Hough *v.* Young, 1 Ohio, 504; Perry *v.* Botsford, 5 Pick. 189; Drown *v.* Smith, 3 N. H. 300).

Nor, in an action on contract, where there is a general denial and a pleading in confession and avoidance, will the plaintiff be relieved of the onus of proving his whole case (Connersville *v.* Wadleigh, 6 Blackf. 297).

In an action on a special contract to recover compensation due on its performance, the onus is with the plaintiff to show performance on his part, or excuse for non-performance (Marsh *v.* Richards, 29 Mo. 99).

In an action upon a receipt for money "to be accounted for on settlement," no action can be maintained until it is shown that the defendant refused to settle or to allow it, on account, on settlement (McQuestin *v.* Young, 19 N. H. 307).

In an action on contract to recover damages for work in cutting a race according to specifications, the onus is with the plaintiff to show that it was cut according to the specifications, and he cannot excuse the omission to make such proof by falling back on a *quantum meruit* (Brewer *v.* Tyson, 3 Jones, N. C. 180).

The onus to show excuse for non-performance of a contract according to specifications, is with the party alleging it (Rizan *v.* Prescott, 15 La. Ann. 112).

The onus is with a party to a contract, after being put in default, to show a waiver (Pratt *v.* Craft, 20 La. Ann. 291). In an action on a contract to grind wheat and deliver flour in payment, the plaintiff must prove a tender of the money (Vance *v.* Dingley, 14 Cal. 53).

When A being the debtor of B, at his request promises to pay the amount of the debt to C, a creditor of B, the onus is upon C, in an action against A, to prove that he accepted A as his debtor (Hoffman *v.* Schwaebe, 33 Barb. 194).

In order to maintain an action for improvement upon the public lands, it is for the plaintiff to prove an express promise (Johnson *v.* Moulton, 2 Ill. (1 Scam.) 532).

Continued.

In an action on a building contract, when the parties agree that an architect shall decide certain matters, the onus is with the plaintiff to show his decision (Mills *v.* Weeks, 21 Ill. 561; Veazie *v.* Bangor, 51 Me. 509; Ess *v.* Truscott, 2 M. & W. 385).

In an action on a contract to furnish supplies to the Government, the onus is with the plaintiff (when the Secretary of War has rescinded the contract), to show that the supplies were needed (Grant *v.* U. S., 7 Wall. 331).

Defendant owned one boat, and he and plaintiff owned together another; they agreed to "pool" the earnings and divide equally. In an action on this contract, the onus was held to be with the plaintiff to show that the defendant had funds belonging to them, being the proceeds of both boats (K. & P. R. R. Co. *v.* White, 38 Me. 63).

In an action by a stranger upon certificates of amounts due workmen, the onus is upon the plaintiff to prove that his purchase of the certificates was either within the original arrangement, or else, that the defendant had subsequently assented to the transfer (Farwell *v.* Dewey, 12 Mich. 436).

A party cannot recover for labor, etc., done under a writing which was to have been signed by all of the parties, but was only signed by the plaintiff, unless he shows that the other party to the contract authorized or encouraged him to proceed under it (Keller *v.* Blaisdel, 1 Nev. 491).

In an action to recover for corn left "on freight," the onus is with the plaintiff to prove that he who received it, shipped it, and had been called on for payment (Outwater *v.* Nelson, 20 Barb. 29).

Under a contract to manufacture articles in a workmanlike manner from materials to be furnished by the employer, the onus is with the manufacturer to show only, that they were manufactured in such manner—though it would be otherwise in a sale of such articles with warranty (Hills *v.* Stillman, 18 How. Pr. (N. Y.) 58).

In a builder's suit for money due on a contract, if the same is resisted by a claim for damages for delay, and it is shown

Continued.

that the contract was changed by introducing extra work, the burden of proof is upon the defendant to show either, that the delay was slightly produced by the change in the contract, or that it was caused by the builder's fault (Bridges *v.* Hayatt, 2 Abb. Pr. (N. Y.) 449).

The value of victuals and lodgings furnished to relatives, *i.e.* when guests, cannot be recovered without proof of an express contract (Kneass' estate, 6 Phil. (Pa.) 353).

In an action on a contract to pay in "cash notes," the onus is with the plaintiff to show the value of the "cash notes" (Ward *v.* Latimer, 4 Tex. 385).

In an action on an agreement to pay plaintiff money for forbearance to contest a will, the onus is upon the plaintiff to show that they would have been benefited by the invalidation of the will, or that they could have succeeded in breaking it (Hartle *v.* Stahl, 27 Md. 157).

Though an order from one person in favor of another on his agent, would be sufficient to maintain an action, if the drawer be made party, the original consideration must be shown (Jones *v.* Holliday, 11 Tex. 412).

When a special contract alone is declared on, the onus is with the plaintiff to show full performance (Taylor *v.* Beck, 13 Ill. 376; Alger *v.* Raymond, 4 Bosw. 418; but see *contra* Veazie *v.* Bangor. 51 Me. 509).

In an action to recover for goods sold on order, when they had been ordered shipped in a certain way, but were shipped in a different way, by means whereof, the expense of transportation was increased, the onus is with the vendors to prove the acceptance of the goods (Corning *v.* Colt, 5 Wend. 253).

In order to maintain an action to recover "back-money" (or rebate), paid under a special contract, the plaintiff is bound to show that the contract is at an end, either by full performance thereof by both parties, or by some act of the defendant inconsistent with it and disabling him from complying with its terms, or rescission by mutual consent (Lawrence *v.* Simons, 4 Barb. 354).

Continued.

To recover on the common counts for materials furnished and work done, the onus is with the plaintiff to show that the materials were received or were used by the defendant and the work done of value to him (Byerley *v.* Kepley, 1 Jones (N. C.), 35).

When services are rendered, at the request of another, the burden of proof falls on the party who declares that by agreement they were to be gratuitous (Doggett *v.* Ream, 5 Ill. App. 174).

In an action on contract, plaintiff alleging that the contract touching certain bank notes was a loan, and the defendant that it was a sale, the onus is with the plaintiff (Breeding *v.* Stoneman, 6 J. J. Marsh. 377).

In an action on a promise to make iron castings, the plaintiff to furnish patterns (unless the defendant had such as he wished) the plaintiff having requested that the castings should be made on a basket belonging to the defendant, the burden is with the plaintiff to show that the basket was not a pattern (Perry *v.* Botsford, 5 Pick. 189).

In an action under the law of New York against the purchaser of stock deliverable at a future day, the onus is with the plaintiff to show that at the time of making the contract he held the amount of stock covered by the contract, unincumbered (Stebbins *v.* Leowolf, 3 Cush. 137).

In an action on an affirmative contract to pay money or perform some duty, if the plaintiff proves the contract, he is not bound to show non-performance, the burden is with the defendant to prove payment or performance or its equivalent (McGregory *v.* Prescott, 5 Cush. 67).

In an action for the value of wheat delivered, if it be alleged by defendant that the contract required the delivery of a greater amount than had been delivered, the onus is upon him to prove it (Church *v.* Fagin, 43 Mo. 123).

In an action based upon a contract between two finders of property in a river partly within the State where the action is brought, and the defence is available if the property was found within that part of the river lying within the State,

Continued.

the burden of proof is on the defendant to show such to be the fact (Cummings *v.* Stone, 13 Mich. 70).

A special contract set up in defence must be proved by the defendant (Richardson *v.* George, 34 Mo. 104; Fox *v.* Hilliard, 35 Miss. 160).

As medical services are in this country regarded as a valid consideration, if, therefore, the defence be that they were rendered gratuitously, the onus is with the party so alleging (*In re* Scott, 1 Redf. (N. Y.) 234; see Prince *v.* McRae, 84 N. C. 674).

In an action to recover the price of intoxicating liquors, the onus is upon the defendant to show that they were unlawfully sold (Wilson *v.* Melvin, 13 Gray, 73; Kidder *v.* Norris, 18 N. H. 532; Horan *v.* Weiler, 41 Pa. 470).

When such sale is prohibited, except by license, the onus is with the plaintiff in such action to show a license, and that they were sold for a lawful use (Bliss *v.* Brainard, 41 N. H. 256; Solomon *v.* Dreschler, 4 Minn. 278).

When one purchases the interest of a firm, agreeing to collect their debts, the burden of proving an excuse for failure to collect any of the debts, is on such purchaser (Prentice *v.* Buxton, 3 B. Mon. 35).

On a promise to deliver goods, a demand is indespensably necessary (Benners *v.* Howard, Taylor (N. C.), 93).

In order to maintain an action upon a contract for the delivery of goods, to be delivered at a certain place and for a certain price, the onus is with the plaintiff to allege and prove that he was ready to perform his part of the contract (Cole *v.* Hester, 9 Ired. 23).

In an action for goods bargained and sold, the plaintiff sufficiently discharges the onus by proving a tender or readiness to make delivery (Hurlbut *v.* Simpson, 3 Ired. 233).

In actions by a vendee under an executory contract of purchase, the burden and only burden upon the plaintiff is to show his ability and readiness to perform his part of the contract (Grandy *v.* McCleese, 2 Jones, N. C. 142; Grandy *v.* Small, 3 *ib.* 8; Burbank *v.* Wood, *ib.* 30; Grandy *v.* Small,

5 *ib.* 50; Shaw *v.* Grandy, *ib.* 56; Washington *v.* Ogden, 1 Black, 450).

In an action on a contract for the sale of goods (tobacco) requiring certain acts to be done in regard to it (paying tax, etc.) before it was to be received, although presumptively the onus would be devolved upon the plaintiff to show performance of such acts, yet, if the defendant accepts it, knowing that such acts have not been done, he waives performance, and the onus is discharged (Dobson *v.* Gilmer, 64 N. C. 512).

In an action upon a contract for the delivery of goods shipped in good order over several lines of connecting railways, but delivered to the consignee in a damaged condition, the onus is upon the last carrier to show that the goods were damaged on some other of the connecting roads (Dixon *v.* R. & D. R. R. Co., 74 N. C. 538).

The burden, when a *prima facie* case is proved, is upon the defendant to show anything in mitigation (Oldham *v.* Kerchner, 79 N. C. 106).

A contract made by a county in one of the Confederate States, during, and in aid of the late war, cannot be enforced; and the onus of showing that it was made for an innocent purpose, is with the party seeking its enforcement (Brickell *v.* Commissioners, 81 N. C. 240).

In an action for a breach of contract in not delivering corn to be ground for defendant, by the plaintiff, at the mill of the latter, the measure of the damages is, *prima facie*, the difference between the cost of grinding and the contract price; and the burden of proof is upon the defendant to prove all matters in reduction of such damages (Oldham *v.* Kerchner, 81 N. C. 430).

In an action against lessors to recover the value of lumber furnished to their lessee, and used in making improvements on the realty, the burden of proof is upon the plaintiff to show a contract, express or implied, on their part to pay. His belief is unimportant (Bailey *v.* Rutges, 86 N. C. 517).

In an action by an insurance company against its former

agent for an account of moneys received, if such agent sets up as a defence that he was entitled to commissions on premiums received on policies effected by him, the burden is upon him to show that the premiums were actually paid to the company (Manning *v.* Ins. Co., 100 U. S. 693).

PARTNERSHIP.

The question of partnership is raised in actions, either between the partners themselves or between them and third persons.

Several Plaintiffs. — It is a general rule that, when the action is brought by several plaintiffs, they must prove either an express contract made by the defendant with them all, or the joint interest of all in the subject of the suit[1] (2 Greenl. Ev. sec. 478).

But the qualification last stated has no applicability to suits on instruments under seal, except perhaps, under the codes of remedial justice, by virtue of the provisions whereof the real party in interest is allowed to sue.

The usual proof of partnership is by the testimony of clerks or other persons, who know that the parties have actually carried on business as partners (2 Greenl. Ev. sec. 479; 2 Saund. Pl. & Ev. 705; Lind. Part. 86 *et seq.*; 1 Coll. Part. (1 Am. ed.) 11, note).

As Defendants. — Or, when partners are sued as such, the partnership may be proved by signs on or over the door showing the names, or by cards, circulars, letter-heads, advertisements, and the like (1 Coll. Part. 11, note; 2 Greenl. Ev. secs. 483, 484).

Inter sese. — If the action be instituted by one partner against another, the usual rules applicable to contracts in general apply; so that if the contract be in writing, it must be produced (2 Greenl. Ev. sec. 481; 1 Coll. Part. 11, note).

[1] This rule does not apply under the codes of remedial justice.

Dormant Partners. — A greater intensity of proof is required to fix a person with being a dormant partner, than in the foregoing instances.

The burden requires some direct proof, either by the articles or by unequivocal acts in admissions, written or oral (Par. Part. 31), or that he had advanced a portion of the capital to be returned to him out of the profits of the business, or which was to be returned to him in any event, if the interest for its use depends upon the profits, or rather upon the accidents of trade (1 Coll. Part. 13; Lind. Part. 34; Story, Part. sec. 63).

Being sued as a partner, the defendant taking the burden may show: —

Limited Liability. — That by an arrangement between the partners, either the power of the acting partner to bind the firm, or the defendant's liability on the contracts of the firm was limited, qualified, or defeated, and that the plaintiff had previous and express notice thereof[1] (2 Greenl. Ev. 485).

Particular Business. — Or, he may show that he was not a partner in the particular trade in which the transaction took place, and that the plaintiff knew the fact (2 Greenl. Ev. sec. 485; 2 Saund. Pl. & Ev. 711).

Dissolution. — Or, that the partnership had been dissolved before the plaintiff had his dealings (2 Greenl. Ev. sec. 485; 2 Saund. Pl. & Ev. 712).

Notice. — Or, that he had notified the plaintiff not to deal with his co-partners, without the defendant's concurrence (2 Greenl. Ev. sec. 485; 2 Saund. Pl. & Ev. 711).

The author does not propose to proceed further in the discussion of this title, as the question of the onus after proof of partnership as to the merits of the controversy, is involved in the consideration of different subjects of litigation.

[1] In many of the States the subject of limited partnerships is regulated by statute, and it is apprehended that on principle and in analogy to the registration of deeds, the articles when filed would operate as constructive notice (Par. Part. chap. 17).

PENALTIES UNDER STATUTES.

In actions on penal statutes, the onus, as well to show the act that gives birth to the penalty, as that the action was brought within the time (if any) prescribed in the statute, or, alternatively, if it be prescribed, that the action shall not be commenced until after the lapse of a certain period, that such time has elapsed (1 Sel. N. P. 519 and notes) lies with the party seeking its enforcement.

But in a *qui tam* action, brought against an officer for issuing a license to a female under age, to marry without the consent of the parent or guardian, it was held by the Supreme Court of Alabama that the plaintiff was not bound to prove the negative averment, that such consent was not given. The record of the fact being in possession of such officer, it is his duty to produce it (Blann *v.* Beal, 5 Ala. 357).

In actions by the United States Government to recover the value of goods imported in violation of the act of Congress, the burden is cast upon the Government to make out its case beyond a reasonable doubt (Chaffee *v.* U. S., 18 Wall. 516).

But it is otherwise as to forfeitures claimed under the internal revenue law; see Part II. title LITIGATION IN REM.

PRESCRIPTION.

As this term is so often applied in discussing different phases of the law, the author deems it not impertinent to treat of it separately in a short way. It is defined to be a title acquired by possession had during the time and in the manner fixed by law.

Character of Possession. — The burden resting upon the party claiming by prescription requires him to prove: —

1. An exclusive possession had for twenty years[1] (2 Wash. R. P. (4th ed.) 318 *et seq.*; Wash. Eas. (2 ed.) 122).

[1] This is the general rule, but, of course, the practitioner will substitute for this term, that, prescribed by the local law where the prescription is claimed (see 3 Wash. R. P. 53; 2 *ib.* 318; 2 Greenl. Cruise, 220, note 1).

2. And that the same was held adversely, and as of right (2 Greenl. Ev. sec. 539; 2 Wash. R. P. 321, 322, 323; Wash. Eas. 124 *et seq.*).

Against Whom. — It must also be shown that during such adverse enjoyment there is some one to whom such use is adverse (2 Wash. R. P. 323, 324; 2 Greenl. Ev. sec. 539 *a*; Wash. Eas. 156).

Open. — It must be shown to have been open and notorious (2 Wash. R. P. 324; Wash Eas. 124–126, 152–155),

Acquiesced in. — and acquiesced in (2 Wash. R. P. 325; 2 Greenl. Ev. sec. 539; Wash. Eas. 105, 152, 158; 2 Greenl. Cruise, 222, sec. 25).

Whether the facts so proved raise a conclusive presumption, or are only *prima facie* evidence of a grant, is by no means settled (see 2 Wash. R. P. 320, holding to the latter view, and 2 Greenl. Ev. sec. 539 to the former).

The party opposing the establishment of the prescription taking the burden has several defences.

Interruption. — He may show that during the period of prescription, the *right*, as contradistinguished from the *possession*, was interrupted (2 Greenl. Ev. sec. 545; Wash. Eas. 141, 142; 2 Crabb, R. P. 1037, sec. 2421 *a*).

Unity of Title. — So he may show that the titles to the land and the easement, have become united in the same party by prescription (2 Greenl. Ev. sec. 545),

Destruction of the *res*. — or he may show the final destruction of the subject to which the right was annexed (*ib.*),

Consent. — or that the commencement and continuance thereof was by agreement and consent of the adverse party, or by his express grant (*ib.*).

It is generally determined either by positive legislation or by analogy to the statutes of repose (2 Greenl. Ev. sec. 539). It may be added that though the usage proved may not be sufficiently long to support the claim of a right by prescription, yet, coupled with other circumstances, it may be sufficient to support the plea of title by lost grant, which the jury will be at liberty, and sometimes be advised to find accordingly (2 Greenl. Ev. sec. 546).

N.B. The references to Greenleaf's Cruise are to the top paging.

PROPERTY IN WATER.[1]

I. Non-navigable streams.
II. Navigable streams.
III. Marine waters.

I. Non-Navigable Streams.

Obstructing Flow. — The property in running water consists in the usufruct, and the usufruct is controlled by the maxim of *sic utere tuo, ut alienum non lædas* (Phear, R. W. 2, 3; Wool. W. 177; Gould, Wat. sec 204).[2]

Therefore the proprietor of land, through or by whose land a stream flows in a defined channel, has no right to so obstruct or divert the water as to injure his neighbor (Underhill (Moak), Torts, 448, Rule 51; Gould, Wat. secs. 213, 218, 373).

The burden, therefore, in an action by the party claiming to be injured, is not only to show an obstruction or diversion, but that he was damaged by it (Big. Torts, 230, § 2; Wool. W. 173; Phear, R. W. 28; Cool. Torts, 583, 584, 585; but see Gould, Wat. secs. 401–410).

The injury may consist in the change of quantity, disturbance of flow, deterioration in quality, alteration of channel or decreasing its production (Phear, R. W. 23, 28, 29; Cool. Torts, 583 *et seq.*).

The plaintiff must not only prove an obstruction or diversion, but also that it effected a *sensible diminution* of the supply to him from the natural flow (Big. Torts, 232; 1 Add. Torts, sec. 82, note 1, p. 96; Elliott *v.* Fitchburg &c. Co., 10 Cush. 191, reported in Big. L. C. Torts, 509; but see Ang. W. secs. 135, 449); but if the upper proprietor makes only a reasonable use of the water, for purposes connected with his land

[1] This subject is treated of as regulated by the common law of England and the United States. There are doubtless statutory regulations in most of the States touching the manner of its user, but it would swell the size of this book to no useful end to analyze and discuss them.

[2] See discussion of the right of property (Ang. W. sec. 5 *et seq.*, sec. 94).

and incidental to its user, he is not liable, even though there be a sensible diminution of the supply to the lower proprietor (Big. L. C. Torts, 519;[1] Phear, R. W. 24; Cool. Torts, 585; Ang. W. secs. 115–120; Miner *v.* Gilmour, 12 Moo. P. C. 131); and this principle has been, to a modified degree, extended to its use for irrigation (Big. L. C. Torts, 519; 1 Add. Torts, sec. 89; Phear, R. W. 24; Cool. Torts, 585; Ang. W. secs. 120–130; Hooper *v.* Wilkinson, 15 La. Ann. 497; Embrey *v.* Owen, 6 Ex. 353 (W. H. G.)).

Ponding Water. — No proprietor has the right to pen back the water running through his land upon the land of the upper proprietor, and if he does so, he is presumptively liable to an action (Underhill (Moak), Torts, 457, 478, sub-rule; 1 Add. Torts, secs. 82, 91, 161; Cool. Torts, 585, 586; Phear, R. W. 28; Wool. W. 178; Ang. W. sec. 330; Gould, Wat. sec. 210; Ogburn *v.* Connor, 40 Cal. 346). Proof of possession in such case will satisfy the burden.

Mills. — The rule just stated is as applicable at common law to the penning back of water to run a mill, as to any other instance of ponding. Doubtless owing to the great public benefit derived from them, the subject has been regulated by local statutes. But it is stated on high authority, as a converse of the proposition under consideration, that with regard to the abstraction of water by the action of mill-dams, from the lower proprietor, that such right is dependent, not upon the damage caused to such lower proprietor, but, upon the consideration as to whether under all the circumstances, considering the size of the stream and that of the mill works, there has been a greater use of the stream than is reasonably necessary and usual in similar establishments for operating the mill (City of Springfield *v.* Harris, 4 Allen, 494, reported in Big. L. C. Torts, 506; and cases cited in notes thereunder at p. 519).

Judge Bigelow says, however, that there is no suggestion

[1] The right to reasonable use has sometimes been applied as the criterion without regard to the damage caused; see Big. L. C. Torts, 518, 519.

that these cases stand upon peculiar grounds, and it is difficult to see any distinction between the case of mill privileges and other privileges of using the water of streams, except as furnished by statute.

It seems that the weight of authority, more consonant with the principles of the common law, is opposed to the doctrine enunciated in the Massachusetts case (1 Add. Torts, secs. 82 and note 1; p. 96, 88 and note 1; Ang. W. sec. 331).

The distinction is clear between the right to detain the stream from the lower proprietor for the "ordinary purposes of life," and where it is claimed for extraordinary purposes — or, as it may be expressed, for incidental, as distinguished from collateral purposes (1 Add. Torts, sec. 82, note 1, p. 96; Big. L. C. Torts, 519; Ang. W. sec. 121; Miner *v.* Gilmour, 12 Moo. P. C. 131).

Watercourses without Channel. — In order to constitute a watercourse within the meaning of the law, as here stated, it is immaterial that the supply of water is precarious, but it is material to be shown that it has a defined channel or banks, and that the water usually flows through it (1 Add. Torts, sec. 88 and note 1, p. 96; Phear, R. W. 31; Big. Torts, 234; Cool. Torts, 577, 578; Wool. W. 31; Underhill (Moak), Torts, 462; Ang. W. sec. 4; Sch. A. R. 135).

The burden will rest upon the plaintiff to show that the stream, obstructed or diverted, was a watercourse; for in the case of casual and intermittent surface-waters, not running in any defined channel but spreading themselves over the surface of the land, there is no principle of law which prevents the land-owner from dealing with them as he pleases (1 Add. Torts, sec. 89 and note 1; Phear, R. W. 31, 32).

Altering Channel. — This is also actionable, but the burden is enhanced by requiring proof of actual damage (Phear, R. W. 28, 29; Wool. W. 254; Underhill (Moak), Torts, 451; Gould, Wat. secs. 401–410).

Diminishing Supply of Fish. — If one does an act whereby the supply of fish is sensibly diminished, he is liable to an action at the instance of the proprietor above or below, as the

case may be (Phear, R. W. 29, 30; 1 Add. Torts, sec. 147; Wool. W. 220 *et seq.*; Ang. W. secs. 84–90; Gould, Wat. secs. 187, 206).

Pollution. — The lower proprietor may sue the upper for polluting the stream, even by heating it (Phear, R. W. 28; Big. Torts, 235, § 4; Underhill (Moak), Torts, 482, Rule 53 and notes; 1 Add. Torts, secs. 92 and note 2, 218, 223 and note 1; Cool. Torts, 569, 587; Big. L. C. Torts, 526; Ang. W. secs. 136, 141; Gould, Wat. secs. 219, 544), without proving special damage (1 Add. Torts, sec. 107).

Spring-Head. — If the natural channel commences at the spring-head, the owner of the land on which the spring is situate cannot divert the water arising in the spring from flowing into such channel (Phear, R. W. 33; 1 Add. Torts, sec. 89; Ang. W. sec. 109; Phelps *v.* Nowlen, 72 N. Y. 39, reported in 28 Am. Rep. 101, note).

Subterranean Waters. — The exclusive appropriation of such waters is, in general, not actionable, though it is otherwise in the case of underground streams flowing naturally in defined subterranean channels, such as the river Mole (1 Add. Torts, sec. 94; Phear, R. W. 33; Big. L. C. Torts, 525; Big. Torts, 234, § 3; Cool. Torts, 580, 581; Ang. W. secs. 109–115; Acton *v.* Blundell, 12 M. & W. 324; Gould, Wat. secs. 280, 286, 542); but while this is the case, such waters may be so employed as to give a cause of action.

Artificial Streams. — The same considerations apply to this class of waters as to those last mentioned, as to the right of exclusive appropriation, but such appropriation must be made before the flow reaches the stream (1 Add. Torts, secs. 88, 163; Wood, Nuis. chap. 11; Underhill (Moak), Torts, 480, Rule 52 and note *et seq.*; Phear, R. W. 33); they are frequently held subject to an easement (Phear, R. W. 39; Ang. W. sec. 141 *et seq.*), and under peculiar circumstances it may acquire the attributes of a natural stream (Underhill (Moak), Torts, 480, Rule 52 and notes; Gould, Wat. secs. 161, 225).

Shed-Water. — The like principles apply to rain-water run-

ning from the roofs of houses (Underhill (Moak), Torts, 460, 461; 1 Add. Torts, secs. 163, 282; Cool. Torts, 568; 2 Greenl. Ev. sec. 466; Wool. W. 278; Big. Torts, 256; Shipley *v.* Fifty Associates, 106 Mass. 194, reported in 8 Am. Rep. 318; Wood, Nuis. sec. 121; Gould, Wat. secs. 292, 293).

Surface-Water. — So as to surface-water (Big. L. C. Torts, 496; Phear, R. W. 32, 33; Underhill (Moak), Torts, 457, 458, 460; Barkley *v.* Wilcox, 86 N. Y. 140; 1 Add. Torts, sec. 89 and note 1; Gould, Wat. sec. 265).

In the last instances the water belongs to the owner of the land, or may so belong, by being collected. At any rate, no action in general lies for its consumption, but only, when if at all, for injury occasioned by the manner of its user (1 Add. Torts, sec. 89 and note 1; Cool. Torts, 575, 580; Big. L. C. Torts, 496, 497, 498, 516; Underhill (Moak), Torts, 458 *et seq.;* Broadbent *v.* Ramsbottom, 25 L. J. (Ex.) 115; S. C., 11 Ex. 602). Motive is immaterial (Underhill (Moak), Torts, 455; Big. L. C. Torts, 525; 1 Add. Torts (Wood), 110, note 1).

Onus of Plaintiff. — For any of the injurious acts above specified, an action may be brought by the possessor of the property injured, and if he is not the proprietor[1] as well, the burden is on him to show his possession at the time the injury occurred, and such damages as he has sustained with respect to his possession (Phear, R. W. 100; Wool. W. 390; Gould, Wat. sec. 492). If he be proprietor in possession, then he may show such injury as has accrued to his estate in the land, and to that end he must show his title, whatever it may be; so, if he be proprietor out of possession, it is incumbent on him to show title, to recover at all (Phear, R. W. 106; Wool. W. 279, 423 *et seq.;* 2 Greenl. Ev. sec. 470; Ang. W. sec. 426).

The onus is also with the plaintiff to show as above stated, that the watercourse has a defined channel; if a diminution in the supply of fish be the gravamen, that fact must be

[1] The term "proprietor" has been used merely for convenience.

shown; or if the injury be alleged to have been caused by the improper user of subterranean waters, the particular facts touching the same must be averred and proved, as that it was a well-defined stream like the Mole in England, or that an excavation withdraws the water from a defined surface channel (Big. L. C. Torts, 525, 526, citing Grand Junction Canal Co. *v.* Shugar, L. R. 6, Chan. 483).

As to the question of damages, the burden, except in the instance of *diminution of supply* by obstruction or diversion, is satisfied by proof of the injurious act, but with regard to that, as we have seen, the burden is enhanced by requiring the plaintiff to show a sensible diminution (see authorities cited *supra*).

Defence: General Burden. — Besides those defences applicable to any action under the general issue, by offering proof to neutralize that given by plaintiff, there are several defences available, the burden being devolved upon the defendant.

Grant. — He may under *liberum tenementum* show a grant (2 Saund. Pl. & Ev. 636; Big. L. C. Torts, 520; 1 Add. Torts, secs. 92, 128, 129; Phear, R. W. 61, 103 *et seq.;* Wool. W. 151, 381 *et seq.;* Underhill (Moak), Torts, 478; Ang. W. secs. 144–150, 153, 168, 363–366).

Prescription. — Or, having the onus, he may show that he has acquired the right to do the act complained of by a user, adversely and as of right, for twenty years (Wool. W. 382; Phear, R. W. 75 *et seq.*, 96; 2 Greenl. Ev. sec. 475; 2 Saund. Pl. & Ev. 923; Underhill (Moak), Torts, 478, 479; 1 Add. Torts (Wood's ed.), secs. 92, 149, 151 and note 2; p. 173, note 1; secs. 161, 162, 204; Big. L. C. Torts, 520; Abb. Tr. Ev. 643; Ang. W. chap. VI.; Gould, Wat. sec. 329), though this defence would scarcely be applicable to inquiry occasioned by roof-water (Good *v.* Wand, 3 Ex. 748).

License. — Or, keeping the onus, he may show a license to commit the act complained of (1 Add. Torts, sec. 447; Underhill (Moak), Torts, 442, sub-rule and notes; Phear, R. W. 58; 2 Saund. Pl. & Ev. 633 *et seq.;* 2 Greenl. Ev. sec. 475;

Wool. W. 382; and see the subject fully discussed in Cool. Torts, chap. X.; Big. L. C. Torts, 697 *et seq.*; Ang. W. secs. 285–330; Gould, Wat. sec. 323).

Destruction of Dominant Tenement. — Perhaps to these may be added the destruction of the subject-matter of the dominant tenement (1 Add. Torts, sec. 187), *ex. gr.*, suppose A has acquired in some of the modes known to the law, a right to pond water on B the upper proprietor; but suppose his dam to fall to decay, and whilst this condition of affairs exists, B detains the water from the pond, but does not thereby cause a sensible diminution of the water, and is sued by A; upon a demurrer to a plea in setting forth these facts, would A be entitled to judgment? (See 2 Greenl. Ev. sec. 476; 1 Add. Torts, 176 and note 1; Phear, R. W. 109.) The point is very doubtful; see Ang. W. secs. 240–244, 385.

Resumption of the Onus by Plaintiff. — Upon evidence, in support of a license, being adduced, the plaintiff may reply that he had revoked the license (being one uncoupled with an interest)[1] before the commission of the tort (1 Add. Torts, secs. 201, 437; Cool. Torts, 304, 305; Underhill (Moak), Torts, 442, sub-rule and notes; 2 Saund. Pl. & Ev. 633, 634; Ang. W. sec. 286).

Or he may show in reply to the defence last stated, that the abandonment of his dominant tenement was only temporary, as for repairs and the like (2 Greenl. Ev. sec. 476; 1 Add. Torts, sec. 176 and note 1; Phear, R. W. 109; Ang. W. secs. 240–244).

Custom. — While this defence is admissible in England, it cannot be claimed to be the settled law of this country (Law. U. & C., notes to Metcalf *v.* Weld, 15 *et seq.*, particularly p. 25).

It will be observed that the first two defences, and in some aspects the third, involve the doctrine of Easements, *q.v.*

[1] This is the usual expression; there seems to be some confusion in the text-books as to what constitutes an irrevocable license. See Phear, R. W. 60 and note 1; 1 Add. Torts, sec. 116 and note 1, p. 129; sec. 177; Cool. Torts, 304 *et seq.*; 2 Greenl. Ev. sec. 475.

II. Navigable Streams.

Fishing. — Fisheries in navigable streams are open to all (Sch. A. R. 61; Gould, Wat. secs. 20, 21). If an action be brought for an obstruction of this right, it is incumbent on the plaintiff to prove that he had thrown out his seine or net into a navigable river, the burden as to this latter point being satisfied, in England, by showing the flow and ebb of the tide therein (Wool. W. 40, 410, 411; 1 Add. Torts, sec. 406 and note 1; Cool. Torts, 331; Underhill (Moak), Torts, 580; Ang. W. secs. 535–542), but in North Carolina, it is held, that the navigability of a stream is not necessarily dependent by the flow of the tide, but if in fact navigable, the right of fishing belongs to the public (Wilson *v.* Forbes, 2 Dev. 30; Collins *v.* Benbury, 3 Ired. 277; S. C., 5 Ired. 118; State *v.* Glenn, 7 Jones, 321).

Damages. — And special damages suffered (Ang. W. sec. 567 *et seq.*).

Navigation. — The public also have a right to navigate such streams; and this right is superior to that of fishing (Cool. Torts, 331; 1 Add. Torts, sec. 406 and note 1; Wool. W. 214; Ang. W. sec. 558); indeed, may be regarded as the paramount right therein (Underhill (Moak), Torts, 450, 506; Wool. W. 186, 214; Phear, R. W. 53; Ang. W. sec. 554, 558; Gould, Wat. sec. 87; 1 Azuni, M. L. chap. III. 9, 10).

In an action for obstructing such right, the plaintiff has the like onus, as in the case of fishing (Wool. W. 373 *et seq.;* Phear, R. W. 53).

The right to navigate includes, as incidental thereto, all such rights upon the water-way, as with relation to the circumstances of each river, are necessary for the full and convenient passage of water-craft along the channel (Phear, R. W. 53).

Bathing. — This is not a common-law right in such streams (1 Add. Torts, sec. 148; Wool. W. 2). It can only be acquired by prescription, and therefore more appropriately falls under the law of easements.

III. Marine Waters.

With reference to the rights of citizens *inter sese*, the law is the same as that touching navigable streams; but as to the rights of subject or citizen as between them and the sovereign, or assignee of the sovereign, it will be treated of under Part IV., Fifth Div.

Defendant's Burden. — To an action for obstructing the right of fishing, the defendant may plead, and the burden will be on him to prove, that the act was done in the reasonable exercise of the right of navigation (Cool. Torts, 331; 1 Add. Torts, sec. 406 and note 1; Wool. W. 186, 214; Underhill (Moak), Torts, 450, 506; Phear, R. W. 53).

The defence to an action for obstructing navigation — the burden being upon the defendant — is mainly confined to a plea that the obstruction was in reality a public benefit (Wool. W. 208).

Legislative Authority. — Or he may show that what he did was under legislative authority (Ang. W. sec. 562).

PURCHASER AT EXECUTION SALE.[1]

Execution. — When an action for the recovery of realty is brought, predicated upon a sale under execution (if by the plaintiff in the execution), he must show judgment and execution (2 Leigh, N. P. 938; 1 Sel. N. P. 610; 2 Arch. N. P. 425; Doe *v.* Murless, 6 M. & S. 110).

Mr. Archbold says that there is some doubt; but he evidently supposes Doe *v.* Smith, cited *infra*, as questioning Doe *v.* Murless; but on examination of that case, it will be seen that it only decides what all the authorities agree on, namely, that when brought by the plaintiff in the execution, he must show judgment as well as execution (Doe *v.* Smith, 2 Stark, (3 E. C. L. R.), 199).

[1] The author conceived that a practical advantage would be subserved by stating the onus as to this subject separately, as it comes into play constantly.

Sale. — Sheriff's Deed. — Defence. — Title by *Elegit*.

Sale. — He must, of course, show a sale under an execution (Tyler, Eject. 529, 530).

Sheriff's Deed. — He must also show a deed pursuant thereto from the sheriff (*ib.*).

Such was the doctrine at common law; but in many of the States it is made incumbent, by decisions departing from the common law, or by statutes, to show a judgment authorizing the execution, and in some, that there was a seizin in the defendant in the judgment, upon which the judgment might attach, or a salable interest (*ib.*; Rutherford *v.* Raburn, 10 Ired. 144; Abb. Tr. Ev. 702 (13)). In the last named case, Ruffin, C. J., reluctantly announced the doctrine that a judgment must be shown, holding himself bound by the authority of a former adjudication, but states the English doctrine as above.

Defence. — At common law, or rather according to the English authorities construing the statutes authorizing sales of realty under execution, it seems to the author that the circumstance of a lack of seizin, or salable interest, is a matter of defence (Free. Ex. sec. 351).

Title by *Elegit*. — The English rule, as to plaintiff claiming under a writ of *elegit*, required proof of an examined copy of the judgment, of the writ of *elegit* taken out upon it, and the inquisition and return thereon, or an examined copy of the judgment-roll containing the award of the *elegit*, and return of the inquisition (1 Sel. N. P. 610; 1 Saund. Pl. & Ev. 463; 2 Arch. N. P. 424, 425). It is apprehended that the statute, 13 Ed. 1, providing for the writ of *elegit*, is not in force in any of the United States, as it was superseded practically in England by 5 Geo. 2, chap. 7, which applied in terms to land in the colonies, and doubtless was substantially re-enacted throughout the Union (Alex. Br. Stats. 716 and note; Mart. Coll. Br. Stats. 395). But, even when the writ of *elegit* was in force, it was lost if the plaintiff did not elect to sue it, and if he sued out an execution, it amounted to a renunciation of the *elegit*.

The *elegit*, it seems to the author, bears no analogy to a

docketed judgment, as in the latter case the judgment is made, by force of a statute, to constitute a lien upon the realty; whereas no such force and effect was given to the *elegit* by Stat. West. 2, and the lien asserted for it arises by implication and depends upon the election.

These remarks are thrown out, because it seems clear that our executions against realty bear no just analogy to the writ of *elegit*, and purchasers under them do not stand upon the footing of a tenant by *elegit* (Jones *v.* Edmunds, 3 Murph. 43).

It is, however, proper to add that so able and thorough a lawyer as Mr. Freeman contends strongly for the rule requiring the production of the judgment, and cites numerous authorities (Free. Ex. sec. 350).

The reason for the English rule, however, where a third person buys, is overwhelming; it is based upon public policy to encourage, by protecting, bidders, and thus enhancing the price of property so sold.

Assessed Value. — Whenever, by statute, it is prescribed that the property shall bring a certain proportion of its assessed value, the purchaser, it seems, should prove the fact.

Confirmation. — In those States, where execution sales are required to be confirmed, of course proof of such fact lies upon the purchaser.

Redemption. — In those States which allow redemption, in general it is not a matter of proof in the cause, but forms the subject of separate litigation, and the party entitled, is held to the strictest proof of compliance with the statutory requirements (Free. Ex. secs. 314, 321).

If the statute prescribes that the deed is to be withheld for a certain period, etc., there can seldom arise any difficulty. If, however, the sheriff is required to execute a deed, and certain persons allowed a right of redemption, if any of such persons should be sued for possession, he may by way of defence show that he strictly complied with the law, and became thus entitled to be re-habilitated. Of course, in

those jurisdictions where the courts of law and equity are separated, he would be driven to his injunction (Free. Ev. 322).

Recitals. — In many of the States, the recitals in the sheriff's deed are made *prima facie* evidence (Herman, Ex. 472, 482, 483). Mr. Freeman says they ought to be (Free. Ex. sec. 334); see also Rorer, Jud. Sales, secs. 1011–1020. Recitals are not, in general, evidence, certainly not as estoppels.

Viewed from the standpoint of principle, it may fairly be contended, as a general principle, that recitals of particular facts constitute an estoppel (Big. Est. 295–303). But this doctrine is restricted to parties and privies, and while the sheriff's deed has, in technical contemplation, the force and effect of the execution of a power (Big. Est. 283, note 1; Gorham *v.* Brenon, 2 Dev. 174; Doe. *d.* Logan *v.* Moore, 1 Dana, 57), yet such a rule is hardly applicable to recitals found in a deed made *in invitum* (McDougald *v.* Dougherty, 11 Ga. 570, 594). But while it would be pressing the doctrine of implied power too far, to give to such recitals the force of an estoppel, yet the true doctrine may be eliminated under the maxim *medio tutissimus ibis*, namely, that such recitals, while not strict estoppels, obviate the necessity of their proof, but do not preclude evidence in their negation.

There is an irreconcilable conflict of decisions on the point, but being a mere question of practice, it would serve no practical purpose to array them.

RES IPSA LOQUITUR.

See this subject discussed under title NEGLIGENCE.

SEALED INSTRUMENTS.

Bonds. — Single-bills are bonds for payment of a certain sum of money without condition.

These instruments may be drawn in the form of promissory notes, with the single exception of the addition of a seal,

which must be, according to the common law, and that of some of the States a waxen impression or wafer; in most, however, any written device at the end of the obligor's name, if intended for a seal, will be so treated (Pool *v.* Dial, 10 S. C. 440); see title ASSURANCES *ante*.

The presence of the seal prevents the defendant from alleging, at common law, a lack or failure of consideration; hence, if *non est factum* be pleaded, the onus is with the plaintiff to prove its execution — that is to say, the signing, sealing, and delivery (1 Sel. N. P. 451). As to the measure of such proof, see SELWYN'S NISI PRIUS and other elementary books. All other defences must be in confession and avoidance, and the burden is always in such cases, upon the party relying upon them, though in some instances, after making a certain quantum of proof, the onus may be shifted.

When *non est factum* is pleaded, and alterations, erasures, etc., are relied on as the basis of the defence, there is, as stated under the title of NEGOTIABLE INSTRUMENTS, *ante*, a wide diversity of judicial thought as to the cast of the onus, at least, as to commercial paper, and much, as applicable to bonds.

Some courts hold that presumptively the alteration or erasure was made before execution; others, that the presumption is the other way, and these distinctions are taken as to different kinds of bonds, and also as to the character of the alteration or erasure itself.

The onus is regulated by the presumption. Where the presumption is, that it was made before execution, the onus, under the general issue, is with the defendant (1 Sel. N. P. 454); where a contrary presumption is held to arise, the onus will be with the plaintiff.

It would prove a task foreign to the general scope of this treatise, to enumerate the authorities *pro* and *con*, but they will be found fully collected and digested in Cowen & Hill's notes to Phillips on Ev. vol. 3 (or Pt. I.), 461–464, also to vol. 4 (Pt. II.), 372 *et seq.*; 1 Stark. Ev. 329; 1 Greenl. Ev. secs. 564–568; vol. 1 U. S. Digest, 1st series, title Alterations, where a vast number of authorities are collected; see

also Putnam *v.* Clark, 29 N. J. Eq. 412; Hayden *v.* Goodnow, 39 Conn. 164; Welch *v.* Coulborn, 3 Houst. 647; Hunt *v.* Gray, 35 N. J. L. 227; Ansley *v.* Peterson, 30 Wis. 653; Brougham *v.* Reddy, 5 Ben. 266; Redington *v.* Woods, 45 Cal. 406; Yocum *v.* Smith, 63 Ill. 321; Wilson *v.* Harris, 35 Iowa, 507; Swift *v.* Barber, 28 Mich. 503; Card *v.* Miller, 3 Thomp. & C. 635; S. C., 1 Hun. 504; Morehead *v.* Parkersburg, N. Bk. 5, W. Va. 74; Warpole *v.* Ellison, 4 Houst. 322.

It may be added that the discussion of the application of the onus to the defence of illegal consideration is treated of under that title.

Penal Bonds. — There is this distinction between the cast of the onus in an action upon a covenant, and a bond with condition, namely, that when in an action of covenant there is a breach charged in negative terms, and a general traverse in affirmative terms, the onus, as we have seen, is with the defendant, but, in an action of debt on a penal bond, *non est factum* not being pleaded but performance, on oyer and assignment of breach, the onus is with the plaintiff to show the breach (1 Sel. N. P. 485), but the plaintiff having discharged the onus by showing a breach, devolves it upon the defendant to prove any matter of excuse, supposing always, that by the *lex fori* the evidence to that effect, is, in itself, competent: such proof, however, is not admissible under the plea of performance, and must be specially pleaded (Shinn *v.* Haines, 21 N. J. L. (1 Zab.) 340).

Corporate Bonds. — The question of the onus probandi, peculiar to this class of bonds by way of proof of a fact, rarely arises except as to the *bona fides* of the holder of such as are payable to bearer or "to —— or bearer."

The logical and orderly mode of trial of such an issue is this: To sustain his claim, the holder suing upon them, produces the bonds and coupons, if any, if the pleadings shall have rendered production necessary. Their execution not being denied, this proof establishes the plaintiff's case, raising a presumption that he is a holder for value, without notice and before maturity. Thereupon, the onus is devolved upon

the defendant to negative the *bona fides* of the plaintiff by showing that he is not a holder for value, or that he purchased after maturity, or had notice of material defects (Murray *v.* Lardner, 2 Wall. 121; Chambers County *v.* Clews, 21 Wall. 323). But without proving either of these points, if the defendant proves strong circumstances of fraud in connection with the origin of the bonds, as bribery, etc., the burden will be shifted to the plaintiff to prove that he did give value for and obtained the bonds before maturity (Smith *v.* Sac Co., 11 Wall. 147, 148, 149; 2 Wash. C. C. 460, 461; 1 Pitts, Rep. 521; Clemens, Corp. Sec. 90; 2 Dan. N. I. sec. 1503; Everston *v.* N. Bk. of Newport, 66 N. Y. 14; S. C., 23 Am. Rep. 9, note 15).

The possession of negotiable bonds is *prima facie* evidence of ownership (Wickes *v.* Adirondack Co., 4 Thomp. & C. 250).

If the bond contains no recitals, the burden is on the plaintiff to show that they were issued pursuant to law (Hooper *v.* Covington, 8 Fed. Rep. Cir. Court of Indiana, 1881).

TAXATION.

Remedy in Equity. — The extent of the remedy by injunction, to restrain the collection of taxes, is discussed by Judge Cooley in his work on Taxation, to which the reader is referred (Cool. Tax. 536 *et seq.*).

General Burden. — It is stated by Judge Cooley that in order to entitle the taxee to relief in equity, he must by his bill or complaint bring his case under some acknowledged head of equity jurisdiction (*ib.* 536; Burr. Tax. secs. 108, 126).

The burden of proof must then correspond with his allegations.

In some of the States, however, the injunctive relief has been awarded on other grounds.[1]

[1] See acc. Black. T. T. 481 *et seq.*; Worth *v.* Commissioners, 1 Winst. Eq. 70; Broadnax *v.* Groom, 64 N. C. 244; Rood *v.* Mitchell County, 39 Iowa, 444.

Remedies at Law; Assessment. — In all cases not admitting of injunctive relief, the taxee, pursuant to the mode pointed out in the local statutes, may apply for a re-assessment of the tax (Cool. Tax. 527, 528 *et seq.;* Burr. Tax. sec. 141).

All that can be said (owing to variant provisions of the different statutes) on this head is, that the taxee must strictly comply with the statute; there is a presumption of correctness which he must rebut by evidence showing the error complained of (Cool. Tax. 528). It is not compatible with the object of this treatise to indicate what errors are thus reviewable, but it may be stated, that when the matter complained of rests in the judgment of the assessors, there is no remedy (*ib.* 529; Burr. Tax. sec. 102).

Certiorari. — When an error in assessment has been committed, and is such as should be corrected, and the board refuses to do so, if the statute allows an appeal that remedy should be adopted, otherwise the writ of *certiorari* is, in general, applicable (Cool. Tax. 530; Burr. Tax. sec. 141). For a discussion of the principles governing the use of this writ, see Cool. Tax. 530 *et seq.;* Burr. Tax. sec. 141.

Burden. — Supposing that it lies at all, it is incumbent on the applicant to show: —

1. That there has been an illegal assessment remediable by this process.

2. That the board of assessors refused to abate the assessment (Cool. Tax. 530 *et seq.;* see Burr. Tax. sec. 141).

Defence. — The defendants may show: —

1. That the writ was not applied for until after the assessment-roll had passed out of their hands (Cool. Tax. 531).

2. Or its purpose is to review political action (*ib.*).

3. Or that great mischiefs would flow from the allowance of the writ (*ib.* 530).

Action. — If none of the foregoing remedies are available to the taxee, he may, in some few instances, resort to *mandamus* (*ib.* 514, 574), or in some localities, to replevin (*ib.* 572, 573).

Failing all these, his course is to pay the tax under protest and bring his action to recover it back (*ib.* 538).

Burden. — Thereupon the burden will be upon him to show: —

1. That the tax was illegal or illegally assessed (*ib.*).
2. That he has paid it under protest (*ib.* 565, 568).

No demand need be proved (*ib.* 571).[1]

Again, if for any reason the collector's warrant or list is essentially defective (see, as to this, Cool. on Tax. 562; Burr. Tax. secs. 104, 108, 127, 142); or if the collector abuses his authority (Cool. Tax. 563; Burr. Tax. *ubi supra*), the taxee may sue in trespass; the burden of proof then, upon a general denial, will be only to show the seizure, upon making which, if the officer justifies, the burden will be shifted to him to show his authority, unless he be charged as trespasser *ab initio*, when upon a general denial the burden will rest with the plaintiff. The taxee may also sue the assessors, but not for error in judgment, as this action is confined to cases where the assessors have acted without power or in excess of their jurisdiction or *mala fide* (Cool. Tax. 553).

The burden in this case is substantially as in other modes of litigation, except that the plaintiff must also show that the defendant was, or acted as, such assessor. Possibly also the action would lie against an assessor who wilfully deprived the taxee of the opportunity of being heard before the board (*ib.* 554).

An action may also in rare instances be maintained against

[1] This action, according to some authorities, does not lie to recover taxes paid under the compulsion of a tax-list (Am. notes to Marriott *v.* Hampton, 2 Smith, L. C. at p. 244; but see Burr. Tax. sec. 108; Osborn *v.* Danvers, 6 Pick. 98; Huggins *v.* Hinson, Phil. (N. C.) 126). The principle is a manifestly just one, when applied to a payment under the final process issued upon judgment regularly rendered (Marriott *v.* Hampton, 2 Smith, L. C. 237, and end of Smith's note); but when a citizen has been *illegally assessed, without a day in court*, it looks hard that he should be driven to test his rights under a tax title. However, the doctrine stated in this note may be supported, as to taxes assessed for the State, upon the principle that the sovereign cannot be sued (Burr. Tax. sec. 142), but is highly technical when applied to tax-lists of municipal corporations: *cessante ratione cessat et ipsa lex* (see Burr. Tax. secs. 127, 142).

a supervisor. See the instances, which give the burden of proof, in Cool. Tax. 557, 558.

A town, village, city, or county for which a tax has been levied and collected, may also, under some circumstances, be liable to an action at the suit of parties from whom the tax has been exacted. The burden requires this proof: —

1. The tax must have been illegal and void, and not merely irregular.

2. It must have been paid under compulsion or the legal equivalent.

3. It must have been paid over by the collecting officer, and have been received to the use of the municipality.

4. And perhaps the taxee should not have elected to proceed in any remedy he may have had against the assessor or collector (*ib.* 565).

Actions for penalties are prescribed in the several States in aid of the execution of their revenue laws, but they need not be here noticed as so far as the onus probandi is concerned: the principles applicable to actions for penalties, in general, apply, and the matter has been discussed under that title, *q.v.* But there is one other matter growing out of the subject of taxation, which it is well to notice before quitting it, and that is sale of land for taxes.

Tax Titles. — Proceedings predicated upon such sales are generally construed *strictissimi juris* (Burr. Tax. secs. 119, 126; Gard. Inst. 191, 192, 363; Black. T. T. chap. 3, note *p*, 63).

General Burden. — It may be safely asserted that if the purchaser sues for the land, the onus is with him to show that the law, under which the sale was effected, has been fully complied with, not only in the sale itself, but in all the anterior proceedings (Burr. Tax. chap. 17; Gard. Inst. 191, 192, 363; Black. T. T. chap. 3; Cool. Tax. 326). But there is a discrepancy between the earlier and later adjudications as to what degree of strictness is required. Perhaps the doctrine of the later cases, namely, that the onus is satisfied by proof of compliance with those provisions of law, which

are in the nature of conditions to the exercise of the power of sale and are not merely directory, is the better rule (Cool. Tax. 326, 327; Gard. Inst. 191, 192, 363). Treated in this light, the purchaser must prove: —

List. — 1. That a tax-list, having the force and effect of an execution, came to the hands of the collector (Cool. Tax. 333; Black. T. T. chap. 3, and p. 109).

Levy. — 2. That the same was levied upon the land in controversy after a return of *nulla bona* (Cool. Tax. 307; Black. T. T. chap. 3, and chap. 6).

Notice. — 3. Notice to the delinquent taxee (Cool. Tax. 334 *et seq.;* Black. T. T. chap. 3, and chap. 12) in some States, of the levy and sale, and in others, of the sale only. For the intensity of proof as to what such notices should contain, see Cool. Tax. 334 *et seq.;* Black. T. T. chap. 3.

Sale. — 4. He must show that the sale occurred at the time and place fixed in the notice (Cool. Tax. 338; Black. T. T. chap. 3), and that the sale was public, and open to competition (Cool. Tax. 339), and that the sale was effected in the mode pointed out in the local statute (*ib.* 341; Black. T. T. chap. 3); generally, it must be to the highest bidder for cash (Cool. Tax. 344; Black. T. T. 276), though in some States it must be sold to the lowest bidder, *ex. gr.*, to him who will pay all the tax for the least amount of the land.[1]

Certificate. — 5. He must next show the certificate of sale (Cool. Tax. 352; Black. T. T. chap. 3).

Deed. — And lastly the deed made after the time for redemption had elapsed (Cool. Tax. 353; Black. T. T. chap. 3).

The burden of proof is modified in some of the States by allowing the deed to be *prima facie* evidence, that the requirements as to the sale have been complied with (Cool. Tax. 355; Black. T. T. chap. 3). To what extent the modification goes will of course depend upon the language of the statute.

An internal revenue collector's deed is made *prima facie* evidence of its recitals by act of Congress (Rev. Stats. U. S.

[1] Such is the law of Maine, North Carolina, and perhaps other States.

sec. 3199; Burr. Tax. sec. 167). Again, in some of the States it has been provided by statute, before a sale of land for taxes shall be made, that there shall be a judicial determination of the taxee's delinquency (Cool. Tax. 357; Black. T. T. chap. 11; Burr. Tax. sec. 119). This procedure is *in rem*, although notice issues to the taxee (Cool. Tax. 360). The actors in such proceedings, *ex necessitate rei*, hold the burden of proof (*ib.* 358, 359; Black. T. T. chap. 11).

Defence. — After the plaintiff, in an action brought upon a tax-deed, has fulfilled his burden of proof, the defendant taking it may show: —

1. That the plaintiff was, for any reason, incapacitated to purchase (*ib.* 345–351; Burr. Tax. sec. 123).

2. Or, that the sale was excessive (Cool. Tax. 343, 344), or fraudulent (Burr. Tax. sec. 123).

3. Or, that the land was sold for a greater amount of taxes than was due (Cool. Tax. 345; Burr. Tax. sec. 123).

4. Or, that he or those whose estates he claims, offered to redeem the land, within the period prescribed for that purpose in the manner required by law (Cool. Tax. 363; Burr. Tax. sec. 124).

5. Or, that the bidding was suppressed by combination (Burr. Tax. sec. 123).

6. Redemption after sale (Burr. Tax. sec. 125). Of course this defence includes an offer to redeem within the time and in the mode pointed out by local statutes (*ib.*).

The taxee, if he shall have offered to redeem as above stated, on refusal by the proper officer to allow the same, may compel redemption.

Redemption. — By *mandamus* (Burr. Tax. sec. 127; Black. T. T. 435). In such proceeding it is incumbent upon the relator to show: —

1. That his realty was sold for taxes.

2. And that he has made tender of the amount required for redemption to the proper officer, and at the time and place pointed out by the local statute (Black. T. T. 420–435).

Tax Title Deed. — And, on the other hand, if the officer

refuses, without legal excuse, to make a deed to the purchaser, he has the like remedy to enforce its execution (Burr. Tax. sec. 117, 127; Black. T. T. 299, 373 and note, 492). The burden requires that he shall show: —

1. The certificate of sale.
2. That the time of redemption has passed.

If *mandamus* is refusable by the *lex fori*, the remedy must be by bill in equity (Black. T. T. 373, 492).

Collector. — In defence the collecting officer may show that the taxee has redeemed the land.

There are doubtless other defences prescribed by various local statutes, needless to be here examined.

TELEGRAPHY.

General Burden; Contract. — In an action against a telegraph company for the breach of its ordinary contract, the plaintiff must prove the execution and non-performance of that contract, and the damages sustained thereby (Gray, Com. by Tel. secs. 26, 53, 54 and notes; Abb. Tr. Ev. 604; 2 Add. Cont. sec. 1015; Big. Torts, 275, § 5; Big. L. C. Torts, 619 *et seq.;* 2 Thomp. Neg. 837; Baldwin *v.* U. S. T. Co., 45 N. Y. 744, reported in 6 Am. Rep. 165 and All. T. C. 613; Pope *v.* W. U. T. Co., 9 Brad. (Ill. App.) 283; W. U. T. Co. *v.* Hope, 11 Brad. (Ill. App.) 289; Leonard *v.* N. Y. Alb. & Buf. T. Co., 41 N. Y. 544, reported in 1 Am. Rep. 446 and All. T. C. 500; U. S. T. Co. *v.* Wenger, 55 Pa. 262; S. C., All. T. C. 356; Rittenhouse *v.* The Ind. Line of Tel., 1 Daly, 474, reported in 4 Am. Rep. 673 and All. T. C. 570; S. C., 44 N. Y. 263; W. U. T. Co. *v.* Ward, 23 Ind. 377; S. C., All. T. C. 250; W. U. T. Co. *v.* Gougar, 84 Ind. 176; So Relle *v.* W. U. T. Co., 55 Tex. 308; W. U. T. Co. *v.* Carew, 15 Mich. 525; S. C., All. T. C. 345; De Rutte *v.* N. Y. Alb. & Buf. T. Co., 1 Daly, 547; S. C., All. T. C. 273; Turner *v.* Hawkeye T. Co., 41 Iowa, 458, 462, reported in 20 Am. Rep. 605; Reliance Lumber Co. *v.* W. U. T. Co., 58 Tex. 394; W. U. T.

Co. *v.* Lindley, 62 Ind. 371; Landsberger *v.* Magn. T. Co., 32 Barb. 530; S. C., All. T. C. 165).

If a telegram fails (*ex. gr.*, cypher) to show that it is of pecuniary value, or of importance, the burden is upon the plaintiff, if he seeks to recover more than nominal damages and cost of the telegram, to show by notice or otherwise, that the company had knowledge of such value or importance[1] (Gray, Com. by Tel. sec. 87; 2 Thomp. Neg. 857; Wood's Mayne, Damages, sec. 35; Abb. Tr. Ev. 604; Mackay *v.* W. U. T. Co., 16 Nev. 222; Dorgan *v.* T. Co., 1 Am. L. T. Rep. (N. S.) 406; Sanders *v.* Stewart, 1 L. R. (C. P. D.) 326; S. C., 15 C. L. N. 220; 45 L. J. C. P. 682, reported in 4 C. L. J. 557; Bank *v.* Tel. Co., 30 Ohio, 555, reported in 5 Rep. 660; Daniel *v.* Tel. Co., 61 Tex. 452; Logan *v.* Tel. Co., 84 Ill. 468; W. U. T. Co. *v.* McKinney (Tex.), reported in 19 Rep. 574; 3 Suth. Dam. 298, 299; Candee *v.* Tel. Co.,

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[1] There is some discrepancy in the decisions on this point.

Hart *v.* W. U. T. Co. (Col.), reported in 18 Rep. 676; S. C., 4 Pac. Rep. 685; Daughtry *v.* Am. Tel. Co. (Ala.), reported in 18 C. L. J. 428, and 18 Rep. 299; W. U. T. Co. *v.* Reynolds, 77 Va. 173; Pinckney *v.* W. U. T. Co., 19 S. C. 71, 74 *dictum*, hold a contrary view to that expressed in the text.

It strikes the author that a distinction should be taken between a failure to deliver *obscure messages accurately*, and a total failure to deliver *any dispatch*.

To allow force to a regulation exempting the telegrapher in the latter class of cases, by reason of a failure of the sender to repeat the telegram, is equivalent, in effect, to allowing the telegrapher to stipulate against his own negligence.

It seems unreasonable to require a repetition from the sender, unless he has some cause for it.

How can he have any reason to suppose that such a course is necessary, unless the sendee wires him a warning?

And while that might and probably would be done (if some kind of dispatch was received) — the more inaccurate the message, the more likely to elicit the warning — how can that course be contemplated if no dispatch at all was delivered?

The author, however, felt bound, by the overwhelming sluice of authorities, to state the legal bearing of the point as laid down in the text.

The technical meaning of "repeating" is, that the sender requires that his message be wired back from the office of delivery (*per rel.* E. R. Dodge, an experienced telegrapher). But it will be readily seen that no such precaution

34 Wis. 471; Belun *v.* Tel. Co., 7 Rep. 710, and 8 C. L. J. 445; Shields *v.* W. T. Co., 9 W. L. J. 283; S. C., All. T. C. 5).

The plaintiff, in an action against a telegraph company for the breach of its ordinary contract, is under no obligation to show that the person to whom the message was addressed was at the place of destination to receive it (Pope *v.* W. U. T. Co., 9 Brad. (Ill. App.) 283). And in England he must show that he is the sender (2 Add. Cont. sec. 1015; Playford *v.* U. K. El. T. Co., L. R. 4 Q. B. 706; S. C., 17 L. T. (N. S.) 243, reported in Allen's Tel. Cases, 437; Dickson *v.* Reuter's Tel. Co., L. R. 2 C. P. Div. 62; S. C., 3 C. P. Div. 1; Gray, Com. by Tel. sec. 65; Poll. Prin. Cont. 197, note (*b*)).[1]

In actions predicated upon contracts, which upon their face profess to exonerate the telegrapher from negligence, the question as to the degree of proof required is the subject of a great conflict of judicial opinion. If, by the judicial decisions or statutes of a State, the telegrapher cannot stipulate for immunity from liability growing out of ordinary negligence, it is apprehended that, notwithstanding the exempting clause, the burden of proof is not enhanced beyond that stated above (Gray, Com. by Tel. secs. 53, 54;[2] Big. Torts, 275, § 5).

There is, however, a contrariety of decisions on this point. The doctrine of the text is sustained by the following author-

would avail when there is a failure to deliver any message to the sendee. It would be a useless expense. Indeed, it is calculated to mislead the sender; for by receiving his own message he knows that it has reached the office of delivery, and fairly presumes that it has been delivered. It is calculated to lull him into a false security — much more than if he had not required the repetition. This view is sustained by the cases of Baldwin *v.* W. U. T. Co., 1 Lans. 125, and Bell *v.* Dominion Tel. Co. (Sup. Court Montreal), 25 L. C. J. 248, reported in 15 W. J. 123.

[1] The weight of the American cases is the other way (Gray, Com. by Tel. sec. 65, and cases cited in note 3; notes to Playford Case, Allen's Tel. Cases, 455; Big. Torts, 277; Big. L. C. Torts, 621 *et seq.*; article in 4 C. L. J. 434; article in 12 *ib.* 365; article in 17 *ib.* 466; notes, 15 W. J. 125).

Judge Abbott does not notice the point (Abb. Tr. Ev. chap. 32).

[2] Mr. Gray, in his invaluable treatise, has demonstrated this proposition in a lawyer-like manner. This book should be in the hand of every attorney as a *vade mecum.*

ities: Bartlett *v.* W. U. T. Co., 62 Me. 209, reported in 16 Am. Rep. 437; True *v.* Int. T. Co., 60 Me. 9, reported in 11 Am. Rep. 156 and note, and All. T. C. 530; Tyler *v.* W. U. T. Co., 60 Ill. 421, reported in 14 Am. Rep. 38 and note; S. C., 74 Ill. 168; W. U. T. Co. *v.* Fontaine, 58 Ga. 433; T. Co. *v.* Griswold, 37 Ohio, 301, reported in 41 Am. Rep. 500; W. U. T. Co. *v.* Blanchard, 68 Ga. 299; Pinckney *v.* W. U. T. Co., 19 S. C. 71; Dorgan *v.* T. Co. (C. C. S. D. Ala., 1874), reported in 1 Am. L. T. Rep. (N. S.) 406; W. U. T. Co. *v.* Meek, 49 Ind. 53; Hord *v.* W. U. T. Co., Super. Ct. of Cinc., 1878, reported in 6 Am. L. Rec. 529; Barnesville Bank *v.* W. U. T. Co., 30 Ohio, 555. Whereas other courts hold, that under such circumstances the plaintiff must not only prove the formation and breach of the contract, but also show affirmatively the negligence of the defendant (Sweatland *v.* Ill. & Miss. T. Co., 27 Iowa, 432, reported in 1 Am. Rep. 285; S. C., All. T. C. 471; Camp *v.* W. U. T. Co., 1 Metc. (Ky.) 164; S. C., All. T. C. 85 and 6 Am. L. Reg. 443, 734; U. S. T. Co. *v.* Gildersleve, 29 Md. 232; S. C., All. T. C. 390; Aiken *v.* W. U. T. Co., 5 S. C. 358; W. U. T. Co. *v.* Neill, 57 Tex. 283; Passmore *v.* W. U. T. Co., 9 Phil. 90; S. C., 78 Pa. 238; Breese *v.* U. S. T. Co., 48 N. Y. 132, per Lott, Chief Commissioner, reported in All. T. C. 679 and in 8 Am. Rep. 526 and note; Wann *v.* W. U. T. Co., 37 Mo. 472; S. C. All. T. C. 261; W. U. T. Co. *v.* Catchpole (Tex. Ct. of App. Civ. Cas. (White & Wilson) § 268. Cf. Ellis *v.* Am. T. Co., 13 Allen, 226; S. C. All. T. C. 306).

In those courts which recognize this right of exoneration, it is held unanimously, it is believed, that where such provision has been inserted in the contract, the plaintiff must not only make the proof as above stated, but also show affirmatively the negligence of the defendant (Gray, Com. by Tel. sec. 53; Becker *v.* W. U. T. Co., 11 Neb. 87; Breese *v.* U. S. T. Co., 48 N. Y. 132, reported in 8 Am. Rep. 526 and note; White *et al. v.* W. U. T. Co., 5 Macrary, 103; Redpath *v.* W. U. T. Co., 112 Mass. 71, reported in 7 Am. Rep. 69 and note; Grinnell *v.* W. U. T. Co., 113 *ib.* 299, reported in 18

Am. Rep. 485. Cf. Ellis *v.* Am. T. Co., 13 Allen, 226; Jones *v.* W. U. T. Co. (C. C. E. D. Ark., 1883), 18 Fed. Rep. 718).

Connecting Lines. — When there is a series of connecting lines of telegraph, the burden will depend upon the terms of the contract. If the term be to deliver at the place of destination, proof of the formation thereof and non-delivery with due speed will satisfy the burden; but when the contract is only to deliver the message to a connecting company, the burden requires not merely proof of non-delivery at the destination, but of a failure to deliver to such connecting company (Gray, Com. by Tel. sec. 61; see All. Tel. Cas. 146, 254, 273, 372; article 15, C. L. J. 182; 2 Thomp. Neg. 839, § 3; Stevenson *v.* Montreal &c. Co., 16 U. C. (Q. B.) 530).

In an action against an auxiliary company the proof required from the sender should vary, it seems, with the fact as to whether the first company was the agent of the auxiliary company, or agent of the sender in contracting for transmission beyond its own lines.

If the first company was the agent of the auxiliary company, proof of the contract with it for further transmission, and of such company's failure to deliver the message correctly and with due speed, either at the place of destination or to another auxiliary company, is sufficient (Gray, Com. by Tel. sec. 62).

If, on the other hand, the first company was the agent of the sender to contract with the connecting company, the sender, in an action against the connecting company, should, it seems, be required to prove the contract made at the place of connection between the two companies and the breach of that contract. Proof of the contract should include evidence of the words which the connecting company received from the first company for further transmission, and, if material, of the time of their receipt (Gray, Com. by Tel. sec. 62).

It has, however, been held that, in an action against a connecting company for delivering a message incorrectly, proof of the contract with the first company and of the fact that the message, as sent, was not delivered at the place of des-

tination, establishes a *prima facie* case; and that the defendant must, to rebut such case, prove that the words which it delivered were identically the same as those received. It follows from this doctrine, that in an action against a connecting company for the failure to deliver a message in due time, proof of the contract with the first company and that the message was not delivered in due time at the place of destination, would satisfy the burden of proof; and the defendant must prove, according to circumstances, either that it never received the message, or that it was received so late that the time, occupied in transmitting and delivering it, was not unreasonably long (Gray, Com. by Tel. sec. 62).

Torts. — In an action in tort against a telegraph company for the injury sustained in acting upon a message altered, or in other respects untrue as delivered, the plaintiff must prove that the error in the message was due to the negligence of the company; that he acted upon the message as delivered to his detriment; and the extent of that detriment. In an action against a telegraph company for injury sustained through acting upon an altered message, the plaintiff establishes, *prima facie*, the negligence of the company by proving the difference between the message which the company agreed to deliver to him, and that which it did deliver to him (Bowen *v.* L. E. T. Co., 1 Am. L. Reg. 685, and All. Tel. Cas. 7; De la Grange *v.* S. W. T. Co., 25 La. Ann. 383; Harris *v.* W. U. T. Co., 9 Phil. 88; De Rutte *v.* N. Y. Alb. & Buf. T. Co., 1 Daly, 547; Tyler *v.* W. U. T. Co., 60 Ill. 421; S. C., 74 Ill. 168, reported in 14 Am. Rep. 38 and note; T. Co. *v.* Griswold, 37 Ohio, 301, reported in 41 Am. Rep. 500; W. U. T. Co. *v.* Blanchard, 68 Ga. 299; Rittenhouse *v.* Ind. Line of Tel., 1 Daly, 474, reported in 4 Am. Rep. 673; S. C., 44 N. Y. 263; Leonard *v.* N. Y. Alb. & Buf. Tel. Co., 41 N. Y. 544, reported in 1 Am. Rep. 446; Smith *v.* Ind. Line Tel., reported in Allen's Tel. Cas. 662 *n*; Lowery *v.* W. U. T. Co., 60 N. Y. 198, 204, reported in 19 Am. Rep. 154; W. U. T. Co. *v.* Hope, 11 Brad. (Ill. App.) 289; Pinckney *v.* W. U. T. Co., 19 S. C. 71 *acc.* Cf. Tur-

ner *v.* Hawkeye Tel. Co., 41 Iowa, 458, reported in 20 Am. Rep. 605; Bank of N. O. *v.* W. U. T. Co., 27 La. Ann. 49; Aiken *v.* W. U. T. Co., 5 S. C. 358; Passmore *v.* W. U. T. Co., 78 Pa. 238; Ellis *v.* Am. T. Co., 13 Allen, 226; Breese *v.* U. S. T. Co., 48 N. Y. 132, reported in 8 Am. Rep. 526 and note; Becker *v.* W. U. T. Co., 11 Neb. 87; Camp *v.* W. U. T. Co., 1 Metc. (Ky.) 164; Sweatland *v.* Ill. & Miss. T. Co., 27 Iowa, 432, reported in 1 Am. Rep. 285; W. U. T. Co. *v.* Neill, 57 Tex. 283; White *et al. v.* W. U. T. Co., 5 Macrary, 103; Womack *v.* W. U. T. Co., 58 Tex. 176; W. U. T. Co. *v.* Catchpole, Tex. Ct. App. Civ. Cas. (White & Wilson) § 268, *contra*).

Presumption of negligence arises upon such proof, because the delivery of an altered message by a telegraph company is, as a matter of fact, due, usually, to the negligence of that company.

In an action against a telegraph company for the injury sustained through acting upon a message delivered after a delay, in the belief that it was delivered with due speed, the plaintiff would presumably establish, it seems, *prima facie*, the negligence of the company by proving the time when the company should have delivered the message, and the time when it did deliver it. An action of this nature has never been brought. A delayed message would usually disclose the delay on its face. The criterion as to the imposition of the burden may also be resolved by reference to the *status* of telegraph companies.

How viewed; Three Lights. — They are viewed by different courts in three lights: —

1. As in the like category with common carriers of goods (McAndrew *v.* E. T. Co., 17 C. B. 3, reported in 33 E. L. & Eq. R. 180; S. C., All. T. C. 38; Bell *v.* Dominion &c. Co. (Sup. Ct. Montreal) 25 L. C. J. 248, reported in 15 W. J. 123; Parks *v.* Alta &c. Co., 13 Cal. 422; S. C., All. T. C. 114;[1] and see Rittenhouse *v.* T. Co., 1 Daly, 475, reported in 4 Am. Rep. 673; Gray, Com. by Tel. secs. 6 and 7).

[1] Mr. Parsons compliments this case very highly, 2 Pars. Cont. (8th ed.) 252, note *x*.

2. That they are analogous (Big. Torts, 275, § 5; Big. L. C. Torts, 619 *et seq.;* R. R. *v.* Lockwood, 17 Wall. 357; Express Co. *v.* Caldwell, 21 Wall. 269; True *v.* International &c. Co., 60 Me. 9, reported in 11 Am. Rep. 156; W. U. T. Co. *v.* Blanchard, 68 Ga. 299; W. U. T. Co. *v.* Meek, 49 Ind. 53; W. U. T. Co. *v.* Fontaine, 58 Ga. 433, per Jackson, J.; Lockwood *v.* Independent &c. Co., reported in Allen, Tel. Cas. 661; Strasburger *v.* W. U. T. Co., reported in Allen, Tel. Cas. 661), to common carriers, and are called upon to exercise the utmost diligence and skill (N. Y. &c. Co. *v.* Dryburg, 35 Pa. 298; S. C., All. T. C. 157; Bowen *v.* L. &c. Co., Com. Pl. Ohio, reported in 1 Am. L. Reg. 685, and All. Tel. Cas. 7; Stevenson *v.* Montreal &c. Co., 16 U. C. Q. B. 530; S. C., All. T. C. 71; De Rutte *v.* N. Y. Alb. & Buf. T. Co., 1 Daly, 547; S. C., 30 How. Pr. 403; Ellis *v.* Am. T. Co., 13 Allen, 226; W. U. T. Co. *v.* Carew, 15 Mich. 525, reported in 2 Thomp. Neg. 828; Baldwin *v.* U. S. T. Co., 45 N. Y. 744, reported in All. T. C. 613 and in 6 Am. Rep. 165; Breese *v.* U. S. T. Co., 45 Barb. 274, reported in 8 Am. Rep. 526 and note; S. C., 48 N. Y. 132; Schwartz *v.* A. & P. T. Co., 18 Hun, 157; Grinnell *v.* W. U. T. Co., 113 Mass. 299, reported in 18 Am. Rep. 485; Jones *v.* Voorhees, 10 Ohio, 145; Redpath *v.* W. U. T. Co., 112 Mass. 71; Wann *v.* W. U. T. Co., 37 Mo. 472; W. U. T. Co. *v.* Fenton, 52 Ind. 1; White *v.* W. U. T. Co., 22 Fed. Rep. 710 and note; Candee *v.* W. U. T. Co., 34 Wis. 471; Hart *v.* W. U. T. Co., 4 Pac. Rep. 685; Tyler *v.* W. U. T. Co., 60 Ill. 421, 427, reported in 14 Am. Rep. 38 and note; S. C., 74 Ill. 168; T. Co. *v.* Griswold, 37 Ohio, 301, reported in 41 Am. Rep. 500; Shields *v.* Wash. T. Co., Allen, Tel. Cas. 5; Camp *v.* W. U. T. Co., 1 Met. (Ky.) 164, reported in 6 Am. L. Reg. 443, 734; Leonard *v.* N. Y. Alb. & Buf. T. Co., 41 N. Y. 544, reported in 1 Am. Rep. 446; Elwood *v.* W. U. T. Co., 45 N. Y. 549; S. C., All. T. C. 594; Bartlett *v.* W. U. T. Co., 62 Me. 209, 220, reported in 16 Am. Rep. 437; Aiken *v.* T. Co., 5 S. C. 358, 371, 372; Hibbard *v.* W. U. T. Co., 33 Wis. 558, 565; Dorgan *v.* T. Co. (C. C. S. D. Ala., 1874) 1 Am. L. T.

R. (N. S.) 406, 410; W. U. T. Co. *v.* Neill, 57 Tex. 283; Passmore *v.* W. U. T. Co., 78 Pa. 238; Baxter *v.* Dom. T. Co., 37 U. C. Q. B. 470; W. U. T. Co. *v.* Reynolds, 77 Va. 173. Cf. Clarence G. M. Co. *v.* Mont. T. Co. (C. C. Quebec, 1881), 8 Q. L. R. 94; Turnpike Co. *v.* News Co., 43 N. J. L. 381; W. U. T. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. (White & Wilson) sec. 1152; S. C., 17 Fed. Rep. 825; Birney *v.* N. Y. &c. Tel. Co., 18 Md. 341; S. C., All. T. C. 195; Pinckney *v.* T. Co., 19 S. C. 71, 16 Rep. 635; Abraham *v.* W. U. T. Co., U. S. C. C. Dist. Oreg. 19 Rep. 583).

3. That they are only required to exercise reasonable diligence and skill (W. &c. Co. *v.* Hobson, 15 Gratt. 122; S. C., All. T. C. 120; Birney *v.* New York &c. Co., 18 Md. 341; Breese *v.* U. S. T. Co., 45 Barb. 274, reported in 8 Am. Rep. 526 and note; Ellis *v.* American &c. Co., 13 Allen, 226; W. U. T. Co. *v.* Carew, 15 Mich. 525; Smithson *v.* U. S. T. Co., 29 Md. 162; S. C., All. T. C. 385; W. U. T. Co. *v.* Fontaine, 58 Ga. 433, per Warner, C. J). As, in any view of the *status* of a telegraph company, the decisions in these cases would have been the same, the opinions that a telegraph company is an ordinary bailee for hire were uncalled for. In Pinckney *v.* W. U. T. Co., 19 S. C. 71, the court held that a telegraph company is an ordinary bailee for hire of the *locatio operis faciendi* class, and is liable as such; but also that it is in the exercise of an occupation of a public nature.

That telegraph companies may make reasonable regulations in restriction of their liability, and may incorporate the same in their contracts with the public, is well settled (article 15, C. L. J. 182; 2 Thomp. Neg. 839, § 4, 841, §§ 5, 6).

When this is the case, and the contention is that the company has failed to fulfil its contract, and it is apparent therefrom that some duty or act was to be performed by the plaintiff to entitle him to sue, he must of course show compliance therewith, *ex. gr.*, such as repeating a cipher message. These remarks are made with reference to actions where something more than nominal damages are sought (article in 14 C. L. J.

386; 23 Am. L. Reg. (N. S.) 291, § 10; W. U. T. Co. *v.* McKinney, reported in 19 Rep. 574). The burden of proof is thus expressed by an able writer in the Law Register: "In the absence of any valid limitation of liability for negligence, the plaintiff in an action against a telegraph company makes out a *prima facie* case by proving: —

"1. The undertaking to transmit and deliver.

"2. Unreasonable delay (W. U. T. Co. *v.* Gougar *et al.*, 84 Ind. 176; Same *v.* Bertram, 1 Tex. App. (Civ. Cas.) sec. 1152; S. C., 17 Fed. Rep. 825; Same *v.* Weiting, *ib.* sec. 801; Behm *v.* W. U. T. Co., 8 Biss. (Cir. Ct.) 131).

"3. Failure to deliver (W. U. T. Co. *v.* Fontaine, 58 Ga. 433; Same *v.* Wenger, 55 Pa. 262; Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744, reported in 6 Am. Rep. 165; W. U. T. Co. *v.* Graham, 1 Col. 230; Same *v.* Fenton, 52 Ind. 1; Pope *v.* W. U. T. Co., 9 Brad. (Ill.) 283).

"4. That the dispatch delivered differs materially from the one sent (W. U. T. Co. *v.* Carew, 15 Mich. 525; Same *v.* Meek, 49 Ind. 53; Tel. Co. *v.* Griswold, 37 Ohio, 301, reported in 41 Am. Rep. 500; Baldwin *v.* U. S. T. Co., 45 N. Y. 744, reported in 6 Am. Rep. 165; Rittenhouse *v.* Ind. Line of Tel., 44 N. Y. 263; Turner *v.* Hawkeye Tel. Co., 41 Iowa, 458, reported in 20 Am. Rep. 605; Bartlett *v.* W. U. T. Co., 62 Me. 209).

"5. Damages.

"The sufficiency of evidence of error to prove negligence is not entirely settled, however.

"Some authorities hold that it is necessary to prove that the error occurred through negligence, where the company is exempted by its regulations from liability for errors occurring without negligence (Sweatland *v.* Ill. & Miss. Tel. Co., 27 Iowa, 433, reported in 1 Am. Rep. 285; Aiken *v.* Tel. Co., 5 S. C. 358; Womack *v.* W. U. T. Co., 58 Tex. 176)."

See the subject discussed in notes, 15 W. J. 124; 17 W. J. 105; 23 Am. L. Reg. (N. S.) 281, 353; 6 South. L. Rev. 321; 5 Am. L. Rev. 504; 6 *ib.* 517; 8 Am. L. Rev. 457; 2 Cent. L. J. 198, 616, 631, 731, 747; 3 *ib.* 31; 14 C. J. L. 386; 15

C. J. L. 182; and particularly on the question of the measure of damages: Hadley *v.* Baxendale, 9 Ex. 341, reported in Law. L. C. 125; Shirl. L. C. 226; Sedg. L. C. on Damages, 126, 809; Leonard *v.* Tel. Co., 41 N. Y. 544, reported in 1 Am. Rep. 446; Bingham *v.* Tel. Co., 18 Up. C. (Q. B.) 60; Stevenson *v.* Tel. Co., 16 Up. C. (Q. B.) 530; Squire *v.* Tel. Co., 98 Mass. 232; Bank *v.* Tel. Co., 30 Ohio, 555, reported in 5 Rep. 660; Logan *v.* Tel. Co., 84 Ill. 468.

Electrical Derangement. — The defendant, the telegrapher, may, taking the burden, show that the message was delayed or inaccurately transmitted, owing to electrical derangement occurring subsequent to the receipt of the message or at the time — unquestionably, if the sender was warned (Gray, Com. by Tel. secs. 8, 18, 54; Hart *v.* Tel. Co. (Col.), reported in 18 Rep. 676; 4 Pac. R. 685). But whether the telegrapher is under a duty, if, after the receipt of the message, electrical disturbances hindering accurate transmission occur, to notify the sender or employ other means, is a question not yet solved (Gray, Com. by Tel. sec. 22).[1]

Illegal or Immoral Message. — Or, that the message proposed to be sent is immoral or illegal upon its face (Gray, Com. by Tel. sec. 15; W. U. T. Co. *v.* Ferguson, 57 Ind. 495; Pugh *v.* Telephone Co. (Ohio), 27 Alb. L. J. 163. Cf. Bryant *v.* W. U. Tel. Co., Cir. Ct. Ky. reported in 17 Fed. Rep. 825; Cent. &c. P. R. R. *v.* W. U. Tel. Co., 24 Kan., reported in 10 Rep. 417).[2]

Sunday. — Or, that the message (not being a work of necessity or charity) was required to be sent on Sunday (Gray, Com. by Tel. sec. 15, note 1; Rogers *v.* W. U. Tel. Co., 78 Ind. 169; G. C. & S. F. R. Co. *v.* Levy, 59 Tex. 542).

[1] It seems to the author that, as a question of common sense, no such obligation rests upon the telegrapher. Both parties contract, knowing that these disturbances may occur at any moment, and if the sender desires notice of such derangement, he ought to stipulate for it.

[2] But the telegrapher cannot refuse to communicate a message apparently proper because it is immoral in its purposes (Gray, Com. by Tel. sec. 15).

Statutes have been passed in several of the States permitting the refusal on this ground (R. S. La. § 3761; Code and Statutes of Cal. §§ 13, 638).

For a discussion of contracts by telegram, see title PAROL CONTRACTS, *ante*.

TRADE MARKS.

See subject as to the onus discussed under the title DECEIT.

Congress attempted to legislate on the subject, but the Supreme Court of the United States held the act to be unconstitutional (U. S. *v.* Steffens; U. S. *v.* Wittemann; U. S. *v.* Johnson, 100 U. S. 82).

The industrious lawyer will find the subject discussed, besides the treatises on the very title, in the following authorities: Abb. Tr. Ev. 751; Underhill (Moak), Torts, 612 *et seq.*; 1 Add. Torts, sec. 17; 2 *ib.* sec. 1232; High. Inj. sec. 672 *et seq.*; Cool. Torts, 359 *et seq.*; Big. L. C. Torts, 69, note.

The plaintiff must prove: —

Title. — (*ib.*)

Resemblance. — (*ib.*)

Intent. — (*ib.*)

Damages. — (*ib.*)

As to Defences. — (*ib.*)

TRESPASSES ON PROPERTY.

I. As to realty.
II. As to personalty.

I. AS TO REALTY.

General Burden. — The plaintiff under the general issue satisfies the onus by proving his possession, and at common law, an entry by defendant; that the property injured is the subject of trespass, and its situation as described[1] (2

[1] This, it would seem, is not necessary under the codes of remedial justice, as it is generally provided in them that, if the action be brought to a wrong locality, it may yet be there tried unless removed, etc.

Saund. Pl. & Ev. 861; 2 Leigh, N. P. 1441; Underhill (Moak), Torts, 368, 370, Rule 40, sub-rule 1; Cutts *v.* Spring, 15 Mass. 135, reported in Big. L. C. Torts, 341, and notes, p. 352 *et seq.*; Cool. Torts, 322; Abb. Tr. Ev. 634; 3 Black. Com. (Chitty) 210, and note 6; Bull. N. P. 84; 1 Arch. N. P. 314; 1 Add. Torts, sec. 441; 2 Sel. N. P. 481 *et seq.*).

As to whether constructive possession is sufficient to maintain this action the authorities are conflicting. Notwithstanding some loose expressions to be found in the books favoring the idea that constructive possession is sufficient (note 6 to 3 Black. Com. (Chitty) 210; 2 Leigh, N. P. 1438), it is the settled law of England that constructive possession alone will not support the action. Addison states the contrary, but the cases he cites do not support his text; the one involved a question of easement, the other being totally irrelevant (1 Add. Torts, sec. 442; 2 Saund. Pl. & Ev. 867, 868; Underhill (Moak), Torts, 370, note to Rule 40; Bac. Abr. Trespass, c. 3; 1 Arch. N. P. 300, 301; 1 Chitty, Pl. 176, 177; 3 Steph. Com. 496). In America, however, the authorities are at variance (1 Chitty, Pl. 176, note 4; 2 Greenl. Ev. sec. 614; Haythorn *v.* Rushforth, 4 Harr. 160, reported in 38 Am. Dec. 540 and note; Cool. Torts, 322).

Property, Subject of Action. — As to what property is the subject of an action of trespass, the reader is referred to the text-books (2 Saund. Pl. & Ev. 854; 2 Leigh, N. P. 1439, 1440; 1 Arch. N. P. 297, 298; 1 Add. Torts, sec. 441; 2 Sel. N. P. 481 *et seq.*).

Situation. — It must appear that the property is situate in the locality where the action is brought (1 Arch. N. P. 299, 300; 2 Saund. Pl. & Ev. 855; 2 Sel. N. P. 490).

Defendant committed it. — It must be shown, of course, that the defendant, either by himself, or by others instigated by him, committed the trespass (2 Saund. Pl. & Ev. 868; 2 Leigh, N. P. 1447; 1 Add. Torts, sec. 441).

Damages. — These must be proved as alleged (2 Saund. Pl. & Ev. 868; 2 Greenl. Ev. sec. 635 *a*; 1 Add. Torts, sec. 454).

Defence. — The burden, when the defence is in confession and avoidance, is shifted, as in other actions, to the defendants to maintain such defence (2 Sel. N. P. 495 *et seq.*; 2 Leigh, N. P. 1447 *et seq.*; 2 Saund. Pl. & Ev. 865; 1 Add. Torts, secs. 446, 447, 448, 449 *et seq.*; 1 Arch. N. P. 327, 331, 339, 348, 350, 354, 358), save the statute of limitations, which forms an exception to the general rule of common-law pleading, that the party adding the *similiter*, must prove the issue (1 Arch. N. P. 132, 133, 359; 2 Greenl. Ev. sec. 431; Wilby *v.* Henman, 2 Cr. & Mees. 658).

II. As to Personalty.

General Burden. — The plaintiff under the general issue must prove: first, that the thing injured is the subject of trespass; second, the plaintiff's right thereto; third, that the defendant committed the injury, and lastly, the damages (2 Saund. Pl. & Ev. 861; 1 Arch. N. P. 363, 365).

Thing Subject of Trespass. — He must show that the *res* is the subject of trespass (2 Saund. Pl. & Ev. 854, 861; 2 Leigh, N. P. 1405). As to what kind of personal property is the subject of the action, the reader is referred to the text-books.

Plaintiff's Right. — Assuming, however, that such proof shall be made, it is then incumbent on him to prove his right to such property at the time of the alleged trespass (2 Saund. Pl. & Ev. 861; 1 Arch. N. P. 366, 367; 2 Leigh, N. P. 1405; Abb. Tr. Ev. 629). In this action constructive possession is sufficient to maintain the action (Underhill (Moak), Torts, 588, Rule 64; 589, sub-rule 1; 590, sub-rule 2; Abb. Tr. Ev. 629; Cool. Torts, 437; 2 Leigh, N. P. 1405; 2 Saund. Pl. & Ev. 861; 1 Arch. N. P. 366, 367; Big. L. C. Torts, 370; 2 Greenl. Ev. sec. 614; Big. Torts, 163, 164).

Defendant committed the Injury. — It will be sufficient to prove that the trespass was committed by the defendant or his servant or by his command (2 Saund. Pl. & Ev. 863; 1 Arch. N. P. 365; Abb. Tr. Ev. 629; Underhill (Moak), Torts, 564, Rule 63).

The Damages. — The plaintiff must offer evidence in sup-

port of the damages stated in the declaration. Under the usual averment of damages, *alia enormia*, matters naturally arising out of the act complained of may be given in evidence in aggravation, though not especially stated (Bull. N. P. 89; 2 Saund. Pl. & Ev. 865; Abb. Tr. Ev. 629; 1 Add. Torts, sec. 539). The foregoing observations are predicated upon the supposition that the general issue, as at common law, was pleaded.

TROVER.

General Burden. — The plaintiff must prove in an action predicated upon the conversion of property: —

1. His property in the chattels at the time of the conversion.
2. His right to possession of them at that time.
3. The nature of such chattels, and that they are the subject of this form of action.
4. The value of the chattels.
5. The conversion by the defendant.
6. The damages (2 Saund. Pl. & Ev. 873; 2 Sel. N. P. 542).

Property in the Chattels. — The burden under this head is sufficiently discharged by proving an absolute or general property, and the title drawing to it the possession (2 Saund. Pl. & Ev. 873; Big. Torts, 185, sec. 2; 1 Arch. N. P. 451; Underhill (Moak), Torts, 588, Rule 64; 589, sub-rule 1; 590, sub-rule 2; Big. L. C. Torts, 424; Cool. Torts, 442, 443; 2 Sel. N. P. 516, 542; 1 Add. Torts, sec. 532 *et seq.*; Abb. Tr. Ev. 623; 2 Leigh, N. P. 1467; 2 Greenl. Ev. sec. 636; Bull. N. P. 33, 34, 36).

Possession. — Possession is presumptively sufficient evidence of title (Abb. Tr. Ev. 623; 2 Leigh, N. P. 1476; 2 Sel. N. P. 523; 2 Saund. Pl. & Ev. 878; Underhill (Moak), Torts, 588, Rule 64; Big. L. C. Torts, 424; Cool. Torts, 444; 1 Add. Torts, sec. 532; 1 Arch. N. P. 451; 2 Greenl. Ev. secs. 637, 640; Bull. N. P. 33, 47).

Nature of Property. — The plaintiff must show that the article converted was a personal chattel. As to what kind of property may be the subject of conversion, see 1 Arch. N. P. 456; 2 Saund. Pl. & Ev. 880; Cool. Torts, 447; 2 Sel. N. P. 524 *et seq.*; 1 Add. Torts, chap. VII.; 2 Leigh, N. P. 1465, 1466; Abb. Tr. Ev. 622; Bull. N. P. 33, 37.

Value. — This must be shown (2 Saund. Pl. & Ev. 880; 2 Sel. N. P. 542; Abb. Tr. Ev. 629).

The Conversion. — Also a conversion (2 Greenl. Ev. sec. 636; 2 Saund. Pl. & Ev. 880 *et seq.*; 2 Sel. N. P. 542 *et seq.*; 1 Add. Torts, secs. 532, 533, 535; Cool. Torts, 448 *et seq.*; Big. Torts, 189, § 3; Abb. Tr. Ev. 626; 2 Leigh, N. P. 1477, sec. V.; 1 Arch. N. P. 460). As to what constitutes a conversion, see the authorities last cited and Big. L. C. Torts, 428–453; 2 Greenl. Ev. sec. 642.

The Damages. — This is also a matter of proof incumbent on plaintiff if he asks for more than nominal damages (2 Leigh, N. P. 1500 *et seq.*; Abb. Tr. Ev. 627; 1 Arch. N. P. 465; 2 Saund. Pl. & Ev. 887; Underhill (Moak), Torts, 75, Rule 21, p. 78, Rule 22, p. 85, Rule 23, p. 98, Rule 24, p. 99, Rule 25; 2 Greenl. Ev. secs. 276, 649).

The foregoing observations are predicated upon a trial at common law under the plea of not guilty.

Defence; General Burden. — The defendant, at common law under the general issue, could controvert the plaintiff's title as well as the conversion (2 Saund. Pl. & Ev. 887; Bull. N. P. 47, 48; 2 Sel. N. P. 536; 2 Greenl. Ev. sec. 648). The effect of the general issue in England is narrowed by the New Rules to a denial of the conversion only (2 Leigh, N. P. 1492, 1493; 1 Arch. N. P. 460; 1 Add. Torts, sec. 529).

Lien. — The defendant either under the general issue or a special plea, may show that he had a lien upon the property when the action was brought (1 Arch. N. P. 461; Abb. Tr. Ev. 627; 2 Sel. N. P. 537; 2 Saund. Pl. & Ev. 887; 1 Add. Torts, sec. 530; 2 Greenl. Ev. 648; 2 Leigh, N. P. 1495 *et seq.*).

The onus is upon him to establish this defence, even when allowable under the general issue.

The form of the special plea is that the plaintiff was not possessed, etc. (1 Arch. N. P. 461), and, as before stated, under the general issue at common law, the defendant could give evidence tending to impeach the plaintiff's title to sue.

Only the pleas of the statute of limitations and release (1 Arch. N. P. 462; 2 Greenl. Ev. sec. 648) were allowable before the new rules, but whenever the plea is in substance in confession and avoidance, the defendant, as we have seen, has the onus (Abb. Tr. Ev. 627). Thus where a title is claimed through a wrong-doer, such defence devolves the burden of proof on the defendant to show that he is free from fault and came into the possession in good faith (Abb. Tr. Ev. 628).

USAGE OR CUSTOM.

Whenever evidence of a custom or usage becomes permissible, the burden of proof to establish the same is upon him who asserts it (Law. Usages, 97, § 52).

As to when, and under what circumstances such evidence is admissible, the reader is referred to the capital treatise on the subject by Judge Lawson, it being without the scope of this work to enter into a full discussion of a minor title.

VIS MAJOR.

Common carriers of goods and innkeepers are, in general, insurers, except as to those casualties which are attributable to the act of God or the public enemy (Red. Car. secs. 24, 596; Chitty, Car. 36).

Presumptively they are insurers, and the burden is upon them to show that the goods were lost or injured from either of the two causes above mentioned (Red. Car. sec. 38, note 11; Chitty, Car. 36, 140, note 2).

If the carrier gives evidence tending to show that the injury or loss was occasioned by the act of God, he *prima facie* discharges himself, and shifts the burden of proof (Chitty, Car. 140, note 2; notes to Coggs *v.* Bernard, 1 Smith, L. C. 82) to

the plaintiff. It may be stated generally, that whoever would excuse himself from the performance of a condition or contract, or the doing or failing to do any act by reason that he was prevented by the act of God, where such defence is permissible, has the onus of proof. And with regard to carriers of passengers, where the plaintiff has shown an injury by collision, breaking of vehicle, defective roadway or other appliances, he has made out a *prima facie* case for damages by showing the contract of carriage, that the accident happened in consequence of such collision, etc., and that by reason of the accident he sustained damages; thus devolving the burden of proof on the carrier to show legal excuse; as, for example, that the train was overturned in consequence of a break in the roadbed caused by a storm of unprecedented violence (Thomp. Car. Pass. 209, 210, 219).

Act of God. — This burden is held by the lessee, when there is a covenant of exception in case of destruction of the premises by the elements, to show that the injury was caused by the forces of nature as directly applied, *ex. gr.*, a cyclone, lightning, or extraordinary flood. So, on the other hand, if part of land demised to a tenant be lost to him by any[1] casualty, as the overflowing of the sea, this is a case of eviction entitling the tenant to an apportionment of the rent; the onus being with the tenant. There are many other instances which can be seen by reference to Broom's L. M. 229 *et seq.*

WAGERING CONTRACTS.[2]

This is the designation by which certain contracts are known, which, though contracts for sale and future delivery in form, are really, in substance, wagers. Thus, a contract in form to deliver one thousand bales of cotton is upon its face innocuous; but the courts hold that if it was made upon an under-

[1] In Hyde County, North Carolina, the land is a resinous formation, and sometimes whole plantations are *burned up* by a spark of fire. This would seem to form an exception to the principle stated by Mr. Broom.

[2] The term "Option Contracts" is frequently, though, as the author con-

standing between the parties that no delivery was to be made, but that when the article was to be delivered, one would pay and the other receive the difference between the contract price and the market price, it is void (Chitty, Cont. (10 Am. ed.) 780; note *f*, Poll. Prin. Cont. 277; Grizzewood *v.* Blane, 11 C. B. 526 (73 E. C. L. R.); Shirl. L. C. 139, note; Barry *v.* Croskey, 2 Johns. & H. 1, 122; Thacker *v.* Hardy, 4 L. R. (Q. B. Div.) 685; S. C., L. J. (Q. B. Div.) 289; 39 L. T. (N. S.) 595; 27 W. R. 158; 1 Add. Cont. 276; Rourke *v.* Short, 5 El. & Bl. (85 E. C. L. R.) 904, reported in 34 E. L. & Eq. 219; *Ex parte* Marnham, 2 De Gex, F. & J. 634).

The principal American authorities are: Bid. Stock. 33; Dos P. Stock. 477, 478; Cole. Coll. Sec. chap. 35; article in 10 C. L. J. 221; 16 *ib.* 225; article in 17 Fed. Rep. 831, notes *et seq.;* Rumsey *v.* Berry, 65 Me. 570, reported in 4 Am. L. T. Rep. (N. S.) 64; Noyes *v.* Spaulding, 27 Vt. 420; Samson *v.* Shaw, 101 Mass. 145, reported in 3 Am. Rep. 327; Yerkes *v.* Solomon, 18 N. Y. 473; Bigelow *v.* Benedict, 70 N. Y. 202, reported in 26 Am. Rep. 573; Story *v.* Soloman, 71 N. Y. 420; Harris *v.* Tunbridge, 83 N. Y. 92; Brua's Appeal, 55 Pa. 294; Smith *v.* Bouvier, 70 Pa. 325; Kirkpatrick *v.* Bonsall, 72 Pa. 155; Maxton *v.* Gheen, 75 Pa. 166; Fareira *v.* Gabell, 89 Pa. 89, reported in 7 Rep. 634, and 20 Alb. L. J. 48; North *v.* Phillips, 89 Pa. 250, reported in 9 C. L. J. 75; Gheen *v.* Johnson, 90 Pa. 38; Ruchizky *v.* De Haven, 97 Pa. 202, reported in 11 Rep. 543; Dickson *v.* Thomas, 97 Pa. 278; May *v.* Hoagland, 9 Bush. 172; Sawyer *v.* Taggart, 14 Bush. 727, reported in 7 Rep. 430; Williams *v.* Tiedmann, 6 Mo. App. 269; Waterman *v.* Buckland, 1 Mo. App. 45, reported in 3 C. L. J. 135; Gregory *v.* Wendell, 39 Mich. 337, reported in 8 C. L. J. 115; 9 *ib.* 76; 33 Am. Rep. 390; Pickering *v.* Cease, 79 Ill. 328; Lyon *v.* Culbertson, 83 Ill. 33, reported in 5 C. L. J. 401, and 25 Am. Rep. 349;

ceives, inaccurately, used as a synonym of this title. Option Contracts is the generic term, and embraces legal as well as illegal contracts giving an option.

It is deemed that a separate treatment will tend to less confusion, and therefore the two titles are distinctly discussed. See Options.

Tenney *v.* Foote, 95 Ill. 109; S. C., 4 Bradw. 594; Calderwood *v.* McCrea, 11 Bradw. 543; Beveridge *v.* Hewitt, 8 Brad. 467; Barnard *v.* Backhaus, 52 Wis. 593, reported in 3 Wis. L. N. 338, 11 C. L. J. 56, and 9 N. W. Rep. 596; Cunningham *v.* Bank, 17 C. L. J. 470; First Nat. Bank &c. *v.* Oskaloosa &c. (Iowa), reported in 17 C. L. N. 321; Everingham *v.* Meighan, 55 Wis. 354, reported in 15 C. L. J. 255, and 5 Wis. L. N. 25; Murray *v.* Ochiltree, 59 Iowa, 435, reported in 15 C. L. J. 434; Rudolph *v.* Vinters, 7 Neb. 125, reported in 5 Rep. 531; *Ex parte* Young, 6 Biss. 53; *In re* Chandler, 9 Nat. Bank Reg. 514, reported in 13 Am. L. Reg. 310; 6 C. L. N. 229, and briefly in 1 C. L. J. 200; Porter *v.* Viets, 1 Biss. 177; *In re* Green, 7 Biss. 338, reported in 15 N. B. Reg. 198; Clark *v.* Foss, 7 Biss. 540, reported in 10 C. L. N. 211; Melchert *v.* Am. &c. Tel. Co. (C. C. D. Iowa), 11 Fed. Rep. 193; Bartlett *v.* Smith, 13 *ib.* 263; Union &c. Bank *v.* Carr (C. C. D. Iowa), 15 *ib.* 438, and 29 Int. Rev. Rec. 118; Cobb *v.* Prell (C. C. Kansas), *ib.* 774, and 16 C. L. J. 453; Hawley *v.* Bibb, 69 Ala. 52; Thompson *v.* Cummings, 68 Ga. 124.

Both parties must concur in the illegal intent (Dos P. Stock. 477, 478; Union &c. Bank *v.* Carr, Sawyer *v.* Taggert, Clark *v.* Foss, Gregory *v.* Wendell, *supra;* Pixley *v.* Boynton, 79 Ill. 351; Marx *v.* Ellsworth (Court App. Tex.), 22 Alb. L. J. 19; Lehman *v.* Strasberger, 2 Woods, 559, reported in 3 C. L. J. 134 and note thereto).

Broker.—The plaintiff, replying to evidence tending to show the illegality, may prove that he was a broker, and merely negotiated the transaction for his principal, the defendant, in good faith (Dos P. Stock. 477, 478; Wharton's note to Melchert *v.* Am. T. Co., 11 Fed. Rep. 201; Rosewarner *v.* Billings, 15 C. B. (N. S.) 316 (109 E. C. L. R.); Pidgeon *v.* Burslem, 3 Ex. (W. H. & G.) 465; Olds *v.* Harris, 10 Ex. (H. & N.) 572; Jessopp *v.* Lutwyche, 10 Ex. (H. & G.) 614; Thacker *v.* Hardy, *supra;* Knight *v.* Cambers, 15 C. B. 563 (80 E. C. L. R.); Clark *v.* Foss, *supra;* Warren *v.* Hewitt, 45 Ga. 501; Lehman *v.* Strasberger, 2 Woods, 554; Tinsley's Case, quoted in Third Nat. Bank *v.* Harrison (C. C. E. D. Mo.),

10 Fed. Rep. 243, 249; Williams *v.* Carr, 80 N. C. 294; Rountree *v.* Smith, 108 U. S. 269; Gilbert *v.* Guager, 8 Biss. 570; Jackson *v.* Foote, 12 Fed. Rep. 37; 13 Rep. 707). To deprive himself of his right of action for advances, he must have joined in the illegal purpose (Cole. Coll. Sec. sec. 351). The case of Thacker *v.* Hardy, *supra*, seems to go beyond this.

Executed. — So he may successfully reply, and show that the note sued on was given for advances and commissions, although on a wagering contract (Cole. Coll. Sec. sec. 358; Lehman *v.* Strasberger, Third Nat. Bank *v.* Harrison, Jackson *v.* Foote, *supra*).

The industrious attorney, who desires to pursue the investigation of this subject further, will find all the learning and all the "cant" in Colebrooke on Collateral Securities, chapters 35 and 36.

Before Maturity. — Or, if the illegality is predicated of a contract to pay a certain sum of money in the shape of negotiable paper, and purchased before maturity and *bona fide*, the defence is not available (Jackson *v.* Foote, 12 Fed. Rep. 37).[1]

[1] At common law, wagers were, in general, valid and actionable. This principle is supported by an unbroken series of adjudications in England and America, save only the Supreme Court of Vermont.

Then what is the true *rationale*, which guides the courts in holding the kind of contracts we have been considering as illegal? One criterion of an illegal wager at common law is that it contravenes public policy. Who is to declare the public policy? The courts? Is not it a legislative function when not declared by the common law? The courts of Pennsylvania and Kentucky put their decisions upon the broad ground that such contracts contravene public policy, whilst others base their decisions upon the ground that such contracts are in violation of statutes prohibiting wagering.

This is the basis of the English law, as will be seen by reference to the leading case of Grizzewood *v.* Blane, cited in the text. This ground is intelligible. What policy of the common law do such contracts contravene? Admit that engrossing was an indictable offence at common law, and that therefore contracts having a tendency to enhance the price of "victuals" (4 Black. Com. 158, 159) are void. Suppose the opposite effect is the natural effect.

But it does not seem to the author that such contracts tend to produce engrossing according to Blackstone's definition.

Making a "corner," according to the nomenclature of speculators, renders a contract void. But the corner is the remote possible effect of such contracts, and wholly collateral; it is not the necessary or even the usual consequence, but is wholly exceptional; the *casus* or causal connection is lacking.

EQUITY DIVISION.

ACCOUNTING.

In an action to recover an open, or signed, or liquidated account, or demand based upon a parol contract, the onus is with the plaintiff to prove it as charged, including the consideration. The measure of proof varying according to the nature of the demand.

In the instance of a signed account, proof of the signature devolves the onus of showing any defence upon the defendant.

In actions based upon book accounts, the onus lies with plaintiff to prove his book, and in some instances delivery, and thereupon the burden of proof to impeach the book, is cast upon the defendant.

It would swell this volume unnecessarily to discuss the statutes of the different States on this branch of the subject, especially, as in almost all the States parties are rendered competent to testify, and the learning is rapidly becoming obsolete.

In *indebitatus assumpsit* upon an account stated, it is not necessary to prove the items, but the onus is only to prove that an account was stated (Bartlett *v.* Emory, 1 T. R. 42, note). When the contention is to open an account settled by note, the burden of proof is on the party objecting to the settlement (Mills *v.* Johnston, 23 Tex. 308).

In an action to recover a balance on an accounting, where it appeared that an accounting was had embracing all of the items of a certain transaction, and the indebtedness of one to

the other settled, and the debtor refused to pay unless the creditor would execute a release embracing other disputed matters, it was held, that the accounting was so far conclusive as to cast upon the debtor, the onus of showing error in the account as settled (White *v.* Whiting, 8 Daly (N. Y.), 23).

And when the account is admitted to be correct, but is alleged to have been paid, the burden of proof is upon the defendant to prove payment (Magenaw *v.* Bell (Neb.), reported in 14 N. W. Rep. 664).

Surcharge and Falsify. — In such actions the onus is clearly with the plaintiff (Smith, Man. Eq. 262).

ADEMPTION.

See title MERITORIOUS OR IMPERFECT CONSIDERATION, *infra*.

AWARDS.

To obtain relief against awards, the complaining party must show, either: —

1. Fraud or misconduct in the arbitrators.
2. That they have not declared their decision with certainty.
3. That the award is not final.
4. That it exceeds the authority given.
5. That the arbitrators have acted on a mistake of the law, when the law itself was not referred, but the reference was to decide on facts according to law. Or
6. That the arbitrators have acted on a mistake as to a material fact, admitted by themselves to have been made and to have influenced their judgment[1] (Adams, Eq. 192; Kerr, F. & M. 43, 44, 288, 291, 446–448; Rob. Prin. Eq. 44;

[1] The equity jurisdiction in England was greatly curtailed by Stat. 9 and 10 Wm. 3, ch. 15; and it is apprehended that this statute has been generally re-enacted in the United States. The code of remedial justice only affects the mode of asserting the equity.

2 Pom. Eq. Jur. secs. 871, 919; 3 *ib.* sec. 1377; 2 Story, Eq. Jur. secs. 1450–1458).

If the objections appear on the face of the award, or if there be actual fraud, the point may be also taken at law, but mere miscarriage, not apparent, can only be avoided in equity, and the like rule is applicable where the submission is by parol, and not made a rule of court (Adams, Eq. 193).

BILLS OF PEACE.

A bill of peace is filed for securing an established legal right against the vexatious recurrence of litigation, whether by a numerous class insisting on the same right, or by an individual reiterating an unsuccessful claim. The first class is not applicable to our country, and we will therefore forego its consideration. Bills of peace of the second class originate in the nature of the action of ejectment.[1]

[1] This action, it will be remembered, was brought in the name of a fictitious plaintiff, *ex. gr.*, John Doe. He alleged in his *narr* that the real plaintiff had made him a lease of the premises; that he entered by virtue thereof, and was subsequently ousted by Richard Roe. This individual, agreeing with Hudibras that "he who fights and runs away may live to fight another day," incontinently yields the contest when the declaration is served upon him, but leaves a memento thereof in the shape of a loving note, added at the foot, and which is served on the tenant in possession, in which he is kindly informed that Richard, unlike his kingly namesake, has fled the field, and that his "loving friend" must hold the bag. The tenant then appears, but is not allowed to defend unless he will agree to enter into a rule to confess the lease, entry, and ouster, and plead not guilty; and thereupon a new declaration is drawn, in which his name is inserted in lieu of his quandam friend Richard, and the cause proceeds to trial upon the title of John Doe's lessor. Now, if John failed in the suit, this same lessor might commence a fresh action in the name of John Den, and he failing, John Goodtitle, John Holdfast, and so on. Because judgment against John Doe could not affect and was no estoppel against John Den, nor that against Den, against Goodtitle, etc. In this way litigants were enabled to take "two or more bites at a cherry," and the process might be repeated *ad infinitum*, unless Chancery should interfere. The Does and the Roes of our admirable ancestors — objects of great veneration in a former age — have passed from the boards of the forensic theatre. *Requiescant in pace* (Haynes, Out. Eq. 184 *et seq.*). There have been statutes in

The complainant must show: —

That the subject-matter has been in litigation between himself and the defendant in the courts of law, and that the right has been repeatedly decided in his favor. Justice Story lays it down that the number of times is not material — whether two or more (2 Story, Eq. Jur. sec. 859; see acc. 1 Pom. Eq. Jur. sec. 248, note 1). Mr. Smith says "after two or more" (Smith, Man. Eq. 406; see acc. Dedman *v.* Chiles, 3 T. B. Mon. 426).

BONA FIDE PURCHASER.

This subject is sometimes put as purchaser for value and without notice.

The Purchase. — In order to bring a man within this category, it is generally necessary[1] to show, firstly: That he has acquired the legal title.

This is his *tabula in naufragio:* it is a shield, not a sword (2 Sug. on Ven. (8 Am. ed.) 791, sec. 15; Adams, Eq. 159, 160; Basset *v.* Nosworthy, 2 W. & T. L. C. 1 and notes; Abb. Tr. Ev. 715, 716; Baynard *v.* Norriss, 5 Gill. 468, reported in 46 Am. Dec. 647).

Value. — Secondly: The party relying on this defence must show that he gave a valuable consideration, though not necessarily an adequate one (notes to Basset *v.* Nosworthy).

Whether an assignee, under a deed in trust executed for the benefit of creditors, can claim to be a purchaser, within the meaning of the rule, is a debatable point (see authorities collected in the notes to Basset *v.* Nosworthy).

Actual payment before notice is, in general, required to be shown (*ib.*, and Bump. F. C. (2d ed.) 483; Wait, F. C. sec. 369; 2 Pom. Eq. Juris. sec. 750).

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some of the States providing that the action shall be brought in the name of the real party in interest. Under these statutes, as well as the codes of remedial justice, there is no place for this equity.

[1] See, however, notes to Basset *v.* Nosworthy.

The consideration must be such as would support a purchase under 27 Eliz. (Wade on Notice, secs. 23, 24; Bump. F. C. 481), or, as stated by Judge Abbott, such as is required in the case of negotiable paper (Abb. Tr. Ev. 716; Wait, F. C. sec. 370; Bump. F. C. (2d ed.) 483). Judge Pomeroy, in his incomparable treatise on equity jurisprudence (a library in itself), discusses the subject at large (Vol. II. sec. 746 *et seq.*). It is to be regretted that no criterion, even approximate, as to the quantum of value is to be found in the books. A capital one was laid down by the Supreme Court of North Carolina. "Certainly, we think, the court will not enter into the question of the inadequacy of consideration, as *per se* vitiating the sale, unless it be plain and great, or gross, as it is commonly called. We have seen that in Upton *v.* Bassett, Cro. Eliz. 445, a year's income was called a petty and inadequate consideration. In Doe *v.* Routledge, Cowp. 705, one-tenth part of the value would not sustain the conveyance. In Metcalfe *v.* Pulvertoft, 1 V. & B. 183, Lord Eldon thought one-third of the value too little; and so should we also think. Prices may range between the extremes of what close men would call a good bargain on one hand, and a bad or even a hard bargain on the other, and the law may not interfere. But when such a price is given, or pretended to be given, that everybody who knows the estate, will exclaim at once, 'Why, he has got the land for nothing,' the law would be false to itself if it did not say sternly and without qualification, to such a person, that he had not entitled himself to the grace and protection of the statute. It is obvious, that there is no morality to vindicate the attempt on the part of a donor to defeat his gift by a sale for even a full price" (Fullenwider *v.* Roberts, 4 Dev. & B. 278, 287).

Notice. — Thirdly: The purchaser must be free from notice up to and including the consummation of his purchase by delivery of his deed and full payment of the price (2 Pom. Eq. Juris. sec. 752 *et seq.*; Bump. F. C. 199 *et seq.*; Wait, F. C. 369 *et seq.*).

It is not deemed pertinent to enter into a discussion of

what constitutes notice; suffice it to say that a prior registered deed is constructive notice, and that it is a disputed point whether a purchaser taking a quit-claim deed is not *per se* affected with notice (Oliver *v.* Piatt, 3 How. 333, 410).

As to these, and the facts sufficient to put upon inquiry, see 2 Pom. Eq. Juris. secs. 753, 757, 758 *et seq.;* Wait, F. C. chap. 24; Bump. F. C. 199, 200, 201, 484; Wade on Notice, chap. 2; Baxter *v.* Sewell, 3 Md. 334.

Notice to the agent, it is familiar learning, is notice to the principal (Bump. F. C. 203, 485; Abb. Tr. Ev. 783 (42); Wade on Notice, sec. 672; 2 Pom. Eq. Juris. secs. 666–676).

Rationale. — The rationale of the doctrine discussed arises from purely technical distinctions between taking *in the per* and taking *in the post.*

Whoever takes *in the per*, takes subject to all equities; whereas if he takes in the *post*, *i.e.*, comes in *over* and not *under*, he holds discharged of the trust. Under the old doctrine of uses, in order to originate a use, there must have existed confidence in the person and privity of estate. If either were lacking, no use could be declared. The analogy, after the passage of the Stat. 27, Hen. 8, was applied, in a modified sense, to trusts, and hence it was held that all who come in with notice or without consideration, were subjectible to the trust; but, if without notice and upon consideration, *aliter* (1 Saund. U. & T. 56, 57, 267; Lewin on Trusts, 279).

CONTRIBUTION.

This equity arises where several persons are bound by a common charge, not arising *ex delicto*, and their order of liability has been accidentally deranged.

The party claiming it must show: —

1. That the charge is binding.
2. That it does not arise *ex delicto.*
3. That he was bound as surety, or is one of several under-

writers on the same risk, and as such has paid[1] more than his share of the entire liability (Adams, Eq. 267 *et seq.;* Rob. Prin. Eq. 179 *et seq.;* Smith, Man. Eq. 345 *et seq.;* 1 Story, Eq. Jur. secs. 492–505; 3 Pom. Eq. Jur. sec. 1418; Dering *v.* Earl of Winchelsea, 1 Cox, 318, reported in Law. L. C. (Eq.) 71, and 1 W. & T. L. C. 100, and notes).

CONVERSION.

The doctrine of equitable conversion is embodied in the maxim that "what ought to be done is considered in equity as done," and its meaning is, that whenever the holder of property is subject to an equity, in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character, which it would then have borne. The simplest operation of this maxim is found in the rule that trusts and equities of redemption are treated as estates; but its effect is most obvious in the constructive change of property from real to personal estate, and *vice versa*, so as to introduce new laws of devolution and transfer.

The subject may be conveniently treated under two heads:

1. As to trusts.
2. As to contracts.

Under the first branch. If a conversion is sought to be established, there is no burden as to the fact, it being a question of law after proof of the instrument creating the trust. But with regard to the defence, the party, on whom the duty was presumptively imposed, may show that by the exercise of a revoking power reserved to the donor,

Countermanded. — or by the act of those in whom the absolute dominion has vested, the conversion was countermanded (Adams, Eq. 136, 137; Rob. Prin. Eq. 95; 1 Story, Eq. Jur. sec. 793; 1 Pom. Eq. Jur. sec. 371; Smith, Man. Eq. 27, 227).

[1] The principle is extended by parity of reasoning to cases of general average (Smith, Man. Eq. 347). See also other illustrations in Adams, Eq. 270, 271.

Failure of Purpose. — Or, he may show that the conversion was directed for a particular purpose, and that such purpose fails to exhaust the entire interest, and to the extent of such failure the trustee will be exonerated[1] (Adams, Eq. 138; 3 Pom. Eq. Jur. secs. 1170–1174; Smith, Man. Eq. 164, 165).

2. As to Contracts.

Binding Contract. — The party, claiming a conversion under this branch, must show a binding contract for the sale of realty, enforceable in equity, and as a question of law or mixed law and fact, that the object of the conversion is within the scope of the contract (Adams, Eq. 140, 141; Smith, Man. Eq. 25, 226, 227; Fletcher *v.* Ashburner, 1 Bro. C. C. 497, reported in Law. L. C. (Eq.) 39 and notes, and in 1 W. & T. L. C. 826 and notes; Ackroyd *v.* Smithson, 1 Bro. C. C. 503, reported in Law. L. C. 41 and notes, and in 1 W. & T. L. C. 872 and notes).

Option. — The trustee may, in defence, show that the contract amounted to an option, and that the same was declared against the conversion (Adams, Eq. 141; 3 Pom. Eq. Jur. secs. 1161, 1163).

Analogous Conversion. — On an analogous principle to that of conversion, it is held that when property subject to a trust has been unduly changed, the substituted property is bound by the incidents of that which it represents.

This may occur in several ways, the statement whereof will be found in the text-books cited; it is sufficient for our purposes to show that the holder of the legal estate, or one who controlled the same, was either a trustee or *quasi* trustee, and that he converted the property in whole or part into some other species[2] (Adams, Eq. 142, 143).

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[1] As to the devolution of such unexhausted surplus, see Adams, 138 *et seq.*

[2] Of course the *cestui que trust* may elect to confirm such conversion.

Where the identity of the original property or fund is lost, and the *corpus* has been transmuted into other funds or estate, such ratification is termed, "following the fund" (Adams, Eq. 143; Rob. Prin. Eq. 95).

COPYRIGHT.

The same general principles, as to the burden of proof, apply to the actions for an infringement of copyright that apply to patents.

Title. — The burden is upon the plaintiff to show in support of his title, a copy of the record of the description certified by the librarian of Congress (Rev. Stat. U. S. sec. 4957; Abb. Tr. Ev. 766; Drone, Cop. 498; 2 Greenl. Ev. secs. 510, 511; 1 Abb. U. S. Prac. 400 *et seq.;* Jollie *v.* Jaques, 1 Blatch. 618, 627; Keene *v.* Wheatley, 9 Am. Law Reg. 33–46; 5 Pa. Law J. 501), and also that he has given notice thereof in the front of his book, as required by Rev. Stats. sec. 4962.

And if an assignee, he must show the assignment (1 Saund. Pl. & Ev. 384; 2 Greenl. Ev. sec. 513; 1 Abb. U. S. Prac. 399; Abb. Tr. Ev. 766).

Piracy. — He must, of course, show the infringement by defendant, commonly termed piracy (1 Saund. Pl. & Ev. 385; 2 Greenl. Ev. sec. 514; 1 Abb. U. S. Prac. 400 *et seq.;* Abb. Tr. Ev. 766).

As to what constitutes a piracy, see the authorities last cited, and Big. Torts, 213, § 3; 1 Add. Torts, sec. 60 *et seq.;* Underhill (Moak), Torts, 679, Rule 79 and notes.

Motive or intent is immaterial (Big. Torts, 214; Underhill (Moak), Torts, 681, sub-rule).

Damages. — The same general rule applies, as in other cases, with the addition, that, by statute, there is a forfeiture of the books, maps, etc., so piratically published (Rev. Stat. U. S. secs. 4964, 4965).

Defence; General Burden. — According to the principle stated elsewhere (see title ONUS AS AFFECTED BY THE PLEADINGS), any defence in confession and avoidance imposes the burden of proof on the defendant.

Pirating by Plaintiff. — Greenleaf lays it down that the defendant taking the burden, may show that the plaintiff pirated from some other work published in a foreign country

(2 Greenl. Ev. sec. 515, citing Boosey *v.* Davidson, 13 Jur. 678; S. C., 13 A. & E. (N. S.) 257 (66 E. C. L. R. 256)).

The author would suggest a doubt, at least as to this position being tenable in this country. The only case cited (above) is based upon Cocks *v.* Purdy, 5 C. B. 860, 5 M. Gr. & S. (57 E. C. L. R.), and that case recognizes the right of a foreign author to his work as a matter of comity, whereas his rights are in express terms denied by the act of Congress (Rev. Stats. secs. 4952, 4971), *in pari materia.* And the rights of native or naturalized authors in their intellectual productions are only protected by a compliance with the provisions of the statute (Rev. Stat. title LX. chap. III.). It is with great diffidence that the author suggests a doubt as to a dictum even, of so learned and thorough a writer, but, he cites no case bearing out his proposition directly, the case cited raising only a question of evidence (Wheaton *v.* Peters, 8 Pet. 591; Clayton *v.* Stone, 2 Paine, 392; Bourcicault *v.* Wood, 2 Biss. 34, reported in 7 Am. L. Reg. 539).

Immorality. — The defendant may show that the work is obscene, immoral, or libellous (2 Greenl. Ev. sec. 515; 1 Saund. Pl. & Ev. 385; Underhill (Moak), Torts, 677; 1 Add. Torts, sec. 60), or that it was in other respects of a nature to affect mischievously the public morals or interests (2 Greenl. Ev. sec. 515; Maugham, L. P. 88, 89).

Assignment and License. — The burden is on the defendant to show these defences (1 Saund. Pl. & Ev. 385, 2 Greenl. Ev. sec. 515).

Deception. — Or defendant may show that the work professes to be the work of another than the author (Wright *v.* Tallis, 1 C. B. 893, 1 M. Gr. & S. (50 E. C. L. R.)).

Delay and Acquiescence. — The burden under this defence, is upon the defendant to show not only delay in the assertion of rights, but plaintiff's knowledge of the piratical publication (Abb. Tr. Ev. 766).

Right lost by Publication. — Under this defence it must be proved that the publication was authorized (Abb. Tr. Ev.

766; Bourcicault *v.* Wood, 2 Biss. 34, reported in 7 Am. L. Reg. (N. S.) 539).

The reader is referred, for a general discussion of infringement, to an article in 3 Am. L. Rev. 453.

CORRECTION.

If, through mistake[1] or accident, an instrument *inter vivos* has been incorrectly framed, there exists a jurisdiction in equity to correct it. The proof required is the same as to the execution of the instrument, and this must be supplemented by evidence, that the parties thereto had agreed upon certain terms which were to have been incorporated therein, but, which, by some mistake or oversight, have either been omitted or so materially altered by qualifying terms, that the instrument as signed does not express the contract as agreed on, and that the mistake was on both sides, and, in general, as to a matter of fact (Kerr, F. & M. chap. II., *passim;* Adams, Eq. 169–171; Rob. Prin. Eq. 71–73; 1 Pom. Eq. Jur. sec. 119; 2 *ib.* sec. 839 *et seq.;* 1 Story, Eq. Jur. sec. 110 *et seq.;* Smith, Man. Eq. 45–47, 49; notes to Gordon *v.* Gordon, 2 Swanst. 400, reported in Law. L. C. (Eq.) 96; Brown *v.* Lamphear, 35 Vt. 252, reported in Law. L. C. (Eq.) 99, and notes; Hunt *v.* Rousmaniere, 8 Wheat. 174; S. C., 1 Pet. 1, reported in Law. L. C. (Eq.) 94, and 1 Am. L. C. (1st ed.) 404; Lansdowne *v.* Lansdowne, 2 Jac. & W. 205; S. C., Mos. 364, reported in Law. L. C. (Eq.) 95; Stapilton *v.* Stapilton, 1 Atk. 2, reported in Law. L. C. (Eq.) 96, and 2 W. & T. L. C. 836).

Voluntary Deed. — The defendant may show that the deed, etc., was made to a stranger. There must be something more than a mere agreement to call forth the extraordinary powers of equity. There must either be a valuable or a meritorious consideration (Smith, Man. Eq. 51); and it may be laid down, that a voluntary deed cannot be reformed

[1] The mistake, however, must be one of fact; as a very general rule, courts will not correct on account of a mistake of the law.

except with the consent of the donor (Smith, Man. Eq. 51, citing Phillipson *v.* Kerry, 32 Beav. 628, and Brown *v.* Kennedy, 33 Beav. 133, 147; Kerr, F. & M. 429; but see Thompson *v.* Whitmore, 1 Johns. & Hem. 268).

Bona Fide Purchaser. — The defendant may also show that he is a *bona fide* purchaser from one of the original contracting parties (Law. L. C. (Eq.) 101).

CY PRES.[1] CHARITABLE TRUSTS.

The English doctrine is, that where an apparent charitable intention, contained in the instrument, has failed, whether by an incomplete disposition at the outset, or by a subsequent inadequacy of the original object, effect will be given to it by a *cy pres*, or approximate application, notwithstanding that in ordinary cases the trust would be void for uncertainty, or would result to the donor or his representatives (Adams, Eq. 69). The first branch of this proposition must be resolved as a question of law. As to the second branch, the party claiming a *cy pres* application, admitting that the object specified is non-existent, must prove to the satisfaction of the chancellor's conscience, that the main intent of the owner was a gift to a public charity, and the particular object was a subordinate intent (Adams, Eq. 71; Smith, Man. Eq. 150 *et seq.;* 2 Story, Eq. Jur. sec. 1169; 2 Pom. Eq. Jur. secs. 1026, note (2); sec. 1027; Jackson *v.* Phillips, 14 Allen, 571, reported in Law. L. C. (Eq.) 20).

DEFECTIVE EXECUTION OF POWERS.

This equity rarely, if ever, embraces any controverted matter of fact, as the equity arises on a comparison of the

[1] There is the utmost variety of views held by the American courts, some following, some denying, and others accepting in a modified form this doctrine. They are classified with great industry by Prof. Pomeroy (2 Pom. Eq. Jur. sec. 1029, notes).

instrument creating the power, and that professing to execute it.

There is a burden as to the class of persons who are entitled to this relief. The plaintiff must show: either

1. That he is a purchaser, or
2. A creditor, or
3. A wife, or
4. A legitimate child, or
5. A charity, or
6. An intended husband.

(Tollet *v.* Tollet, 2 P. Wms. 489, reported in Law. L. C. (Eq.) 86, and 1 W. & T. L. C. (1st ed.) 155; Adams, Eq. 99; Rob. Prin. Eq. 69; 1 Story, Eq. Jur. secs. 112, 114, 169–179; 2 Pom. Eq. Jur. secs. 589, 590, 834, 871; Smith, Man. Eq. 42, 43; Kerr, F. & M. 438–444; Sug. Pow. 348 *et seq.*)

DISCHARGE BY MATTER, *IN PAIS*, OF SPECIALTIES.

Specialties were at common law governed by the maxim *Quodque dissolvitur eodem ligamine quo ligatur*. But, the courts of Chancery disregard such technicalities, and, acting upon the conscience, will, by injunction or otherwise, protect the obligor who has discharged the specialty by parol.[1] The burden in such cases is merely to show the payment (Adams, Eq. 106).

Guarantees. — The most ordinary application of this equity is in favor of sureties, where a guarantee under seal has been given, and the creditor without the surety's consent has discharged or modified the principal's liability. In such case the only proof required is: —

1. That the contract has been modified or changed.

[1] Most of the States had allowed this defence at law before the introduction of the code-system; under it, the doctrine becomes unimportant, as the defence could be set up as an equitable counter-claim.

2. Without the assent of the surety (Adams, Eq. 106; Sands' Suit in Eq. 372, note).

Giving Time. — The same effect is produced, if the creditor enters into a binding contract to give the defendant time for payment. The burden requires proof of a binding contract, *i.e.*, as would constitute a bar to an action on the instrument at the suit of the obligee.[1] A mere forbearance will not satisfy the burden, unless there be a stipulation in the guarantee, binding the party guaranteed, to use due diligence against the principal (Adams, Eq. 107; Brandt, S. & G. secs. 296–329; 1 Pom. Eq. Jur. sec. 383; Smith, Man. Eq. 84 (10); 1 Story, Eq. Jur. (11th ed.) sec. 326). As to whether the withdrawal of an execution levy will so operate, see American editor's notes to Rees *v.* Berrington, 2 W. & T. L. C. 1900–1903.

Reserving Rights. — In defence to this equity, the creditor, it seems, may show that in giving time, he reserved his rights as against the surety (1 Story, Eq. Jur. sec. 326; Adams, Eq. 107; notes to Rees *v.* Berrington, 2 W. & T. L. C. 1878; Brandt, S. & G. sec. 329; Sand's Suit in Eq. 372, in note; Rob. Prin. Eq. 54).[2]

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[1] The reason given for the doctrine, is singularly diverse. Adams puts it upon the ground of a breach of faith with principal — as the surety, by paying the debt, could immediately sue. Whereas Brandt and Story put it upon the ground that it is a breach of faith with the surety, by depriving him of the right to pay, and sue immediately. To this effect is the opinion of Lord Loughborough in Rees *v.* Berrington, 2 Ves. 540, reported in 2 W. & T. L. C. 974, and see acc. notes, 1876. It seems that the latter views are preferable. The surety, anciently at least, could only secure reimbursement from his principal, under the doctrine of subrogation, *i.e.*, of taking the legal position of the creditor, on payment, and consequently would be bound by the extension given (3 Pom. Eq. Jur. sec. 1417; Brandt, S. & G. sec. 260; 1 Story, Eq. Jur. sec. 327).

[2] So distinguished a writer as Mr. Smith says: "It has been repeatedly held (but contrary to principle, as the writer submits) that the giving of time does not discharge the surety, if it is agreed between the creditor and the principal debtor, when further time is given, that the surety shall not be thereby discharged" (Smith, Man. Eq. 85). *Cui bono*, if (as according to Adams) the creditor can immediately sue without such agreement? The whole idea of reserving rights as against the surety, seems to cast doubt on the reason as-

Covenant not to sue. — The Supreme Court of North Carolina hold, that the creditor may defend on the ground (if such is the form of the instrument), that it is a covenant not to sue and does not come within the reason of the general doctrine[1] (Russell *v.* Adderton, 64 N. C. 417; Harshaw *v.* Woodfin, *ib.* 568; Carrier *v.* Jones, 68 *ib.* 127); although the same court also hold, that when the debt is merged into a judgment (which by the law of that State constitutes a lien upon realty when docketed), an agreement not to enforce the same, releases the surety (Evans *v.* Raper, 74 *ib.* 639).

DONATIONES MORTIS CAUSA.

To maintain a gift of this kind, the donee must prove: —

1. A delivery of a personal chattel, by which is meant an actual tradition of the thing itself to the donee, or some one on his behalf, or of some other thing[2] controlling the subject-matter of the gift (Smith, Man. Eq. 117).

2. That it was made in expectation of rapidly approaching death.

3. That a condition was annexed, that it was only to be absolute in the event of the donor's death.

4. That the donor parted with all dominion over the subject-matter of the gift (Rob. Prin. Eq. 155, 156; Smith, Man. Eq. 117, 118; 3 Pom. Eq. Jur. secs. 1146–1151; 1 Story, Eq. Jur. secs. 606, 607 *d*; McNgtn. S. C., notes to Ashton *v.*

signed by Mr. Adams. It is with great reluctance that a doubt should be suggested as to the accuracy of such an author. Mr. Roberts adds a material qualification, which puts the doctrine stated in the text upon intelligible ground; namely, "and the position of the surety is not thereby materially changed" (Rob. Prin. Eq. 55).

[1] The author, after a diligent search, can find no corroboration of this doctrine in any of the treatises, nor is any authority therefor cited in the opinion. It is the opinion, however, of a very great judge, the late Chief Justice Pearson.

[2] *Ex. gr.*, key of a box to carry contents. Documentary evidence of *a chose in action.*

Dawson, 53; Ward *v.* Turner, 2 Ves. 431, reported in Law. L. C. (Eq.) 36 and notes, and 1 W. & T. L. C. 905 and notes).

ELECTION.

It is a general principle that the equity to enforce contracts made for value is extended, by a parity of reasoning, to cases where a benefit has been conferred as the consideration for an act, and knowingly accepted, although the party so accepting it may not be bound by an actual contract or by a condition of performance annexed to the gift.

The equity of election is analogous to this. It applies not to cases of contract or of conditional gifts, but to those bounties on which the donor of an interest, given by will, has tacitly annexed a disposition, which can only be effected by the donee's assent, *ex. gr.*, when a testator leaves a portion of his property to A, and by the same will professes to dispose of property belonging to A. This double disposition implies that he did not intend that A should have both the interests, and he must therefore elect between the two, and either relinquish his own property or compensate the disappointed donee out of the property bequeathed.

The burden is therefore upon the party asserting the obligation of election to show: —

1. That the testator gave property of his own.

2. That he professed to give also the property of the devisee or legatee (2 Story, Eq. Jur. secs. 1075–1099; Adams, Eq. 92, 93; Smith, Man. Eq. 370 *et seq.;* 1 Pom. Eq. Jur. sec. 462 *et seq.;* Wilbanks *v.* Wilbanks, 18 Ill. 17; Brodie *v.* Barry, 2 Ves. & B. 127; Cooper *v.* Cooper, L. R. 7 H. of L. C. 53, all reported in Law. L. C. (Eq.) 44, 45 and notes).

EXONERATION.

The right of exoneration arises between surety and principal, so soon as the surety has paid any part of the debt.

Upon payment, he may sue his principal at law; but equity goes a step further, and warrants him in filing a bill to compel payment by the principal, when he has been brought under liability by the debt falling due. He must show: —

1. That he was the surety of a principal debtor.

2. That the debt has fallen due (Adams, Eq. 270; Smith, Man. Eq. 356 *et seq.;* Bank *v.* Jenkins, 64 N. C. 719; 3 Pom. Eq. Jur. sec. 1417).

Upon payment of the debt, he may sue the creditor, in equity, for an assignment of any mortgage or collateral security for the debt. This is called substitution or subrogation. The only additional burden cast in this instance is to show: —

1. The payment of the debt.

2. The existence of the collateral. And

3. The refusal by the creditor to assign (Adams, Eq. 269; Smith, Man. Eq. 356 *et seq.;* 1 Story, Eq. Jur. secs. 730; 3 Pom. Eq. Jur. sec. 1417, note 2, and 1419 and note 1).

FIDUCIARIES.

Under this *nomen generalissimum* may be ranked: Trustees by express agreement, or by construction of law, Executors, Administrators, Guardians, Committees, Partners, Attorneys, Principal and Surety, Agents, and others (see Kerr, F. & M. 192, 193). When suit is brought (charging a breach of trust), the presumption in favor of good faith devolves the burden of proof, ordinarily, upon the plaintiff.

Thus, to charge an executor with a *devastavit*, the inventory must be produced, or some proof adduced, tending to fix him with assets.

Thereupon the burden is shifted, and it is with the executor to show that he has legally disbursed the assets which have come into his hands. This learning is too elementary to need citation of authority. So, too, if the gravamen of the action be to establish a parol trust, and fasten it upon the legal title, the onus is with the plaintiff to prove such trust.

But there is a class of cases, distinct from the above, in

which it is alleged that a party, standing in a confidential relation towards the party complaining, has taken advantage of the influence arising from such relation, to work a wrong upon the other.

In many of this class of cases, when the confidential relation is admitted, or has been established, the burden of proof is devolved upon the other party to prove a negative: namely, that the transaction was fair and honest and above all suspicion (Michael *v.* Michael, 4 Ired. Eq. 349; Graham *v.* Little, 3 Jones, Eq. (N. C.) 152; Deaton *v.* Munroe, 4 Jones, Eq. (N. C.) 39; Oldham *v.* Oldham, 5 Jones, Eq. (N. C.) 89; Franklin *v.* Ridenhour, 5 Jones, Eq. (N. C.) 420; Hadley *v.* Rountree, 6 Jones, Eq. (N. C.) 107; Allen *v.* Bryant, 7 Ired. Eq. 276; Boyd *v.* Hawkins, 2 Dev. Eq. 195; *ib.* 329; Baxter *v.* Costin, Busb. Eq. 262; McLeod *v.* Bullard, 84 N. C. 515; Kerr, F. & M. 151, 157, 164, 165, 172, 386, 387; 2 Jones, Mort. sec. 711; Ford *v.* Olden, 3 Law Rep. (Eq.) 461; Bigelow, Fraud, 493; Villa *v.* Rodriguez, 12 Wall. 325; McLeod *v.* Bullard, 86 N. C. 210; Dunne *v.* English, reported in L. R. 18 Eq. Cas. 524, and 10 E. R. (Moak) 837; *In re* Biel's Estate, Gray *v.* Warner, reported in L. R. (16 Eq. Cas.) 577, and 7 E. R. (Moak) 591; Ashwell *v.* Lomi, L. R. 2 Prob. & Div. 477, reported in 4 E. R. (Moak) 700; Cumberland &c. Co. *v.* Parish, 42 Md. 598; Street *v.* Goss, 62 Mo. 226). The doctrine may be thus stated: all that the court requires is, that the confidence which has been reposed be not betrayed. But the burden of proof lies, in all cases, upon the party who fills the position of active confidence to show that the transaction has been fair (Kerr, F. & M. 151).

Care should be taken to distinguish between transactions had between persons standing toward each other in a confidential relation, and those between strangers but induced by fraud, or undue influence — as upon this distinction depends the burden of proof; and any apparent discrepancy in the decisions may, perhaps, be reconciled by the consideration above adverted to. It is deemed proper, therefore, as a guide

to correct discrimination, to state quite briefly the principle upon which the distinction rests. It is this: —

Transactions between persons standing towards each other in a confidential relation, are affected upon a principle of public policy, with a presumption that an undue influence has been exercised, and it therefore devolves the proof upon the party claiming to uphold the transaction, to show that the presumption is adequately rebutted. Whereas, in the other class of cases, the burden is with the party complaining. But, while such is the *status* of the burden, on proof being made tending to show undue influence, courts will watch the case with great jealousy (Huguenin *v.* Baseley, 2 White & Tudor, L. Cas. Eq. 406 and notes).

The criterion, for determining what are such confidential relations, may be thus expressed: the principle upon which courts give relief, as against persons standing in such relations, extends to all the variety of relations in which dominion may be exercised by one person over another (*ib.* 437).

According to the English doctrine, the relation of parent and child is embraced, but the Supreme Court of the United States unanimously decided, that the doctrine is not applicable to such relation (Jenkins *v.* Pye, 12 Pet. 240). The case of Graham *v.* Little, cited *supra*, carried the doctrine to a great length, the plaintiff being induced to execute a note to the executor of an estate in which he was interested to an amount for which he had recovered judgment and received payment, to reimburse such executor on certain moral grounds. This note was executed in the house of his uncle by marriage, while on a visit, and mainly at his solicitation; the uncle being also entitled as a legatee, and having declined on like moral grounds to accept the recovery, the executor being occasionally present and assenting, at times, to the arguments and representations of the uncle. The court held that the collection of the note should be enjoined. It is true that the court do not put their decision upon the doctrine of "confidential relations," but the reasons adduced would seem to align this case with that of Dent *v.* Bennett, 4 My. & Cr.

277, which is cited, and in which LD. COTTENHAM, adopting the *formula* advanced by SIR SAMUEL ROMILLY in the case of Huguenin *v.* Baseley, laid down the criterion given above, for determining when cases fall within the class of confidential relations.

The whole doctrine proceeds upon the idea, not that there *was*, but there *might have been*, fraud. The doctrine of "confidential relations" has been extended by a highly respectable court to the case of a mortgagee and mortgagor, holding that a purchase by a mortgagee of the equity of redemption was presumably fraudulent (McLeod *v.* Bullard, 84 N. C. 515; S. C., 86 N. C. 210). These cases, however, are not only in direct conflict with a former decision of the same court (Chapman *v.* Mull, 7 Ired. Eq. 292), but also with the whole current of English and American authorities (Kerr, F. & M. 162; Coote, Mort. 349; Lewin, Trusts, 465; Perry, Trusts, sec. 199; Hill, Trustees, 159; Roberts, Prin. Eq. 166; Powell, Mort. 361; Trower, D. & C. 584; Sugden, Vend. (4th Eng. ed. 8th Am.) 412, top; 1 Jones, Mort. sec. 711).

Indeed, SIR EDWARD SUGDEN says: "But the rule has never been applied to a purchase by the mortgagee from the mortgagor, and it is to be hoped it never will" (Sug. Vendors, (2d Am. from 5th Lon. ed.) 424); "A sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connection with each other" (*ib.* 424). It is very different when the mortgagee attempts to buy at his own sale, made under a power. Then, the power creates the confidential *status*, and the sale cannot be upheld. The principle is thus laid down in many of the books: "A mortgagee may purchase the equity of redemption, but if he takes a conveyance with a power of sale, he cannot," and for that is cited Downes *v.* Glazebrook, 3 Mer. 200; but upon examination of that case, it will be seen that it was predicated upon a sale made under the mortgage (see 2 Jones, Mort. sec. 1876). The matter would not have been noticed at length, but for the circumstance that the doctrine seems to derive some color from language used by so eminent, and generally accurate, a writer as JUDGE BIGELOW (Big. Fraud, 259).

Under this title it may be also remarked, that in actions against collecting agents, if the agency is proved or admitted, the onus is with such agent to show what he has done with the paper committed to his charge (Brumble *v.* Brown, 71 N. C. 513). So, where a person receives money in a fiduciary capacity, without authority to apply it to his own use, and does thereafter so apply it, the burden is with him to show that permission was given him to do so (Lamb *v.* Fairbanks, 48 Vt. 519). So, where an agent for sale takes an interest in the purchase negotiated by himself, the burden of proving a full disclosure to his principal lies upon such agent (Dunne *v.* English, reported in L. R. 18 Eq. Cases, 524, and 10 E. R. (Moak) 837).

Strictly speaking, the doctrine here stated, should fall under the title of the SHIFT OF THE BURDEN, as the onus is with the complainant to establish, unless admitted, the fiduciary relation; but for more convenient reference, it has been segregated, and placed under this title.

I. EXECUTORS AND ADMINISTRATORS.

In proving title to their office a distinction was taken, at common law, between actions predicated upon their own possession, as it was technically styled, that is, upon causes of action which had accrued in the lifetime of their testator or intestate, and those brought on such causes of action, as had accrued after the death of the party they professed to represent.

In the former class of cases *profert* was made of the letters in the declaration, and they were not required to be shown on the trial (1 Chitty, Pl. 489; 2 Wms. Ex. 1158 (4 Am. ed.) 1594), unless there be a plea of *ne unques*, in which case, the burden is cast upon the plaintiff to show it (2 Wms. *ib.*); but in the latter class of actions, as the letters formed a part of the title itself, the onus was with the plaintiff to produce the letters in evidence (1 Chitty, Pl. 489; 2 Wms. Ex. *ib.*).

Independent of this point, when an action is brought by a personal representative, it stands upon a like footing with

other actions, and the onus, as in them, is originally cast or shifted, the letters being presumptive evidence of the death of the person whose estate is represented, as well as of the appointment. If the defendant desires to question the fact of death, or the title, the burden of proof having been discharged by the production of the letters, is then devolved upon the defendant. It is not proposed to discuss what measure of proof is required, that not being within the scope of this treatise.

When an action is brought against a personal representative, if he would defend on the ground that he never filled the office, he must plead a special plea in bar of *ne unques* executor or administrator, and, as that is substantially a denial, that any cause of action ever existed against him *qua* personal representative, the onus is with the plaintiff to prove the appointment (2 Wms. Ex. 1656). When sued, and this defence is not interposed, and no defence going to the question of assets is asserted, the onus is cast or shifted, as in ordinary cases.

If the defendant should deny liability on account of the assets being appropriable to other demands, or having been exhausted, or for any reason not subject to plaintiff's claim, (with the exception of the pleas of "no assets" or "fully administered"), these defences being in form and substance a confession and avoidance, the onus is with the defendant.

As to the plea of no assets, it is quite analogous to the general issue, and is a negative defence. There is no such plea under the English practice, and is only local in America. It answers, however, where recognized, to the plea of *plene administravit*, and devolves the burden of proof on the plaintiff (2 Wms. Ex. 1677).

The burden is discharged by showing, by the inventory or otherwise, assets, and is thereupon shifted to the defendant (*ib.* 1678 *et seq.*).

The onus is also upon the plaintiff, *in assumpsit*, to prove his debt, or he will only, at utmost, recover nominal damages (*ib.* 1682).

When an action or special proceeding is brought to recover a legacy, or distributive share, the plaintiff has the onus, to establish the fact that he fills the character of legatee or distributee, and that the time allowed by local statutes for winding up the estate, has either expired, or that for special reasons, the time for settlement has pre-arrived.

In taking the account, whether at the instance of a creditor, legatee, or distributee, the representative is chargeable with interest, unless he shows that he kept an interest account, and the onus is with him for that purpose (Graham *v.* Davidson, 2 D. & B. Eq. 155). He may also be chargeable with interest: 1. If he has been guilty of negligence in omitting to lay out money for the benefit of the estate. 2. If he has made use of the money to his own profit, or has committed some other *misfeasance* (2 Wms. Ex. 1567); but the burden of proof, in such case, is upon the party so charging.

II. Guardian.

Title. — If the plaintiff sues in his capacity as guardian, he must, in addition to proof, as in ordinary actions, show his appointment, and that the cause of action accrued to him *qua* guardian.

The common-law doctrine, as to appointment of guardians, does not obtain in this country.

The subject is regulated by statutes of similar import in the different States.

The statute, 12 Ch. 2, chap. 24, allowing the appointment by deed or will, has been quite generally re-enacted,[1] and the courts exercising the powers of a surrogate, are, generally, invested with the power of appointment of the guardians of infants and persons *non compos mentis*, and in some States, of drunkards and spendthrifts. This class of actions is comprised within a narrow compass, mainly, if not entirely, to actions for the recovery of the ward's property or for injuries thereto, and perhaps to the abduction of the ward (Kerr. A. at L. 66).

[1] Alex. Br. Stats. 466; Mart. Coll. Br. Stats. 405.

As to when infants should sue, see title INFANCY.

As Defendant. — When sued as defendant, the action is not dissimilar in its general characteristics to other actions, except in two instances: 1. When sued for necessaries furnished to his ward; 2. When sued by his ward for settlement.

Necessaries. — A guardian, like a father, is not liable for necessaries furnished to his ward, except upon a contract, express or implied (State *v.* Cook, 12 Ired. 67). And such contract, if express, must be proved, as in other cases of contracts, or if claimed to be implied, it must be shown that the defendant was guardian, possessed means of his ward for the purpose, and neglected or refused to furnish him with such necessaries (note to Tucker *v.* Moreland, 1 Am. L. C. (1st ed.) 105). The most important liability of guardians arises toward their wards.

Action by Ward.[1] — Upon the arrival at full age, or marriage of a *feme* under age, becoming of sane mind, or death, the ward, or personal representative respectively, becomes entitled to call upon the guardian for a settlement. In such action, if denied by the pleading, he must prove the appointment of such guardian.

Assets. — Upon taking an account, the plaintiff has the onus of proving that the guardian received property belonging to him. Upon this proof being made, or upon showing that the ward was entitled to property, which the guardian might, by due diligence, have reduced into possession, the burden is shifted to the defendant. He then is held to strict proof, as to the disposition he has made of such property.

He must show, not only *uberrima fides*, but due diligence. He is presumptively chargeable with compound interest on moneys received, and rests in the account will be accordingly made (Schoul. D. R. 469 *et seq.*; Ford *v.* Vandyke, 11 Ired. 227; Little *v.* Anderson, 71 N. C. 190; Covington *v.* Leak, 67 *ib.* 363).

[1] The action of account lay at common law (Pulling, Accts. 115), but it was more usual to proceed in equity. In this country the more usual course is to sue upon the guardian bond.

III. Trustees.

The like measure of faith and diligence is exacted from trustees as from guardians.

Title. — In actions brought by or against them, their title must be alleged, and if controverted, proved (McConnell *v.* Caldwell, 73 N. C. 338).

Fraud. — If, in actions brought against them, fraud is alleged, it must be proved as in other cases.

IV. Agents.

Their rights and liabilities are discussed under title Agency.

V. Bailees, Factors, etc.

For a discussion of the onus, as to this class of fiduciaries, see title Bailments.

VI. Mortgagees.

Their ordinary rights and obligations are entirely analogous to those of trustees. As to their dealings with their *cestuis que trust*, see *ante*, 319.

VII. Attorneys at Law.

Their duties and rights are analogous to those of trustees, and do not call for a separate exposition.

FRAUDS ON POWERS.

This subject, outside of the formal proof of the instruments creating and professing to execute the powers, is not within the range of the onus probandi. It is a question of construction, and it is for the court to adjudge whether, upon a comparison of the appointment with the original instruments directing the execution of powers, the former amounts to a *bona fide* execution and not illusory (Adams, Eq. 185; Kerr. F. & M. 267, sec. V.; Smith, Man. Eq. 105–107; 1 Story, Eq.

Jur. secs. 252, 255; 2 Pom. Eq. Jur. sec. 920; Aleyn *v.* Belchier, 1 Eden, 132, reported in Law. L. C. (Eq.) 113, and 1 W. & T. L. C. 377 and notes; Sug. Pow. 489 *et seq.*).

INJUNCTIONS.

The party applying for an injunction under the former equity system was the actor, and in common injunctions could only obtain the relief sought upon the equity confessed in the answer (Adams, Eq. 196). In special injunction, *ex. gr.*, to stay waste and the like, the motioner,[1] being still the actor, may read affidavits to contradict the answer, but has the burden of proof throughout (*ib.* 356). For a very able and exhaustive exposition of the subject, see Capehart *v.* Mhoon, Busb. Eq. 30; Lloyd *v.* Heath, *ib.* 39.

The motioner is no less the actor in cases arising under the codes of remedial justice, the difference in the procedure being variant. He must make out a presumptive case, generally, by affidavits. The general tendency of the American cases is to constitute the motioner the actor, and treat all cases as special injunctions (High, Inj. sec. 992). It is only allowed upon such positive averments of equities as establish a clear *prima facie* case (*ib.* sec. 995).

INTERPLEADER.

A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt, or duty; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter.

The plaintiff must therefore prove: —

1. That the same thing, debt, or duty is claimed by both of the parties against whom relief is asked.

[1] Although marked obsolete in Webster, as we have no substitute, the author has taken the liberty to reinstate the word.

2. That he has incurred no independent liability to either claimant.

3. That he claims no interest in the matter.

(Adams Eq. 204; Smith, Man. Eq. 401, chap. II.; Rob. Prin. Eq. 213 *et seq.;* 2 Story, Eq. Jur. secs. 806–820; 3 Pom. Eq. Jur. secs. 1322–1326.)

LITERARY PROPERTY.

There is a distinction between the proprietary right to published and unpublished literary or other intellectual compositions.

The first class falls clearly within the doctrine of copyright, but the second is governed by the common law (1 Abb. U. S. Prac. 389, note 1; Keene *v.* Wheatley, 9 Am. L. Reg. 33, 44; S. C., 5 Penn. L. J. 501). Literary property as thus understood, may embrace any kind of paper-writing, and is not confined to intellectual efforts *par excellence* (2 Black. Com. (Cooley) 407, n. 10; Underhill (Moak), Torts, 667 *et seq.;* Cool. Torts, 353 *et seq.;* 1 Abb. U. S. Prac. 388; High, Inj. sec. 668). The owner of the materials is presumptively the owner of the paper-writing, but if one write a poem or the like upon the paper or parchment of another, according to the Roman law he would be the owner (2 Black. Com. 406, 407).

If, then, this right be disturbed, the proprietor has the same remedies, as upon a trespass, detention or conversion of personal property generally, the onus probandi touching which has been already discussed. Or, if the user of such property may not have been of such character as to bring it within either category, then, by a special action on the case in which the burden will be substantially the same (1 Abb. U. S. Prac. 388).

And besides, he has the right, under particular circumstances, to have the publication thereof enjoined (High, Inj. secs. 663, 664, 665; 3 Pom. Eq. sec. 1353; Phill. Cop. 27–34; Smith, M. Eq. 421, 422).

The burden then will devolve upon the plaintiff to show, besides his property, that the publication would be calculated to arouse irreparable mischief and vexatious litigation, or lead to scandalous exposures, or disturb the peace of families or connections (High, *ubi supra*).

Defence. — The defences are the same as when sued touching other personal property in detinue, replevin, trover, trespass, or case, and need not be repeated.

For a copious discussion of the subject, the reader is referred to an able article in 9 Am. Law Rev. 16, also 8 S. L. Rev. 13.

MARRIED WOMEN.

This subject will be considered: —

I. With reference to the doctrines of the English and American Chancery Courts.

II. With reference to modern constitutional and statutory regulations.

I. English and American View.

Separate Estate.

Debts; English View. — It is needless to discuss the onus with reference to the claim of the *feme covert*, as it resolves itself into a question of law depending upon the phraseology of the instruments under which it is sought to be established. Suppose, however, a creditor asserts a claim to subject such estate, what is the extent of proof required from him to substantiate his debt? According to the English doctrine, he must prove the creation of the estate, but it is not necessary that he should prove that by her contract a married woman professes to charge her separate estate, but only that she professed to act, *quoad hoc*, as a *feme sole*[1] (Adams, Eq. 45;

[1] This statement is made upon the assumption that the instrument creating the separate estate does not contain a clause against anticipation, which Mr. Pollock terms "an anomaly grafted on an anomaly" (Pol. Prin. Cont. 67).

Rob. Prin. Eq. 236, 237; Haynes, Out. Eq. 212 *et seq.;* notes to Jordan *v.* Foley, McNagn. S. C. 68; 2 McQ. H. & W. 300 *et seq.;* Trow. D. & C. 400 *et seq.;* Lewin, Trusts, 634 *et seq.;* Bell, L. Prop. 494 *et seq.;* Jer. Eq. 208; New. Eq. Cont. 28, 29; Hill, Trust. 424 *et seq.;* Smith, Man. Eq. 455, II.; Hulme *v.* Tenant, 1 Bro. C. C. 16, reported in 1 W. & T. L. C. 679 and notes). This statement is certainly applicable to debts executed by a married woman in the shape of securities, such as single-bills, notes, bills of exchange, checks, and the like;[1] but it is, at least, questionable whether her separate estate is bound by what is termed her "general engagements," *i.e.*, open accounts or assumpsits, and the better opinion seems to be, that when such is the character of the debt, the burden of proof is further enhanced by requiring the creditor to show that the same was made with reference to, and upon the faith or credit of, that estate (Poll. Prin. Cont. 68; Smith, Man. Eq. 462; Johnson *v.* Gallager, 3 De Gex, F. & J. 494, 515; Haynes, Out. Eq. 215, 216). As to such debts, upon proof of the contracting of the same, the burden is, in general, satisfied by showing that she was living apart from her husband (Pol. Prin. Cont. 68, 70; Smith, Man. Eq. 462).

Conveyances; English View. — Whatever doubt may have formerly existed as to whether a *feme covert* could dispose of her realty, for an estate which would extend beyond her own life, and also as to whether she could convey it at all without being joined by her husband, and upon privy examination (Rob. Prin. Eq. 237; Lewin, Trusts, 644, 645; Rop. H. & W. 182) both points are now well settled in the negative. Consequently the burden of proof on the part of her alienee is satisfied by proof of her own conveyance alone (2 McQ. H. & W. 296; Adams, Eq. 45; Lewin, Trusts, 644–647; Smith, Man. Eq. 455, II.; finally settled by Taylor *v.* Meads, 4 De Gex, J. & S. 597; 11 Jur. N. S. 166; 34 L. J. Ch. (N. S.) 203;

[1] This rule also applies to notes signed as surety for her husband (Pol. Prin. Cont. 68). And Haynes intimates, that an oral promise to pay a definite sum, founded on a consideration, stands on the same footing (Haynes, Out. Eq. 216).

12 L. T. (N. S.) 6; 13 W. R. 394; full extract in 1 Bish. M. W. sec. 853).

This is unquestionably correct as to estates settled on the wife before or after marriage, and the like doctrine seems applicable to any quantity of estate created by *a third person* (Smith, Man. Eq. 455–458).

With respect, however, to a separate estate based on a post-nuptial agreement of the husband, and consisting of personalty, or an estate for life in realty, her disposal thereof can effect her husband's rights alone; and, therefore, according to Smith, the husband's assent would be required; but his high authority finds no support elsewhere, and the proposition above laid down may be taken without any qualification, except, of course, a limitation on the wife's power contained in the instrument creating the estate.

PIN-MONEY.[1]

As to this, no personal obligation can be assumed by the wife, and the only point necessary to be discussed is, as to the burden of proof devolved on the wife to establish his right thereto.

This is confined to proof of the execution of the settlement under the terms of which it is claimed to arise[2] (Smith, Man. Eq. 449, I.; Adams, Eq. 46). In United States acc. (Cord, Rights M. W. chap. XXIII.; 1 Bish. M. W. chap. XVIII.; 2 Story, Eq. Jur. secs. 1375 *a*, 1396; 3 Pom. Eq. Jur. sec. 1111).

PARAPHERNALIA.[1]

The only point to be noticed, is the proof required from the widow, if the articles comprising the paraphernalia should be taken by the personal representative.

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[1] These points are noticed hesitatingly, as the evolution of fashion has not yet given rise to their consideration by our courts to any appreciable extent. But we are a progressive people, and there is no predicting what modern culture and our Flora McFlimseys may accomplish.

[2] The case of McKinnon *v.* McDonald, 4 Jones, Eq. 1, seems to be a denial of this doctrine, but, upon an examination, it is evident that the court had become "mixed," not distinguishing between the separate estate and pin-money.

The burden requires her to prove her marriage, and that the articles were given to her by her husband as her paraphernalia (2 McQ. H. & W. 147 *et seq.*; Smith, Man. Eq. 450, II.). In United States acc. (2 Story, Eq. Jur. secs. 1376, 1377; 3 Pom. Eq. Jur. sec. 1112; Cord, Rights M. W. sec. 598 *et seq.*; 1 Bish. M. W. sec. 226 *et seq.*).

EQUITY TO A SETTLEMENT. — ENGLISH VIEW.

This right is administered either on a bill to restrain the wife's trustee of her equitable chattels real or equitable choses in action, from transferring the same to her husband, or, on a bill by the husband to compel the trustee to assign, or, by his assignees for value suing after his death.[1] The burden does not arise under the latter branch, as the husband or his assignee in stating the facts discloses the wife's equity; as to the former proposition, the wife must prove: —

1. The deed of settlement.
2. The threatened disposition.
3. That the value of the property exceeded £200 (Adams, Eq. 48; Lewin, Trusts, 369, 370, 627 *et seq.*; 1 McQ. H. & W. 69 *et seq.*; Bell, L. Prop. 113 *et seq.*; Rob. Prin. Eq. 229–234; Smith, Man. Eq. 463, sec. IV.; Lady Elibank *v.* Montolieu, 5 Ves. 737, reported in Law. L. C. (Eq.) 73, and 1 W. & T. L. C. 424; Murray *v.* Ld. Elibank, 10 Ves. 84; 13 Ves. 1, reported respectively in Law. L. C. (Eq.) 74, and 1 W. & T. L. C. 432, 439 and notes thereto; Ind. L. C. 68). In defence to the wife's bill, or by replication to her answer to his own, the husband or his assignee may show: —

Waiver. — That the wife (except a ward of chancery, who has married without the approbation of the court) has in open court, or under a commission, relinquished her claim (*ib.*).

Misconduct. — In a like manner it may be shown that the wife has been living in adultery, apart from the husband (*ib.*).

[1] Assignees in bankruptcy and insolvency are bound precisely as the husband (Smith, Man. Eq. 467).

DEEDS OF SEPARATION. — ENGLISH VIEW.

If the action, brought either by husband or wife, be predicated upon a deed of separation, which purports to comply with the law, the only burden is proof of the deed made.

It is presumed to be valid. The burden therefore rests upon the defendant to show that notwithstanding its terms, it contemplated a future separation (2 McQ. H. & W. 345; Bell, L. Prop. 523 *et seq.;* Sug. L. Prop. 176 *et seq.;* Rob. Prin. Eq. 241; Adams, Eq. 44; Stapilton *v.* Stapilton, 1 Atk. 2, reported in 2 W. & T. L. C. 824, and notes thereto).

Reconciliation. — Full reconciliation is also a good defence (*ib.*).

POST-NUPTIAL SETTLEMENT BY HUSBAND. — ENGLISH VIEW.

While such a deed is voluntary, it is not therefore presumptively fraudulent, and if attacked by a creditor, the onus is upon him to show fraud (2 McQ. H. & W. 275; Bell, L. Prop. 443 *et seq.*). Slight evidence would be sufficient to turn the scales and shift the burden of proof (Kerr, F. & M. 232; Lewin, Trusts, 93; Rob. Prin. Eq. 58; Ath. M. Sett. 164). There is a seeming discrepancy in the books, but it is perhaps reconcilable on this distinction, viz., that the post-nuptial conveyance, while not *per se* fraudulent, as such a conveyance may be made by a man of wealth, yet that, proof of insolvency at the time of the execution of the conveyance is sufficient to set aside a post-nuptial settlement, or, as expressed by that thorough writer, Mr. Smith, "if, at the time, or immediately afterwards" [referring to the date of the deed] "he is indebted to such an amount that he has not ample means exclusive of that property available to pay debts, such conveyance is fraudulent and void as against creditors to the extent to which it may be necessary to apply the property conveyed in payment of the debts" (Smith, Man. Eq. 96; 2 Bish. M. W. sec. 751, 2d note 3).

DOWER. — ENGLISH VIEW.

As dower is only allowable out of an equity pursuant to the dower act, 3 and 4 Wm. 4 ch. 105, and consequently of no interest to American lawyers, the subject is not discussed.

ELECTION. — ENGLISH VIEW.

A married woman, notwithstanding that she may be a free-trader, or have the power to make an appointment in the nature of a will, is still, to that extent, *sub potestate viri*, that she cannot create a case for election (Adams, Eq. 93). A widow, however, may be bound to elect (*ib.* 94), but, with regard to a married woman, she is deemed incompetent, and the court will make the election for her (Smith, Man. Eq. 377).

POWERS. — ENGLISH VIEW.

A married woman is competent to execute any power whether appendant, collateral, or in gross (Sug. Pow. chap. III. sec. 1; Worth. Wills, 305, note). A party, claiming as an appointee under the power, must show, more as a matter of law than of fact, that the power was executed pursuant to the provisions of the instrument creating it (Sug. Pow. chap. V.).

WILLS. — ENGLISH VIEW.

Presumptively, a married woman cannot make a will,[1] except by the consent of her husband, and even then subject to his power of revocation after her death, and even before probate. This question is discussed in Part III. title WILLS. But, as to her separate estate, she is invested with full power of disposition by will as by deed (Smith, Man. Eq. 455, II.; Worth. Wills, 309, in notes). The party propounding such a will holds the onus to prove the execution of the will in like manner as if she were a *feme sole* (Bell, L. Prop. 403; Lewin, Trusts, 642; Haynes, Out. Eq. 218).

[1] Of course, where she holds as executrix, she has power to make a will so as to pass the right of representation (Bell, L. Prop. 402).

I. Separate Estate.[1]

Debts. American View. — Under the old system, according to the current of the American decisions, the burden is not satisfied by merely proving the promissory note, etc. The burden is enhanced by requiring the creditor to show, according to one class of cases: —

1. That the contract was made for the benefit of the estate.

2. According to another class, that it was made with the concurrence of the trustee.

3. According to another class, that it was made as a charge upon the estate.

4. And still according to others, that it was more or less of a mixture of the three preceding[2] (1 Bish. M. W. §§ 873–

[1] For any misstatement or oversight in this discussion an ample apology is afforded in the following pithy extract from Bishop: "Since the confusion of tongues at the Tower of Babel, there has been nothing more noteworthy, in the same line, than the discordant and ever-shifting utterances of the judicial mind on the subject of the present sub-title. True, there has been sometimes a language which, though limited in its sphere, was tolerably plain; but, no sooner was the language in the way of becoming understood, than, lo! some conquering power of another sort came in, and all was confusion once more. Let us see, however, if we cannot draw out from the mass of discordant sound something which shall call to mind the heaven which ought to be, resting over the hell which is" (1 Bish. M. W. III. § 847). "But this attempt to point out doctrines held in particular States becomes wearisome and unsatisfactory. We have seen how the English course of adjudication has varied from time to time. It is much the same in our States. It is impossible for the author to know whether any doctrine he may set down in the text will be held by any court hereafter. The practitioner must look carefully at what has been adjudged in his own State, examining the cases in the original reports for himself, look at the true principles, consider the mental conformation and habits of the individual men who at the time when a controversy arises compose the supreme bench of his State, then judge of the question before him somewhat as he would of a game of chance; and, if his client, after being informed of the nature of the ground, chooses to travel it, he may well go along over it with her to guide, yet hardly to protect, keeping meanwhile in full sight of her husband. Some matter will be put, rather at hap-hazard, into a note" (1 Bish. M. W. § 869).

[2] Mr. Bishop's eloquent diatribes on the "distressing" conflict and contrariety of judicial thought on the subject of contracts touching separate estate,

880; Cord, Rights M. W. chap. XIII.;[1] Wells, Sep. Prop. chap. XXV. *passim*).

Professor Pomeroy, in his usual lucid style, analyzes the subject and divides the decisions under three types, and a reference thereto is all that is necessary for as clear an understanding of the different phases as a great legal mind could accomplish (3 Pom. Eq. Jur. sec. 1126 and notes; Am. notes to Hulme *v.* Tenant, 1 W. & T. L. C. (4th Am. from 4th London ed.) 735 *et seq.;* 2 Story, Eq. Jur. secs. 1397–1401 *a*). In several of the States it is held that a married woman cannot convey or charge her separate estate, unless pursuant to the terms of the instrument creating it (notes to Hulme *v.* Tenant, *supra;* notes to Jaques *v.* Methodist E. C., Law. L. C. (Eq.) 78).

Conveyances; American View.—The general current of the American decisions requires the wife's alienee to prove, more as inferences of law than fact:—

1. That she was authorized to convey by virtue of the terms of the settlement, or was not precluded therefrom, thereby.

2. That her conveyance pursues the terms of the power, or, is consistent therewith.

3. And, according to some of the courts, that her privy examination was taken.

4. In others, that she must be joined by her trustee, or his consent be shown.

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produced an effect on the author similar to that produced upon the first recipient of Mark Twain's "Punch, brothers, punch with caire," and nearly caused him to remark thereon, in the paraphrased language of the modest girl who strayed through the moors in search of her jilted lover, that legal

"Wilds, immeasurably spread,
Seem lengthening as I go."

The reader will bear in mind that the text is his, but, that notes represent thinking aloud.

[1] Mr. Cord's treatment of the subject is exceptional, and is another illustration of the "legal wilds." It may be useful to the practitioner in those localities where libraries are very meagre. The industrious young lawyer will find aid from this work; but life is too short to look for a needle in a hay-mow, and therefore the above is one of the very few times when the work will be cited.

5. And yet by others, that her conveyance, in which she was joined by her husband, must still be ratified by her trustee (1 Bish. M. W. secs. 865–870; Am. notes to W. & T. L. C. 741 *et seq.*; 2 Story, Eq. Jur. secs. 1388–1397; Cord's Rights M. W. chap. XV.).

EQUITY TO A SETTLEMENT. — AMERICAN VIEW.

In general the American decisions recognize the wife's equity to a settlement (1 Bish. M. W. 642–645; 2 Story, Eq. Jur. secs. 1404–1408; 3 Pom. Eq. Jur. secs. 1114–1116; Cord, Rights M. W. secs. 158, 166, 175, 186, 266, 270).

DEEDS OF SEPARATION. — AMERICAN VIEW.

The American authorities on this point are rare (2 Pom. Eq. Jur. sec. 932; Stew. M. & D. sec. 184).

Mr. Bishop lays it down that such deeds are void, but he only cites as authority Rogers *v.* Rogers, 4 Paige, Ch. 5, 16, reported in 27 Am. Dec. 84. That case only decided that a voluntary agreement for separation was void, but that the law *tolerates* such agreements when made with a trustee. However, the courts of New York, in later cases, seem to have decided both ways (Gould *v.* Gould, 29 How. Pr. 441, 458; Mercein *v.* People, 25 Wend. 64, 77; Morgan *v.* Potter, 17 Hun, 403, against, and Heyer *v.* Burger, 6 Hoff. 1, sustaining).

The Supreme Court of the United States has decided in favor of their validity, and assume that they have received the sanction of our courts generally (Walker *v.* Walker, 9 Wall. 743).

POST-NUPTIAL SETTLEMENTS BY HUSBAND. — AMERICAN VIEW.

According to Mr. Bishop, there is no presumption of fraud in such conveyances (2 Bish. M. W. 751, note 5 *et seq.*; see also Wells, Sep. Prop. sec. 93).

DOWER. — AMERICAN VIEW.

The right to dower in equitable estates, by decision or statute, almost universally, prevails in the United States. The widow must prove: —

1. The ordinary requisites, such as marriage, etc., for which see Part I. title DOWER.

2. That her husband was seized of an equitable estate of inheritance (1 Bish. M. W. sec. 285 *et seq.*).

3. And his death.

Of course the practitioner will be guided by the phraseology of the local statutes. In a well-considered case it was held that the interest of a vendee, under articles, who had paid only a part of the purchase-money, had a trust estate of which his widow was dowable (Thompson *v.* Thompson, 1 Jones, 430). Whereas, in Pennsylvania and Alabama, it is held that the vendee must have paid the whole (1 Bish. M. W. sec. 285, note 4).

ELECTION. — AMERICAN VIEW.

This doctrine seems to prevail in this country (Stew. M. & D. sec. 462; 1 Bish. M. W. sec. 377 *et seq.;* Wells, Sep. Prop. sec. 714; Cord, Rights M. W. secs. 651, 677–684).

POWERS. — AMERICAN VIEW.

The capacity of married women to execute powers, forms also a part of the American doctrine (Cord, Rights M. W. secs. 717, 718).

WILLS. — AMERICAN VIEW.

The power of a married woman to make a devise, which is one of the common assurances, is strictly analogous to a deed, and this point, as well as her right to make a will of her separate personal estate, it is assumed, would be governed by the rule adopted as to her deeds. As to her power in other respects, the American view coincides with the English (Cord, Rights M. W. sec. 802 *et seq.;* Wells, Sep. Prop. sec. 686 *et seq.*).

II. UNDER STATUTES. — AMERICAN VIEW.

Under the constitutions and laws of most of the States, all property to which a *feme sole* is entitled before, or becomes

so after marriage, is vested in her as her separate estate. And she is, generally, constituted *quoad hoc* a free-trader. It would uselessly swell the size of this volume, without corresponding profit, to attempt a separate analysis of these enactments, as they are all more or less variant; besides, the local practitioner is familiar with his own, and the decisions upon them.

It may be stated, in a general way, that the object of these statutes is to create a *statutory*, as distinguished from a *contractual* separate estate, and to prescribe the rights, powers, and duties of the married woman with reference thereto. It is apprehended that the effect of these statutes is not to abrogate the power to make marriage settlements, as the broad words employed should be restrained to the case of an unfettered gift (Wells, Sep. Prop. sec. 53 *et seq.*).

Married women are also allowed by various statutes to become free-traders.

Hence it follows that married women, whether suing or sued, with reference to their statutory separate estates or as free-traders, stand upon the footing of *femes sole*,[1] so the burden of proof is determined, in general, with reference to considerations applicable to persons strictly *sui juris*.

There are doubtless to be found provisions collateral to the main inquiry, and which would form elements of proof, *ex. gr.*, certificate of *sole* trader, etc.; but, when preparing for trial, the language of the statutes can hardly mislead as to these points.

This subject, forming, as it does, the bulk of a valuable treatise, may then be closed with a reference to Wells on the Separate Property of Married Women, *passim*, where the industrious lawyer will find everything to instruct and much to amuse.

[1] We believe that, with a solitary exception, these statutes authorize married women to convey their estates as if they were *sole*. The exception is to be found in the Constitution of North Carolina, which superadds the qualification that it must be with the "written assent of her husband" (Const. N. C. Art. X. sec. 6; Code, Vol. II. p. 718).

MARSHALLING.

The equity for marshalling arises where the owner of property subject to a charge, has subjected it, together with another estate, to a paramount charge, and the estate thus doubly charged is inadequate to satisfy both of the claims.

The plaintiff must show: —

1. That he is a junior incumbrancer upon an estate.

2. That the prior incumbrancer has also, as security for the same debt as that constituting such prior incumbrance, a lien on another estate, or fund of the common debtor.

3. That the prior incumbrancer has exhausted the doubly-charged estate (Adams, Eq. 271 *et seq.*; 3 Pom. Eq. Jur. sec. 1414; 2 Story, Eq. Jur. sec. 1227; Rob. Prin. Eq. 177, 178; Smith, Man. Eq. 284, 285; notes to Coppin *v.* Coppin, McNgtn. S. C. 89; Aldrich *v.* Cooper, 8 Ves. 308, reported in Law. L. C. (Eq.) 62, and 2 W. & T. L. C. 228 and notes). There are other instances, but all referable to the same general criterion, and are substantially governed by the same burden of proof, and a statement in detail is deemed unnecessary; see Adams, Eq. 274, 275 *et seq.*

The defendant, it seems, if an alienee of the original debtor, may show in defence, that fact, even if he bought with notice, provided it was before the institution of the *puisne* incumbrancer's suit (*ib.* 273).

MERITORIOUS OR IMPERFECT CONSIDERATION.[1]

The doctrine of meritorious consideration originates in the distinction between the three classes of consideration on which promises may be based; viz, valuable consideration, the performance of a moral duty, and mere voluntary bounty.

[1] Justice Story says that the whole doctrine seems now overthrown (2 Story, Eq. Jur. (11th ed.) sec. 987). The great weight that properly attaches to anything asserted by Adams has induced the author to give a short summary of the doctrine as contended for by him.

The first of these classes alone entitles the promisee to enforce his claim against an unwilling promisor; the third is for all legal purposes a mere nullity until actual performance of the promise.

The second, or intermediate class, is termed meritorious, and is confined to the three duties of charity, of payment of creditors, and of maintaining a wife and children; under this last head are included provisions made for persons, not being children of the party promising, but in relation to whom he has manifested an intention to stand *in loco parentis*, in reference to the parental duty of making provision for a child.

Considerations of this imperfect class are not distinguished at law from mere voluntary bounty, but are, to a modified extent, recognized in equity. And the doctrine with respect to them is, that although a promise made without a valuable consideration cannot be enforced against a promisor, or against any one in whose favor he has altered his intention, yet if an intended gift on meritorious consideration be imperfectly executed, and if the intention remains unaltered at the death of the donor, there is an equity to enforce it in favor of his intention, against persons claiming by operation of law without an equally meritorious claim.

The burden is upon the party asserting a right under this doctrine to show: —

1. That such party is either (1) a creditor, or (2) a wife or child, or (3) an object of charity.

2. That a promise of bounty was made (1) by a debtor, (2) by a husband or parent, or (3) by any person to such parties respectively.

3. That such promisor is dead.

4. That he had not altered his intention in favor of any one else (Adams, Eq. 97, 98; Smith, Man. Eq. 231, XII.; 2 Pom. Eq. Jur. sec. 834; Ellison *v.* Ellison, 6 Ves. 656, reported W. & T. L. C. 245 and notes; Wadsworth *v.* Wendell, 5 Johns. Ch. 224, reported in Law. L. C. (Eq.) 8, and note).

The doctrine is principally applied in supporting defective executions of powers, when the defect is formal, against the

remainderman (Tollet *v.* Tollet, 2 P. Wms. 489, reported in Law. L. C. (Eq.) 86, and 1 W. & T. L. C. 155, 227 and notes).

Purchase in Another's Name, etc. — This equity is also applied to the case of a purchase by a parent in the name of a wife or child, and where a legacy is construed a provision instead of a bounty.[1]

Relation. — Under either branch of this proposition, the burden is one of fact, and exacts simply proof that the party purchasing, stood toward the party in whose name the conveyance was taken, as husband, or *in loco parentis*. It is a doctrine of counter presumption to that arising ordinarily on a purchase made by one in the name of another (Adams, Eq. 101–103; Smith, Man. Eq. 172, 173, 383; 1 Pom. Eq. Jur. sec. 554; 2 *ib.* secs. 1039–1041; Dyer *v.* Dyer, 2 Cox, 92, reported in Law. L. C. (Eq.) 14 and 15 notes, also in 1 W. & T. L. C. 203; *Ex parte* Pye, 18 Ves. 140, reported in 2 W. & T. L. C. 365, and Law. L. C. (Eq.) 54, and see notes 55).

Double Portions. — There is a presumption against double portions. The burden is therefore upon the party claiming a repeated legacy to show: That the donor was a parent, or stood towards the donee *in loco parentis;* whereupon a presumption is raised that the first legacy was intended as a provision, proportioned to the then existing claims of the legatee, and that the later gift or legacy had the same object, and was intended as an immediate payment or a modified repetition, either in full or *pro tanto*, by reason of the altered circumstances of the first[2] (Adams, Eq. 103, 105, 106; Snell, Eq. 257–259; Ind. L. C. (Eq.) 104; Law. L. C. (Eq.) 58, notes; Smith, Man. Eq. chap. X.; notes to Hooley *v.* Hatton, 2 W. & T. L. C. 362 (4 Am. from the 4th London ed.); 1 Pom. Eq.

[1] These two subjects are generally treated of in the text-books under the heads respectively of "resulting trusts" and "satisfaction," but the author conceives that Adams' arrangement tends to greater perspicuity, and is therefore adopted. The subjects referred to are elsewhere discussed, Part I. title Resulting Trusts.

[2] This subject is generally treated in the text-books under the head of satisfaction, but the author prefers to follow Adams. It will be observed that we assume the admissibility of extrinsic evidence (1 Pom. Eq. Jur. sec. 569).

Jur. secs. 569–577). The doctrine of double portions arises where there has been a prior and subsequent gift of legacies; a legacy followed by advancements; and of portions followed by legacies (Adams, Eq. 104, 105; Smith, Man. Eq. 380).

The presumption may also be rebutted by intrinsic evidence derived from the instrument itself (Smith, Man. Eq. 378, III.; 2 W. & T. L. C. in note 359, 732, top (4 Am. from 4th London ed.); 1 Pom. Eq. Jur. sec. 567). If the donee be a stranger, however, there is no presumption, such as that above stated, but the onus is throughout with those who contend that the two provisions are to be considered as one (Smith, Man. Eq. 382, 383).

Care should be taken to distinguish, also, between the case of a will followed by a gift *inter vivos* and those we have been considering. In the former, the will being ambulatory, the subsequent is regarded as substitutionary, and is called an ademption, whereas, the former is termed a satisfaction. In such a case the question of the burden of proof cannot arise, as the latter gift displaces the former, *proprio vigore*, as a matter of law (Smith, Man. Eq. 380, 381; Law. L. C. (Eq.) note 57, III.–IV.; 1 Pom. Eq. Jur. secs. 524, 554; 3 *ib.* sec. 1131).

Legacy to Stranger. — A legacy given to a creditor, if it is of an amount equal to or greater than the debt, and in other respects equally beneficial, will, in general, in the absence of all countervailing circumstances, be deemed to be a satisfaction of the debt, on the principle that a testator shall be presumed to be just before he is generous (Smith, Man. Eq. 384, III.; Adams, Eq. 105; 1 Pom. Eq. Jur. sec. 527; Talbot *v.* Duke of Shrewsbury, Prec. Ch. 392, reported in 2 W. & T. L. C. 379, and Law. L. C. (Eq.) 52; Chancey's Case, 1 P. Wms. 408, reported in 2 W. & T. L. C. 380 and Law. L. C. 52).

To the rule of satisfaction there are a number of exceptions embracing matters of law (collated in 1 Pom. Eq. Jur. sec. 528 *et seq.*; Law. L. C. (Eq.) 55, 56). So, it may be stated that, in general, the burden is upon the legatee to sustain his claim to the legacy and a debt also. The limitations of the rule as to both matters of law and fact, involving the burden of proof are stated by Mr. Smith (Smith, Man. Eq. 384, III.).

Defence. — Foreclosure. — Redemption. — Relinquished.

Defence. — The defendant, if the fact does not appear upon the plaintiff's case, may show that he has an equally meritorious claim — thus, the defendant, as heir at law or remainderman, may show that he is a child, or even a grandchild, unprovided for (Adams, Eq. 100, 101).[1] And as to satisfaction of legacies: —

1. That the same matter is expressed and the same sum given in both instruments (Law. L. C. (Eq.) 56, note *b*; Smith, Man. Eq. 379, I.).

2. That the same specific thing is the subject of both gifts (*ib.*).

MORTGAGES, PERFECT AND IMPERFECT.

Little need be said on this subject, as questions thereunder mainly turn on points of law.

Foreclosure. — When foreclosure is sought, all that is required of the mortgagee is, to produce his mortgage, and, in general, show it to have been legally registered.

Redemption. — If redemption is sought, the burden requires the plaintiff to allege his willingness to pay; thereupon, as is done in foreclosure, a short day is given to redeem by paying principal, interest, and costs.

The same general principles apply to the imperfect mortgages, except in the case of the equitable lien of a vendor. When the vendor files his bill, to have satisfaction out of the realty conveyed for the unpaid purchase-money, he must, of course, on a general denial prove: —

1. The execution of the deed to the defendant and its registration.

2. That the purchase-money has not been paid.

Relinquished. — The defendant may show in support of his allegation to that effect, that the lien had been relinquished (Adams, Eq. (2 Am. ed.) 128 and note 1, 129; Smith, Man. Eq. 181; Rob. Prin. Eq. 93, 94; 2 Story, Eq. Jur. secs. 1218–

[1] Mr. Adams puts this principle with a *semble*.

1230; 1 Perry, Trusts, sec. 236; 1 Pom. Eq. Jur. sec. 167; 3 *ib.* secs. 1260–1263; Mackreth *v.* Symmons, 15 Ves. 329, reported in Law. L. C. (Eq.) 22 and notes, and 1 W. & T. L. C. 289 and notes).

Bona Fide **Purchaser.** — The defendant may likewise show that he is a purchaser for value and without notice of the equity of the vendor for his unpaid purchase-money (*ib.*).

Creditors. — While, the weight of authority seems to show that this lien prevails as against assignees claiming by a general assignment under the bankrupt and insolvent laws; against assignees claiming under a general assignment; against a dowress, and judgment creditor, Justice Story lays it down that it will not be upheld as against specified creditors claiming under an assignment for their particular security or satisfaction, they having no notice of the non-payment of the purchase-money[1] (2 Story, Eq. Jur. secs.

[1] The American authorities are not agreed as to the law found in the text of Story. Judge Pomeroy is overflowing with authorities. But it seems incomprehensible how any distinction can be taken between general assignments for the benefit of creditors, and an assignment to a particular creditor for his security; he is not out of pocket one cent.

The maxim *qui prior est tempore portior est jure*, applies as between equal equities; but can it be contended that a creditor, *who does not release his debt*, has an equal equity with the vendor? And how can the case of a *security* given to a particular creditor be, in legal contemplation, distinguished from a security to creditors generally?

The leading case, Bayley *v.* Greenleaf, 7 Wheat. 46, did not go upon any such distinction, and several of the cases following it were applications of this view to general assignments (Webb *v.* Robinson, 14 Ga. 216; Dunlap *v.* Burnett, 5 Sm. & M. 702 (13th Miss.); Brown *v.* Vanlier, 7 Hump. 239).

This proposition can only be upheld upon either the idea of the creditor having a superior equity, or, being a purchaser for value. It certainly cannot be maintained upon the latter ground, for, as forcibly put by Daniel, J., in Harris *v.* Horner, 1 D. & B. Eq. 455, 456, "he does not come within the principle of the rule" [purchaser for value] "as he in fact was nothing out of pocket by the assignment . . . the inducement for the assignment was old debts due by Carrington" [the debtor] "to him, and already incurred liabilities, *but no acquittance* was given for the same to Carrington." Or as well expressed in a Mississippi case, "a *bona fide* purchaser is defined to be one, who, at the time of his purchase, advances a new consideration, *surrenders some security*, or does some other act which leaves him in a worse position, if his purchase should be

1228, 1229; 2 Sug. Vend. (8th Am. ed.) [680] 393 *et seq.*; Smith, Man. Eq. 182, 183, 184; 3 Pom. Eq. Jur. sec. 1253 *et seq.*; 1 Perry, Trusts, sec. 239; Rob. Prin. Eq. 93, 94; Mackreth *v.* Symmons, *supra*).

PATENTS.

General Burden. — As property in inventions was unknown to the common law, inventions patented are recognized by statute as property, and an action given for infringement (Rev. Stat. U. S. sec. 4919).

It is obvious that he who claims such right must take the burden of proof.

Patent. — He must prove that letters-patent were issued to him by the proper authority, and that the subject of the patent is embraced within the purview of the acts of Congress [1] (Hollida *v.* Hunt, 70 Ill. 109, reported in 22 Am. Rep. 63, 67, note; Abb. Tr. Ev. 755; Lund. L. P. 215; 2 Abb. U. S. Prac. 58; Walk. Pat. sec. 491; Whit. Pat. 512,

set aside" (Boon *v.* Barnes, 23 Miss. 136). How does a creditor, who merely takes from the vendee a mortgage without advancing any money or releasing his debt, when the only possible consideration must be the anteeedent debt, and when his position, *qua* creditor, remains unchanged, be treated as having an *equal*, much less a *superior* equity to the vendor? Such a doctrine, it seems, is repugnant to the well-settled conception of the rule, that between equal equities the law must prevail.

[1] The letters-patent are presumptive, or *prima facie* proof of the constituent elements of a patent, namely: novelty, utility, patentee being first inventor, specifications, assignee's title, extension, renewal, reissue, and patentability (Abb. Tr. Ev. 756, 757, 758; 2 Abb. U. S. Prac. 58, 130).

The rule is different in England, being an exclusive privilege against the common right, and the burden is upon the plaintiff to show the existence of the conditions of the validity of the patent (Norman, L. P. 164), at least upon a plea of *non concessit* (Coryton, L. P. 277).

Perhaps the true reason for this discrepancy is, that patents in this country are not issued without inquiry. It seems, that in England, the defence of want of novelty, plaintiff not first inventor, etc., are to be pleaded specially. The general issue only goes to the extent of denying the fact of infringement (Coryton, L. P. 282).

522). And if suing as assignee, the assignment (Walk. Pat. sec. 495).

Infringement. — He must further prove an infringement of his right thus secured, by showing the making, using, or vending of articles so patented.

It is without the scope of this treatise to state in detail the various decisions touching infringements.

For this, the reader is referred to the text-books, particularly to Big. Torts, 205, § 2; Lund. L. P. 215; 1 Abb. U. S. Prac. 527 *et seq.*; Walk. Pat. secs. 497, 532.

But, as a general criterion, it may be stated, that in order to satisfy the burden, the plaintiff must show that the defendant avails himself of the subject of the invention so patented, without such variation as will constitute a new discovery, or, otherwise stated, that he has made, used, or sold a copy thereof, made after and agreeing with the principle laid down in the specification of the patent (Big. Torts, 206; Hudson *v.* Draper, 4 Fish. Pat. Cases, 256; S. C., 4 Cliff. 178; Brady *v.* Atlantic &c., 4 Cliff. 408), or only colorably different (1 Add. Torts, sec. 74; Lund. L. P. 221; Norman, L. P. 133, 134).

Damages. — Upon making this proof, the plaintiff entitles himself to nominal damages at least, and to such substantial damages as he may be able to establish (Walk. Pat. sec. 502; Big. Torts, 210; Underhill (Moak), Torts, 652, Rule 77 and p. 662; Carew *v.* Boston &c., 3 Cliff. 356; Stimpson *v.* Railroads, 1 Wall. Jr. 164; Dean *v.* Mason, 20 How. 198; Wilbur *v.* Beecher, 2 Blatch. 132), and the damages may be trebled by the court (Rev. Stats. U. S. sec. 4919; Underhill (Moak), Torts, 662); or, if the remedy applied for be an injunction, he thereby entitles himself to have it perpetuated, and to an account (Underhill, *ubi supra*).

It will be sufficient to show that any grant of right has been infringed (Waterbury &c. *v.* N. Y. &c., 3 Fish. Pat. Cases, 43; McComb *v.* Ernest, 1 Woods, 195). Or that a part of the right has been infringed (Adair *v.* Thayer, 4 Fed. Rep. 441).

Delay. — When an injunction is sought, it must be applied

for in apt time, and delay in so doing must be accounted for by the plaintiff (Walk. Pat. sec. 636).

Defence; General Issue. — As we have seen, in England, the general issue only goes to the fact of infringement. The practice in this country is regulated by the act of Congress (Rev. Stat. sec. 4920), which prescribes that the plaintiff may give notice, under the general issue, of the following defences which may be stated briefly, thus: —

1. Deceit and fraud upon the office.
2. Surreptitiously obtaining patent.
3. Prior patent or description.
4. That the plaintiff was not first inventor or discoverer.
5. That the invention had been in use or abandoned to the public.

This provision is not, however, obligatory, but permissive, and the defendant may instead, if he chooses, plead specially the matters of which he could give notice (2 Abb. U. S. Prac. 61, 62). It will be observed that there are a number of defences in confession and avoidance to which the statutory provision is not applicable, such as license, release, etc., and which must be specially pleaded, and the burden of proof will, according to the principles elsewhere laid down, devolve upon the defendant to establish such defence. See title Onus as affected by the Pleading.

If the defendant fails to give notice, and pleads the general issue, the burden is upon the plaintiff to the extent above stated.

If the defendant, however, gives notice, then, as to such defences as are specified in the statute, or if he pleads any defence, not amounting to the general issue, specially, it seems that the burden is upon him to make good his plea. (Walker, Pat. sec. 443 *et seq.*). The defences are twenty-seven in number, and will now be treated separately.

Non-Patentability. — The burden is upon the defendant, to show that the invention was not the subject of a patent. For this purpose, he must show that the terms of art or science, which are used in the patent, have such a meaning that the

court is bound to construe the patent to be one for a principle, or for something other than a process, machine, manufacture, composition of matter, or design (Walk. Pat. sec. 504).

No Invention. — The burden, to show that the subject-matter of the patent was not an invention, is upon the defendant (Walk. Pat. 505; Whit. Pat. 510, 511, 512, 522, 523; Pitts *v.* Hall, 2 Blatch. 229, 231; Hovey *v.* Henry, 3 West. L. J. 153, 154; Hoffheins *v.* Brandt, 3 Fish. 218; Whitney *v.* Mowry, 3 Fish. 157).

Lack of Novelty. — The burden, in this behalf, is upon the defendant to prove a lack of novelty (Walk. Pat. secs. 76, 506; Whit. Pat. 320, 511, 512, 535–537; Hovey *v.* Henry, *supra;* Potter *v.* Holland, 1 Fish. P. C. 382; Curtis, Pat. sec. 472; Phila. &c. *v.* Stimson, 14 Pet. 456, 458; Parker *v.* Stiles, 5 McLean, 44, 60).

Inusefulness. — The burden to show inusefulness is upon the defendant (Walk. Pat. secs. 85, 511; Whit. Pat. 512, 535–537).

Abandonment. — The burden, is also upon the defendant, to prove abandonment beyond a reasonable doubt (Walk. Pat. secs. 108, 512; Whit. Pat. 510, 520, 521; Pitts *v.* Hall, 2 Blatch. 229, 238; Hoffheins *v.* Brandt, 3 Fish. P. C. 218).

Constructive Abandonment. — As to constructive abandonment, the burden is upon the defendant (Walk. Pat. sec. 513).

Discrepancy between Patent and Invention. — Also as to discrepancy between patent and invention, it is upon the defendant (Walk. Pat. sec. 514).

Surreptitiously obtained. — The burden under this defence is upon the defendant, to show that another, than the patentee, conceived the invention before he did; that the other used reasonable diligence in adopting and perfecting the same; that the patentee knew of that prior conception, and with such knowledge obtained his patent, though the other had filed his *caveat* (Walk. Pat. sec. 515).

Joint Invention. — The defendant must show that another than the patentee was joint inventor with him of the subject-

matter of the patent (Walk. Pat. sec. 516; Whit. Pat. 272, 273).

Invention by One of Several Joint Inventors. — The burden is upon the defendant to show invention by one of several joint inventors (Walk. Pat. sec. 517; Whit. Pat. 272).

Fraudulent Specifications. — The burden is on the defendant to show that the letters-patent contain less than the whole truth relevant to the invention, or that it contains more than is necessary to produce the desired result, and that the fault arose from an intention to deceive the public (Walk. Pat. sec. 518; Whit. Pat. 300).

Insufficient Specifications. — The burden to show insufficient specifications is upon the defendant (Walk. Pat. sec. 519).

Indistinct Claim. — Also to show indistinct claim is on the defendant (Walk. Pat. sec. 520).

Disclaimer Delayed. — The burden is on the defendant, to prove that one or more of the claims of the patent are void for want of embodying a subject-matter of the patent, or for want of invention, or for want of novelty, and that the patentee has long known the facts, which make it invalid in that behalf (Walk. Pat. sec. 521).

Reissue Illegal. — The burden to show illegal reissue is on the defendant (Walk. Pat. sec. 522; Whit. Pat. 510, 552, 553, 554; Hussey *v.* McCormick, 1 Fish. P. C. 509; Knight *v.* B. &c. Co., 3 Fish. P. C. 1; Hoffheins *v.* Brandt, 3 Fish. P. C. 218; Park *v.* Little, 3 Wash. 196).

Reissue too Broad. — The burden to show that the reissue is too broad is on the defendant (Walk. Pat. sec. 523; Whit. Pat. 510; Hussey *v.* McCormick, 1 Fish. P. C. 509).

Reissue; Different Invention. — The burden, to prove that the reissue covers a different invention, is upon the defendant (Walk. Pat. sec. 524; Whit. Pat. 510, 574 *et seq.*; Hussey *v.* McCormick, 1 Fish. P. C. 509).

Illegal Extension. — The burden to show illegal extension is on the defendant (Walk. Pat. sec. 525; Whit. Pat. 598).

Repeal of Patent. — The burden to show repeal of patent is on the defendant (Walk. Pat. sec. 526).

Expiration of Patent. — The burden to show expiration of patent is on the defendant (*ib.* sec. 527).

Lack of Marks. — The burden to show lack of marks is on the defendant (*ib.* sec. 528).

Lack of Title. — The burden to show lack of title is on the defendant (*ib.* sec. 529).

License. — The burden to show license is on the defendant (*ib.* sec. 530).

Release. — The burden to show release is on the defendant (*ib.* sec. 531.)

Estoppel. — The burden to show estoppel is on the defendant (*ib.* sec. 533).

Statute of Limitations. — If the plaintiff's case leaves the question as to the bar of the statute in doubt, the burden is cast upon the defendant to show that part or all of the acts of infringement occurred at a time further back than the statutory period for bringing the action (*ib.* sec. 534).

Profits. — Though, in general, as before stated, the burden of proof as to the damages is upon the plaintiff, yet, when it appears that he has mingled such profits with his own, the burden is upon him to show the amount of the latter, it being a matter within his peculiar knowledge (*ib.* sec. 719).

Immoral Tendency. — The author suggests that, although an invention may be useful in the sense of adaptation to wants, yet, if it be in furtherance of some immoral purpose or end, it would constitute a good defence, under the maxim of *ex dolo malo non oritur actio*, the burden, when the taint not appearing on the face of the letters, being on the defendant.

This defence is open to an action for pirating a copyright, and the analogy would seem to be complete (1 Saund. Pl. & Ev. 385; Stockdale *v.* Onwhyn, 5 B. & C. 173 (11 E. C. L. R. 416); S. C., 2 C. & P. 163 (12 E. C. L. R. 506), as to invent improved gaffles.

PENALTIES.

Penal Bonds. — Relief against the enforcement of penalties, treated as the subject-matter of an original suit, has been, quite universally, conferred upon the common-law courts, and may be regarded as swept away from equity jurisprudence, unless where a penal bond constitutes a contract which might be specifically enforced, and such enforcement is to be attempted to be evaded by payment of the penalty (Adams, Eq. 107, 108).

The burden is upon the party seeking relief, to show that the sum fixed by the bond, either from the terms of the contract itself, or the subject-matter or otherwise, was intended as a penalty; and if he be the obligee, that the essence of the contract would be evaded by allowing the payment of the amount of the penalty, by showing, that it constitutes a contract which he rightfully seeks to have specifically performed (Adams, *ubi supra;* Law. L. C. (Eq.) 68–71; Rob. Prin. Eq. 193–195; 1 Pom. Eq. Jur. secs. 381, 433, 446, 447 *et seq.;* Bish. Cont. 756, III.; Smith, Man. Eq. 258, XX., 365, III.; 2 Story, Eq. Jur. secs. 1301–1318; Shepherd *v.* Beecher, MacNgtn. S. C. 120, and notes; Sloman *v.* Walter, 1 Bro. C. C. 418, reported in Law. L. C. (Eq.) 68, and 2 W. & T. L. C. (4th Am. ed.) 2022, top; Peachey *v.* Duke of Somerset, 1 Str. 447, reported in Law. L. C. (Eq.) 69, and 2 W. & T. L. C. 2014, top, and notes to both).

Non-performance of Covenants. — This equity has also been extended to clauses of re-entry for non-performance of the covenants in a lease in analogy to forfeited mortgages. The plaintiff must show, that, subsequently to the breach, he has performed the same; and, where money alone is involved, that he has paid the interest; and, perhaps in case other than breach for non-payment of money, he should also be required to prove that the forfeiture was incurred through unavoidable ignorance or accident (Adams, Eq. 109; Smith, Man. Eq. 368, V.; 1 Pom. Eq. Jur. secs. 450, 451, n., 453, 454; 2 *ib.* sec. 826, n. 2; Rob. Prin. Eq. 193–195; 2 Story, Eq. Jur. sec. 1315).

Stipulated Damages. — In defence to the action from relief against the penalty of a bond, the obligee may show that although in form a penalty, the sum so fixed was stipulated, or, as it is sometimes, though inaccurately, termed liquidated damages. This depends, to a great extent, upon the terms of the contract, and the *criteria* will be found in the authorities cited (Adams, Eq. 108, 109; Smith, Man. Eq. 367, IV.; 1 Pom. Eq. Jur. secs. 437, 440–445; the cases from White & Tudor cited *supra*, and notes; 2 Story, Eq. Jur. sec. 1318).

The *inclination* of the courts is to hold the sum to be a penalty, and, while the burden of proof does not come into play, the burden of argument is, in general, on the party whose contention is, that the sum expressed is stipulated damages (Wood's Mayne, Dam. 205, sec. 163).

Mr. Sutherland treats the question in a masterful manner, his dissertation being alone worth the price of the three volumes (1 Suth. Dam. 475, sec. 6, *passim*).

PERFORMANCE.

The doctrine of performance is founded on the maxim that equity imputes an intention to fulfil an obligation; *i.e.*, when a person covenants to do an act, and he does some other act that is capable of being applied toward the performance of this covenant, he will be presumed to have had the intention of doing such act, as in performance of such covenant (Law. L. C. (Eq.) note to p. 50; Wilcocks *v.* Wilcocks, 2 Vern. 558, reported in Law. L. C. (Eq.) 48, and in 2 W. & T. L. C. 389; Blandy *v.* Widmore, 1 P. Wms. 323, reported in Law. L. C. (Eq.) 48, and in 2 W. & T. L. C. 391, and notes; Oliver *v.* Brickland, cited in 1 Ves. Sr. 1, and 3 Atk. 420; Snell, Eq. 232).

The cases arising under this rule are divisible into two classes.

Under the first class the burden requires proof: —

1. Of the original covenant.
2. Of the subsequent substitutionary acquisition.

Under the second class: —

That the covenanter died after the obligation accrued. The subject is so ably discussed by Judge Lawson that a mere reference is sufficient (Law. L. C. (Eq.) 50).

POSSIBILITIES AND POST-OBITS.

This subject falls strictly under the title of RESCISSION AND CANCELLATION, but, on account of its importance, has been selected for special treatment. Bargains made with expectant heirs or reversioners are looked upon with great jealousy, but are not necessarily and absolutely void (Adams, Eq. 186).

The presumption is against the contract with presumptive heirs, and the burden, as to such cases, is upon the party claiming under it to prove that he paid a fair[1] consideration, and took no undue advantage of the necessities of the borrower, or, that the bargain was submitted to and approved by the person from whom the *spes successionis* is entertained (Adams, Eq. 186; Rob. Prin. Eq. 48, 49; notes to Dews *v.* Brandt, McNgtn. S. C. 26 *et seq.*; 1 Story, Eq. Jur. sec. 336; 2 Pom. Eq. Jur. secs. 953, 954; notes to Chesterfield *v.*

[1] Whether the criterion for determining the inadequacy should be a "full" or "fair" price, is the subject of much conflict of opinion. In the case of Gowland *v.* De Faria, 17 Ves. 20, Sir Wm. Grant, M. R., laid it down that "full" value should be shown to have been given, and there are a number of authorities in that direction; see acc. notes to Law. L. C. (Eq.) 105; notes to Earl of Aldborough *v.* Tyre, 7 Cl. & F. 436; Smith, Man. Eq. 86–90. There was also some conflict at one time as to the rule of valuation, but it seems now to be well settled that it is the market price, and not an actuary's valuation (notes to Chesterfield *v.* Janssen, cited supra (4th Am. from 4th Lond. ed.) 821, 822 top). The rule of the "fair" price is, perhaps, the most reasonable, for the lender may have to wait many years for his money. As forcibly put by a great poet, speaking of the contemplated death of an ancestor: —

> "Still breaking, but with stamina so steady,
> That all the Israelites are fit to mob its next owner
> For their double-damn'd post-obits."

Janssen, 2 Ves. 125, reported in 1 W. & T. L. C. 809, 811, 812, 815 top *et seq.*; Earl &c. *v.* Tyre, 7 Cl. & F. 436; Headen *v.* Rosher, McC. & Y. 89; Potts *v.* Curtis, Young. 543).

Improvident Transactions. — In order to leave no case uncovered and compress the subject of the onus with regard to the quantum of the consideration, it may be stated generally: That while, ordinarily, parties are required to take care of themselves, yet, inadequacy of consideration, or the absence of independent professional advice, becomes a most material circumstance where one of the parties to a transaction is, from age, ignorance, distress, incapacity, weakness of mind, body, or disposition, or from humble position or other circumstances, unable to protect himself. In all such cases, whatever be the nature of the transaction, the onus rests with the party who seeks to uphold it, to show that the other performed the act, or entered into the transaction voluntarily and deliberately, knowing its nature and effect, and, that his consent to perform the act or become a party to the transaction, was not obtained by reason of any undue advantage taken of his position, or of any undue influence exerted over him (Kerr, F. & M. 189, 190).

PRIORITIES.

The rule of priority, in regard to transfers and charges of the legal estate, whether made spontaneously by a conveyance, or compulsively by a judgment at law, is that the order of such date prevails (Adams, Eq. 145).

Let us consider the case of conveyances. These will be viewed in the light of the statutes of 13th and 27th Eliz. Under these statutes a prior deed may be rendered voidable in three ways: —

1. If it be designedly fraudulent.
2. If it contain a power of revocation.
3. If it be made without valuable consideration and followed by a conveyance or contract for value by the bargainor.

The onus as to the first proposition is discussed elsewhere, Part I. title FRAUD.

The second proposition embraces only a question of law.

Under the third, the onus is with the attacking party to prove: —

1. That the prior deed was not founded on a valuable consideration.

2. And that it was followed by a conveyance or contract for value by the grantor.

Notice in this case is immaterial[1] (Adams, Eq. 146).

As to the first point, the fraud may be apparent on the face of the deed, otherwise it must be shown *dehors*.

And as to the second point, it must be proved that the second bargainee was a purchaser according as the term is understood in common speech, and, while full adequacy of price is not required it must not be illusory (Wait, F. C. secs. 158, 369; 2 Pom. Eq. Jur. sec. 747). These principles are applied as to executed conveyances at law, but, when only executory, the aid of equity must be invoked (Adams, Eq. 146). The onus with reference to fraudulent conveyances under the statute of 13th Eliz. is elsewhere discussed, Part I. title FRAUD. The foregoing remarks are introductory. The rule of priority, which governs transfers and charges of a legal estate, governs also, in the absence of a special equity, transfers and charges of an equitable interest; but, if the legal and equitable titles conflict, or if, in the absence of a legal title, there is a perfect equitable title by conveyance on the one hand, and an imperfect one by contract on the other, a new principle is introduced, and priority is given to the legal title, or, if there is no legal title, to the perfect equitable one (Adams, Eq. 148). This doctrine is embodied in the maxim that between equal equities the law shall prevail. In order, however, that this maxim may operate, it is essential that the equities be equal.

[1] Because with notice of the deed, the purchaser also had notice of the fraud per Ruffin C. J. in Hiatt *v.* Wade, 8 Ired. 340, 342.

If they are unequal, the superior equity will prevail; and such a priority may be acquired under any of the three following rules, as classified by Adams: —

RULE I. *The equity under a trust, or a contract* in rem, *is superior to that under a voluntary gift, or under a lien by judgment.*

RULE II. *The equity of a party who has been misled, is superior to his who has wilfully misled him.*

RULE III. *A party taking with notice of an equity, takes subject to that equity.*

Of each in their order.

The party claiming under a trust, on contract *in rem*, must, of course, prove: —

1. His title, by the production of the paper.

2. And that the defendant claims either as a donee or a judgment creditor, *i.e.*, that he comes in *in* the *per* (Adams, Eq. 148, 149; 2 Pom. Eq. Jur. sec. 685).

The second rule is a mere application of the general doctrine of law with respect to fraud, where the fraud complained of is a representation, express or implied, false within the knowledge of the party making it (Adams, Eq. 150).

The burden is upon the party asserting this equity, to prove that the defendant, whilst owning or interested in an estate, knowingly misled the plaintiff into dealing with the estate, as if he were not interested (Adams, Eq. 150; 2 Pom. Eq. Jur. 686; 2 Story, Eq. Jur. sec. 1543).

Ex. gr. denial or concealment of his title when applied to for information; suffering another to expend money on his estate, etc., or gross negligence. There must be intentional deceit[1] or gross negligence (Adams, Eq. 150, 151; 2 Pom.

[1] The Supreme Court of North Carolina pushed this doctrine to, what the author conceives to be, an unwarrantable length in the case of Mason *v.* Williams, 66 N. C. 564.

In that case Mason's title was, at the time of the sale at which the defendant purchased, unsettled; Mason was present and bid, and it was afterwards determined in a collateral proceeding by the Supreme Court that Mason had

Eq. Jur. sec. 686; 2 Story, Eq. Jur. 1543; 2 W. & T. L. C. (Basset *v.* Nosworthy) in notes 30 (4th Am. ed. from 4th London)).

The third rule embraces the doctrine of notice.[1] The meaning of this doctrine is, that, if a person acquiring property has, at the time of acquisition, notice of a prior equity binding the owner in respect of that property, he shall be presumed to have contracted for that only which the owner could honestly transfer, viz.: his interest, subject to the equity as it existed at the date of the notice (Adams, Eq. 151).

The character of the burden is involved in the principle. It should be observed, however, that the notice required by this doctrine is notice of an equity, which, if clothed with legal completeness, would be indefeasible, and not merely notice of a defeasible legal interest, or of an interest which, if legal, would be defeasible. There are various applications of the doctrine, an enumeration whereof will be found in the authorities cited; amongst others an apparent exception is found in the instance of unregistered deeds (Adams, Eq. 152 *et seq.;* Smith, Man. Eq. 98 (9); 2 Pom. Eq. secs. 594, 692 *et seq.;* 1 Story, Eq. Jur. sec. 398 *et seq.;* Le Neve *v.* Le Neve, 2 W. & T. L. C. 35 and notes (4th Am. from 4th London ed.)).

Notice may be proved by evidence of a *lis pendens;*[2] and there are other modes of constructive notice prescribed by local statutes. Besides these modes, however, and in the

title. It was held by a bare majority that Mason was estopped. The late Chief Justice Pearson and Dick J. (now U. S. Judge) dissented. The case of Saunderson *v.* Ballance, 2 Jones Eq. 322, a clear case, was cited and approved. Mason *v.* Williams is directly in conflict with Adams, who, as above stated, holds that there must be intentional deceit. Justice Story says that the equity must be based upon a fraudulent purpose.

[1] This is the converse of want of notice which is treated in Pt. I. tit. Bona Fide Purchaser.

[2] Or notice of *lis pendens* under the codes of remedial justice. It is a much preferable practice than the old doctrine. In England the *lis pendens* must now be docketed, and only constitutes notice from its docketing.

absence of any actual information of the equity, the party may also be affected with notice,

Put on Enquiry. — By proof of his information of any fact or instrument relating to the subject-matter of his contract, which, if properly inquired into, would have led to its ascertainment (Adams, Eq. 158; 2 Pom. Eq. Jur. sec. 692; 1 Story, Eq. Jur. (11th ed.) secs. 399, 400 *a*; Smith, Man. Eq. 99; Le Neve *v.* Le Neve, *supra*). Indeed, if there be proof of a wilful abstinence from inquiry or any other act of gross negligence, it may be treated as evidence of fraud (Adams, Eq. 158).

Application of Purchase-Money. — When a purchase is made from a trustee, if the purchaser should afterwards be sued by the *cestui que trust*, he holds a peculiar burden. He must, in order to prop his purchase, show that the trustee made a rightful application of the purchase-money[1] (2 Story, Eq. Jur. secs. 1124–1135; Adams, Eq. 155, 156; Smith, Man. Eq. 141, XVII.; Perry, Trusts, sec. 790; Elliot *v.* Merryman, Barnard, Ch. 78, reported in Law. L. C. (Eq.) 27, and 1 W. & T. L. C. 64). This doctrine does not apply to the case of a trust for the payment of debts generally (Hill, Trust. 342; Perry, Trusts, secs. 795, 797), nor in case of a purchase from executors or administrators (Perry, Trusts, secs. 809–814).

RECEIVER.

A receiver is appointed, generally, at the instance of an equitable creditor, upon an allegation of anticipated wrong or fraud touching property on which the equitable interest has attached, or concerning which an equitable claim exists. The appointment rests in the sound discretion of the court (3 Dan. Ch. Pr. 400 *et seq.*; High, Rec.[2] chap. I.). Under

[1] This equity does not prevail in some of the States, and is to a great extent abrogated in England by Stat. 7 & 8 Vict. chap. 76.

[2] Judge High says "it is essential that plaintiff should show, first, either a clear legal title in himself" &c. sec. 11. Daniel, however, holds that the

American practice, application may be made at chambers, and a receiver may, in case of the gravest emergency, be appointed *ex parte*, or, as it is generally termed, before answer (High, Rec. secs. 105, 111). In general, when the application is made at chambers, the burden is upon the applicant to show: —

1. By bill, petition, or affidavit (according to the procedure of the *lex fori*) disclosing either an equitable title to the property, or a legal title and the necessity for such appointment (1) for the protection of the estate, or of the rents and profits; (2) or, that it consists of property in the nature of trade; (3) or, that there are conflicting legal claims, and that it is impossible to obtain tenants.

2. That he has a lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand.

3. That the possession of the property (except in cases of legal title) was obtained by defendant through fraud.

4. Or that the property itself or the income derivable from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant (3 Dan. Ch. Pr. (1 Am. ed.) 412 *et seq.*; 2 *ib.* (3d Am. ed.) 1724 *et seq.*; High, Rec. sec. 11).

The applicant is the actor; he must satisfy the conscience of the court; if the equity asserted is fully denied, the application is almost universally refused — certainly under the old equity practice — for by his bill he seeks discovery, and makes the defendant his witness and must take his answer to be true unless he can overcome it by proof. Under the code system he is still the actor, and under either, he must by proof satisfy the court of the necessity for this extraordinary course (High, Rec. secs. 23, 24).

remedy will not be accorded to the holder of the *legal* title, except in very rare cases, and under extraordinary circumstances (3 Dan. Ch. Pr. (1st Am. ed.) 412, 413; 2 *ib.* (4th Am. ed.) 1724).

RE-EXECUTION.

If an instrument evidencing a transaction is destroyed or lost, an equity arises to cause it to be re-executed. The statement of the principle carries with it the criterion of the proof. The plaintiff must prove[1]: —

1. That the instrument alleged to have been lost or destroyed was existent, as set forth.

2. That it has been lost or destroyed (Adams, Eq. 167; Tam. Eq. Ev. 4; 2 Pom. Eq. Jur. sec. 831 *et seq.*; 3 *ib.* sec. 1376, note 3; 1 Story, Eq. Jur. sec. 88; Rob. Prin. Eq. 67, 68; Smith, Man. Eq. 40, 41, 42; note to Lawrence *v.* Lawrence, Law. L. C. (Eq.) 83).

3. As affecting the costs; that he applied to the defendant to re-execute the instrument, and that he refused.

4. As to instruments for payment of money and negotiable securities; that he tendered indemnity, or at least made such offer in his bill (1 Story, Eq. Jur. secs. 81–89).

RESCISSION AND CANCELLATION.

The jurisdiction under this head arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation, and is exercised for a double purpose: —

1. For cancelling executory contracts where such contracts are invalid, but their invalidity is not apparent on the instrument itself, so that the defence may be nullified by delaying to sue until the evidence is lost.

2. For setting aside executed contracts or other impeachable transactions, when it is necessary to replace the parties in *statu quo*.

The doctrine is founded upon the maxim *ex turpi causa*

[1] Under the old equity practice the pleader was required to annex to his bill an affidavit of the loss or destruction, and that the same is not in his possession or power; but this did not supersede proof at the hearing.

non oritur actio (Adams, Eq. 174). It is not proposed to discuss the various instances in which this kind of relief is administered, but only the points arising as to the burden of proof. In those instances in which a court of equity does interfere, the plaintiff must prove: —

1. That the contract was illegal.

2. Obtained by fraud.

And under this head he must show either: —

(1) A representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract or act[1] (Adams, Eq. 176; Kerr, F. & M. 382–391; Rob. Prin. Eq. 217–219; 2 Pom. Eq. Jur. secs. 899, 910–921, 926–928, 944–974; 3 *ib.* sec. 1377; Smith, Man. Eq. 396, chap. I.; 1 Story, Eq. Jur. sec. 694 *et seq.*). Or,

(2) That a woman on the eve of marriage, conveyed her property in fraud of the marital rights of her husband. The husband's burden extends to proving: —

1. That pending the treaty of marriage, his wife represented[2] to him, that she had property to which, upon the marriage, he would become entitled *jure mariti*.

2. That during such treaty she clandestinely conveyed away the property.

3. Either to benefit some third person or secure to herself the separate use thereof.

4. That such concealment continued until the marriage (Adams, Eq. 180; 2 Pom. Eq. Jur. sec. 920; 3 *ib.* sec. 1113; 1 Story, Eq. Jur. sec. 273; Smith, Man. Eq. 95; Rob. Prin. Eq. 60; Kerr, F. & M. 217 *et seq.*; Strathmore *v.* Bowes, 1 Ves. 22, reported in Law. L. C. (Eq.) 111, and 1 W. & T. L. C. 406, and notes).[3]

[1] As the subject is fully discussed elsewhere (Pt. I. title DECEIT), it is deemed sufficient here to cite the equity authorities in a general way.

[2] Concealment may be sufficient; it is a question of the quantum of proof sufficient to satisfy the chancellor (Adams, Eq. 181).

[3] This doctrine is necessarily abrogated where what is known as the married woman's law (by which all of her property remains hers) prevails (3 Pom. Eq. Jur. sec. 1113).

Poverty, etc. — There are several circumstances which may be offered in opposition to the enforcement of this equity. It may be shown: —

1. That the husband was poor.
2. That he made no settlement upon the wife.
3. That the deed was executed in fulfilment of a moral or legal obligation, as in the case of a settlement upon the children of a former marriage,[1] or of a bond given to secure a debt contracted for a valuable consideration.
4. And the ignorance of the husband that the wife possessed the property, or had disposed of it.
5. Acquiescence and delay. These are circumstances to be weighed by the court, but, when in addition to these circumstances, there existed the further fact, that the husband had brought the intended wife to his house, and had induced her to cohabit with him before marriage, they constitute a complete defence (Adams, Eq. 181; Law. L. C. (Eq.) 112; Kerr, F. & M. 218; 1 Story, Eq. Jur. sec. 273).

Duress. — If an instrument is executed under duress equity grants relief. The burden is satisfied, at law, by showing the release or other instrument, see Pt. I. title DURESS (Adams, Eq. 182; 1 Story, Eq. Jur. sec. 239; Smith, Man. Eq. 68, 69; Kerr, F. & M. 184, 185, 189, 190, 193, 194; notes to Hugenin *v.* Baseley, 14 Ves. 273, reported in 2 W. & T. L. C. 556, at p. 1245 (4th Am. from 4th London ed.); 2 Pom. Eq. Jur. sec. 950; Rob. Prin. Eq. 45).

Infants, Idiots, and Lunatics. — The contract[2] of an idiot or lunatic, may also be avoided in equity; the burden of proof being substantially the same as at law. The variation being, that if the contract is evidently beneficial to the *non compos*, equity will not interfere (Adams, Eq. 182, 183; Rob. Prin. Eq. 44–46; Kerr, F. & M. 143–148; 1 Story, Eq. Jur. secs. 240–242; 2 *ib.* secs. 1335–1337, 1362–1365; 2 Pom. Eq. Jur. secs. 945, 946; 3 *ib.* 1311–1314; Smith, Man. Eq. 67, 76, 77).

Mental Imbecility. — It is also held, that independently of

[1] But see 1 W. & T. L. C. 458; Ind. L. C. Eq. 59.

[2] The apparent contract would be the more accurate expression.

that utter imbecility which renders a man *non compos*, a conveyance may be impeached by showing: —

1. Weakness of intellect in the bargainor.

2. Accompanied with such circumstances as show that the weakness, such as it was, had been taken advantage of by the other party (Adams, Eq. 183; Rob. Prin. Eq. 45; 2 Story, Eq. Jur. sec. 1365, *c*; Kerr, F. & M. 145; 2 Pom. Eq. Jur. secs. 947, 948; Smith, Man. Eq. 68).

Drunkenness. — A deed obtained from a party whilst in a state of complete intoxication, may be relieved against, and the statement of the proposition carries with it the measure of proof required (Adams, Eq. 183; Rob. Prin. Eq. 45; Kerr, F. & M. 147; 1 Story, Eq. Jur. secs. 230, 231; Smith, Man. Eq. 67).

We come now to consider that class of cases, where the transaction has been carried on in ignorance or mistake of facts material to its operation. The most ordinary applications for this class of relief occur, when releases or compromises have been made affecting rights of which the existence was unknown, or the character mistaken by the party executing the release or compromise; and there are three forms in which such ignorance or mistake may exist, viz.: —

We need only notice two: —

1. Where the release or compromise refers to other matters, and the facts originating the particular right are unknown to the parties, or are mistaken by them.

The party complaining must prove: —

That he executed the instrument in ignorance or mistake as to the facts which originated the right (Adams, Eq. 189;[1] Kerr, F. & M. 433, 434; 1 Story, Eq. Jur. secs. 121–132; 2 Pom. Eq. Jur. secs. 850, 871; 3 *ib.* secs. 1376, 1377; Smith, Man. Eq. 47, 48).

2. The next class is, when the facts are known but the law is mistaken. This question has been the subject of conflicting decisions. The general rule is that, in such cases,

[1] There is an exception to this equity in the case of family arrangements (Adams, Eq. 189; Kerr, F. & M. 434; 1 Story, Eq. Jur. sec. 129).

equity does not relieve (Law. L. C. (Eq.) notes, 97; Kerr, F. & M. 397; 2 Pom. Eq. Jur. secs. 841, 842; 1 Story, Eq. Jur. sec. 111; Smith, Man. Eq. 46; notes to Stapilton *v.* Stapilton, 2 W. & T. L. C. 840). The exceptional cases are Bingham *v.* Bingham, 1 Ves. Sr. 126, and Lansdowne *v.* Lansdowne, Mos. 364; 2 Jac. & W. 205. Both of these cases are put questionably by Adams (190, 191); were criticised by Ld. Cottenham in Stewart *v.* Stewart, 6 Cl. & F. at p. 968; the latter (Lansdowne *v.* Lansdowne) is directly opposed by Bilbie *v.* Lumley, 2 East, 469; was doubted in Hunt *v.* Rousmaniere, 1 Am. L. C. 404, and denied in Crawford *v.* State, 2 Yerg. 60, 63. The weight of principle and authority is so decidedly opposed to these cases, that a discussion of the burden arising upon the points therein laid down is omitted.

RESULTING TRUSTS.

These, or as they are sometimes termed, implied or constructive trusts, do not fall within the purview of the Statute of Frauds. These trusts may originate in eight ways.[1]

1. If a purchase is made in the name of one person, and the consideration advanced by another.

In this instance the party alleging a trust must show *clearly*: —

That, notwithstanding the deed was taken in the name of A, the consideration was paid by him (1 Greenl. Cruise,[2] 357, sec. 42; Lewin, Trusts, 199; Hill, Trustees, 91, 94, 97; Perry, Trusts, sec. 126; Smith, Man. Eq. 171, VIII.). And thereupon the burden of proof is shifted to the volunteer, to show that the party who paid the consideration meant a gift (Hill, Trustees, 96).

[1] Mr. Lomax divides them into thirteen instances (2 Lom. Dig. 200), but the divisions made in the text are deemed sufficient. Mr. Perry divides into five classes (Perry, Trusts, sec. 125).

[2] Sometimes the same top paging occurs twice, as the treatise is divided into books; but, as the subject-matter is printed at top of the pages, the reader can easily find the reference.

2. If a purchase be made by a trustee with the trust money or funds, a trust arises to the *cestui que trust.*

The burden here requires proof from the plaintiff that the trust fund was so disposed of (1 Greenl. Cruise, 359, sec. 48; Lewin, Trusts, 754 *et seq.;* Hill, Trustees, 374; Perry, Trusts, sec. 127 *et seq.;* Smith, Man. Eq. 184, IV.).

3. When the legal estate in lands, is conveyed to a stranger without any consideration or declaration of use to the bargainee, a resulting trust arises to the bargainor (1 Greenl. Cruise, 361, sec. 52).[1]

The doctrine probably originated in conveyances at common law, made without consideration. Under the Statute of Uses, 27 Hen. 8,[2] a pepper-corn was sufficient to raise a use; and if a man sedately made a deed operating under the statute, in the absence of such collateral considerations, as

[1] This doctrine is taken from CRUISE, a first-class authority, and generally accurate, and is inserted in order that the practitioner may weigh the authorities, and decide accordingly. The principle is controverted by other very high authorities, and should be received *cum grano salis* (Hill, Trustees, 106 *et seq.;* Perry, Trusts, sec. 161 *et seq.;* 2 Story, Eq. Jur. sec. 1199).

Though literally covered by Adams in his sweeping general statement, the specification, which in terms embraces the point, is well referable to a purchase in the name of a stranger (Adams, Eq. 33, 34). Mr. Perry, in note, cites Story, a decision of Ch. Kent, and also Tolar *v.* Tolar, 1 Dev. Eq. 456, in the same note in which he cites Lewin, and the inference might be drawn that these authorities support his text, but the reverse is the case; see Story, *ubi supra;* Souverbye *v.* Arden, 1 John. Chan. 240; Tolar *v.* Tolar, in Tourgee's cited cases, and authorities approving it. Perhaps the true rule is, that in analogy to the doctrine that any valuable consideration named in a deed operating under the doctrine of uses was sufficient to raise a use — even a pepper-corn — the court, treating such conveyance as well executed to pass the legal title as if *full value* had been given and in the absence of some special equity, would allow the legal title to prevail. It is to be considered, however, that this reasoning is confined to realty, and it may be that the rule applicable to feoffments still governs sales of personal property (see Hayes *v.* Kingdome, 1 Vern. Chan. 33; Sculthorp *v.* Burgess, 1 Ves. Jr. 91).

In the latter — a sale of stock for five shillings — Ld. Eldon held that there was a resulting trust.

It may be as well to state that Mr. Cornish lays it down, that a resulting use can only arise on a conveyance operating by transmutation (Cor. on Uses, 69).

[2] Substantially re-enacted in all of the States.

accident, mistake, or fraud, it is not easy to see upon what ground of equity jurisprudence he can ask to be relieved, or what is equivalent thereto, to have his bargainor declared a trustee for him.

The burden requires the plaintiff to show a negative; namely, that there was no consideration. At common law, homage and fealty constituted a consideration, and the doctrine, it is apprehended, as we have said, is only applicable to modern conveyances deriving their force and effect from the Statute, 27 Hen. 8, and is based upon the principle that a use could not be raised without a consideration (1 Greenl. Cruise, 361, sec. 52; Lewin, Trusts, 177; Smith, Man. Eq. 157, III.).

4. When the legal estate in lands is conveyed to a trustee, and a trust declared as to part only, a resulting trust arises to the original owner.

The burden here requires clear proof of the deed in trust, and the conclusion is a matter of law or legal inference (1 Greenl. Cruise, 362, sec. 55; Lewin, Trusts, 179; Hill, Trustees, 113 *et seq.*; Perry, Trusts, sec. 152; Smith, Man. Eq. 156, II.).

5. So, where the whole of an estate is conveyed for particular purposes, or on particular trusts only, which by accident or otherwise cannot take effect, a trust will result to the owner or his heirs.

The burden in such case requires proof that the purposes of the trust, for some reason of fact, cannot be effectuated (1 Greenl. Cruise, 362, sec. 57; Perry, Trusts, secs. 157–160).

6. Renewals of leases by a trustee in his own name individually.

Here the burden requires the simple proof of the original trust deed and the renewal (1 Greenl. Cruise, 364, sec. 62; Lewin, Trusts, 218; Hill, Trust. 438; Perry, Trusts, sec. 538; Smith, Man. Eq. 184, IV.).

7. When a fraud is committed in obtaining a conveyance of realty, the bargainee will be constituted a trustee for the party defrauded. In this instance the burden requires proof: That the party so obtaining the conveyance stood in some

confidential relation to the party claiming to be defrauded; and a familiar illustration is the case of one who engages to buy for another at a sale, and then takes the deed in his own name (1 Greenl. Cruise, 365, sec. 66; Lewin, Trusts, 178).

The only authority that Cruise cites does not decide the point. The text is only borne out by a very general *dictum* of Ld. Hardwick *arguendo*, and it would seem that all questions of fraud are resolvable into some of the other heads of this title. Even in the case implied, in stating the burden there can be no substantial distinction taken between A's purchasing in the name of B, and B's purchasing on a secret trust for A.

8. There is another case, and that is of a father who purchases in the name of a son who is of full age and fully advanced and emancipated. In this case the son is treated as a stranger, and in addition to the same proof as in the case of a stranger, the plaintiff must also show: —

1. That the son was of full age.

2. That he had been fully advanced and emancipated (1 Greenl. Cruise, 369, sec. 75; Lewin, Trusts, 211 *et seq.*; Hill, Trustees, 97; Perry, Trusts, secs. 150, 151; Smith, Man. Eq. 171, VIII.).

SATISFACTION.

With the reference as below, this subject may be here disposed of by stating that, with regard to strangers, the onus probandi rests with those who contend that the two provisions are to be considered as one; whereas, in the case of children, the burden of proof is on those who contend for the double provision (Smith, Man. Eq. 382). For a discussion of the subject fully, see title Meritorious or Imperfect Consideration, *ante*.

SPECIFIC PERFORMANCE.

The equity to compel specific performance of a contract arises when a contract, binding at law, has been infringed, and the remedy at law by damages is inadequate. In order to originate this equity, it is essential that the contract shall have been made for a valuable consideration, and that its enforcement in specie be practicable and necessary (Adams, Eq. 77; 3 Pom. Eq. Jur. sec. 1400 *et seq.;* 1 Story, Eq. Jur. secs. 712–793).

Binding. — The onus is with the plaintiff to show a contract binding in a court of law. As to what is necessary to be shown in this behalf, see titles OPTIONS, PAROL CONTRACTS, and SEALED INSTRUMENTS. If the contract be unilateral, the burden is further enhanced by requiring the plaintiff to litigate promptly on the default or refusal of the vendor (Fry, Spec. Per. (2 Am. ed.) secs. 291, 721, 733; Richardson *v.* Hardwick, 106 U. S. 252; S. C., 5 Mor. Trans. 341; 3 Pom. Eq. Jur. sec. 1405; Rob. Prin. Eq. 117–133; 1 Story, Eq. Jur. sec. 787).

Consideration. — Without regard to the form of the contract he must also show that the contract, so broken, was founded upon a valuable consideration. But while on the one hand a moral or meritorious consideration will not avail, it is not essential that the consideration shall be adequate, the parties being the best judges of that; therefore mere inadequacy, if not so gross as to prove fraud or imposition, will not warrant the refusal of relief (Adams, Eq. 79; 3 Pom. Eq. Jur. sec. 1405; Fry, Spec. Per. sec. 275 *et seq.;* Smith, Man. Eq. 231, XII.; Rob. Prin. Eq. 122, 123; 1 Story, Eq. Jur. sec. 793 *b*; Osgood *v.* Franklin, 2 John. C. R. 1, 23; S. C., on appeal, 14 John. Rep. 527; see also Seymour *v.* DeLancey, 3 Cowen, 445; Garnett *v.* Macon, 2 Brock. 185; Rodman *v.* Zilley, Saxton, 320; White *v.* Thompson, 1 D. & B. Eq. 493; Fripp *v.* Fripp, Rice, Ch. 84; Bean *v.* Valle, 2 Miss. 126).

Practicable. — He must also show that the specific performance of the contract is practicable; *i.e.*, that the contract is

one which the defendant can fulfill, and the fulfilment of which, on his part and also on the part of the plaintiff, can be judicially secured (Adams, Eq. 80; 3 Pom. Eq. Jur. sec. 1405; Law. L. C. (Eq.) 126; Fry, Spec. Per. sec. 658; Pom. Cont. sec. 203; Tobey *v.* County of Bristol, 3 Story, Rep. 800; Fitzpatrick *v.* Featherstone, 3 Ala. 40; 1 Story, Eq. Jur. sec. 769), though perhaps in most instances this state of facts would more properly constitute a defence.[1]

Necessary. — Also that an enforcement in specie be necessary, *i.e.*, it must be really important to the plaintiff and not oppressive on the defendant. In accordance with this principle, specific performance may be enforced of contracts for the sale of land, etc.; on the other hand, it will not ordinarily be decreed on a contract for the sale of stock or goods; because with a sum equal to the market price, the plaintiff may buy other stock or goods of the same description (Adams, Eq. 82, 83; Smith, Man. Eq. 223, II., 224, III.

Parol Contracts. — In several of the American States this doctrine of English equity has been repudiated. Where it prevails the plaintiff must show: —

1. That he has been admitted to the possession of lands under a parol contract of purchase.

2. And that during his occupancy he has been allowed to build and otherwise to expend money on the estate (Adams, Eq. 86; 3 Pom. Eq. Jur. sec. 1409; Smith, Man. Eq. 252, XV.; Fry, Spec. Per. sec. 383, *et seq.*; 1 Story, Eq. Jur. secs. 759–763). And although the contract must be alleged to be in writing, it need not be proved even if a parol agreement be admitted by the answer, and the protection of the statute be waived or not claimed (Fry, Spec. Per. secs. 373, 377; Smith, Man. Eq. 252, XV.; 1 Story, Eq. Jur. sec. 755).

Or, it may be shown that it was intended that the agree-

[1] The Supreme Court of North Carolina decrees specific performance even where the vendor has not title; they hold that he must make reasonable exertions to procure title; that he is not to be the judge of that, but the court (Love *v.* Camp, 6 Ired. Eq. 209; Jones *v.* Carland, 2 Jones, Eq. 502 Love *v.* Cobb, 63 N. C. 324; Swepson *v.* Johnston, 84 N. C. 449).

ment should be reduced to writing, but that the same was prevented by the fraud of one of the parties (Smith, Man. Eq. 253 (2); Fry, Spec. Per. sec. 378 *et seq.;* Adams, Eq. 171).

Part Performance. — This subject is more dependent upon the pleadings and parties than upon evidence other than that usually adduced. It comes into play when one of the parties is unable literally to perform, and the other is seeking partial performance. And as the whole doctrine is a matter of sound discretion, relief is more readily accorded to a vendee than a vendor seeking part performance (Adams, Eq. 87, 89–91; Smith, Man. Eq. 253 (3); Lester *v.* Foxcroft, 1 Coll. P. C. 108, reported in 1 W. & T. L. C. 1027; 1 Story, Eq. Jur. sec. 779).

Oppressive. — The defendant taking the burden may show that the specific execution of the contract would operate oppressively upon him (Adams, Eq. 83, 84; King *v.* Hamilton, 4 Pet. 311; Western Railroad Corporation *v.* Babcock, 6 Met. 346; Perkins *v.* Wright, 3 Har. & McHen. 324; Leigh *v.* Camp, 1 Ired. Eq. 299; Hall *v.* Ross, 3 Hey. 200; Rice *v.* Rawlings, Meigs, 496; Eastland *v.* Vanarsdel, 3 Bibb, 274; Wingart *v.* Fry, Wright, 105; Handley *v.* Edwards, Hardin, 604).

Practicable. — Or, he may show, if it should not appear on plaintiff's case, that the contract is incapable of fulfilment (Adams, Eq. 80).

Mutuality. — Or, that the defendant was incompetent to contract (Smith, Man. Eq. 231, X.; Fry, Spec. Per. sec. 286 *et seq.;* Dodson *v.* Swan, 2 W. Va. 511, reported in Law. L. C. (Eq.) 125 and notes).

Inequitable. — Or, that the enforcement would be inequitable (Smith, Man. Eq. 234, XIII.; Fry, Spec. Per. sec. 233; Dodson *v.* Swan, *ubi supra;* 1 Story, Eq. Jur. sec. 750 *a*).

Public Policy. — Or, against public policy (Smith, Man. Eq. 238, XIV.; Fry, Spec. Per. sec. 133 *et seq.;* 1 Story, Eq. Jur. *ubi supra*).

Incorrectly Framed. — Or, that the contract was, by inadvertence not originating in carelessness, framed differently from

his own intention (Adams, Eq. 84, 85; Fry, Spec. Per. sec. 229 *et seq.*; 1 Story, Eq. Jur. *ubi supra*).

Statute of Frauds. — If the defendant relies upon the fact that the agreement was not reduced to writing, although admitting a parol agreement, or fails to answer as to such allegation, it constitutes a perfect defence, devolving the burden of proof on the plaintiff to prove a written signed agreement, unless, as before stated, the plaintiff relies upon part performance, in which case proof thereof will satisfy the onus. This is a seeming exception to the rule, which, in general, imposes the burden on the party pleading in confession and avoidance, but it is more seeming than real, as courts of equity acting on the legal conscience treat the statute as having been aimed at perjury, and such a conclusion is excluded by an admission of the agreement in a sworn answer (Smith, Man. Eq. 252, XV.; Fry, Spec. Per. sec. 336 *et seq.*).

Time. — In general, time is not of the essence of a contract, and mere delay, not amounting to evidence of abandonment, cannot, in general, constitute a defence; but, as we have seen, there is a great modification of this doctrine, in its application to unilateral contracts, and it may be added, that the defendant may show that by the very terms of the contract time was made an essential element, or that an intent so to constitute it, is inferrible from the nature of the subject-matter; *ex. gr.* a reversion, mining rights, etc. (Smith, Man. Eq. 228, VI.; Adams, Eq. 88; 3 Pom. Eq. sec. 1408 and notes; Fry, Spec. Per. sec. 710 *et seq.*; articles in 15 West. Jur. 97, 145; 1 Story, Eq. Jur. sec. 776).

Chattels; Peculiar Value. — The English Chancery Courts also entertain analogous suits to compel the surrender of title-deeds and personal chattels of peculiar value, such as an ancient horn, by which the complainant held his lands (Pusey *v.* Pusey, 1 Vern. 273, reported in 1 W. & T. L. C. 820; also in Law. L. C. (Eq.) 118), altar-piece or other curiosity (Duke of Somerset *v.* Cookson, 3 P. Wms. 389; S. C., 2 Eq. Cas. Abr. 164, Pl. 28, reported in 1 W. & T. L. C. 821 and Law. L. C. (Eq.) 118). The ground upon which this equity

is based is, that judgment at law in trespass or trover is for damages and in detinue for the specific article, *if it be found*, or, alternatively for damages; but as there is no power vested in the common-law courts to prevent destruction or defacement, *pendente lite*, this lack of power originated the jurisdiction in chancery (Adams, Eq. 91, 92; Fry, Spec. Per. sec. 30;[1] Smith, Man. Eq. 427, IV.; 3 Pom. Eq. Jur. sec. 1402 and note; 1 Story, Eq. Jur. sec. 709). The burden of proof in such case upon a general denial requires the plaintiff to show: —

Possession. — 1. The defendant's possession and refusal on demand to surrender.

Pretium Affectionis. — 2. And that (without regard to its intrinsic value) it constituted either the muniment of his title or was an article of peculiar worth,[2] as a curiosity, a memento, or an object of affection to the plaintiff, as a man, a scholar, or a scientist (3 Pom. Eq. Jur. sec. 1402; Fry, Spec. Per. sec. 30).

TACKING.

The cases to which this doctrine applies, are those where several incumbrances have been created on an estate, and two or more of them, not immediately successive to each other, have become vested in a single claimant (Adams, Eq. 163).

There is only one question of fact upon which the burden of proof arises, namely: The party claiming a right to tack

[1] Mr. Fry suggests that the necessity of resorting to a court of equity has been superseded by the provision, in the common-law proceedure act, destroying the defendant's option to retain and pay the assessed damages (Fry, Spec. Per. sec. 32); but, as injunctive relief against destruction or defacement, is still withheld from the common-law courts, it would seem that the necessity for this mode of procedure is as urgent as ever. Perhaps, in its *technicality*, but not essenee, it is inapplicable to the Code of Remedial Justice.

[2] Mr. Fry's word is "unique" (Fry, Spec. Per. sec. 30), though the text-books generally employ the expression "peculiar value." It is claimed that

Not prevalent in U. S.

must show that, at the time he advanced his money and took his security, he was not aware of the existence of the intermediate incumbrances (Adams, Eq. 163; Rob. Prin. Eq. 171, 172; Smith, Man. Eq. 303, 335; 2 Pom. Eq. Jur. sec. 768; 1 Story, Eq. Jur. sec. 412 *et seq.;* Sug. Vendors (1st Am. ed.), 695; 2 *ib.* (8th Am. ed.) 500 top *et seq.*). Securities, as against creditors and purchasers, in this country, almost universally take effect from registration, and, from that time, operate as constructive notice.

This doctrine, therefore, does not generally obtain in the United States (1 Story, Eq. Jur. sec. 419, note 2; 2 Pom. Eq. Jur. sec. 768; 2 W. & T. L. C. (4th Am. from 4th Lond. ed.) 36, 37, in notes; Marsh *v.* Lee, 1 *ib.* 837 top).

There may be cases or analogous cases, but they are of exceptional occurrence (Boone *v.* Chiles, 10 Pet. 177; Baggarly *v.* Gaither, 2 Jones, Eq. 80; Carroll *v.* Johnston, *ib.* 120).

There are analogous instances of tacking, but, as they present pure questions of law, requiring only proof of writing, the onus probandi does not, strictly speaking, arise (Adams, Eq. 164, 165).

VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY.

This subject will be found discussed under title MORTGAGES, PERFECT AND IMPERFECT, treated *ante.*

the people of Mecklenburg County, N. C., proclaimed the first declaration of independence on May 20, 1775. That document, though not worth, in money, a nickel, would come within the principle. Our brethren of the "mystic tie" will be pleased to learn that the doctrine applies to "masonic dresses and ornaments" (Fry, Spec. Per. sec. 30).

ADMIRALTY DIVISION.

GENERAL OBSERVATIONS.

The strict rules of the common law in respect to the admission of evidence, are not fully applied. The mode of proof is subject to rules prescribed by the Supreme Court (Rev. Stat. sec. 862; Blease *v.* Garlington, 92 U. S. 1).

The proofs must substantially conform to and sustain the pleadings; and although the strict rules of the common law in respect to variance are not followed, yet, in general, the court will not permit a party to be surprised by the exhibition of proof materially variant from the case stated in the pleadings. But, unless the variance is calculated to mislead, the court may proceed to a decree (Abb. Tr. Ev. 785).

AVERAGE.[1]

The doctrine of average is deducible from this principle, namely: all loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested. There is a distinction claimed between *general* and *particular* average, but, as the latter is governed by principles controlling the doctrine of negligence, it is not proposed to discuss it sepa-

[1] Equity has concurrent jurisdiction, but it is deemed more appropriate to classify the subject under the Admiralty Division.

rately, and our attention will be alone directed to the onus as applicable to general average.

Whole Adventure. — The owner of the goods destroyed has the onus to prove that the jettison was incurred for the benefit of the *whole* adventure, and not merely to show a loss incurred in consequence of a *part* being put in peril (Abb. Ship. chap. 8, § 1; Par. Mer. L. XVII. sec. 8; 1 Wait, A. & D. 183, 184; 3 *ib.* 172; Jacob, Sea Laws, Book IV. chap. 2; Adams, Eq. 270, 271; Rob. Prin. Eq. 185; 1 Story, Eq. Jur. secs. 490 *et seq.*; Birkley *v.* Presgrave, 1 East. 220, reported in 1 Tud. L. C. 83 and notes; Whitteridge *v.* Norris, 6 Mass. 125; Caze *v.* Reilly, 3 Wash. C. C. 298; Walden *v.* Le Roy, 2 Caines, 262; Sarah Ann, 2 Sum. 206; N. E. &c. Co. *v.* Brig Sarah Ann, 13 Pet. 387, the five foregoing cases being reported respectively in 2 Am. L. C. (1 ed.) pp. 376, 379, 404, 426, and 436 and notes thereto).

The evidence touching this matter is not confined to the sacrifice of a part of the cargo at sea, but, if it be shown that in consequence of a stress of weather, some part of the vessel or her tackle had been sacrificed for the general safety, and that a part of the cargo was sold in order to defray expenses and repair losses, the burden is satisfied; so too, when it is shown that some part of the ship or her tackle had been sacrificed for the safety of the whole concern, the burden is satisfied on a claim of general average by the ship-owner;[1] so, too, if it is shown that in order to escape an enemy or to avoid shipwreck, a vessel is intentionally run aground in what was apparently the least dangerous spot, it will constitute a case for general average (*ib.*).

Conducive. — It is not only necessary to prove that the ship was in distress, and a part was sacrificed to preserve the rest, but, it must also be shown, that the sacrifice was *conducive* to the saving (*ib.*).

Voluntary. — And voluntary[2] (*ib.*).

[1] Not, however, if the loss was accidental (1 Tud. L. C. 96, in note).

[2] It was once held that it was necessary that there should have been a previous consultation if practicable (Bouv. L. Dict. title Average; Jacob. Sea

Protests. — If the ship ride out the storm and arrive in safety at the port of destination, it must also be shown that the captain made regular protests and oath joined by some of the crew, and that the sacrifice was made for no other cause than the safety of the ship, and the rest of the cargo [1] (1 Tud. L. C. 92, in note). The claimant of general average holds the onus probandi to such an extent that the defendant rarely takes the laboring oar.

Cargo on Deck; Custom. — But the claimant may so develop his proof as not to disclose that the jettisoned goods were carried on the deck. If so, the defendant may show that fact as against a claim for average, and thereupon the owner of the goods jettisoned may show that there was a general custom to place such goods there (Law. U. & C. 255, sec. 113).

BLOCKADE.

As our people have become, in consequence of the levelling of the Chinese wall of human slavery, homogeneous, we can safely predict that there will never be another civil war, and as our foreign relations are so adjusted as to render highly improbable a foreign war, the subject will be but briefly discussed.

Breach of blockade, by the law of nations, is a cause of forfeiture of the vessel.

When such vessel is seized and libelled by reason of committing such breach of blockade, the captors become actors in the proceeding, and the onus is with them to prove: —

1. An actual blockade; they must show that, at the time

Laws, 345), but this doctrine has been abandoned (1 Tud. L. C. 91, 92, 108, in notes).

[1] Jacobsen lays it down that "the motives and circumstances of such jettison are to be further declared in the ship's journal, and confirmed by oath within twenty-four hours after the master's arrival at the first port" (Jacob. Sea Laws, Book IV. chap. 2, p. 345). He cites no authority, and the author has not been able to find this statement corroborated by other text-books.

of the breach, whether in going in or coming out, there was an adequate force present to prevent all communication with the blockaded port (The Betsey, 2 Tudor, L. C. 875, 883; The Sarah Starr, Blatch. P. C. 69; The Peterhoff, 5 Wall. 28; Wheat. I. L. (Dana) secs. 509, 511, 512 note *a*, and note 233; Levi, Mer. L. 96), and actual war (Prize cases, 2 Black. 635).

The Supreme Court U. S. hold that this may be effected by batteries on shore as well as by ships afloat (Circassian, 2 Wall. 135, decided in 1864, Nelson, J., dissenting).

An important distinction is to be observed, with respect to the burden of proof, as to the existence of blockade by simple fact, and in the case of a blockade by a notification accompanied with the fact. In the former case when the fact ceases (otherwise than by accident or the shifting of the wind), there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, it seems that, *prima facie*, the blockade must be supposed to exist until it shall have been publicly repealed (The Betsey, 2 Tud. L. C. 875, 887; 2 Wild. I. L. 183, 188; Levi, Mer. L. 96).

The libellant then must show that at the time of the attempted entry or exit, the port was either actually blockaded, or that there was a potential blockade.

2. He must next show knowledge. As a constituent element of this, he must show that the offending party had notice, either actual, by the presence, at the time of the breach, of the blockading squadron, or constructive, as by notice to the government of the offending vessel (The Betsey, 2 Tudor, 875, 888–890; Levi, Mer. L. 97; 2 Wild. I. L. 183 *et seq.;* The Hiawatha, Blatch. P. C. 1; S. C. on App. 2 Black, 675; The Empress, Blatch. P. C. 175; Wheat. (Dana) I. L. sec. 515; The Neptunus, 1 Rob. 171).

3. The breach (2 Tudor, L. C. 890 *et seq.;* Wheat. (Dana) I. L. secs. 519, 523; 2 Wild. I. L. 194, 197 *et seq.*). A mere *intent* is not a breach (Fitzsimmons *v.* Newport & Co., 4 Cr. 185; though see Wild. I. L. 194, 197 *et seq.*).

It is not the object of this treatise to discuss the *stati* which have been held to constitute a breach, but the reader is referred to the notes to The Betsey, 2 Tudor, L. C. 890 *et seq.*, for an exhaustive disquisition on the subject; also consult Wild. I. L. 193 *et seq.*

Having shown these three facts, condemnation must follow, unless the offending vessel can show some excuse recognized by international law, and these defences we propose in a short way to advert to.

The offending party taking the laboring oar, may show, in exoneration, that the notice to his government could not have reached him (2 Tudor, L. C. 891; The Spes and Irene, 5 C. Rob. 81; The Shepherdess, *ib.* 262; The Nayade, 1 Newb. 366; see Wheat. (Dana) I. L. sec. 514), or that the vessel had loaded *bona fide* at the port before the blockade began (2 Tud. L. C. 892; The Vrouw Judith, 1 C. Rob. 151; The Neptunus, *ib.* 170; The Johanna Maria, Spinks, 307; Cremidi *v.* Powell, 11 Mo. P. C. C. 116; 2 Wild. I. L. 20, 202), or before notice (The Hiawatha, *supra;* Wheat. (Dana) I. L. sec. 520; 2 Wild. I. L. 191), or that when notified, was also notified that the blockading squadron had been driven off (Wheat. (Dana) I. L. sec. 517; Levi, Mer. L. 96; 2 Wild. I. L. 182), or that the vessel had been *bona fide* transferred before the blockade commenced (2 Tud. L. C. 892; The Vigilantia, 6 C. Rob. 122, 124; The Potsdam, 4 C. Rob. 89), or that the vessel entered the blockaded port before the blockade was established, and was on her way out (2 Tud. L. C. 892; The Juno, 2 C. Rob. 119; The Nossa Senhora, 5 C. Rob. 52; The Potsdam, 4 C. Rob. 89; Cremidi *v.* Powell, 11 Moo. P. C. C. 116; Levi, Mer. L. 98; 2 Wild. I. L. 20, 202); even with a cargo, if taken on board, before notice of the blockade (*ib.*).

This rule extends also to merchandise sent in before the blockade, and withdrawn *bona fide* by neutral proprietors (2 Tud. 892; The Juffrouw Maria Schroeder, 4 C. Rob. 89, note). So he may show that the blockade was directed against the *importation* of a particular article, and that he was going out with such article (2 Tud. L. C. 893; Cremidi *v.* Powell,

11 Moo. P. C. C. 88, 115), or he may show that, although a breach had been committed, there was no seizure until after the blockade had been raised (2 Tud. L. C. 894; The Lisette, 6 C. Rob. 387; 2 Wild. I. L. 209).

Sometimes the vessel might be condemnable, yet defence may be made as to the cargo by showing that the shippers, at the time of shipment, could not have known of the blockade (2 Tud. L. C. 895; The Mercurius, 1 C. Rob. 80; 2 Wild. I. L. 205, 206).

Or, as to the cargo, that the same was carried out of port without the knowledge of the owners (2 Tud. L. C. 897; The Neptunus, Kuyp, 3 C. Rob. 173; The Adelaide, Box, *ib.* 281; The Manchester, Reynolds, 2 Acton, 60; The Crenshaw, Blatch. P. C. 23). But the owners of the cargo, says Mr. Dana, are liable for the act of the master in attempting to run the blockade if the cargo was shipped after they knew of the existence of the blockade, or they might have known it (Wheat. (Dana) I. L. note 238 to sec. 523); so as to neutral consignee (The Isabella Thompson, Blatch. P. C. 377).

Or it may be shown, even where there was an entry after the blockade, that it was for the purpose of carrying despatches from a neutral government to its representative at the blockaded port (2 Tud. L. C. 899; The Drummond, Langdon, 1 Dods. 103, 104).

Or, that the vessel committed the breach under a reasonable belief, founded on representations to the effect, that the port was not blockaded (2 Tud. L. C. 899; The Neptunus, Hempel, 2 C. Rob. 110, 115), but the mistake must apply to the *fact* only of blockade, and not amount merely to a legal conclusion (2 Tud. L. C. 900; The Comet, Mix, Edw. 32).

Or, that the breach was committed through unavoidable necessity (2 Tud. L. C. 900; The Charlotta, Edw. 252; The Fortuna, 5 C. Rob. 27; The Elizabeth, Edw. 198; The Christiansberg, 6 C. Rob. 376, 378; Baltazzi *v.* Ryder, 12 Moo. P. C. C. 168, 171, 172; The Nayade, 1 Newb. 366; The Forest King, Blatch. P. C. 45; The Argonaut, *ib.* 62; The Major Barbour, *ib.* 167; The Diana, 7 Wall. 354; 2 Wild. I. L. 203).

Or he may show that he was compelled to leave the port because of the immediate and pressing danger of seizure and confiscation by the government of the blockaded port (2 Tud. L. C. 900; The Drie Vrienden, 1 Dods. 269).

Or, that unprivileged ships were, at the time, allowed to come in and go out (Wild. I. L. 180, 181, citing The Rolla, 6 Rob. 373).

Or, that the blockading squadron was driven off by a superior force — not by the elements (2 Wild. I. L. 182).

Or, on seizure for going out, a license to go in (2 Wild. I. L. 202).

COLLISION.

The great governing principles applicable to collision on land, control, in their essence, in the matters of collision between vessels, which will now be noticed. But there are some general rules, which can hardly be termed presumptions, that throw light upon the cast of the onus, and which will be briefly stated.

Stationary; Moving. — When one vessel is stationary and the other moving, the presumption of negligence is against the latter; but this rule is not applicable to all stationary bodies (Whart. Neg. sec. 945; 5 Wait, A. & D. 710; Hall *v.* Little, reported in 18 Alb. L. J. 151; S. C., 6 Rep. 577).

Sailing Vessel; Steamer. — In approaching each other, the steamer having the more manageable motor power should give way to the sailing vessel; consequently, in case of collision, the sailing vessel shifts the burden by proof of the *res ipsa loquitur* (Whart. Neg. sec. 946; 5 Wait, A. & D. 713, § 4; Fashion *v.* Wards, 6 McL. 152; Propeller &c. *v.* Fitzhugh, 12 How. 443).

Porting Helm. — When approaching, the rule is, that each one shall port her helm [1] so as to pass on the port side; but

[1] For the benefit of land-lubbers, "porting the helm" means to turn the helm to the port or left side of the vessel, which would cause the ship to bear to the right.

this rule is confined to vessels *ejusdem generis* (5 Wait, A. & D. 713, § 4).

Casus. — *Casus* is a defence, but its use is not called for until a *prima facie* case of neglect has been made (Whart. Neg. sec. 950).

Duty. — The omission to perform some well-known duty, such as displaying lights, etc., is sufficient, of itself, to devolve the burden of proof upon the neglecting vessel (5 Wait, A. & D. 711 *et seq.*; Taylor *v.* Harwood, Taney, 437).

Tug and Tow. — Where two steamers, each with their tows, have exchanged mutual assenting signals as to the mode in which they will pass each other, and a collision afterwards ensues, the libellant's tug having the other on her starboard hand, the burden of proof is upon the libellant to show, by a reasonable preponderance of evidence, that the respondent's tug was in fault; and, failing to do this, the libel should be dismissed (The Webster (D. C. A. D., N. Y.), 18 Fed. Rep. 724).

Contributory Negligence. — Unless in very exceptional instances (Whar. Neg. sec. 952), the defence of contributory negligence is unavailing (5 Wait, A. & D. 710, 711).

Deviation. — When a vessel claims protection for a departure from the statutory requirement, she must show: —

1. That a proposition to depart was given, by means of the prescribed signals, and in due season.
2. That the other vessel heard and understood them.
3. That the other vessel accepted them (5 Wait, A. & D. 714; The Johnson, 9 Wall. 146).

The subject is regulated in this country, to a great extent, by Acts of Congress (Rev. Stats. secs. 4233, 4234), and is elaborately discussed in Jacobson's Sea Laws, Book IV. chap. 1.[1]

[1] Perhaps, however, it might be deemed advisable to have a "tar" by you to explain it.

CONTRABAND.

During a war, neutrals are not permitted by the laws of war to carry into the ports of either belligerent and sell articles known as *contraband of war*. What such articles are it is not our purpose to show, but to state the principle.

It is necessary for the captors to prove that the goods were found on board ship, or that in some way the vessel was taken *in delicto* (Wheat. (Dana) Int. L. sec. 506; The Ionia, 3 Rob. 168), or that the vessel quit port with a cargo of contraband, intending to carry them to a belligerent port, and was seized *en voyage* (2 Wild. Int. L. 218), or that the ship is going on such service under a false destination (*ib.* 216), or with false papers (*ib.*), or that the owner is privy to the offence (*ib.;* and see The Neutralitet, 3 Rob. 295), or if the identical goods are not *in delicto*, yet that they are the proceeds of contraband (2 Wild. Int. L. 219). A *prima facie* case being made out, the offending cargo or vessel must take the onus, and doing so may, in exoneration, show by way of *locus pœnitentiæ*, that, although she originally left port with a contraband cargo, her destination had been changed, and that at the time of her capture she was sailing to a neutral port (*ib.* 218), or that she sailed with contraband articles to a hostile port, which had surrendered before the ship was captured (*ib.*), or that the ship sailed before knowledge of hostilities, carrying despatches altogether of a commercial character (*ib.* 237, 238), or that the despatches were from one of the belligerents for its consul-general in a neutral country, unless they be of a hostile character (*ib.*), or the despatches are to a neutral ambassador in a hostile port (*ib.*).

The true *criteria* seem to be that: —

1. If the vessel leaves port with intent to carry her cargo of contraband goods to the hostile port, she is *in delicto*, and if captured whilst that *status* continues, is confiscable.

2. But she is allowed a *locus pœnitentiæ*, and may abandon her purpose and change her course.

3. The offence, though complete as stated above on sailing from port, is purged, if, in fact, the port when reached shall be found to have been surrendered.

4. Although the offence was complete as above, and even though she had supplied the enemy with her contraband cargo, the offence is purged if no seizure shall have been made before she had completed her return voyage.

Formerly, forfeiture extended to the vessel as well as the goods (note 230 to sec. 507, Wheat. (Dana) Int. L.; 2 Wild. Int. L. 217). And this rule yet prevails when the contraband cargo belongs to the owner of the vessel (Wheat. *ib.;* Levi, Mer. L. 99, citing The Jonge Tobias, 1 Rob. 329, 330; 2 Wild. Int. L. 216, 217). The modern doctrine is, that if the neutral has done no more than carry goods for another, which are contraband, the only penalty upon him is the loss of his freight, time, and expenses (note to Wheat. *ubi supra;* 2 Wild. Int. L. 216). In proceedings against a ship and cargo as prize of war, the burden of proving neutral ownership is on the claimants (Jenny, 5 Wall. 183).

WRECK AND SALVAGE.

Wrecks at Common Law. — There are two kinds of wrecks. One, when a vessel or part thereof or goods are cast by the sea upon the shore and there left, not continuing in the possession of the owner. This is the wreck at common law (1 Black. Com. 290, 293; Mar. W. & S. sec. 131, note 1). By the ancient common law in such case, the owner lost his property; but this harsh rule was modified by statute, and afterwards the owner was allowed, within a certain time, to claim the property; but he was still required to prove his property, as against the fortunate finder or other legal custodian (2 Step. Com. 556, 557). It is deemed unnecessary to discuss the procedure in such cases under the English law, as in the United States the matter is regulated by statute (Rev. Stat. U. S. sec. 3755).

There are other provisions to be found in the statutes of the United States not necessary to be cited. The States have also generally provided for wrecks.

Salvage. — Wreck at sea means a vessel disabled and the right of salvage is incident thereto. Salvage is defined to be a right of compensation for maritime services rendered in saving property, or rescuing it from impending peril, on the sea or wreck on the coast of the sea, or on a public navigable river or lake where inter-statal or foreign commerce is carried on (Mar. W. & S. sec. 97; 1 Abb. U. S. Prac. 572, 573), or even at a wharf (The Florida, &c., U. S. Cir. Court, Ga. Dec. 84).

Salvor. — The party who asserts that he has rendered such services may, if such were performed at the instance of the owner, bring his action *in personam*, and, upon making proof of the request and service, recover damages (Mar. W. & S. sec. 33).

Or he may proceed *in rem*. This is done in the form of a petition, technically styled libel, in which the salvor must propound and articulate in distinct articles, the various allegations of fact upon which he relies; it should embody the names and rank of all the salvors, or if very numerous, some may be admitted to sue for all; it should also state the agreement of consortship, if any; it should be advanced as against the whole property saved, and should allege its estimated value, and also the amount claimed for salvage (Mar. W. & S. sec. 34; 1 Abb. U. S. Prac. 151, Rule 19).

Under proper process the *res* is brought *in custodia legis*. The owner may, thereupon, apply to the court for leave to file an answer; to that end, and for that purpose, he is an actor, and the burden of proof is upon him to establish that fact (Mar. W. & S. sec. 51; U. S. *v.* 422 casks of wine, 1 Pet. 549). If, upon such preliminary proceeding, the claimant shall be allowed to answer, the question of ownership is, in general, thereafter eliminated from the controversy (Mar. W. & S. sec. 51). So, any person claiming a legal interest in the property, may apply to intervene, either in the original

proceeding or by a separate libel, as his interest may demand. Of course he must satisfy the court of his interest, and of its protectible character *qua* the proceeding (Mar. W. & S. chap. IX.).

Under peculiar circumstances not necessary to be here stated, persons, not having such right, may be allowed to intervene as *amici curiæ* (Mar. W. & S. sec. 61). If the defendant or owner fails to make due answer, the libel is adjudged to be taken *pro confesso* as to him, and the cause is heard *ex parte*. If an answer is filed denying the allegations of the libel, the cause proceeds regularly, but in either case the burden of proof is upon the libellant to establish his case *secundum allegata et probata* (Mar. W. & S. secs. 78, 79). The answer is not, as in equity practice, evidence for the defendant (Mar. W. & S. sec. 79), but the sworn statements on both sides are considered by the court (Mar. W. & S. sec. 79). Thereupon the burden is upon the libellant to prove: —

Peril. — 1. That the property saved was in danger beyond the ordinary exposures of navigation; that it was involved in liability to loss and destruction; and in need of extraordinary assistance to rescue it (1 Abb. U. S. Prac. 574; Mar. W. & S. sec. 99; The Cifton, 3 Hagg. Adm. 121; Tyson *v.* Prior, 1 Gall. 133).

Derelict. — 2. He must show that the property was derelict (1 Abb. U. S. Prac. 574; Mar. W. & S. sec. 124).

Risk. — 3. The risk to the salvors (Mar. W. & S. sec. 121).

Beneficial Services. — 4. And it seems that he should also be able to show that the services rendered were beneficial (Mar. W. & S. sec. 158).

There are no established rules touching the measure of compensation. Under Anglo-American law the quantum rests in the sound discretion of the court; so the point, as to the burden of proof in this matter, does not arise (Mar. W. & S. sec. 169; Queen of the Pacific, 21 Fed. Rep. 459).

The defendant then taking the burden, correspondent to his allegations in avoidance, may show: —

Misconduct. — That the salvors were guilty of misconduct in various ways, *ex. gr.*, embezzlement of a portion of the property (Mar. W. & S. sec. 220; 1 Abb. U. S. Prac. 588); destruction of marks (Mar. W. & S. sec. 221); carrying out an anchor ahead (Mar. W. & S. sec. 222); even gross negligence (Mar. W. & S. secs. 159, 223).

No Salvor. — The defendant may also show that the libellant, for various causes, could not have constituted himself a salvor, *ex gr.*, that he was the master, passenger, seaman, or pilot of the wrecked vessel (Mar. W. & S. sec. 139;[1] 1 Abb. U. S. Prac. 576 *et seq.*). Or he may show that the wreck was saved by other instrumentalities than those alleged in the libel (Mar. W. & S. sec. 103; see Gard. Inst. 232, 563, 565).

Military Salvage. — As we are at peace with all the world, it is deemed useless to discuss the burden of proof in such cases; the reader being referred to Wheat. Int. Law (Dana), 456 *et seq.*; Tud. L. C. 945 *et seq.*; 2 Wild. Int. Law, 277, 341.

The same remarks are applicable to other questions growing out of war, such as PRIZE, etc.

[1] Perhaps this statement is too unqualified as to seamen, as it is a debatable point whether they may not be entitled to salvage under peculiar circumstances; see Mar. W. & S. sec. 149.

Part II.

LITIGATION IN REM.

PROCEEDINGS IN REM (For Forfeiture).

Imports. — Under the 71st sec. of the act of 1799, Rev. Stat. U. S. sec. 909, on an information predicated upon a seizure made thereunder, upon proof by the prosecution of probable cause, the onus probandi is cast, by the language of the act, upon the claimant, and probable cause implies reasonable ground of presumption — by which, however, is not meant complete *prima facie* proof (Abb. Tr. Ev. 783; 2 Abb. U. S. Pr. 126; Conk. Treat. 469 *et seq.*; Wood *v.* U. S., 16 Pet. 342; Locke *v.* U. S., 7 Cranch, 339; Luminary, 8 Wheat. 407; Taylor *v.* U. S., 3 How. 197; U. S. *v.* 25 cases cloths, 1 Crabbe, 356; Clifton *v.* U. S., 4 How. 242; Buckley *v.* U. S., 4 How. 251; Cliquot's Champagne, 3 Wall. 114, 143; John Griffin, 15 Wall. 29; U. S. *v.* An open boat, 5 Mas. C. C. 232; Short Staple, 1 Gall. 103). Mr. Bump says that it means that the seizure was made under circumstances which warrant suspicion (Bump, F. P. 620).

In an information, based upon acts in violation of another act of Congress, touching importation of goods, etc., not the growth, etc., does not come under the provisions of the act of 1799, and the burden of proof is on the United States (Schooner Abigail, 3 Mas. C. C. 331). When, the gist of an action is the recovery of duties alleged to have been illegally exacted by the collector, the onus is with the plaintiff (Arthur *v.* Unkart, 96 U. S. 118). If the replication *de injuria* be interposed to a plea of justification, in an action by a collector of internal revenue, the burden of proof is cast upon the defendant (Erskine *v.* Hohnbach, 14 Wall. 613).

Whiskey and Tobacco. — Upon proof made, on an information based upon a seizure of distilled spirits, that the dealer failed to comply with any of the requirements of law, the burden of proof is devolved upon the claimant to show that no fraud was committed, and that all of the requirements of the law were complied with (Rev. Stat. U. S. sec. 909)[1]; and the burden has been extended, by analogy, to seizures of tobacco (Lilienthal's Tobacco, 97 U. S. 237).

Indians. — In suits between a white man and an Indian, whenever the Indian shall make out a presumption of title in himself, from the fact of previous possession or ownership, the burden of proof is by the statute devolved upon the white man. This only means that a presumption may be raised without showing title from or out of the United States[2] (Rev. Stats. U. S. sec. 2126).

[1] See also sec. 3333.

[2] This principle does not fall properly under this title, but, being an important matter, it is put here rather than to make a separate title of it.

Part III.

LITIGATION QUASI IN REM.

SCIRE FACIAS.

This writ is used for many purposes, but it is only proposed to state under it the doctrine of the onus probandi as to the repeal of patents. As to the instances in which this writ becomes available to effect a repeal of letters-patent, see Foster, S. F. 228.

Whatever may be the particular object aimed at by the proceedings, the burden of proof is upon the prosecutor (Nor. L. P. 206; Cor. L. P. 250) to show the invalidity of the patent attacked (Hoyt *v.* Rich, 4 D. & B. 533).

WILLS.

General Onus. — It is elementary learning that the burden of proof, is upon the propounder,[1] to show the formal execution of the script in accordance with the requisites of the law applicable to the will, that is, of realty, in general, by the *lex rei sitæ;* of personalty by the *lex domicilii* (1 Jarman, Wills,[2] 1, 2; Mod. Prob. Wills, chap. 22; Matter of Convey, 52 Iowa, 197, reported in 1 Am. Prob. Rep. 90; Hubbard *v.* Hubbard, 7 Oreg. 42; Webb *v.* Dye, 18 W. Va. 376, reported in 2 Am. Prob. Rep. 558; Reynolds *v.* Reynolds, 1 Spears, 253, reported in 40 Am. Dec. 599; Harris *v.* Vanderveer, 21 N. J. Eq. 561; Tingley *v.* Cowgill, 48 Mo. 291; Matter of Kellum, 52 N. Y. 517).

[1] For the sake of uniformity, the usual expressions "propounder" and "caveator" are employed instead of "proponent" and "contestant" as sometimes used (Bouvier, L. Dic. titles "Propound" and "Caveat").

[2] 2d Am. ed., top paging.

In some States, as Ohio, he is required, as part of such proof, to give evidence of the sanity of the testator.

The doctrine of the onus in relation to the question of insanity has already been discussed under that title.

The weight of authority relieves the propounder from proof that the testator knew the contents of the will; such knowledge, on proof of execution, is presumed (1 Jarman on Wills, 44, note 4; Harrison *v.* Rowan, 3 Wash. C. C. 580; Cuthbertson's Appeal, 97 Pa. 163, reported in 2 Am. Prob. Rep. 54; Key *v.* Holloway, 7 J. Baxt. 575, reported in 1 Am. Prob. Rep. 360; Griffin *v.* Diffenderffer (Md.), reported in 7 Reporter, 527; King *v.* Kinsey, 74 N. C. 261; *In re* Piercy, 1 Robertson, Ecc. 278; Pettes *v.* Bingham, 10 N. H. 515; 1 Tay. Ev. sec. 130). But, in a late English case, it was held that the burden was upon the propounder to show that the testator knew and approved of the contents of the will (Cleare *v.* Cleare, L. R. 1 Prob. & Div. 655; see also Gerrish *v.* Nason, 22 Me. 438, reported in 39 Am. Dec. 589).

According to the earlier English authorities, in case suspicion is thrown upon the instrument, as when a principal legatee has drawn the will and the like, knowledge of the contents must be shown (1 Jarman, Wills, 44, note 4; Paske *v.* Ollat, 2 Phill. 323), but this was modified and the doctrine laid down that, such evidence, unexplained, should merely have great weight in causing the court to reject the will (Barry *v.* Butlin, 1 Curt. 637; note 4 to 1 Jar. Wills, 44). See the subject fully and ably discussed in Downey *v.* Murphey, 1 Dev. & Bat. 82, where the apparent confusion is so clearly stated as to justify an extract from the opinion delivered by the late Chief Justice Ruffin: "In support of the opinion of the Court, many cases have been read from the Ecclesiastical Courts of England; in which the rules laid down to the jury, are stated as *rules* or *principles*, which govern those Courts. But those cases and the terms in which the Judges deliver themselves, are far from satisfying us, that the nature of the inquiry makes it, in a Court of Common Law, the province of the Judge and not the jury to

determine it. The Court of Probate in England, decides every question both of law and fact, which the case presents; the capacity of the testator, in all its various gradations as perfect, doubtful, and defective. Where of the last kind, the instrument is necessarily inoperative under all circumstances. But where a testable capacity is found, the degree of proof that the instrument was freely executed, and that its provisions were really assented to by the maker, must necessarily vary with the degree of capacity, in order to satisfy a rational mind, that there was such free agency, knowledge, and assent as the law demands. That tribunals such as the Ecclesiastical Courts, constituted of a single Judge, holding the Court permanently, and deciding the whole case, should, in the course of repeated discussions of evidence of a similar kind, adopt for the ease of the Court, and for the information of suitors, some propositions, as the measure of that proof, to be deemed sufficient or insufficient under particular circumstances, is not surprising. To the usefulness of such a Court, such rules, as *principles* for the government of the judge, are indispensable. They are requisite, both to relieve the Judge from unnecessary *labor*, and to exclude the suspicion and the danger of unlimited and irresponsible discretion upon all questions of fact; which in a permanent magistrate is intolerable. Hence, in the very able opinions which have been delivered by the Judges of those Courts, are constantly found expositions of the reasons, on which the credit to be given to the witnesses ought to rest, and on which inferences of particular facts may be rationally drawn from certain evidence; and such reasons, and the determination to which they led in one case, are naturally appealed to by counsel, and acknowledged by the Court in succeeding cases. At first they may be respected only as the conclusions of an able, well-instructed, and experienced mind, well calculated to influence another mind to adopt the same conclusions. But they soon acquire the authority which a succeeding judge is neither able nor willing to deny them, of being precedents. For, as has been forcibly remarked, it is

the professional tendency to repose on precedents; and it is fortunate for the institutions of every country, that there is such a tendency." With regard to wills of the blind, it was at one time contended that it should be shown to have been read over to him (1 Wms. Ex.[1] 117), but the later doctrine seems to be that the burden only extends to proof, in some form, that such testator knew the contents of the will (Mod. Prob. Wills, 201; 1 Jar. Wills, 47; Boyd *v.* Cook, 3 Leigh, 32; Harrison *v.* Rowan, 3 Wash. C. C. 580, 585; Lewis *v.* Lewis, 6 Serg. & R. 489, 496), and that it need not be read over to him (Worth. Wills. 564). The subject is further discussed *infra*. So if a testator makes his mark, it lies upon the propounder to show that he knew the contents of the script (Bartee *v.* Thompson, 8 Baxt. 508). A will of an Indian made according to the regulations of the tribe will be sustained (Gray *v.* Coffman, 3 Dill. C. C. 393).

The learning as to what quantum of proof is required to establish the different kind of wills, in different jurisdictions, being regulated by statute and dependent upon its peculiar phraseology, is pretermitted, as without the design of this treatise.

Lost or Destroyed Wills. — In this connection, however, the subject of lost or destroyed wills and undue influence in procuring their execution, will be considered. There is no doubt as to the jurisdiction to establish lost or destroyed wills (Sug. Law Prop. 189; Foster's Appeal, 87 Pa. 67, reported in 1 Am. Prob. Rep. 435, 6 Reporter, 87, and 30 Am. Rep. 340; Mod. Prob. Wills, chap. 25).

The burden is upon the propounder to show, by secondary evidence, that the script was executed in the manner prescribed for wills; according to the English authorities by the clearest evidence (Iredell, Ex. 30 (7); 1 Taylor, Ev. sec. 406; Martin *v.* Laking, 1 Hagg. 244; Davis *v.* Davis, 2 Add. 223).

However, according to the weight of American authority, it only must be proved with reasonable certainty, and not with all the strictness as if the script itself was propounded

[1] 5th Am. ed.

(Grant *v.* Grant, 1 Sandf. Ch. 235; Wallis *v.* Wallis, 114 Mass. 510; Havard *v.* Davis, 2 Binn. 406; Day *v.* Day, 2 Green, Ch. 549; Vining *v.* Hall, 40 Miss. 83; Lagare *v.* Ashe, 1 Bay, 464; Matter of Johnson's will, 40 Conn. 587; Anderson *v.* Irwin, 101 Ill. 411, reported in 2 Am. Prob. Rep. 116; Foster's Appeal, 87 Pa. 67, reported in 1 Am. Prob. Rep. 435, 6 Reporter, 87, and 30 Am. Rep. 340; Dickey *v.* Malechi, 6 Mo. 177, 182; and other cases cited in note to Foster's Appeal as reported in the Am. Prob. Rep.). In the above note it is stated that some of the American courts adhere to the English rule as to the degree of proof.

If the whole of the will cannot be proved, as much, as can be, must be (Dickey *v.* Malechi, 6 Mo. 177, reported in 34 Am. Dec. 130; 1 Taylor on Ev. sec. 406; Sugden *v.* Ld. St. Leonards, L. R. 1 Pro. Div. 154; S. C., 17 E. R. (Moak) 453; and see notes to Foster's Appeal, *ubi supra*). However, there are American authorities which hold that the intensity of the proof must extend to the whole will; that the entire contents must be proved by the clearest, most conclusive and satisfactory evidence (Rhodes *v.* Vinson, 9 Gill. 169, reported in 52 Am. Dec. 685 and notes; Davis *v.* Sigourney, 8 Met. 486). Whatever may be required as to the intensity of the proof, it is clear that it may be proved by secondary evidence, as in case of other lost or destroyed instruments (Toller, Ex. 14; 2 Greenl. Ev. sec. 688 a; 5 Phil. Ev (Cowen & Hill, notes) 287, note 11; Abb. Tr. Ev. 126 (78); Mod. Prob. Wills, 387; see also Grant *v.* Grant, 1 Sandf. Ch. 235; Clark *v.* Wright, 3 Pick. 67; Everitt *v.* Everitt, 27 How. Pr. 600; Rider *v.* Legg, 51 Barb. 260). But to warrant the admission of secondary evidence it devolves upon the propounder to prove that diligent search has been made, for the will, among the archives of the testator, or, at the place where it was most likely to be found, at the request of the party interested (Abb. Tr. Ev. 127; Mod. Prob. Wills, 387; note to Phil. Ev. *ubi supra*), or, to show that the testator placed the will with some third person, or, that having retained possession, the testator in a fit of insanity, or, after permanent derangement, destroyed it,

or, that he destroyed it through error or by accident, or, that it was destroyed by force, or, that it was otherwise destroyed by a third person: for, when the paper is traced to the possession of the testator and is not forthcoming at his death, or is found mutilated, the presumption is that he destroyed it (McBeth *v.* McBeth, 11 Ala. 596; Weeks *v.* McBeth, 14 Ala. 474; Bounds *v.* Gray, Ga. Dec. Pt. 2, 136; Linely *v.* Harwell, 29 Ga. 509; Holland *v.* Ferris, 2 Bradf. 334; Durant *v.* Ashmore, 2 Rich. 184; Brown *v.* Brown, 10 Serg. 84; Minkler *v.* Minkler, 14 Vt. 125; Appling *v.* Eades, 1 Gratt. 286; Betts *v.* Jackson, 6 Wend. 173; Buckley *v.* Redmond, 2 Bradf. Sur. 281; Rickards *v.* Mumford, 2 Phil. 23). But this presumption does not arise if the testator had become insane (Sprigge *v.* Sprigge, L. R. 1 Prob. & Div. 608), and the party setting it up must then prove that, in fact, it was not destroyed by the deceased (1 Jar. Wills, 158; Mod. Prob. Wills, 220, 379, 381; 1 Red. Wills, chap. 7, sec. 2, sub-sec. 8; Parsons, Wills, 58; Ired. Ex. 38 (60), 25 (28), 40 (77), 41 (78), citing Bennett *v.* Sherrod, 3 Ired. 303 (reported in 40 Am. Dec. 410) and Eure *v.* Pittman, 3 Hawks, 364; Abb. Tr. Ev. 126–7; Mercer *v.* MacKin, 14 Bush, 434, reported in 1 Am. Prob. Rep. 399 and 8 C. L. J. 106; 6 Wait, A. & D. 383). Where the existence and loss are not controverted, the ordinary rules touching the reception of secondary evidence apply (5 Phill. Ev. 287 (Van Cott's notes); 1 Jar. Wills, 223).

There is a great diversity of opinion as to what court shall take jurisdiction of lost or destroyed wills, but, with that question we have no concern. The governing principles are the same, whatever forum may be sought for their exposition.

SWINBURNE gives his opinion in the case of a torn or obliterated will that the tearing should be attributed to the act of the person in whose possession it shall be found (Swin. Wills, 538; Ired. Ex. 25 (27)). The rule and presumption founded thereon, above stated, is sensible; but, it seems to be a stretch to say that the testator was presumed to retain his will — common experience rather establishes the reverse.

If the lost will is shown to have been lost while in the cus-

tody of some third person; after the proof of its execution, the burden is shifted to the caveators to prove that the script was returned to the custody of the testator, or, that it was destroyed by his direction (1 Red. Wills, *ubi supra*). The doctrine will be found discussed in the following authorities besides those already cited: Worthington, Wills, 532, 533, in note; 5 Phil. Ev. (Cowen & Hill, notes) note 11, 287 *et seq.*; Bennett *v.* Sherrod, 3 Ired. Law, 303, reported in 40 Am. Dec. 410.

Undue Influence and Fraud. — The next subject which claims our consideration is that of procuring the making of wills by means of undue influence in its bearing upon the burden of proof. This kind of fraud does not fall, strictly, within that class of cases known to equity jurisprudence as constructive frauds, so as, by showing the confidential relation, to devolve or shift the burden upon the fiduciary; but its determination is dependent upon all the facts and circumstances attending the transaction.

The doctrine is so tersely and clearly expressed by Mr. Justice WILDE in a late case, as to supersede any other attempt at a definition: "to make a good will, a man must be a free agent; but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like. They are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.

"Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort; these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, the testator may be

led, not driven, and his will must be the offspring of his own volition, and not that of another" (Kerr, F. & M. 185; 2 Greenl. Ev. 688).

It may be presumed, that, according to the current of both English and American authorities, a court of equity cannot take jurisdiction of such a fraud, and this is put upon the ground that the Courts of Probate have exclusive cognizance touching the admission to or rejection from probate of wills, in England of personalty and in this country, generally, of both real and personal estate; the reason is equally applicable, in England, to devises, as they are there proved on an ejectment trial, or upon an issue out of chancery (Calvert, Eq. 162; Smith, Man. Eq. 408; Roberts, Prin. Eq. 211, 212; Swin. Wills, 478; Spence, Eq. Jur. 701, 702; Bisph. Eq. sec. 199; Colton *v.* Ross, 2 Paige, Ch. 396, reported in 22 Am. Dec. 648 and notes; Adams, Eq. 249; Powell, Dev. 691). It is treated as being without equity, because within the jurisdiction of another competent tribunal (Adams, Eq. 175, 248; 1 Smith, Ch. Prac. 3; 1 Madd. Ch. 258; Mit. Ch. Pl. 123, note 1; Smith, Man. Eq. 56; 1 Wms. Exr. (5th ed.) 341; 2 Steph. Com. 202–205; Roberts, Prin. Eq. 39; 2 Dan. Ch. Pr. 29; Sug. L. Prop. 194 and note; 1 Fon. Eq. 13 note, 68 note; Jeremy, Eq. 488; Powell, Dev. 691–696; Perry, Trusts, sec. 182; 2 Pom. Eq. Jur. sec. 913; Meluish *v.* Milton, L. R. 3 Ch. Div. 27–36; S. C., 17 E. R. (Moak) 771; Allen *v.* McPherson, 1 H. of L. Cas. 191, 195; Case of Broderick, 21 Wall. 503; California *v.* McGlynn, 20 Cal. 233; Scott *v.* Kramer, 31 Ohio, 295, reported in 6 Reporter, 314; Blue *v.* Patterson, 1 D. & B. Eq. 457; Clark *v.* Fisher, 1 Paige, Ch. 171, reported in 19 Am. Dec. 402; Heyer *v.* Burger, 1 Hoff. Ch. 10; Burger *v.* Hill, 1 Bradf. 371; Booth *v.* Kitchen, 7 Hun, 255; Matter of Hathaway, 9 *ib.* 89; Lyne *v.* Guardian, 1 Mo. 410, reported in 13 Am. Dec. 509; Holden *v.* Meadows, 31 Wis. 284; Middleton *v.* Sherburne, 4 Y. & Coll. 358, 393; MacNaghten, S. C. 139 and notes).

This refusal of the Courts of Equity to interfere is regarded as an exception, and Ld. Eldon regretted it (*Ex parte* Fearson,

5 Ves. Jr. 647). It may be that, if the Probate Courts are not invested with power to deal with the question, such circumstance would originate an equity; but it is supposed, that provision is made for the settling and transferring of an issue predicated upon the fraud to a court of competent jurisdiction. Independent of this consideration, where the fraud consists in unduly obtaining the consent of the next of kin to the probate of the script, or, if it goes only to some particular clause in the will, equity takes jurisdiction and decrees a trust (Adams, Eq. 248; MacNaghten, S. C. 139; Roberts, Eq. 39; Mit. Pl. 257; Powell, Dev. 691, 696; Smith, Man. Eq. 57; 1 Fon. Eq. 13 note, 68 note; case of Broderick's Will, 21 Wall. 503; Perry, Trusts, sec. 182; 2 Pom. Eq. Jur. sec. 913, note 1); or, when a will has been prevented from being made, or a name fraudulently inserted therein, or where a revocation has been procured by fraud (Perry, Trusts, sec. 182; Clark *v.* Fisher, 1 Paige, Ch. 171, reported in 19 Am. Dec. 402 and note; Colton *v.* Ross, 2 Paige, Ch. 396, reported in 22 Am. Dec. 648; Lyne *v.* Guardian, 1 Mo. 410, reported in 13 Am. Dec. 509 and note; Small *v.* Small, 4 Greenl. 220, reported in 16 Am. Dec. 253; Heyer *v.* Burger, 1 Hoff. Ch. 10; Booth *v.* Kitchen, 7 Hun, 255; Matter of Hathaway, 9 *ib.* 89; Bowen *v.* Idley, 6 Paige, Ch. 43; McCosker *v.* Brady, 1 Barb. Ch. 342; Lake *v.* Ranney, 33 Barb. 49). In New York it has been held that the Court of Chancery will not take such jurisdiction when the objection is taken in apt time, but that it is too late to raise it after the voluntarily going into trial on the merits (De Bussierre *v.* Holliday, 55 How. Prac. 25; S. C. 119 and 4 Abb. (N. Cases) 111).

On the other hand, the chancery jurisdiction is upheld in many of the States (1 Story, Eq. Jur. sec. 184 and note; Gould *v.* Gould, 3 Story, 537; Holden *v.* Meadows, 31 Wis. 284; *Re* Simpson, 56 How. Prac. 125; Harris *v.* Tisereau, 52 Ga. 153, reported in 21 Am. Rep. 242; 2 Pom. Eq. Jur. sec. 914 and notes; Buchanan *v.* Matlock, 8 Hump. 390, reported in 47 Am. Dec. 622).

The discussion of the question of jurisdiction may, at first blush, seem to be unnecessary; but when we come to consider the different rules of evidence governing the courts of the different systems, it is seen with what facility the onus itself may be shifted.

If the question of undue influence is tried in a common-law court, the doctrine of constructive fraud, being unknown to its jurisprudence, cannot arise; if tried in a Court of Chancery, we have seen that it is applied. See Horah *v.* Knox, 87 N. C. 483.

It was, therefore, deemed pertinent to discuss the question for the benefit of the profession in those States where it is as yet *res integra.*

We shall now proceed to discuss the bearing of the onus in whatever form the question may be tried. The presumption is that the testator was unrestrained (Greenwood *v.* Cline, 7 Oreg. 17). In general, the burden of proof is upon the party charging the fraud (Renn *v.* Lamon, 33 Tex. 760; Davis *v.* Davis, 123 Mass. 590; Booth *v.* Kitchen, 3 Red. Sur. 52; Pierce *v.* Pierce, 38 Mich. 412, reported in 3 C. L. J. 225; McMechen *v.* McMechen, 17 W. Va. 683, reported in 41 Am. Rep. 682, and 17 Am. Law Reg. (N. S.) 744), and turns upon the particular circumstances of each transaction. Some evidence of fraud must be adduced, and that being done, the court will scrutinize all the facts narrowly. Often the cases turn more upon the quantum of evidence than the burden of proof. The burden requires for its discharge evidence of something more than importunity (Bleecker *v.* Lynch, 1 Bradf. 458; Gardiner *v.* Gardiner, 34 N. Y. 155; Kerr, F. & M. 185; Van Deusen *v.* Rewley, 8 N. Y. 358), or honest, and moderate intercession, persuasion or flattery unaccompanied by fraud or deceit, and when the testator is not threatened or put in fear (Davis *v.* Calvert, 5 Gill. & J. 269; reported in 25 Am. Dec. 282, and in Redf. Am. Cas. Wills, 420; Clark *v.* Fisher, 1 Paige, Ch. 171, reported in 19 Am. Dec. 402; Floyd *v.* Floyd, 3 Strob. 44, reported in 49 Am. Dec. 626; Woodward *v.* James, 3 Strob. 552, reported in 51 Am. Dec. 649;

Taylor *v.* Taylor, 6 Ired. Eq. 26, reported in 51 Am. Dec. 412; Deaton *v.* Munroe, 4 Jones, Eq. 39; Futrill *v.* Futrill, 6 Jones, Eq. 337, 340), or earnest solicitation (Wait *v.* Breeze, 18 Hun, 403), or the mere exercise of an influence possessed (Potts *v.* House, 6 Ga. 324, reported in 50 Am. Dec. 329; Todd *v.* Fenton, 66 Ind. 25), or that illicit sexual intercourse subsisted between the testator and the party procuring the execution of the will (Main *v.* Ryder, 84 Pa. 217; Dickie *v.* Carter, 42 Ill. 388; Farr *v.* Thompson, Cheves (S. C.), 37) or that the will was made in favor of a minister of the Gospel (Russell *v.* Evans, 3 Houst. 103), or mere bad treatment of the children by the wife (Tingley *v.* Cowgill, 48 Mo. 291), or kindness and attention (Matter of Gleespin, 26 N. J. Eq. 523; Trumbull *v.* Gibbons, 2 Zab. 117 (22 N. J. L.), reported in 51 Am. Dec.253), or the persuasion of a wife (Pingree *v.* Jones, 80 Ill. 177; Hughes *v.* Martha, 32 N. J. Eq. 288; Pierce *v.* Pierce, 38 Mich. 413; Small *v.* Small, 4 Greenl. 220; reported in 16 Am. Dec. 253), or the reiterated charge of seduction by a female legatee (Wainwright's Appeal, 89 Pa. 220, reported in 1 Am. Prob. Rep. 43), or that beneficiaries drafted the will (Byrne's Estate, Myrick's Prob. (Cal.) 1; Coffin *v.* Coffin, 23 N. Y. 9), or unjust provisions in the will (Hubbard *v.* Hubbard, 7 Oreg. 42), or importunate persuasion from which a delicate mind would shrink (Tawney *v.* Long, 76 Pa. 106, reported in 2 Am. L. T. Rep. (N. S.) 341; Rutherford *v.* Morris, 77 Ill. 397; Rabb *v.* Graham, 43 Ind. 1; Bundy *v.* McKnight, *ib.* 502; Newhouse *v.* Godwin, 17 Barb. 236), or though made in favor of a charity by a patient in a hospital, at the instance of the chaplain (Muller *v.* St. Louis Hosp. Ass., 5 Mo. App. 320), or if it does not deprive the testator of the possession of his will (Hazard *v.* Hazard, 5 Thomp. & C. 79; S. C., 2 Hun, 445).

The principle of "dominion," as applied by courts of equity to the confidential relations, according to the weight of authority, is not the governing criterion; a wife, a son, an attorney, physician, priest, confidential adviser, even mistress, may fairly importune and even draw the will.

Free Agency destroyed.

The stress of the burden goes further. It must be shown that there was fraud or moral coercion or such restraint upon the will as to destroy free agency (Floyd *v.* Floyd, 3 Strob. 44, reported in 49 Am. Dec. 626; Rabb *v.* Graham, 48 Ind. 1; Seguine *v.* Seguine, 4 Abb. App. Dec. 191; Horn *v.* Pullman, 72 N. Y. 269; Wittman *v.* Goodhand, 26 Md. 95; Tyson *v.* Tyson, 37 *ib.* 567; Rollwagen *v.* Rollwagen, 63 N. Y. 504; Clark *v.* Fisher, 1 Paige, Ch. 171, reported in 19 Am. Dec. 402; Small *v.* Small, 4 Greenl. 220, reported in 16 Am. Dec. 253 and notes; Kessinger *v.* Kessinger, 37 Ind. 341; Pingree *v.* Jones, 80 Ill. 177; Parfitt *v.* Lawless, L. R. 2 Pro. & Div. 462; S. C., 4 E. R. (Moak) 687; Matter of Humphrey, 26 N. J. Eq. 513; Baldwin *v.* Parker, 99 Mass. 79; Horah *v.* Knox, 87 N. C. 483; Downey *v.* Murphey, 1 Dev. & Bat. 82; Brinkmann *v.* Renggesick, 71 Mo. 553; Dale *v.* Dale, N. J. Prerog. Court, 36 N. J. Eq. 269; Riddell *v.* Johnson, 26 Gratt. 152, reported in 3 Am. L. Times (N. S.), 171; Tyler *v.* Gardiner, 35 N. Y. 559; Boyse *v.* Rossborough, 6 H. of L. C. 2; Rutherford *v.* Morris, 77 Ill. 397; Brick *v.* Brick, 66 N. Y. 144; Barnes *v.* Barnes, 66 Me. 286; Hubbard *v.* Hubbard, 7 Oreg. 42; Stultz *v.* Schaeffle, 16 Jur. 909; S. C., 18 E. L. & Eq. Rep. 576; Yoe *v.* McCord, 74 Ill. 33; Thompson *v.* Hawks, 11 Biss. 440, reported in 14 Fed. Rep. 902; Children Aid Society *v.* Loveridge, 70 N. Y. 387; Roberts *v.* Trawick, 17 Ala. 55, reported in 52 Am. Dec. 164; Marvin *v.* Marvin, 5 N. Y. Sup. Court, 429, note; Abbott *v.* Traylor, 11 Bush, 335; Eelbeck *v.* Granberry, 2 Hay (N. C.), 232 (411), reported in 2 Am. Dec. 624; Merritt *v.* Rolston, 5 Redf. 220; Archer *v.* Meadows, 33 Wis. 166; Greenwood *v.* Cline, 7 Oreg. 17; Thompson *v.* Davitte, 59 Ga. 472; Nexsen *v.* Nexsen, 3 Abb. App. Dec. 360; Leeper *v.* Taylor, 47 Ala. 221; Tyson *v.* Tyson, 37 Md. 567; Clarke *v.* Clarke, Irish Rep. 2 Common Law, 395; Mairs *v.* Freeman, 3 Red. Sur. 181; La Bau *v.* Vanderbilt, *ib.* 884; McClure *v.* Mansell, 4 Brewst. 119; 1 Wms. Ex.[1] 43, note; Ired. Ex. 10 (20), 11 (23), (24); 1 Jar. Wills, 36, 40; Abb. Tr. Ev. 119 (67); 2 Greenl. Ev. sec. 688 and note; Mod. Prob. Wills, 128 *et seq.*; 1 Red. Wills, chap.

[1] 5th Am. ed., which is the one cited throughout.

10, *passim*, and particularly as to the onus, sec. 52), but mere passion or prejudice or the influence of peculiar religious opinions (Newton *v.* Carbery, 5 Cr. C. C. 632), or the residence of the testator (a son) in the household of his father (Gaither *v.* Gaither, 20 Ga. 709), or the persuasion of a son (Elliott's Will, 2 J. J. Marsh. 340, reported in Red. Am. Cas. on Wills, 434), is not sufficient. For various other illustrations of what facts are not sufficient in themselves and as a question of law, to amount to undue influence, the reader may consult: Miller *v.* Miller, 3 S. & R. 267, reported in Red. Am. Cas. on Wills, 410, and 8 Am. Dec. 651; Cheatham *v.* Hatcher, 30 Gratt. 56, reported in 32 Am. Rep. 650; Lide *v.* Lide, 2 Brev. 403; Eckert *v.* Flowry, 43 Pa. 46, reported in Red. Am. Cas. on Wills, 418; Dean *v.* Negley, 41 *ib.* 312; McMahon *v.* Ryan, 20 *ib.* 329; Wright *v.* Howe, 7 Jones, 412; Gilreath *v.* Gilreath, 4 Jones, Eq. 142; Tunison *v.* Tunison, 4 Bradf. Sur. 138; Wilson *v.* Moran, 3 *ib.* 172; Lowe *v.* Williamson, 2 N. J. Eq. 82; Turner *v.* Cheesman, 15 N. J. Eq. 243, reported in Red. Am. Cas. on Wills, 130; Moore *v.* Blauvelt, *ib.* 367; Sechrest *v.* Edwards, 4 Met. (Ky.) 163; Harrison's Will, 1 B. Mon. 351; S. C., Red. Am. Cas. on Wills, 438; Lucas *v.* Cannon, 13 Bush. 650; Turley *v.* Johnson, 1 Bush. 116; Sutton *v.* Sutton, 5 Harr. (Del.) 459; McDaniel *v.* Crosby, 19 Ark. 533; Morris *v.* Stokes, 21 Ga. 552; Walker *v.* Hunter, 17 Ga. 364; Blakey *v.* Blakey, 33 Ala. 611; Leverett *v.* Carlisle, 19 Ala. 80; Gilbert *v.* Gilbert, 22 Ala. 529; Dunlap *v.* Robinson, 28 Ala. 100; Taylor *v.* Kelly, 31 Ala. 59; Pool *v.* Pool, 35 Ala. 12; Hall *v.* Hall, 38 Ala. 131; Clarke *v.* Davis, 1 Red. Sur. 249; O'Neall *v.* Farr, 1 Rich. 80; Wampler *v.* Wampler, 9 Md. 540; Lynch *v.* Clements, 24 N. J. Eq. 431; Rogers *v.* Diamond, 13 Ark. 474; Dickie *v.* Carter, 42 Ill. 376; Hoge's Estate, 2 Brewst. (Pa.) 450; Matter of Jackman's Will, 26 Wis. 164; Matter of Gleespin's Will, 26 N. J. Eq. 523; Barnes *v.* Barnes, 66 Me. 286; Meeker *v.* Meeker, 75 Ill. 266; Bundy *v.* McKnight, 48 Ind. 502; Bleecker *v.* Lynch, 1 Bradf. Sur. 458; Rankin *v.* Rankin, 61 Mo. 295; Carmichael *v.* Reed, 45 Ill. 108; Leeper *v.* Taylor, 47 Ala. 221; Kenworthy *v.* Williams, 5 Ind. 375; Noble *v.* Enos, 19 *ib.* 72; Roe

v. Taylor, 45 Ill. 485; Allmon *v.* Pigg, 82 *ib.* 149; Monroe *v.* Barclay, 17 Ohio, 302, reported in Red. Am. Cas. on Wills, 442; Browne *v.* Molliston, 3 Whart. (Pa.) 129; Gardner *v.* Gardner, 22 Wend. 526; Brick *v.* Brick, 66 N. Y. 144; Tobin *v.* Jenkins, 29 Ark. 151; Kinleside *v.* Harrison, 2 Phill. 449, 551; Earl Sefton *v.* Hopwood, 1 Fost. & F. 578; Marshall *v.* Flinn, 4 Jones, 199, reported in Red. Am. Cas. on Wills, 413; Harwood *v.* Baker, 3 Moo. P. C. 282; Reynolds *v.* Root, 62 Barb. 250; Bicknell *v.* Bicknell, 2 Thomp. & C. 96; Dennis *v.* Weekes, 51 Ga. 24; Wisener *v.* Maupin, 58 Tenn. (2 J. Baxt.) 342; Marvin *v.* Marvin, 5 N. Y. Sup. C. Rep. 429, note; S. C., 3 Abb. App. Dec. 192; Nexsen *v.* Nexsen, *ib.* 360; S. C., 2 Keyes, 229; Stokes *v.* Miller, 10 W. N. C. 241; S. C., 12 C. L. J. 445.

The correct rule is expressed in a case from South Carolina: "As to imputed undue influence, the law gives general rules; but as to the ultimate fact whether the testator's mind was or was not left free to consent or dissent, there is no prescribed or fixed principle by which the court can attain a conclusion. Upon that fact the jury must pass" (Thompson *v.* Farr, 1 Spears, 93).

The doctrine of undue influence is stated with great perspicuity by the court of West Virginia as follows: —

"Any influence which induces a testator to make a disposition of property which he does not desire and intend, notwithstanding he is not controlled by any act of force, coercion, or persuasion, put forth at the time of signing, is such undue influence as will avoid the will" (Forney *v.* Ferrell, 4 W. Va. 729). Undue influence need not be shown to have been exerted at the time of making the will, that is, it is not confined to that exact time (Fulton *v.* Andrew, L. Rep. 7 H. of L. 448; S. C., 12 E. R. (Moak) 76; Davis *v.* Calvert, 5 Gill. & J. 269, reported 25 Am. Dec. 282, and in Red. Am. Cas. Wills, 420; Roberts *v.* Trawick, 17 Ala. 55, reported in 52 Am. Dec. 164; Bunyard *v.* McElroy, 21 Ala. 316; Taylor *v.* Wilburn, 20 Mo. 306, reported in Red. Am. Cas. Wills, 412).

In Parfitt *v.* Lawless, *supra*, undue influence is construed to mean coercion or fraud, and that seems to be the drift of the

cases above cited (Rutherford *v.* Morris, 77 Ill. 397). However, there are a number of authorities which, when confidential relations are shown, apply the equitable doctrine of constructive fraud, and devolve the burden of proof upon those claiming under the will (Harvey *v.* Gullins, 46 Mo. 147; Boyd *v.* Boyd, 66 Pa. 283). Thus, it is held in the Supreme Court of New York that, a legacy to a testator's physician is presumptively fraudulent (Crispell *v.* Dubois, 4 Barb. 393; Lansing *v.* Russell, 13 Barb. 510), or to an agent, counsellor, guardian, or one sustaining a relation of peculiar confidence toward the testator (Vreeland *v.* McClelland, 1 Bradf. 393; Limburger *v.* Rauch, 2 Abb. (N. S.) 279; Lee *v.* Dill, 11. Abb. Pr. 214; Lake *v.* Ranney, 33 Barb. 49), or in favor of one living in adultery with the testator (Will of McGuire, 1 Tuck. 196; Kessinger *v.* Kessinger, 37 Ind. 341: *contra,* Wainwright's Appeal, 89 Pa. 220, reported in 1 Am. Prob. Rep. 43; Dean *v.* Negley, 41 Pa. 317, reported in Red. Am. Cas. Wills, 439, and 1 Am. Law Reg. (N. S.) 283; Monroe *v.* Barclay, 17 Ohio, 302, reported in Red. Am. Cas. Wills, 442; Main *v.* Ryder, 84 Pa. 217; Rudy *v.* Ulrich, 69 Pa. 177; O'Neall *v.* Farr, 1 Rich. (S. C.) 80; Dickie *v.* Carter, 42 Ill. 376), but upon this question, the correct principle is that, though the existence of such relations is a circumstance to be considered by the jury, no definite weight can be assigned to it (Main *v.* Ryder, *supra*).

Upon making this proof, according to these authorities, the propounder may take the onus, and show that the will conformed to the wishes of the testator.

In Pennsylvania, it is held that where the testator is shown to be weak in mind, though not sufficiently so to create testamentary incapacity, and a person, whose advice had been sought and taken, receives a large benefit under the alleged will, such person must show affirmatively all the circumstances connected with the drawing of such will, and that the testator had a full understanding of the nature of the disposition contained in it (Cuthbertson's Appeal, 97 Pa. 163, reported in 2 Am. Prob. Rep. 54, and 12 Cent. L. J. 352). And the same view is held in Connecticut (Drake's Appeal, 45 Conn. 9, reported in 1 Am. Prob. Rep. 227).

The Pennsylvania case cites no authority except their own previous adjudications; the Connecticut case cites several cases decided in the Ecclesiastical Courts, and especially the case of Barry *v.* Butlin, 1 Curt. 614, 637. But it should be borne in mind that those courts decide both law and fact, and, to satisfy their consciences, have a right to require suspicious circumstances to be cleared up; and it will be remembered that it was in this very case of Barry *v.* Butlin that PARKE, B., laid down the doctrine contrary to the full current of English authorities, — that the onus probandi was with the propounder.

However, the court also cites the following American authorities, as sustaining the same view: Beall *v.* Mann, 5 Ga. 456; Hughes *v.* Meredith, 24 Ga. 325; Simpler *v.* Lord, 28 Ga. 52; Lee *v.* Dill, 11 Abb. Pr. 218; Leacroft *v.* Simmons, 3 Bradf. 35; *In re* Welch, 5 *ib.* 244; Langton's Will, 1 Tucker Sur. Rep. 301; Tyler *v.* Gardiner, 35 N. Y. 594, reported in Red. Sur. Cas. Wills, 451; Delafield *v.* Parrish, 25 N. Y. 35.

The Pennsylvania cases seem rather conflicting.

In Mississippi, it is held that the will of a ward, giving all, or nearly all, of her property to her guardian, is presumptively void (Meek *v.* Perry, 36 Miss. 190).

In Georgia, that there is a strong presumption against a will drawn by legatees (Beall *v.* Mann, 5 Ga. 456), and they have the onus thrown upon them, per Ld. HATHERLEY in Fulton *v.* Andrew, L. R. H. of L. 448, reported in 12 E. R. (Moak) 76.

In New York, that the will of an aged person of impaired mind and memory must be shown to be free from influence (Mowry *v.* Silber, 2 Bradf. Sur. 133), and in Pennsylvania, that undue influence operating on the mind of an elderly woman, —weakened by intemperance, inflamed by abnormal sensual desire, and subjected to the persuasions of one, the object of inflamed longings, whose relations of confidence gave him ample opportunity of accomplishing his private end, — is an imprisonment of the mind not less cogent than actual duress, and is sufficient to avoid a will made under such influence (Dunshene's Appeal, Pa.[1]).

[1] Not yet reported.

The author respectfully submits that the doctrine of these latter cases cannot be maintained upon principle or authority (Mark *v.* McGlynn, 88 N. Y. 357; Thompson *v.* Hefferman, 4 Drury & War. 285; St. Leger's Appeal, 34 Conn. 434; Norton *v.* Relly, 2 Eden, 286; *In re* Welch, 5 Redf. 238).

The author has endeavored to demonstrate above that the doctrine under discussion never formed a part of equity jurisprudence; but see the decisions grouped and analyzed in 3 Pom. Eq. Jur. sec. 1154 and note. The parties were sent to law, and the only issue was *devisavit vel non.* The courts, trying this issue, possessed no equity jurisdiction, and if they had, for the reasons so strongly advanced by Lord Penzance in Parfitt *v.* Lawless, *supra*, they ought not to have extended the doctrine of constructive fraud to such confidential relations. The reasons that gave birth to that wholesome equitable doctrine ought not to apply; that doctrine was addressed to transactions *inter vivos* (Lee *v.* Lee, 71 N. C. 139), and affected only the participants in the fraud and the gain, whereas, to extend the doctrine to cases of wills would most often seriously destroy the just expectations of beneficiaries in no wise connected with the fraud. The following extract from the opinion of Lord Penzance needs no apology for its insertion, especially as the probate and divorce court reports are rarely found in this country, and, while they ought to be, Mr. Moak's valuable edition of the English Reports is not always to be had: —

"This rule was granted in order to consider a suggestion, strongly pressed, that the rules adopted in the courts of equity, in relation to gifts *inter vivos*, ought to be applied to the making of wills. In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought in question; and, if a gift or contract made in favor of him who holds the position of influence, is impeached by him who is subject to that influence, the courts of equity cast

upon the former the burden of proving that the transaction was fairly conducted, as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence.

"Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this, or any other court, regarding wills; and that, if this court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty.

"'One point, however, is beyond dispute,' said Lord Cranworth, in Boyse *v.* Rossborough (6 H. L. C. 49), 'and that is, that where once it has been proved that a will has been executed with due solemnities, by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed.'

"But, in truth, the cases of equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts *inter vivos* there is a transaction in which the person benefited, at least, takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But, in the case of a legacy under a will, the legatee may have, and, in point of fact, generally has, no part in, or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence, or with what motives the legacy was made, or what advice the testa-

tor had, professional or otherwise, would be to cast a duty on him which, in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in the cases of gifts *inter vivos*, is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside, unless the party benefited by it can show affirmatively that the other party to the transaction was placed 'in such a position as would enable him to form an absolutely free and unfettered judgment' (Archer *v.* Hudson, 7 Beav. 551).

"The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another."

There remains but one more matter to be considered relating to ordinary wills:

Revocation. — Let the defence on a caveat be, that the supposed testator revoked the script propounded. It is evident that this is a matter in confession and avoidance, and therefore the burden of proof is upon the caveator. When a lost or destroyed will is propounded, the caveator may take upon himself the burden of proving the revocation in any of the modes pointed out by statute, or, in ordinary cases, he may take the burden of proving a revocation by some

other will containing provisions inconsistent with the one propounded, or a will merely of revocation, or alteration in the circumstances of the testator, as the local statute may prescribe.

On the probate of lost or destroyed wills, we have seen that the burden of proof is on the propounder to show, by secondary evidence, its existence and loss, and to show that due search was made; if destroyed, that it was destroyed by a stranger, without the concurrence or privity of the testator, or by the testator himself, by mistake, accident, or when mentally incapacitated (1 Red. Wills, chap. 7, sec. 2, *passim;* Worth. Wills, 530 in note; Foster's Appeal, 87 Pa. 67; Bennett *v.* Sherrod, 3 Ired. 303, reported in 40 Am. Dec. 410). Therefore the burden is devolved upon the caveators, to show that the will was revoked by some of the means or in some of the ways pointed out in the local statute; he must prove not only that there was a destruction, but that it was done by the testator, *animo revocandi* (1 Red. Wills, chap. 7, sec. 2, *passim;* Roberts, Wills, Part 12, p. 365; Worth. Wills, 530, in note; Powell on Dev. 633 *et seq.;* Toller, Ex. 13, 14; Johnson *v.* Brailsford, 2 Nott & McCord, 272, reported in 10 Am. Dec. 601; Wikoff's Appeal, 15 Pa. 281, reported in 53 Am. Dec. 597).

According to a number of authorities, the *animus revocandi* is presumed from the act of destruction (Swin. Wills, 537; Best, Pres. 177; Ired. Ex. 24 (21) citing Bethell *v.* Moore, 2 Dev. & Bat. 311; Mod. Prob. Wills, 219, citing 1 Add. 74; Dan *v.* Brown, 4 Cow. 483, reported in 15 Am. Dec. 395; Brown's Will, 1 B. Mon. 56, reported in 35 Am. Dec. 174; Smock *v.* Smock, 11 N. J. Eq. 156; Youse *v.* Forman, 5 Bush. 337; Munnikhuysen *v.* Magraw, 35 Md. 280; Wolf *v.* Bollinger, 62 Ill. 368; Willard, Wills, 123). But, the destruction to constitute a revocation must be directed against the will as a whole (Malone *v.* Hobbs, 1 Robinson (Va.), 346, reported in 39 Am. Dec. 263; *In re* Will of Fuguet, 11 Phila. 76). He may also show that the testator made an effort to destroy his will, and was induced to believe that he had done so (1 Red.

Wills, *ubi supra;* Roberts, Wills, Part 12, p. 365; Worth. Wills, 531, in note; 1 Jar. Wills, 117; Mod. Prob. Wills, 225; Bibb *v.* Thomas, 2 Wm. Black. 1043; White *v.* Costen, 1 Jones, 197; Greer *v.* McCrackin, Peck, 301, reported in 14 Am. Dec. 755). But there must be some act performed by the testator towards the destruction — the slightest will be held sufficient (Dan *v.* Brown, 4 Cow. 483; notes to Gains *v.* Gains, 2 A. K. Marsh. 190, reported in 12 Am. Dec. 375; 1 Red. Wills, *ubi supra;* Roberts, Wills, 367; 1 Jar. Wills, 118; Ired. Ex. 25 (24)); or if shown to have been in the testator's custody for a considerable period before his death and not found (Dan *v.* Brown, *supra;* Betts *v.* Jackson, 6 Wend. 173, 189; Buckley *v.* Redmond, 2 Bradf. 281; see also Bennett *v.* Sherrod, 3 Ired. 303, reported in 40 Am. Dec. 410; Will. Exr. 126).

But a mere intention to revoke, unaccompanied by *any act*, even though such should have been prevented by force or fraud, will not amount to a revocation (Gains *v.* Gains, *supra;* Kent *v.* Mahaffey, 10 Ohio St. 204). Any other rule would tend to a judicial repeal of the Statute of Frauds (1 Jar. Wills, 117). If he desists voluntarily or through the persuasion of others, after he has begun some act of destruction, it does not constitute a revocation (Moore *v.* De la Torre, 1 Phill. 375).

According to some American authorities, it is sufficient to show that the testator was induced to believe that he had destroyed his will, to constitute a revocation (Pryor *v.* Coggin, 17 Ga. 444; Smiley *v.* Gambill, 2 Head. 164); but this doctrine cannot be sustained, as it would amount to a virtual repeal of the Statute of Frauds, and is denied in a number of other American authorities (Gains *v.* Gains, 2 A. K. Marsh. 190, reported in 12 Am. Dec. 375 and note; Malone *v.* Hobbs, 1 Rob. (Va.) 346, reported in 39 Am. Dec. 263 and note; Floyd *v.* Floyd, 3 Strob. 44, reported in 49 Am. Dec. 626 and notes; Hise *v.* Fincher, 10 Ired. 139, reported in 51 Am. Dec. 383 and notes; Boyd *v.* Cook, 3 Leigh, 32; Runkle *v.* Gates, 11 Ind. 95; Chingman *v.* Mitcheltree, 31 Pa. 27; Kent *v.* Mahaffey, 10 Ohio, 204; Blanchard *v.* Blanchard, 32 Vt. 62; Munday *v.* Munday, 15 N. J. Eq. 290).

It is due to the Tennessee Court to add that the case of Smiley *v.* Gambill was put upon the ground that the Statute of Frauds touching the destruction of wills had not been re-enacted in that State. He may show an erasure amounting to either total or partial revocation (Ired. Ex. 25 (29), citing Bethell *v.* Moore, 2 Dev. & Bat. 311; 1 Red. Wills, chap. 7, sec. 2, sub-secs. 39, 44), but, if the erasure is effected by running a pencil mark through writing, it is presumed to be deliberative, not conclusive (2 Greenl. Ev. sec. 681 and note 5; 1 Red. Wills, *ubi supra;* Roberts, Wills, Part 18, p. 377; Worth. Wills, 535, 536 in note; *In re* Hall, L. R. 2 Prob. & Div. 256; Francis *v.* Grover, 5 Hare, 39; Hawkes *v.* Hawkes, 1 Hagg. 321; Edwards *v.* Astley, 1 Hagg. 490; Dickinson *v.* Dickinson, 2 Phill. 173; Lavender *v.* Adams, 1 Add. 406); — though Toller seems to think otherwise, 15 — if in ink, final and absolute (*ib.;* 1 Jar. Wills, 69, note 1; 2 Greenl. Ev. sec. 681; Taylor, Ev. sec. 133; see also, In the Goods of Adams, 2 E. R. (Moak) 151). A middle ground is taken in Bethell *v.* Moore, 2 Dev. & Bat. 311, and see Woodfile *v.* Patton, 76 Ind. 575, reported in 2 Am. Prob. Rep. 200. Alterations, interlineations and erasures in a will, according to the weight of English authority, are presumed to have been made after its execution, and even of any codicils thereto (1 Tay. Ev. sec. 134; Doe *v.* Catomore, 16 Q. B. 745; Doe *v.* Palmer, 16 Q. B. 747; *In re* James, 1 Swab. & Trist. 238; Williams *v.* Ashton, 1 Johns. & Henr. 115; Lushington *v.* Onslow, 16 E. & Mar. Cas. 183; S. C., 6 notes, Cas. 183; Christmas *v.* Whinyates, 32 L. J. Pr. 73; S. C., 3 Swab. & Trist. 81; *In re* White, 30 L. J. Pr. 55; S. C., 6 Jur. N. S. 808; Gann *v.* Gregory, 22 L. J. Ch. 1059, per Stewart, V. C.; S. C., 3 De G. M. & J. 777; Cooper *v.* Bockett, 4 Moo. P. C. 419; S. C., 4 E. C. & Mar. Cas. 685; Greville *v.* Tylee, 7 Moo. P. C. 320; S. C., 24 E. L. & Eq. 531; *In re* Harry, 30 L. J. Pr. 142; Simmons *v.* Rudall, 1 Sim. (N. S.) 115; S. C., 15 Jur. 162, and 2 E. L. & Eq. 97; Shallcross *v.* Palmer, 16 Q. B. 747; S. C., 20 L. J. Rep. (N. S.) Q. B. 367; 15 Jur. 836, and 6 E. L. & Eq. Rep. 155; Rowley *v.* Merlin, 6 Jur. (N. S.) 1165; Banks *v.* Thornton, 11 Hare, 180; 1 Red. Wills, chap. 7, sec. 2, sub-sec. 23).

In the Goods of Tweedale, L. R. 3 Prob. & Div. 304, reported in 11 E. R. (Moak) 389, under peculiar circumstances, as to the will of a soldier, alterations were presumed to have been made before the execution of the will.

The author has been unable to find any adjudication upon this point in the American cases, but it has been twice decided by a very able court that alterations in the testator's handwriting are presumed to have been made before the execution of the will (Wikoff's Appeal, 15 Pa. 281, reported in 53 Am. Dec. 597; Linnard's Appeal, 93 Pa. 313, reported in 2 Am. Prob. Rep. 96), but it was held in a recent English decision that, in the absence of any proof that alterations in a will were made before its execution, beyond the fact that they bear an earlier date than the will, in the handwriting of the testator, such alterations will not be recognized (In the Goods of Adamsom, L. R. 3 Prob. & Div. 253; S. C., 14 E. R. (Moak) 704).

He may also show the destruction of a duplicate which was retained by the testator (Lovelass, Wills, 347, 348; Powell, Dev. 637[1] *et seq.;* 1 Red. Wills, *ubi supra;* Roberts, Wills, 375, note (3); Worth. Wills, 533, in note; 1 Jar. Wills, 124; Ired. on Ex. 25 (30), 26 (33); Mod. Prob. Wills, 278).

But, it is doubtful if the onus would be discharged by showing such destruction, if both duplicates remained with the testator (1 Red. Wills, *ubi supra;* Roberts, Wills, *ubi supra;* Worth. Wills, 532, in note; *semble* not, Mod. Prob. Wills, 220, 279, citing Roberts *v.* Round, 3 Hagg. 548, which bears out the text). Lovelass puts it thus: "And it is said that if the testator has possession of both, the same presumption" [of cancellation] "holds, but weaker; and that, even if, having both in his possession, he alters one, and then destroys that which he has altered, there is also the same presumption, but still weaker" (Love. Wills, 348; Jarman is to the same effect, 1 Jar. Wills, 125; Ired. on Ex. 26 (31)).

[1] The citations from Powell are from the original edition, unless L. L. ed. is added; there seems to be a discrepancy between it and the edition in the Law Library.

Later Inconsistent Will.

He may also show a later will containing a clause of revocation or provisions inconsistent with those of the prior will (1 Red. Wills, chap. 7, sec. 5, *passim;* Nelson *v.* McGiffert, 3 Barb. Ch. 158, reported in 49 Am. Dec. 170; Will. Exr. 118, 119, 120, 121, 122; Roberts, Wills, 256–7; Powell, Dev. 535 *et seq.;* 1 Jar. Wills, 152, sec. V. *passim;* Toll. Ex. 15, 16; Ired. Ex. 27 (41); Mod. Prob. Wills, 243, 246; Love. Wills, 344; State *v.* Crossley, 69 Ind. 203, reported in 1 Am. Prob. Rep. 413; Clark *v.* Eborn, 2 Murph. 234; S. C., 1 C. L. Rep. 91; Reese *v.* Prob. Court, 9 R. I. 434; Ludlum *v.* Otis, 15 Hun, 410; Robinson *v.* Smith, 13 Abb. Prac. 359; Simmons *v.* Simmons, 26 Barb. 68; Matter of Simpson, 56 How. Pr. 129; *Re* White, 25 N. J. Eq. 501; Clarke *v.* Ransom, 50 Cal. 595; Dempsey *v.* Lawson, 3 Prob. Div. 98; S. C., 20 E. R. (Moak) 620); even by a foreign will (Cottrell *v.* Cottrell, L. R. 2 Prob. & Div. 397; S. C., 3 E. R. (Moak) 475); or by a second will which cannot have effect in consequence of the incapacity of the devisee or other matter *dehors* (Price *v.* Maxwell, 28 Pa. 23; Love. Wills, 343; Gossett *v.* Weatherly, 5 Jones, Eq. 46; Hairston *v.* Hairston, 30 Miss. 276; Succession of Mercer, 28 La. Ann. 564; Ludlum *v.* Otis, 15 Hun, 410; Plenty *v.* West, 17 Jur. 9; S. C., 22 Law. J. R. (N. S.) Chan. 185, and 15 E. L. & Eq. Rep. 283).

In Ohio by a nuncupative will (McCune *v.* House, 8 Ohio, 144).

Or, to show a revocation as to personalty, that the testator made a subsequent valid will professing to bequeath such personalty (Marston *v.* Marston, 11 N. H. 503), or a codicil with like purport (Brant *v.* Wilson, 8 Cow. 56).

Or, a revoking codicil (Brenchley *v.* Lynn, 16 Jur. 226; S. C., 9 E. L. & Eq. R. 563).

Or, a will not containing any disposition of property, but expressly revocatory of a former will (1 Red. Wills, *ubi supra;* Swin. Wills, 523, 524; Roberts, Wills, 256 *et seq.;* Will. Exr. 122; Worth. Wills, 529, in note; Pow. on Dev. 646; 1 Jar. Wills, *ubi supra;* Toll. Ex. 15; Love. Wills, 343; Matter of Thompson, 11 Paige, 453; Rudy *v.* Ulrich, 69 Pa. 177, reported in 8 Am. Rep. 238).

See the distinction between the nature of the proof in the two instances last mentioned pointed out in Pow. Dev. 646, 647; Mod. Prob. Wills, 243; Love. Wills, 343. So if a revoking will be lost, and there should not be sufficient evidence to probate it, it may yet be used as a revocation (Wallis *v.* Wallis, 114 Mass. 510). But if the later will contains substantially the same provisions, it is a question for the jury to determine which will shall prevail (Fleming *v.* Fleming, 63 N. C. 209). He may also show subsequent marriage and birth of child[1] (Toll. Ex. 18, 19, 20; 2 Fon. 350, note *b*; Swin. Wills, 535; Bac. Ab. Wills, H; 1 Red. Wills, chap. 7, sec. 1, *passim;* Rob. Wills, 395 *et seq.;* Worth. Wills, 524–527, in note; Pow. Dev. 554; 1 Jar. Wills, 106 *et seq.;* Pars. Wills, 58, 59; Mod. Prob. Wills, 256; 1 Wms. Exr. 161; Love. Wills, 364; Bowers *v.* Bowers, 53 Ind. 438; Will. Exr. 127). In some States it is held that marriage alone, even in the case of a male testator, is a presumptive revocation (Duryea *v.* Duryea, 85 Ill. 41; Sneed *v.* Ewing, 5 J. J. Marsh. 460, reported in 22 Am. Dec. 41; see the able note to Fon. Eq. (2d Am. ed.) 353, note (*b*),[2] asserting this); but notwithstanding the strong views there presented, it is clearly and fully settled by the English authorities that in the instance of a male testator, both circumstances must concur

[1] It may be well to consider, in this connection, as well as in that of the reply to such presumed revocation, the reason assigned therefor by the courts, as the practitioner may be better enabled to thereby determine the rights of his client, especially when the courts of his State shall have followed one or other views taken by the English courts. There is a discrepancy between the courts of common law and the ecclesiastical courts on the question. The common-law courts holding that the revocation was in consequence of a rule of law or of a condition tacitly annexed by law to the execution of a will; that when the circumstances under which the will was made became entirely altered by a subsequent marriage and birth of a child, the will should become void; and that the operation of this rule was altogether independent of any intention on the part of the testator: whereas the ecclesiastical courts held that the revocation was grounded upon the implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will was made; and upon such implied intention only (1 Wms. Exr. 167, 168).

[2] This note occurs on p. 350, 1st ed.

(Worth. Wills, 527–8 in note). In other States it is provided for by statute (Fallon *v.* Chidester, 46 Iowa, 588; S. C., 26 Am. Rep. 164; Negus *v.* Negus, *ib.* 487; Hughes *v.* Hughes, 37 Ind. 183; McCay *v.* McCay, 1 Murph. 447).

Marriage alone is held sufficient in the instance of a *feme sole*, by all the authorities (see the authorities above cited, also *In re* Carey, 49 Vt. 236, reported in 24 Am. Rep. 133; Miller *v.* Phillips, 9 R. I. 141; Will. Exr. 127).

Or he may show in the instance of a married testator, the subsequent birth of issue, and other circumstances in aid of that fact (Worth. Wills, 525, in note; Mod. Prob. Wills, 257–8; Love. Wills, 366; Will. Exr. 129; Morse *v.* Morse, 42 Ind. 365; Carey *v.* Baughn, 36 Iowa, 540, reported in 14 Am. Rep. 534; McCullum *v.* McKenzie, 26 Iowa, 510; Succession of Parham, 11 La. Ann. 646; Negus *v.* Negus, 46 Iowa, 487, reported in 26 Am. Rep. 157; see the whole subject discussed in the notes of Graves *v.* Sheldon, 2 D. Chip. (Vt.) 68, reported in 15 Am. Dec. 653).

Or he may show that the testator, after making his will, executed a conveyance of his property (Love. Wills, 351; Worth. Wills, 536, 543, in note; Pow. Dev. 566 *et seq.;* 1 Jar. Wills, 130, sec. III. *passim;* Toll. Ex. 20, 21; Mod. Prob. Wills, 283; 1 Went. Ex. 23; Graves *v.* Sheldon, *supra;* Coulson *v.* Holmes, 5 Sawyer, C. C. 279, reported in 6 Reporter, 674; Epps *v.* Dean, 28 Ga. 533; Bowen *v.* Johnson, 6 Ind. 110; Balliet's Appeal, 14 Pa. 451; Brown *v.* Thorndike, 15 Pick. 388; Floyd *v.* Floyd, 7 B. Mon. (Ky.) 290; Skerrett *v.* Burd, 1 Whart. (Pa.) 246; Minuse *v.* Cox, 2 Johns. Ch. 441, reported in 9 Am. Dec. 313; Walton *v.* Walton, 7 Johns. Ch. 258, reported in 11 Am. Dec. 456; Will. Exr. 130).

Or, formerly he might show an alteration in the quality of the estate (Pow. Dev. 580 *et seq.;* 1 Jar. Wills, 140; 1 Went. Ex. 24; Worth. Wills, 537, 539, *et seq.* in notes; 1 Wms. Exr. 171), and even at this day in case of a "remodelling" as Worthington terms it; as, if after making a will, devising the equitable fee, the testator should afterwards take a conveyance of the legal fee though merely by a limitation to bar

dower, that is: by the contrivance invented by Mr. Fearne, predicated upon the case of Duncombe *v.* Duncombe, so that, although there would be a limitation to the heirs of the testator, after a life estate to himself by the interposition of trustees to preserve contingent remainders, the inheritance would not vest in the bargainee *simul et semel* (1 Fearne, C. R. 347, note; Worth. Wills. 539, in note; Love. Wills, 351 *et seq.;* and Plowden *v.* Hyde, 21 L. J. Rep. (N. S.) Chan. 329; S. C., 9 E. L. & E. Rep. 238, where Vice-Chancellor KINDERSLEY lays down the determining *criteria*).

Or, to show the revocation of a codicil he may prove the cancellation of the will to which it was ancillary (Mod. Prob. Wills, 222; Love. Wills, 348; Ired. Ex. 27 (38); 1 Jar. Wills, 127–8; 2 Greenl. Ev. sec. 682; 1 Wms. Exr. 134; 1 Red. Wills, chap. 7, sec. 2, sub-sec. 16, note 28).

Or, perhaps that it was altered by the legatee (Mod. Prob. Wills, 285; citing Pigot's Case, 11 Rep. 26, and Jackson *v.* Malin, 15 Johns. 293).

The case from Johnson is directly in point, but cites no authority except Pigot's Case, which was the case of a deed. The case of Jackson *v.* Malin is overruled by the same court in Herrick *v.* Malin, 22 Wend. 388.[1] Or, he may show that the will was unfinished (1 Jar. Wills, 97; Mod. Prob. Wills, 155–6; Love. Wills, 316–7; Public Adm. *v.* Watts, 1 Paige, 347; S. C., 4 Wend. 168; Gaskins *v.* Gaskins, 3 Ired. 158; Rochelle *v.* Rochelle, 10 Leigh, 125; Malone *v.* Harper, 2 Stew. & Port. 454).

Reply to Revocation.—When evidence tending to prove a revocation has been offered, the propounder must consider

[1] The point is put, but doubtingly, by Judge Redfield, citing Jackson *v.* Malin (1 Red. Wills, chap. 7, sec. 2, sub-sec. 43). The later case of Herrick *v.* Malin, while sustaining the implied doubt of this very learned lawyer, seems to have escaped his notice: *Aliquando magnus dormitat Homerus.* It might be argued with force that there are reasons for sustaining the doctrine as applicable to deeds, which ought not to affect wills. I do not find the principle stated elsewhere among the text-books than in Modern Probate of Wills. In Smith *v.* Fenner, 1 Gall. 170, it was held that the alteration of a pecuniary legacy by the legatee or a stranger does not avoid it.

whether it would be sufficiently strong to convince a jury; if he is so advised, he takes the onus and may reply to such evidence.

As almost, if not all, the instances of revocation, depend upon *intention*, he may show any facts and circumstances tending to rebut such intention.

In particular he may show: —

When the revocation is predicated upon marriage and the birth of issue, that such issue was otherwise provided for by the testator (1 Red. Wills, chap. 7, sec. 1 (5): Roberts, Wills, 397; Worth. Wills, 527, in note; 1 Jar. Wills, 109; see also Peters *v.* Siders, 126 Mass. 135, reported in 30 Am. Rep. 671; 26 Am. Rep. 157, 164; Love. Wills, 365; 1 Pow. Dev. (Law Lib. ed.) 533, note 9; 1 Red. Wills, chap. 7, sec. 1, sub-sec. 5; Mod. Prob. Wills, 272 *et seq.*; 2 Greenl. Ev. sec. 684 and note 2; 1 Wms. Exr. 172 *et seq.*).

Or, that the will does not dispose of the whole property (authorities last above cited), or that a codicil was made after the birth of issue, referring in direct terms to the antecedent will, treated as amounting to a republication[1] (Mod. Prob. Wills, 271, 272, citing Gibbens *v.* Cross, 2 Add. 455; 1 Wms. Exr. 172 *et seq.*; 2 Greenl. Ev. 684).

Or, the making of a codicil by a woman after marriage (Brown *v.* Clarke, 16 Hun, 559).

Or, that the testatrix was a widow with children when she married, and died without issue by her second marriage (*In re* Tuller, 79 Ill. 99, reported in 22 Am. Rep. 164).

Or, if the proof of revocation is pointed to the destruction of the will, he may show that it occurred by accident or mistake or through misapprehension (1 Red. Wills, chap. 7, sec. 2, sub-sec. 3; Worth. Wills, 530, in note; Roberts, Wills, 368; 1 Jar. Wills, 115; Mod. Prob. Wills, 220; Love. Wills, 346, 350; 1 Wms. Exr. 128 *et seq.*; 1 Pow. Dev. (L. L. ed.) 594-5; Ired. Ex. 25 (23); Pringle *v.* McPherson, 2 Brev. (S. C.) 279, reported in 3 Am. Dec. 713; Will. Exr. 123, 124).

Or, that having made two wills, the testator by mistake

[1] The reader will bear in mind that this point is predicated upon the reasoning of the ecclesiastical courts.

destroyed the one he intended to keep (Burns *v.* Burns, 4 Serg. & R. 295).

Or, that the testator made a second will under the supposition that the former was lost, but on finding it, destroyed the second (Marsh *v.* Marsh, 3 Jones, 77; S. P. Lawson *v.* Morrison, reported in 1 Am. Dec. 288).

Or, as decided by the Courts of Appeals of Virginia, by a script neither written nor signed by the testator, but prepared at his instance, corrected by him, and declared to be his last will (Glasscock *v.* Smither, 1 Call, 479; S. P. Laughton *v.* Atkins, 1 Pick. 535; Read *v.* Manning; 30 Miss. 308; Snowhill *v.* Snowhill, 23 N. J. L. 447; Barksdale *v.* Hopkins, 23 Ga. 332).

Whether the intentional destruction of an inconsistent later will of personal estate amounts to a revival[1] of a former, is a vexed question. A simple reference to the English authorities is considered sufficient (Mod. Prob. Wills, 221 *et seq.;* Worth. Wills, 567 *et seq.;* Roberts, Wills, 376 *et seq.;* 1 Wms. Exr. 154 *et seq.;* but a will of realty could only be revived in the manner pointed out by the Statute 29th Chas. 2).

So, also, when a partial destruction is shown, the propounder may, in reply, prove that the testator, after tearing the will, reconsidered his determination to destroy it, and expressed himself satisfied that "it was no worse" (1 Red. Wills, chap. 7; Worth. Wills, 531, in note; 1 Jar. Wills, 118, 119; Mod. Prob. Wills, 227; Doe d. Perkes *v.* Perkes, 3 B. & Ald. 489 (5 E. C. L. R. 353); Love. Wills, 346; 1 Wms. Exr. 122; Will. Ex. 124, 125).

Or, that he tore it up under the mistaken impression that it was invalid, but afterwards collected and preserved the pieces until his death (Giles *v.* Warren, L. R. 2 P. & D. 401; S. C., 3 E. R. (Moak) 478; In Goods of Colberg, 2 Curt. 832; Elms *v.* Elms, 1 Swab. & Trist. 155; Clarkson *v.* Clarkson, 2 Swab. & Trist. 497; 1 Red. Wills, chap. 7, sec. 2, sub-sec. 7).

Or, he may show that the cancellation was effected under

[1] The expression "republication" is often but inaccurately used in the books (Worth. Wills, 566).

the supposition that he (the testator) had made a subsequent effectual will, which proved invalid (1 Red. Wills, chap 7, sec. 2, sub-sec. 11; Worth. Wills, 529, in note; Roberts, Wills, 373; 1 Jar. Wills, 121; Pringle *v.* McPherson, 2 Brev. 279, reported in 3 Am. Dec. 713; Williams *v.* Tyley, Johns. 530; S. C., 5 Jur. N.S. 35; Love. Wills, 349; 1 Wms. Exr. 130 *et seq.*).

Or, that it was only deliberative, showing an intention that the revocation should depend upon the making of another will (1 Red. Wills, chap 2, sec. 2, sub-sec. 21; Worth. Wills, *ubi supra;* Love. Wills, 346; *Re* Brewster, 6 Jur. N. S. 56).

Or, that it was donè by a third person, out of the presence of the testator (1 Red. Wills, chap. 7, sec. 2, sub-sec. 28; Pow. Dev. 612; 1 Jar. Wills, 129; Love. Wills, 346, 350); and this fact is presumed when shown to have been in the custody of a legatee (Bennett *v.* Sherrod, 3 Ired. 303; S. C., 40 Am. Dec. 410). However, in those jurisdictions, where the doctrine prevails that an intentional destruction of a later, amounts to or is presumptive evidence of the revival of a former will, such fact may be shown in rebuttal[1] (1 Red. Wills, chap. 7, sec. 2, sub-sec. 12 *et seq.;* Worth. Wills, 567, 568, in note; Roberts, Wills, 376; Pow. Dev. (1st ed.) 549–551; Mod. Prob. Wills, 221; 2 Greenl. Ev. sec. 683; 1 Wms. Exr. 129, 130; Love. Wills, 347; *Re* Simpson, 56 How. Prac. 125; Brown *v.* Clark, 77 N. Y. 369; S. C., 16 Hun, 369; Randall *v.* Beatty, 31 N. J. Eq. 643; Rhodes *v.* Vinson, 9 Gill. 169, reported in 52 Am. Dec. 685; Flintham *v.* Bradford, 10 Barr, 82).

Or, that the revoking act was procured by fraud or undue influence (May *v.* Bradlee, 127 Mass. 414; see a singular illustration, Hale *v.* Tokelove, 14 Jur. 817; S. C., 5 E. L. & Eq. Rep. 574; O'Neall *v.* Farr, 1 Rich. (S. C.) 80).

[1] The doctrine of the text is in accordance with the decisions of the common-law courts. The ecclesiastical courts seem to hold the other way (1 Jar. Wills, 123; 4 Kent, Com. 531; 1 Tuck. Com. Book 2, 295; 2 Minors' Ins. 931; 1 Lom. Ex. (2d ed.) top page, 131; Love. Wills, 347; Worth. Wills, 567–8; 2 Greenl. Ev. sec. 683). In Moore *v.* De la Torre, 1 Phill. 375, the court seemed to lean to the opinion that the presumption was rather against the revival; in James *v.* Cohen, 3 Curt. 770 (7 E. E. R. 585), Sir H. Jenner Fust held that there was no presumption either way. See Mod. Prob. Wills, 221–2.

Or, that the mental unsoundness of the testator coincided with the act of revocation (1 Red. Wills, chap. 7, sec. 2, sub-sec. 37; Mod. Prob. Wills, 220, citing 1 Add. 74; Apperson *v.* Cottrell, 3 Port. 51, reported in 29 Am. Dec. 239; Allison *v.* Allison, 7 Dana, 94; Smith *v.* Wait, 4 Barb. 28; Idley *v.* Bowen, 11 Wend. 227; Ford *v.* Ford, 7 Hump. 92).

Or, that the revoking act was done under uncontrollable excitement, incapacitating the testator from having a just *animus revocandi* (Forman's Will, 54 Barb. 274; S. C., 1 Tuck. Sur. 205).

Or, that the obliteration was done as part of an entire transaction, which failed of effect (1 Red. Wills, chap. 7, sec. 2, sub-sec. 49; 1 Jar. Wills, 122; Love. Wills, 346; 1 Pow. Dev. (L. L. ed.) 602, 603; 1 Wms. Exr. 132, 133; Roberts, Wills, 367 *et seq.*).

Or, as laid down by Judge Redfield, if a conveyance is relied on as a revocation, that it was executed under compulsion (1 Red. Wills, chap. 7, sec. 3, sub-sec. 9).

Or, made by mistake (Roberts, Wills, 282, note (1); Love. Wills, 354; 1 Wms. Exr. 133; Pringle *v.* McPherson, 2 Brev. 279, reported in 3 Am. Dec. 713).

Or, that it was a conveyance in *mortmain*[1] (1 Red. Wills, chap. 7, sec. 4, sub-sec. 3; 1 Jar. Wills, 150; Love. Wills, 354; 1 Pow. Dev. (L. L. ed.) 583, note 2).

Or, that it was the deed of a *feme covert*, or other incapacitated person (1 Red. Wills, chap. 7, sec. 4, sub-sec. 4; 1 Jar. Wills, 151; Love. Wills, 354).

Or, that the deed is void (1 Red. Wills, chap. 7, sec. 4, sub-sec. 5; Roberts, Wills, 281; Love. Wills, 355; but see 1 Jar. Wills, 149, as to the distinction between being void at law or in equity).

Certainly, when void for fraud, or when based upon an immoral consideration (1 Red. Wills, *ubi supra;* 1 Jar. Wills, 151).

So, he may prove that the provisions of a second will (except as to clause of revocation) were obtained by fraud

[1] And for that reason void.

(Rudy *v.* Ulrich, 69 Pa. 177, reported in 8 Am. Rep. 238), or that the deed was so procured (Love. Wills, 354, 355). So, where there is an earlier and a later inconsistent will, he may show a script purporting to be a codicil to the first will, as that, it seems, not only operates to revoke the later, but to revive the former, and "bring it down to the date of the codicil, and makes it speak, as it were, at that time" (Mod. Prob. Wills, 222, citing Rogers *v.* Pittis, 1 Add. 30; 1 Went. Ex. 25; Neff's Appeal, 48 Pa. 451; 1 Pow. Dev. (L. L. ed.) 621, note 3; Will. Exr. 133).

Or, that the testator was prevented from perfecting an imperfect script by sudden death, or insanity, or any other involuntary preventing cause (1 Jar. Wills, 95, 96; Gaskins *v.* Gaskins, 3 Ired. 158).

Nuncupative Wills. — This is the oldest form of a will; it was used by Abraham, by which he constituted Eliezer his devisee (Gen. chap. XV. verse 3).

It may not be inuseful to state the rule of the common law touching such dispositions, as, in those States which have adopted the common law and have failed to enact the Statute 29 Chas. 2 modifying it, with regard to such wills, this learning might still be applicable; also, to such of these testaments as do not purport to bequeath an estate equal to the minimum sum specified in the statute, and to the wills of soldiers in actual military service, or mariners or seamen at sea, who are excepted out of the statute. But few of the States have re-enacted 1 Vic. chap. 26, and, consequently, the common-law learning touching such wills may come into play. At common law, then, these wills (only embracing personal estate) were made by word of mouth, and put in writing after the testator's death. Seven witnesses are required to the speaking of the words, who must be especially called for that purpose by the testator (Sum. Silv. 443 *b*; 1 Went. Ex. 8).[1] To this extent the burden of proof went at common law.

[1] Wentworth says "seven"; this is presumably correct, as in the case of Coles *v.* Mordaunt (note to 4 Ves. Jr. (Sumn. ed.) 196; Mod. Prob. Wills,

The law concerning these testaments was materially changed by the Statute 29 Chas. 2, sec. 19, the material provisions of which, it is assumed, are generally re-enacted in the United States.

By force of that statute, the propounder must prove with the utmost strictness: —

1. That the estate exceeds the amount specified in the statute.

2. It must be proved by three witnesses present at the making thereof.

3. That the testator bid the persons present or some of them to bear witness that such was his will.

4. That it was made during the last sickness of the testator.

5. And, in his house or where he had been resident for ten days or more next before the making of such will, or that such testator was taken sick from home, and died before returning thereto.

6. Unless offered for probate within six months after the speaking of the testamentary words, that the testimony or its substance was committed to writing within six days after the making of said will. Unless the testator was a soldier in actual military service or a mariner or seaman being at sea, in which case the rule of the common law applied (Givins'

316; Sykes *v.* Sykes, 2 Stewart (Ala.) 364) nine witnesses were examined in support of the pretended testamentary words, the will having been alleged to have been made in 28 Chas. 2. The notion of such wills was unquestionably borrowed from the civil law, which required seven (note 2, p. 2, Roberts, Wills).

In Louisiana, where the civil law prevails, seven witnesses are required to a holograph will, termed there "the mystic testament" (Freed. Leg. Adviser, 325, note; 4 Kent, Com. 519; Civil Code, La. arts. 1567–1614).

However, Bracton lays it down, touching wills, *fieri autem debet testamentum liberi hominis, ad minus coram duobus, vel pluribus viris legalibus et honestis* (Brac. Lib. II., chap. 26, p. 61), but he does not cite any authority, and this book is by a learned author, termed "a curious compound of Roman Law and Feudal usages" (Long's Discourses, 96, Law Library, April, May, and June, 1848; see, also, Code, Lib. VI. tit. 22, sec. 8; Just. Lib. II. tit. 12, secs. 3 and 4; Dig. Lib. 37, tit. 3).

Will, 1 Tuck. (N. Y.) 44; Dawson's Appeal, 23 Wis. 69; 1 Jar. Wills, 89 *et seq.;* Matter of Hebdin, 20 N. J. Eq. 473; Swin. Wills, 59, 60; Toller, Ex. 3, 4; 1 Red. Wills, chap. 7, sec. 2; Parsons, Wills, 27, 28, 29; 1 Wms. Ex. 101, 102; Ired. Ex. 20, 21; Roberts, Wills, 204 *et seq.;* 4 Kent, Com. 516, 517; Mod. Prob. Wills, chap. 21; notes to Sykes *v.* Sykes, 20 Am. Dec. at p. 44; 10 Bac. Abr. 487; Ired. Ex. 20, 21; Dorsey *v.* Sheppard, 12 Gill. & J. 192, reported in 37 Am. Dec. 77; Morgan *v.* Stevens, 78 Ill. 287; Succession of Wilkins, 21 La. Ann. 115; Hollingshead *v.* Sturgis, *ib.* 450; Prince *v.* Hazleton, 20 Johns. 502, reported in 11 Am. Dec. 307; Hubbard *v.* Hubbard, 8 N. Y. 196; O'Neill *v.* Smith, 33 Md. 569; Campbell *v.* Campbell, 21 Mich. 438; Succession of Pardo, 22 La. Ann. 139; Smith *v.* Thurman, 2 Heisk. 110; Ellington *v.* Dillard, 43 Ga. 361; Hoover *v.* York, 24 La. Ann. 375; Biddle *v.* Biddle, 36 Md. 630; Andrews *v.* Andrews, 48 Miss. 220; Weir *v.* Chidester, 63 Ill. 453; McCullom *v.* Chidester, *ib.* 477; Conner *v.* Brasher, 25 La. Ann. 663; Nolan *v.* Gardner, 7 Heisk. 215; Pierce *v.* Pierce, 46 Ind. 86; Sticker *v.* Oldenburg, 39 Iowa, 653; St. James Church *v.* Walker, 1 Del. Ch. 284; George *v.* Greer, 53 Miss. 495; Harrington *v.* Stees, 82 Ill. 50; King *v.* Vairin, 28 La. Ann. 452; Mulligan *v.* Leonard, 46 Iowa, 692; Broach *v.* Sing, 57 Miss. 115; Bolles *v.* Harris, 34 Ohio, 38, reported in 1 Am. Prob. Rep. 63; Baker *v.* Dodson, 4 Hump. 342, reported in 40 Am. Dec. 650; Devisees of McCune *v.* House, 8 Ohio, 44, reported in 31 Am. Dec. 438; Phoebe *v.* Boggess, 1 Gratt. 129, reported in 42 Am. Dec. 543; notes to Guthrie *v.* Owen, 2 Hump. 202, reported in 36 Am. Dec. 311, 317; Priscilla E. Yarnall's Will, 4 Rawle, 46, reported in 26 Am. Dec, 115; Gwin *v.* Wright, 8 Hump. 639; Hatcher *v.* Millard, 2 Cold. 30; Werkheiser *v.* Werkheiser, 6 Watts & S. 184; Sykes *v.* Sykes, 2 Stew. 364, reported in 20 Am. Dec. 40; Parsons *v.* Miller, 2 Phill. 194; Bennett *v.* Jackson, *ib.* 190; Gibson *v.* Gibson, Walk. (Miss.) 364; Taylor's Appeal, 47 Pa. 31; Mitchell *v.* Vickers, 20 Tex. 377; Lucas *v.* Goff, 33 Miss. 629; Lemann *v.* Bonsall, 1 Add. 389; Kelly *v.* Kelly, 9 B.

Mon. 553; Jones *v.* Norton, 10 Tex. 120; Reese *v.* Hawthorn, 10 Gratt. 548; Boyer *v.* Frick, 4 Watts & S. 357; Johnson *v.* Glasscock, 2 Ala. (N. S.) 218; Garner *v.* Lansford, 12 Sm. & M. 558; Arnett *v.* Arnett, 27 Ill. 247; Wynn *v.* Bob, 3 Leigh, 140, 151; Dockum *v.* Robinson, 26 N. H. 372; Babineau *v.* Le Blanc, 14 La. Ann. 729; Brown *v.* Brown, 2 Murph. 350; Parsons *v.* Parsons, 2 Greenl. 298; Parkison *v.* Parkison, 12 Sm. & M. 672; Marks *v.* Bryant, 4 Hen. & M. 91; Ellington *v.* Dillard, 42 Ga. 361; Stamper *v.* Hooks, 26 *ib.* 603; Hunt *v.* White, 24 Tex. 643; Porter's Appeal, 10 Pa. 254; Mason *v.* Dunman, 1 Mumf. 456; *Ex parte* Thompson, 4 Bradf. 154; Will of Smith, 6 Phil. (Pa.) 104; Warren *v.* Harding, 2 R. I. 133; Van Deuzer *v.* Gordon, 39 Vt. 111; Lawson *v.* Lawson, 12 La. Ann. 603; Carter *v.* McManus, 15 *ib.* 627; Shannon *v.* Shannon, 16 *ib.* 8; Acosta *v.* Marrero, *ib.* 136; Prendergrast *v.* Prendergrast, *ib.* 219; Devall *v.* Palms, 20 *ib.* 202; Hubbard *v.* Hubbard, 12 Barb. 148; Botsford *v.* Krake, 1 Abb. Pr. (N. S.) 112; Ridley *v.* Coleman, 1 Sneed, 616; Sampson *v.* Browning, 22 Ga. 293; Portwood *v.* Hunter, 6 B. Mon. 538; Welling *v.* Owings, 9 Gill. 467; Haus *v.* Palmer, 21 Pa. 296; Tally *v.* Butterworth, 10 Yerg. 501; Gould *v.* Safford, 39 Vt. 498; Erwin *v.* Hamner, 27 Ala. 296; McLeod *v.* Dell, 9 Fla. 451; Palmer *v.* Palmer, 2 Dana (Ky.), 390; Williams *v.* Pope, Wright (O.), 406; Page *v.* Page, 2 Rob. (Va.) 424; Gillis *v.* Weller, 10 Ohio, 462; Ashworth *v.* Carleton, 12 Ohio St. 381; Barnes *v.* Brashear, 2 B. Mon. 380; Offutt *v.* Offutt, 3 B. Mon. 162; Breaux *v.* Gallusseaux, 14 La. Ann. 233; Abston *v.* Abston, 15 *ib.* 137; Succession of Morales, 16 *ib.* 267; Magee *v.* McNeil, 41 Miss. 17; Newman *v.* Colbert, 13 Ga. 38; Slocumb *v.* Slocumb, 13 Allen, 38; Nowlin *v.* Scott, 10 Gratt. 64; Leathers *v.* Greenacre, 53 Me. 561; Bowles *v.* Jackson, 1 Spinks, 294; Herbert *v.* Herbert, Deane & Swab. 10; Warren *v.* Harding, 2 R. I. 133; Matter of Hill, 1 Rob. Ecc. 276).

Holograph Wills. — In several of the States statutes have

been passed, giving effect to what are termed holograph[1] wills, *i.e.*, where the script is entirely in the handwriting of the testator. As this kind of will is wholly the creature of modern statutory law, it is conceived that no useful purpose could be subserved by a statement of the provisions of the statutes.

The author therefore contents himself with referring to such of the local treatises and the authorities cited as touch upon it. The burden is, of course, upon the propounders to show a strict compliance with the terms of the statute (1 Red. Wills, chap. 6, sec. 3, sub-secs. 10, 11, 12; Ired. on Ex. 14 (4), 18 (39), 19 (40) (41) (42) (43), citing Harrison *v.* Burgess, 1 Hawks. 384; Galloway *v.* Yates, 1 Dev. 296; see also St. John's Lodge *v.* Callender, 4 Ired. 335; Simms *v.* Simms, 5 Ired. 684; Outlaw *v.* Hurdle, 1 Jones, 150; Brown *v.* Beaver, 3 Jones, 516; Love *v.* Johnston, 12 Ired. 355; Johnson's Estate, Myrick's Prob. (Cal.) 5; Wilbourn *v.* Shell, 59 Miss. 205, reported in 2 Am. Prob. Rep. 520; Little *v.* Lockman, 4 Jones, 494; Sawyer *v.* Sawyer, 7 Jones, 134; Adams *v.* Clark, 8 Jones, 56; Hill *v.* Bell, Phil. L. 122; Hughes *v.* Smith, 64 N. C. 493; Winstead *v.* Bowman, 68 *ib.* 170; Armstrong *v.* Armstrong, 29 Ala. 538; Pub. Admr. *v.* Watts, 1 Paige, 347; 5 Toull Le Droit Civil Francais, No. 357; 1 Stuart's (Lower Canada) R. 327; Succession of Ehrenberg, 21 La. Ann. 280; Succession of Fuqua, 27 La. Ann. 271; Waller *v.* Waller, 1 Gratt. 454; Tilghman *v.* Steuart, 4 Harr. & J. 156; Gaines *v.* Lizardi, 3 Woods, C. Ct. 77; Bailey *v.* Teackle, Wythe (Va.), 173; Selden *v.* Coulter, 2 Va. Cas. 553; Watts *v.* Pub. Adm., 4 Wend. 168; Douglass *v.* Harkrender, 59 Tenn. 114; Porter *v.* Campbell, 58 Tenn. 81; Roth's Succession, 31 La. Ann. 315; McCullough's Estate, Myrick's Prob. (Cal.) 76; McCloud's Estate, Myrick's Prob. (Cal.) 23).

[1] The word is sometimes, though inaccurately, spelled "ological." It is from the Greek *ὁλογραφον*, and having the *spiritus asper* before the vowel, was pronounced in Greek as if written with an "h." Hence, we write it with the "h." (Bullions' Gr. Grammar, p. 5, par. 2.)

The leading English case is Lemayne *v.* Stanley, 3 Lev. 1; S. C., Freeman, Ch. 538, cited in Waller *v.* Waller, reported in 42 Am. Dec. 564.

In that case the will was all in the handwriting of the testator, but his name was not subscribed, but written at the beginning, thus: "I, John Mills," etc. This was held to have been a good will under the statute 29 Chas. 2 (Johnson's Estate, Myrick's Prob. (Cal.) 5).

The statutes of some of the States, therefore, regulate the making of such wills by requiring them to be proved by three witnesses testifying to the handwriting and other solemnities, thus operating, not as enlarging, but restraining statutes (Rev. Stat. Ark. chap. 157, secs. 4, 5; Code, N. C. (1883) 1 vol. sec. 2136; Civil Code, La. art. 1581).

Wills of Deaf-Mutes. — The burden, with regard to wills made by this unfortunate class, is upon the propounder, in addition to the ordinary proof, to show that the testator made the instrument understandingly (1 Jar. Wills, 48; 1 Wms. Ex. 16, 17; Shel. Lun. 3, 4); and Judge Redfield pertinently suggests that, it ought also to be shown when the testator cannot write, that the witnesses could communicate with him (1 Red. Wills, chap. 3, sec. V.; Brower *v.* Fisher, 4 John. Ch. 441, reported in Ewell, L. C. 721, and notes at p. 724; Barnett *v.* Barnett, 1 Jones, Eq. 221; Brown *v.* Brown, 3 Conn. 299, 303; Wharton and Stille, Med. Juris. 16, sec. 13; Worth. Wills, 31, in notes; Parsons, Wills, 7, 8; Ired. Ex. 10 (15); Mod. Prob. Wills, 92; Potts *v.* House, 6 Ga. 324, reported in 50 Am. Dec. 329; Will. Exr. 69).

Notwithstanding the amelioration that is being effected to a great extent in the condition of these unfortunates, yet, it is not too much to say that education is the exception, not the rule; and as the normal condition of such persons, if their affliction was congenital, classifies them with the insane, that, upon evidence showing such condition to have pre-existed the will, the burden will be shifted to the propounder to show that the testator had been educated into that low degree of intellectuality which is allowed for the making of

wills (1 Greenl. Ev. sec. 366; Morrison *v.* Lennard, 3 C. & P. 127; State *v.* De Wolf, 8 Conn. 93; Brower *v.* Fisher, *ubi supra;* Christmas *v.* Mitchell, 3 Ired. Eq. 335, 541, where the subject is discussed).

Wills of Deaf, Dumb, and Blind. — It was generally supposed that persons so afflicted are incapable of making a will (2 Black. Com. 497; Co. Lit. 42 *b*; Dickenson *v.* Blissett, 1 Dick. 268; 3 New Rep. (B. & P.) 415; Worth. Wills, 31; Toller, Ex. 9; Mod. Prob. Wills, 91). If, however, possible, and a learned judge (Richardson) in Reynolds *v.* Reynolds, 1 Speers, 256, 257, has suggested it — the burden would rest upon the propounder to show capacity and intelligence by clear and satisfactory evidence (1 Jar. Wills, 48; 1 Red. Wills, chap. 3, sec. 6, *passim;* notes to Brower *v.* Fisher, Ewell, L. C. 724).

Wills of the Blind. — The burden cast upon the propounder in addition to the formal proof is, as laid down by that very learned writer, Judge Redfield, that the proper communication be made from the testator to the witness, so that they may be able to depose to the act being understandingly done (1 Red. Wills, chap. 3, sec. 6).

This is the criterion, and the intensity of the proof must be in inverse ratio to the lack of intelligence of the testator. It may vary with each case. It may be exceedingly slight, as in case the testator writes his will.

Then *cui bono* read the will? Swinburne, Part 2, sec. 11, lays it down that it must be read to him; but the modern doctrine has greatly relaxed the rigor of the ancient rule (Hess' Appeal, 43 Pa. 73; Mod. Prob. Wills, chap. 13; Worth. Wills, 564; 1 Jar. Wills, 47, note 1; 1 Wms. Ex. 16, 17; Barton *v.* Robins, 3 Phil. 455, note; Ewell, L. C. 721 and notes; Ray *v.* Hill, 3 Strob. 297, reported in 49 Am. Dec. 647; Neil *v.* Neil, 1 Leigh, 6, 23; Reynolds *v.* Reynolds, 1 Spears, L. 253, reported in 40 Am. Dec. 599; Hemphill *v.* Hemphill, 2 Dev. 291, reported in 21 Am. Dec. 331; Clifton *v.* Murray, 7 Ga. 564, reported in 50 Am. Dec. 411; Fincham *v.* Edwards, 3 Curt. 63; Longchamps *v.* Fish, 2 New Rep. (B. & P.) 415).

Wills of Mariners and Soldiers. — The only points of differ-

ence between the nuncupative wills of seamen and soldiers consists in the circumstance that the *rogatio testium* is not required of them as of others, and they are by the terms of the statute of 29 Chas. 2, allowed to make such wills "as before the making of the act."

And it must be shown that he was in actual service or a seaman at sea (1 Red. Wills, chap. 6, sec. 6, sub-secs. 13, 14, 15, 16, 17; Mod. Prob. Wills, chap. 29; Roberts, Wills, 209; 1 Jar. Wills, 89, 90, note 1).

As to what facts constitute being in "actual service" or "at sea," the reader may consult the authorities above cited, and also the following cases: Earl of Euston *v.* Seymore, cited in 2 Curt. 339; Goods of Hayes, *ib.* 338; Goods of Donaldson, *ib.* 386; Drummond *v.* Parish, 3 *ib.* 522; Shearman *v.* Pyke, Mod. Prob. Wills, 527; Master *v.* Stone, 2 Lee, 339; Morrell *v.* Morrell, 1 Hag. 51; Matter of Tweedale, L. R. 3 Prob. & Div. 204; S. C., 11 Eng. R. (Moak) 389; Lindsay *v.* Lindsay, L. R. 2 Prob. & Div. 459, reported in 4 E. R. (Moak) 684.

Mutual and Conditional Wills. — A mutual will is said to be unknown to the English law (1 Jar. Wills, 27; Mod. Prob. Wills, chap. 28; Hobson *v.* Blackburn, 1 Add. 274; 1 Wms. on Ex. 9); but so thorough a lawyer as Judge Redfield lays down the contrary doctrine (1 Red. Wills, chap. 6, sec. 1, sub-sec. 24); and he, in support of his view, cites a number of late English decisions to which may be added Matter of Hugo, L. R. 2 Prob. Div. 73, reported in 20 E. R. (Moak) 603; Goods of Stracey, Dea. & Sw. 6. To give it effect (if by the local law it is permissible) as a mutual will, it must be probated after the death of the survivor, and, of course, that fact must be proved; and if the will so provides, it cannot be admitted to probate for any purpose until after the death of the survivor (1 Red. Wills, *ubi supra*).

In North Carolina it is held that such a will cannot be probated as a joint will, nor as the separate will of the party making it, because it purports to be a joint will (Clayton *v.* Liverman, 2 Dev. & Bat. 558). The case of Clayton *v.*

Liverman is followed by Schumaker *v.* Schmidt, 44 Ala. 454, reported in 4 Am. Rep. 135; Gould *v.* Mansfield, 103 Mass. 408; Evans *v.* Smith, 28 Ga. 98; Walker *v.* Walker, 14 Ohio St. 157; and Bynum *v.* Bynum, 11 Ired. 632.

The following cases sustain such wills: Izard *v.* Middleton, 1 Desaus. 116; Rivers *v.* Rivers, 3 *ib.* 190; *Ex parte* Day, 1 Bradf. Sur. 476; *Re* Diez, 50 N. Y. 88; Denyssen *v.* Mostert, L. R. 4 P. C. 236; see also 8 Moo. P. C. C. (N. S.) 502. It seems to be so held in Kentucky (Breathitt *v.* Whitaker, 8 B. Mon. 530). See as to conditional wills, Lindsay *v.* Lindsay, L. R. 2 Prob. & Div. 459, reported in 4 E. R. (Moak) 684; Will. Ex. 60.

Miscellaneous Rules of Practice. — Where a will has been admitted to probate, and a later one has been produced which does not revoke the former in terms, the question of revocation cannot be determined in a mere proceeding for the probate of the later will, if there is any room for construction (Besancon *v.* Brownson, 39 Mich. 388).

A court of equity has jurisdiction to reinstate the probate of a will alleged to have been set aside upon an issue of *devesavit vel non*, through a fraudulent combination between the propounder and the caveator to procure the result (Smith *v.* Harrison, 2 Heisk. 230).

If all the statutory formalities with regard to the execution of a will are proved, by one of the subscribing witnesses, to have been complied with, the will may be admitted to probate although the other witness fails to remember that such formalities were observed (Auburn Theological Seminary *v.* Calhoun, 62 Barb. 381; Jauncey *v.* Thorne, 3 Barb. Ch. 40, reported in 45 Am. Dec. 424; Nelson *v.* McGiffert, 3 Barb. Ch. 158, reported in 49 Am. Dec. 170; and other cases cited in note to last case, 49 Am. Dec. 174).

Part IV.

LITIGATION DOMINATED BY THE SOVEREIGN.

FIRST DIVISION.

CIVIL ACTION AGAINST THE CITIZEN.

ESCHEAT.

This is a prerogative of the sovereign, delegated, in some governments, to some public institution, as, in North Carolina, to the trustees of the University. Little need be noted touching it, as it is based upon a single proposition, namely, the death of an owner in fee of realty without heirs in fact or legal contemplation; and the burden is plainly cast upon the sovereign or those who claim from it, to show as a fact or as a mixed question of law and fact, that such owner died seized in fee without having left any heirs whom the local tribunals would recognize as such.

The stern rules appertaining to this subject at common law (2 Black. Com. 245 *et seq.*) have been to a greater or less extent modified by the constitution or statutes in the different States, and it is almost narrowed down to the isolated instance of a failure of heirs *propter defectum sanguinis*, or, by the death of an alien. The procedure is prescribed by local law, but, in whatever mode, the negative proof of defect of heirs must be made by the parties claiming the escheat (Catsham *v.* State, 2 Head. 553; Hammond *v.* Inloes, 4 Md. 138).

Crown. — Escheats to the crown were adjudged *ex parte* on office found. The party injured could only sue the escheator

for a false return, or bring his petition or *monstrans de droit* (F. N. B. 100, note *a*; Coke, 4th Inst. 225; Warden &c. Case, 4 Rep. 54 *b*; 3 Black. Com. 260).

Lord. — If the escheat was to the lord, however, he was driven to his writ (Jacob, L. D. title Escheat).

There is a dearth of learning touching the procedure in such action, but, presumably, on general principles, the burden of proof would be on the lord.

In an action brought by a lord for the recovery of copyhold, he must prove: —

1. That he is the lord.
2. That the defendant is a copyholder.
3. And that he has incurred a forfeiture (Run. Eject. 337; 1 Saund. Pl. & Ev. 474).

In the United States, the doctrine of escheats prevails.[1]

The manner in which the title to escheats is asserted in the several States, is regulated by statute. But whatever mode is prescribed, it may be safely asserted that the sovereign becomes the actor, and must prove that the last owner died without heirs (3 Wash. R. P. 47, 48; Com. *v.* Hite, 6 Leigh, 588).

And proof of seven years' absence, it seems, will not satisfy the burden (Hutchins *v.* Erickson, 1 Har. & McH. 339). The fact must be proved by other means.

PRIORITY OF THE UNITED STATES.

[Rev. Stats. Sec. 3466.]

In order to establish the priority of the United States, it is incumbent on the Government to show, in case of assignment,

[1] There is a diversity of judicial opinion on the point, as to whether our lands are held allodially, or by virtue of feudal tenure. Kent asserts positively that feudal tenures do not exist in this country (4 Kent, Com. 424; 3 Dane, Abr. 140, § 24).

Judge Sharswood lays down the contrary doctrine as to Pennsylvania (Shar. L. L. Lec. 8). The title, probably, in most of the thirteen original States, was feudal, depending upon grants from the crown (3 Wash. R. P. 46, 47).

that all the property of the debtor was conveyed thereby (U. S. *v.* Howland, 4 Wh. 108; Conk. Treat. 690 (4th ed.)).

But, if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception to show it (U. S. *v.* Duncan, 4 McL. 607, 633).

It must be shown to be *legal insolvency*, and not a mere *inability* to pay debts (Prince *v.* Bartlett, 8 Cr. 431).

It should be borne in mind that the Act of Congress does not create a *lien*, but only a *priority*. And this right cannot be enforced as against a specific lien (Conk. Treat. 686), but whether it is available as against a general lien is not altogether free from doubt (U. S. *v.* Duncan, 4 McL. 607, 630).

The following authorities may be advantageously consulted under this title: U. S. *v.* Fisher, 2 Cr. 358; U. S. *v.* Hooe, 3 Cr. 73; Harrison *v.* Sterry, 5 Cr. 289; U. S. *v.* Bryan, 9 Cr. 374; Thelusson *v.* Smith, 2 Wh. 396; Conard *v.* Ins. Co., 1 Pet. 386; Harris *v.* D' Wolf, 4 Pet. 147; Conard *v.* Nicoll, 4 Pet. 291; Hunter *v.* U. S., 5 Pet. 173; U. S. *v.* State Bank, 6 Pet. 29; Conard *v.* Pacific &c. Co., 6 Pet. 262; U. S. *v.* Hack, 8 Pet. 271; Field *v.* U. S., 9 Pet. 182; Brent *v.* Bank of Washington, 10 Pet. 596; Beaston *v.* Farmer's Bank, 12 Pet. 102; U. S. *v.* Canal Bank, 3 Story, 79; U. S. *v.* Mott, 1 Paine, 188; U. S. *v.* Clark, *ib.* 629; Bayne *v.* U. S., 93 U. S. 642.

TAXES.

The remedy for the collection of statal taxes, is in the United States, mainly regulated by statute as well as the mode of collection. In those States where summary judgment is not provided for on default, the collecting officer must be sued by ordinary action either as against himself or on his bond.

General Burden. — In such action, if, by the *lex fori*, the general issue should have the effect to put in issue the official character of the defendant, proof must be offered to show that he is the collecting officer either *de jure* or *de facto* (Cool. Tax. 190, 191).

It must also be shown upon a general denial that the collector had received the taxes (*ib.* 497, 498), and, either a demand or a failure by such collector to pay over at the time and place designated by law (*ib.* 501).

Judge Cooley does not seem to think that a demand is necessary; presumptively it would appear to be, but the statutes of the States have probably dispensed with it.

He also states that the collector may defend as in an ordinary action by principal against agent (*ib.* 497), though he lays it down elsewhere, what is clearly the law, that the collector cannot exculpate himself by showing even that his collections had been stolen (*ib.* 501; U. S. *v.* Prescott, 3 How. 578; U. S. *v.* Morgan, 11 How. 154; Morbeck *v.* State, 28 Ind. 86; Muzzy *v.* Shattuck, 1 Denio, 233), or deposited in a bank which afterwards failed.

The burden of proof having been satisfied, the author is not aware of any defence open to the collector except a legislative release or extension of the time for settlement, or that he was enjoined. Of course, to make any of these available, the burden is on the defendant.

Failure to Collect. — In an action for a failure to collect the burden requires from the plaintiff proof: —

1. That defendant was a *de jure* collecting officer.[1]
2. That he had or ought to have received the tax-lists.
3. His failure to settle.

The like defences are open in this as in the action above discussed, and also the uncollectibility of the list or any part thereof (Cool. Tax. 500), or the uncollectibility of the tax (*ib.* 500, 501).

Action on Bond. — In an action on the bond, assuming that a general denial is interposed, the burden is upon the plaintiff to prove, in addition to the facts necessary to charge the collector for failure to pay over or to collect, the execution of

[1] This is the author's conclusion from an examination of the authorities. There seems to be a manifest distinction between the scope of a suit for failing to collect and failing to pay over (Cool. Tax. chap. 8).

the bond in the mode prescribed by the local law (*ib.* 499–504).

Defence. — In addition to the defences available to the collector as above stated, the surety may show that the contract has been altered without his consent (*ib.* 502).

As to whether the extension of time to the principal exonerates the surety, according to the general doctrine, there is a conflict of judicial opinion; the weight of authority seems adverse to the defence (*ib.* 502, 503; State *v.* Carlton, 1 Gill. 249; Bennett *v.* The Auditor, 2 W. Va. 441). It is held a good defence in Tennessee (Johnson *v.* Hacker, reported in 2 Cent. L. J. 625).

Summary Remedies. — In many of the States provision is made for a summary remedy against a defaulting collector and the sureties on his bond, by the entering up judgment, for the amount of the defalcation without regular action, upon short notice. These statutes provide for certain preliminary steps to be taken before judgment can be demanded, and to that extent the burden of proof is upon the plaintiff (Cool. Tax. 504 *et seq.*).

The defendants are not entitled to a jury trial, but it is apprehended that, as a matter addressed to the court, they might show such changes in the law since the execution of the bond, as, if applied to their contract, would subject them to further responsibility (*ib.* 508–511).

SECOND DIVISION.

QUASI CRIMINAL ACTIONS OR PROCEEDINGS AGAINST THE CITIZEN.

MANDAMUS.

A resort to this extraordinary process can only be had for a violation of some legal right or duty, for which the law has not provided any specific or adequate legal remedy (Tapp. Man. 5; 2 Sel. N. P. 261; Kerr, A. at L. 48).

It is not proposed to discuss the extent of this remedy, or to what subject-matter it is applicable, or the nature of the procedure; for this, the reader is referred to the text-books (Tapp. Man. chap. 3; High, Ex. Rem. sec. 498 *et seq.*).

The definition, *ex vi termini*, conveys the criterion as to the burden of proof.

Relator's Burden. — It is upon the relator or prosecutor to show: —

1. That there was a violation by defendant of some legal right of the plaintiff.

2. That there is no specific or adequate legal remedy therefor (Tapp. Man. 5; High, Ex. Rem. sec. 10; 2 Sel. N. P. 261, 262).

The onus, then, upon a general traverse, is with the plaintiff, to prove such a state of facts as therefrom a legal right flows, and having thus satisfied the burden as to the first branch, the burden, as a question of law only, is upon him to show that he has no adequate or specific remedy for the infraction or denial of his rights (High, Ex. Rem. secs. 10, 450).

The proof under the first branch is exceedingly broad and comprehensive, the remedy extending to a vast variety of subjects; and, as the allegations of the actor must be stated with great distinctness and particularity, the proof must be as co-extensive — the writ of mandamus not being a purchasable writ, and obtainable *ex debito justiciæ*, but an extraordinary remedy, not grantable except in clear cases (High, Ex. Rem. chaps. 2, 3, 4, and 5, *passim;* Tapp. Man. chap. 2).

It would be an idle task to attempt to enumerate the instances, and it is sufficient to say that, where an infringed right is insusceptible of redress, except by mandamus, the analogy of common-law pleading, in the statement and the rules of evidence as applicable thereto, should be pursued (Tapp. Man. *ib.;* High, Ex. Rem. sec. 448).

Respondent's Burden; Traverse. — We discuss elsewhere the burden of proof as upon a traverse.[1] This traverse may be addressed to any particular allegation of fact (Tapp. Man. 348), and is so far assimilated to pleadings under the reformed procedure as to have the effect of admitting whatever is not denied (Tapp. Man. 349, 386).

Special Returns. — If the respondent's defence consists of matter in confession and avoidance, he must make a special return setting forth the same *in extenso* and in accordance with the spirit of common-law pleading (Tapp. Man. 352; High, Ex. Rem. sec. 473); and anciently, with great particularity (Tapp. Man. 353; 2 Sel. N. P. 276; High, Ex. Rem. secs. 464, 474). Though the ancient strictness has been of late years somewhat relaxed (High, Ex. Rem. sec. 471; Tapp. Man. 354). And the burden of proof, as on such defence in an ordinary action, is upon the respondent.

Relator's Onus in Reply. — If the return be palpably deficient, the relator may move to quash it (High, Ex. Rem. sec. 489), or if defective, move for a *concilium* (High, Ex. Rem. sec. 490; Tapp. Man. 372, 373); or, according to the modern practice under the statute (6 and 7 Vic. ch. 67), he can demur (High, Ex. Rem. sec. 491; Tapp. Man. 372, 375).

[1] Title, Onus as affected by the pleading.

Plea to Return. — If the return be sufficient in point of law, the relator may, under the statute of Anne,[1] traverse it by a pleading termed a plea (High, Ex. Rem. sec. 496; Tapp. Man. 382, 383). When this course is rendered necessary, the onus is with the relator (High, Ex. Rem. sec. 496; Tapp. Man. 389). Under the code-system there is no necessity for a pleading by way of replication, as the return is deemed to be controverted, as upon a traverse, or, confession and avoidance as the case may require (High, Ex. Rem. sec. 497). When the plea to the return is in confession and avoidance, in accordance with the principle above stated that the rules of common-law pleading govern, the burden of proof is upon the relator, and the like distinction applies to all the subsequent pleadings.

PROHIBITION.

This is not a writ of right (High, Ex. Rem. sec. 765); it is distinguishable from injunctive relief, in that, its force is spent upon a court, whereas the injunctive relief is addressed to a litigant (High, Ex. Rem. secs. 762, 763), and it is in many respects the converse of mandamus (High, Ex. Rem. sec. 763). In England, it is almost exclusively confined to checking the encroachment of the ecclesiastical tribunals (High, Ex. Rem. sec. 764), but its scope is more extensive with us (High, Ex. Rem. sec. 765 *et seq.*). It only issues in cases of necessity (High, Ex. Rem. sec. 765), and is only allowed for usurpation of power, not for error merely (High, Ex. Rem. sec. 767); nor, for the control of persons or courts exercising functions purely administrative or ministerial (High, Ex. Rem. sec. 769).

It is only granted where no other remedy exists (High, Ex. Rem. sec. 770), and is not allowed as a substitute for an appeal (High, Ex. Rem. sec. 771).

Nor for the correction of errors (High, Ex. Rem. sec. 772).

[1] At common law no traverse of the return was allowed, but the relator was driven to his action for a false return (Tapp. Man. 383).

Nor for mere irregularities (High, Ex. Rem. sec. 771).

It is not granted after judgment, unless the lack of jurisdiction is apparent on the record (High, Ex. Rem. sec. 774).

Nor where the decision is final (High, Ex. Rem. sec. 777).

Nor merely on the ground of inconvenience (High, Ex. Rem. sec. 778).

And is confined to judicial officers (High, Ex. Rem. sec. 782).

It is not granted against collectors of taxes (High, Ex. Rem. sec. 782).

Nor a governor of a State (High, Ex. Rem. sec. 783).

Nor county officers (High, Ex. Rem. sec. 784).

And is not grantable by inferior courts (High, Ex. Rem. sec. 788).

General Burden. — The relator must, in general, satisfy the court that the tribunal which is charged with the usurpation of authority is a court of inferior jurisdiction; though courts of equity have been thus restrained (High, Ex. Rem. sec. 776).

Usurpation. — It is also incumbent upon the relator to show clearly that such inferior court is proceeding or about to proceed in some matter over which it possesses no rightful jurisdiction (High, Ex. Rem. sec. 767).

As to various instances of usurpation and what facts and circumstances constitute it, the reader is referred to the admirable treatise of Judge High on Extraordinary Remedies, chap. 21, Part II.

It is perhaps pertinent to add that the onus is also with the relator, as a question of law, to satisfy the court, applied to, that no other remedy exists (High, Ex. Rem. sec. 770).

QUO WARRANTO.

There is a distinction, in some respects, between the writ of *quo warranto*, and the information in the nature of a *quo warranto*, but it does not affect the burden of proof, as the

object of both proceedings is substantially the same, namely, to correct the usurpation, non-user or mis-user of an office or a corporate franchise (High Ex. Rem. sec. 609).

The remarks, then, which follow, are equally applicable to each except when distinguished. As to the kind of office to which the proceeding is addressed, see High, Ex. Rem. sec. 626.

It may be stated generally that the defendant cannot plead "not guilty" or "non usurpavit" (Cole. Cr. Inf. Pt. I. 209); he must plead justification (*ib.*).

Title. — There is a marked contrast between this and other modes of litigation. The relator (not seeking the office) is not bound to show title to it, but the burden rests upon the respondent to show a good title to the office, whose functions he claims the right to exercise[1] (High, Ex. Rem. secs. 629, 652, 712; Abb. Tr. Ev. 750; A. & A. Corp. sec. 756; People *v.* Utica Ins. Co., 15 Johns. 353, reported in 8 Am. Dec. 243).

Indeed, a court of the highest standing has held that, it is incumbent on the respondent to show, not only a good title,

[1] This is put upon the ground that the *quo warranto* was a writ of right, and that the sovereign could arbitrarily call on any one, at any time, to show cause why he should not be deemed to have usurped the office; and the books lay it down that no pleas are permissible except disclaimer or justification (2 Sel. N. P. 339; Bull. N. P. 207; see Cole. Cr. Inf. Pt. 2, App. B, showing forms of pleas; State *v.* Harris, 3 Ark. 570, reported in 36 Am. Dec. 460; State *v.* Evans, 3 Ark. 585, reported in 36 Am. Dec. 468; People *v.* Rensselaer R. R. Co., 15 Wend. 113, reported in 30 Am. Dec. 33 and notes).

This doctrine, so repugnant to our sense of justice, had its origin in the reign of Edward I., when a writ issued to the sheriff directing him to make proclamation for all persons claiming any liberties by royal charter or otherwise, to come before the justices *ad primam assisam cum in partes illas venerint*, to show *quomodo hujusmodi libertates habere clamant, et quo warranto*, etc.

So that, by virtue of this proceeding, all persons were, by general proclamation, put to defend their rights and prove their titles. This state of affairs produced the statute 18 Ed. I., which provided substantially for a particular notice of *quo warranto* in lieu of the proclamation, but, which still cast the burden of proof on the respondent (2 Reeves's Hist. of E. Law, chap. 11). The subsequent English statutes were merely amendatory of the procedure; hence, we have the principle stated in the text.

but also, the continued existence of every qualification necessary to the enjoyment of the office (People *v.* Mayworm, 5 Mich. 146). After the defendant has made proof in support of his title, *ex. gr.*, that he was declared elected by the proper officers, the burden of proof shifts, and the relator in reply may show fraud *aliunde* (Cole. Cr. Inf. Part I. 221, 222).

But where the relator seeks by information, not only to oust the respondent but also to establish his own right to the office, he must show both his interest in and title to the office, as well as the necessary qualifications to render him eligible thereto (High, Ex. Rem. secs. 630, 652; Abb. Tr. Ev. 749).

The rule as to the burden of proof first stated, is confined to public offices, and is based upon the idea that the sovereign had been satisfied presumptively of the usurpation, but it has no applicability to strictly private offices, as in *quo warranto* for them, the burden is upon the relator to show title in himself (High, Ex. Rem. sec. 652), and also actual user of the office (*ib.* sec. 655).

Damages. — No proof is permissible, either at common law or under the English statutes, as to damages. The English judgment, if for relator, is amotion and costs, or, if for respondent, for costs (Cole. Cr. Inf. Part I. 236–238).

THIRD DIVISION.

OFFICE FOUND.

It is apprehended that by virtue of the terms, or as the proper effect of our Constitution and laws, with a single exception, there is no such proceeding as "office found" in the United States.

The rights of the States as successors to the crown, touching wrecks, forfeitures, escheats, etc., are determined, in some form, by action.

The exception (if it be one) is that of an *inquisitio post mortem* (Mart. Coroner, 15; 2 Tuck. Black. 295; 4 *ib.* 121; Alex. Br. Stats. 74, note).

The proceedings are technically deemed to be *ex parte*, but counsel would doubtless be allowed to attend and make suggestions (Barkley's Case, 2 Sid. 90, 101).

As upon a verdict of guilty, the party charged must be arrested as upon the finding of a bill, it sometimes becomes exceedingly important to have counsel present; he might perform an excellent function by directing the judgment of the coroner as to the intensity of the proof required.

There is no express authority as to the quantum of proof, but, as the coroner acts judicially, it is fairly to be assumed that he must require as great a degree as any committing magistrate (Alex. Br. Stats. 71 *et seq.*).

FOURTH DIVISION.

CRIMINAL ACTION AGAINST THE CITIZEN.

ALIBI.

General Burden. — Where this defence is interposed, it devolves upon the defendant the burden to prove it by a preponderance of the testimony (State *v.* Northrup, 48 Iowa, 583; Deggs *v.* State, 7 Tex. App. 359; State *v.* Kline, 54 Iowa, 183, reported in 6 N. W. Rep. 184; State *v.* Krewsen, 57 Iowa, 588; S. C., 2 Sup. Ct. Trans. 588; State *v.* Hardin, 46 Iowa, 623, reported in 26 Am. Rep. 174; French *v.* State, 12 Ind. 670; State *v.* Waterman, 1 Nev. 543).

The courts, however, are not in full accord; the Supreme Court of Ohio holding that, if such evidence of *alibi* should be introduced as to cause a reasonable doubt on the whole case, the defendant should be acquitted, but, that the burden of proof is not shifted from the State (Walters *v.* State, 39 Ohio St. 215, reported in 10 Week. Cin. L. Bul., Aug. 20, p. 85; Com. *v.* Webster, 5 Cush. 320).

Whereas the Supreme Court of North Carolina hold it to be the "most suspicious evidence"[1] (State *v.* Jaynes, 78 N. C. 504). The Supreme Court of Tennessee seem to have fallen into a like view (Breswell *v.* State, reported in 3 Leg. Rep. (N. S.) 283).

[1] Differing essentially from the opinion of the elder Weller, who regarded it as the most conclusive of all proof; see Pickwick Papers; also, see Turner *v.* Com., 86 Pa. 54, reported in 27 Am. Rep. 683.

CONFESSIONS.

Before any confession can be received in evidence in a criminal case, it must be shown, by the party offering it, to have been voluntary (1 Greenl. Ev. sec. 219).

The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind (*ib.;* Steph. Dig. art. 22).[1]

CRIMES.

This subject will be treated of under two divisions: —

I. Common-Law Crimes.
II. Statutory Crimes.

I. Common-Law Crimes.

When, in our language, the word *want* was entirely synonymous with *need* (see Walker's Dict.), crimes were circumscribed within a narrow compass; but with the advancement made in civilization and luxurious tastes thereby induced, when *want* comes to mean desire or wish, crimes have become extended to a wide horizon, and it would fill quite a volume to discuss the onus probandi with reference to all the statutory crimes appertaining to the English or American law. The author therefore deems it sufficient to treat of common-law crimes, and a few statutory, by way of full illustration of the subject.

Independent of any modification by statute to rebut the presumption of innocence,[2] the burden of proof rests upon the

[1] Mr. Stephens, following the earlier English authorities, qualifies the text of Greenleaf by saying that such influence must be brought to bear by a person in authority.

Perhaps the reason for the discrepancy lies in the fact that an English prisoner is fully protected from undue influence of outsiders, whereas, in our country, we all know the contrary to be the case.

[2] More accurately expressed, presumption of non-committal of crime.

prosecution in every kind of criminal action or proceeding; or as otherwise expressed by an eminent author, "the burden of proof is always on the party who asserts the existence of any fact which infers legal accountability" (Wills, C. Ev. 145, Rule 2).

Guilt must be established by sufficient evidence. There have been various *formulæ* in use, such as "beyond a reasonable doubt," "fully satisfied," "satisfied." The first expression is said to be inexplainable. Probably, as sensible a definition as can be found, was expressed by Baron Parke: "The doubt, however, must be not a trivial one, such as speculative ingenuity may raise, but a conscientious one, which may operate upon the mind of a rational man, acquainted with the affairs of life" (Reg. *v.* Tawell, Sp. Assizes (1845), cited in Wills, C. Ev. 154).

But, while this definition is correct in the abstract, it is *felo de se* in this: that if a juror has a doubt, his *amour propre* instructs him that it is a "conscientious," not a "trivial" one, because *he* entertains it, and because he considers himself "acquainted with the affairs of life." The definition given by Ch. Baron Pollock (Wills, C. Ev. 210) is liable to the same objection.[1]

[1] The intensity of the proof on criminal trials has been the subject of much diversity of judicial thought, at least as to the mode of expressing it. Some adhere to the old formula, "beyond a reasonable doubt." Some that the jury must be fully "satisfied." Some contend that the "reasonable doubt" is inexplainable, but fail to advert to the suggestion that "satisfied" expresses all, grammatically, that "fully satisfied" does. The author suggests that the intensity of the proof is more dependent upon the nature of the offence than any mere form of expression. The common law, claimed by pedants to be the perfection of reason, whatever its other imperfections, might arrogate to itself great praise in its system of jury trials, and it could never be intended of such a system that the jury were to be cramped in their considerations of a case by mere arbitrary *formulæ;* but, rather, that the jury should apply their common sense and knowledge and observation of human nature to the facts developed in testimony, and, thus guided, they would require greater weight of proof to convict of a heinous or serious offence than one of trifling character; or, as well expressed by a great judge, "although less strong and less irrefragible proof would produce that belief, which would justify a conviction in a misdemeanor than in a capital case, yet

Defendant's Name.

In discussing the burden of proof in criminal actions, it has been deemed best to present analyses of the established forms of indictments, as in those States where more condensed forms have been adopted, the burden will appear by necessary implication from what is so prescribed.

As to the former — *major in se minus continet* — and the remarks that follow, unless otherwise stated, are predicated upon the plea of not guilty.

Defendant's Name. — This need not be proved as laid, as an arraignment is presumed in lower crimes; and when the prisoner is arraigned, that is, called upon by the name specified in the indictment, to answer, he holds up his right hand as an admission that he is the party named (4 Black. Com. 322, 323).

If, however, the defendant should plead the misnomer in abatement, such plea being an affirmative defence, the burden of proof will lie upon him to establish it (Arch.[1] Cr. Pl. 82, 83).

ARCHBOLD states that it may, perhaps be questioned, whether the proof of this issue be not entirely upon the prosecution (*ib*).

But this remark occurs after giving the form of the plea and replication thereto in confession and avoidance, namely, that he was as well known by one name as the other, in which, there can hardly be a question but that the burden would be upon the prosecution.

in either case the mind arrived at the same point, *not having a rational doubt*" (State *v.* Cochran, 2 Dev. 63).

Viewed from this standpoint, the author suggests that the word "satisfied" covers the whole ground. It seems that the prerogative of the jury was invaded in the recognition, as a presumption of guilt, of recent possession of stolen property. The many conflicting decisions as to what constitutes possession, or recent possession, naturally variant, as the minds of different judges, they not being *en rapport* with others (like a jury) who are likely to be, are illustrated in the cases cited in Abb. U. S. Dig. 1st series, 670, title Larceny, sec. 353 *et seq.*; Wills, C. Ev. 64 *et seq.*

In using the word "satisfied," we should be understood in doing so, as expressing by it any of the *formulæ* employed in instructing juries touching the quantum of proof.

[1] The citations from Archbold, unless otherwise noted, are from 5th Am. from 10th London ed.

As the judgment, if found against the defendant in crimes below the grade of felony, was final, this plea is seldom resorted to (*ib.* 83).

Time. — It is only essential at common law to prove a time anterior to the finding of the bill (*ib.* 96).

Place. — It is incumbent on the prosecution to prove that the larceny was committed in the county, or, at least, within the territorial jurisdiction of the court, or that, if stolen elsewhere, the goods were carried into such territory (*ib.* 97).

Thing Stolen. — The thing stolen must be proved as laid (*ib.* 99), as, in the case of animals *feræ naturæ*, that they were reclaimed or confined (*ib.* 74).

Value. — Value need not be proved as laid, but the thing stolen must be shown to have been of some value (2 Bish. Cr. L. sec. 767; State *v.* Bryant, 2 C. L. R. 269 (249)).

Property. — Property must be proved as alleged (Arch. Cr. Pl. 100).

Name of Prosecutor. — The proof as to the name of the owner should be substantially as alleged; that is, if the name proved is not the full name, it may be shown that it is that by which he is usually known; or if it be *idem sonans*, that will be sufficient (*ib.* 100, 101).

Feloniously. — It must be shown that the defendant knowingly took and carried away the goods of another, without any claim or pretence of right, with intent to wholly deprive the owner of them, and to appropriate or convert them to his own use (*ib.* 179, 180).

And such intent must appear to have been entertained at the very moment of the taking (State *v.* Roper, 3 Dev. 473).

Taking. — The prosecution must prove a taking of the goods, either actual or constructive.

1. Actual, as where goods have actually been taken out of the owner's possession against his will, or without his consent.

2. Constructive, where the owner delivers the goods, but either does not thereby divest himself of the legal possession; or that the legal possession of the goods has been obtained by fraud and in pursuance of a previous intent to steal them (Arch. Cr. Pl. 182 *et seq.*).

Asportation. — It must also be shown that the goods were taken away; a bare removal, however, from the place where the thief found the goods, though he does not make off with them, is sufficient evidence, *ex. gr.*, removing a cask of wine from the head to the tail of the wagon (*ib.* 192, 193).

Against the Law of Nations.

Violation of Safe-Conducts or Passports. — As such an act tends proximately to bring about war and is therefore a public grievance, it was indictable at common law (4 Black. Com. 69).

The burden should extend to proof of the safe-conduct or passport, and that, when arrested, the bearer produced it, and that the arrest was thereafter continued.

Piracy.

High Seas. — The offence must be proved to have been committed within the jurisdiction of the court, that is, upon some part of the sea which is not *infra corpus comitatus* (Arch. Cr. Pl. 265).

On Board. — It must also be shown that it was committed on board of the craft specified in the indictment (*ib.* 266).

Peace. — The usual allegation of "in the peace," etc., need not, in crimes generally, be proved; but in cases of piracy there must be some evidence thereof (*ib.*).

Fear. — The prosecutor must prove either that he was in actual bodily fear from the defendant's actions at the time of the commission of the piratical act, or, he must prove circumstances from which it may be fairly presumed that there was such a degree of apprehension of danger as was calculated to induce the prosecutor to part with his property (*ib.* 253, 254, 266).

Articles Stolen. — Articles stolen must be proved as in larceny (*ib.* 266).

Value. — Value need not be proved (*ib.*).

Property. — The property taken must be alleged to be the goods of a subject or citizen of the country where the indictment is found, or of some State in amity with it (*ib.*).

Piratically, Feloniously, and Violently. — The goods must be proved to have been taken *animo furandi* as in other cases of larceny, and they must also be proved to have been taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute a robbery on land, *q.v.* 467 *infra* (*ib.*).

Steal, etc. — The allegation of stealing, taking, and carrying away, must be proved, as in robbery, *q.v.* 467 (*ib.* 267).

Authority. — The defendant, under not guilty, may show that the acts proved were committed by authority of some Prince or State (*ib.* 266).

Mistake. — Or he may show that he commanded a commissioned ship, and by mistake captured a vessel belonging to the subjects of a friendly power, supposing it to belong to an enemy, and that he, thereupon, either released it or brought it, without damage, into port, for condemnation (*ib.* 267).

Treason.

It is deemed unnecessary to discuss this crime under the English law, as treason in this country may be directed either against the federal government or the statal governments, and is regulated as to the former by the Constitution and laws of the United States, and as to the latter by their several constitutions or statute laws (Const. U. S. Art. 3, sec. 3, cl. 1; Rev. Stat. sec. 5331), and, as to the former, is confined to the acts of levying war against the United States, or in adhering to their enemies giving them aid and comfort.

Levying War. — There must be an actual raising of troops, and assembled for the purpose of war, or some act of violence, or some act in the nature of war (2 Bish. Cr. L. secs. 1229–1232; Towle, Const. 198; *Ex parte* Bollman, 4 Cranch, 75; see authorities cited in Rap. Fed. Dig. title Treason, 562).

Or it must be shown that the prisoner, *flagrante bello*, adhered to the public enemy giving them aid and comfort (authorities cited *supra*).

Intensity. — The offence must be proved by the testimony of two witnesses (authorities cited *supra*).

Treason against the several States is limited substantially as it is by the Constitution and laws of the United States (2 Bish. Cr. L. sec. 1254).

Counterfeiting.

Mauufactured. — The subject has been regulated for so many centuries in England by statutes, that its bearing at common law seems to have been lost sight of in the text-books. HAWKINS declares that counterfeiting the king's coin was an offence at common law of the grade of treason (2 Hawks. P. C. chap. 48, sec. 4; Pulton, De Pace Regis et Regni,[1] fol. 108, sec. 6). The latter authority declares that the offence was high treason by the common law and not newly obtained by the Stat. 25 Ed. 3. Whatever may be the grade of the offence, the prosecution on a common-law criminal action must prove the manufacture of the spurious coin to that extent, as to be capable of being used for purposes of fraud (2 Bish. Cr. L. sec. 290).

Spurious. — It must also be shown to be spurious (*ib.*).

Similitude. — It must also be shown to have a resemblance to the genuine (*ib.* sec. 291; Arch. Cr. Pl. 502).

The burden as to this latter point has been discharged substantially in England by the Stat. 2 Will. 4, c. 34, § 3 (See Arch. Cr. Pl. 502). Statutes have been passed both in England, and in the United States by Congress, extending the crime of counterfeiting to various shifts devised to elude the force of the common-law and earlier statutes.

The onus probandi in its bearing on a few, by way of illustration, will be stated.

Coloring. — In addition to the usual proof, show the gilding or coloring (Arch. Cr. Pl. 503).

Intent. — In one aspect of cases arising under 2 Will. 4, the intent must also be shown (*ib.* 504).

Filing. — Where the charge is filing or altering, that fact must be proved (*ib.* 505).

Intent. — Also the unlawful intent (*ib.*).

[1] Edition of 1625.

Impairing. — So where the impairing or diminishing of the value is charged under that statute, that fact must be proved by direct or presumptive evidence, and also the intent that such altered coin should pass for current (*ib.* 506).

Buying or Selling. — When under this statute the charge is buying or selling at a lower rate than its denomination imports, the act of buying, selling, or putting off, must be proved by showing a complete tradition (*ib.* 507).

Spurious. — Also that it was spurious (*ib.*).

Rate. — And that it was sold at a lower rate than its denomination imports (*ib.*).

Importing. — In addition to the usual proof when the charge is importing such coin, the importation must be proved, and the guilty knowledge (*ib.* 508).

Uttering. — So under a charge for uttering, that fact and guilty knowledge must be proved (*ib.* 509, 510).

These examples are deemed a sufficient illustration of the subject. The careful practitioner bearing in mind the quantum of proof required at common law, should compare the statute with it, and allege and prove any fact superadded by the statute, by direct or presumptive evidence.

Misprisions.

This word, in its broader sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law[1] (1 Bish. Cr. L. sec. 624; 1 Russ. Cr. 45). BISHOP and RUSSELL both lay it down that the failure to prosecute a felon, or discover his offence to the magistrate, was indictable as a misprision (1 Russ. Cr.[2] 194; 1 Bish. Cr. L. sec. 267, citing 3 Inst. 139 *et seq.;* 1 Hale, P. C. 372–374; 1 Hawk. P. C. chap. 59; 4 Black. Com. 121). The authorities cited (except Coke) use the word "concealment" alone. COKE puts it as synonymous with "not discovery." RUSSELL also lays it down that "silently to observe the com-

[1] One of the most accomplished lawyers on this continent defines it as — a neglect, oversight, or contempt (Alex. Brit. Stats. 367, in note).

[2] 9th Am. from 4th Lon. ed. is cited throughout.

mission of a felony, without using any effort to apprehend the offender, is misprision" (1 Russ. Cr. 194), and cites Hale and Coke, *ubi supra*. But HALE does not support him, and COKE lays it down that if any be present when a man is slain and omit to apprehend the slayer, it is misprision, citing 8 Ed. 2, cor. 395. BISHOP states the same doctrine (1 Bish. Cr. L. sec. 720). None of the authorities state it as a common-law principle, and it will be observed that the only authority cited by Coke was a decision rendered after Stat. West. 1, chap. 9. The implication from that statute is, it seems, clear, that the failure to prevent was not a crime at common law. At common law the vill was answerable (2 Hale, P. C. 72, 73), and the object of that and other statutes was to make individuals responsible as distinguished from a community.[1]

Whether indictable at common law, or by the statute, the burden of proof would certainly extend to showing that a human life was taken, and that the defendant was present and neglected to use any available exertions to prevent it.

Undoubtedly it is a misprision to refuse the call for the *posse comitatus* (4 Black. Com. 122). In such case the burden requires proof that a known officer or one who exhibited his process (or that when a crime was committed in the presence of a known officer) called upon the defendant (being one of the *posse comitatus*) to assist him in making the arrest of the party charged with crime; that there was a reasonable necessity for such call, and the failure or refusal of the defendant to obey such demand (1 Bish. Cr. L. sec. 469; Reg. *v.* Brown, 1 Car. & Marsh. (41 E. C. L. Rep.) 314).

Rescue. — Blackstone put the crime of rescue under this head. In order to establish this offence the prosecution must prove: —

1. The lawful custody of the party rescued.

2. And that, while so in custody, the defendant forcibly rescued him as stated in the indictment (Arch. Cr. Pl. 561).

Assaults on Officers, etc. — Assaults made in or near the

[1] The author regrets that he has not had access to the "Year-Books" cited by the text-books.

courts of justice were certainly indictable at common law[1] (4 Black. Com. 125; 1 Russ. Cr. 1036; 3 Inst. 140; 2 Bish. Cr. L. sec. 49; 1 Hawk. P. C. chap. 21, sec. 3; Davis' Case, 2 Dyer, 188 and notes; Sir W. Waller's Case, Cro. Car. 373; S. C., Sir W. Jones, 343; Carye's Case, Cro. Eliz. 405; East, P. C. 408-410; Pult. De. Pace &c. 9, 10).

If, therefore, such assaults be prosecuted *qua misprisions*, the prosecution must, in addition to proof of an assault, show that it was committed in or near some court in session.

So, to assault or perhaps even threaten (4 Black. Com. 126) an opposing litigant, or a lawyer for being employed against one, or a juror for his verdict, or a sheriff or jailor for keeping one in lawful custody, is indictable as a misprision (4 Black. Com. 126; 3 Inst. 141, 142). The burden, in such cases, requires proof, in addition to the assault, of the *lis*, or the lawful custody, and the legal relation, as the case may be, of the party assaulted toward the assailant (Whar. Cr. Pl. & Pr. secs. 965, 966).

So it is a misprision to prevent a witness from giving his attendance, or to dissuade him from giving his testimony, in which case there must be proof either of a depending *lis*, or that the witness knew of some crime committed; and in either case, that the defendant dissuaded such witness from giving his testimony or disclosing his knowledge of the crime committed to the proper officials (4 Black. Com. 126; 1 Bish. Cr. L. sec. 468).

So if a grand juror disclose to any party indicted, the evidence that appeared against him before the grand jury, he is guilty of an indictable offence[2] (4 Black. Com. 126; Whar. Cr. Pl. & Pr. sec. 377; 1 Whar. Cr. L. secs. 507, 508).

[1] A convict threw a brick-bat at Richardson, C. J., at the assizes, which narrowly missed; and for this an indictment was immediately drawn against the offender, his right hand was cut off and fixed to the gibbet, upon which he was immediately *hanged in the presence of the court*. See note to Davis' Case, 2 Dyer, 188 *b*. This punishment was prescribed by Statute 22 Ed. 3.

[2] There is one exception to the inviolability of the secrecy of the grand jury room; that is, in case a witness before that body should commit perjury (4 Black. (Cool.) 126, note 12).

The burden requires proof that the defendant was sworn on the grand inquest and disclosed to a party charged the nature of the evidence adduced against him before that body (Stark. Cr. Pl. 177).

There are many other instances of misprisions (1 Bish. Cr. L. sec. 468; 4 Cool. Black. 126, note 11), such as preventing any one, whose duty it becomes to attend court, from doing so, by force or fraud. The burden will require proof of the legal *status* of the party so prevented, when prevented, and of the means of prevention as charged.

Indeed, this branch of the subject of crimes may be summed up by stating that the charge, in such cases, generally carries with it to the intelligent lawyer the necessary burden of proof, and the indictment will, if properly drawn, guide to a correct discrimination in this regard.

Public Justice.

Obstructing Process. — The prosecution must prove: —

1. That a legal precept was in the hands of an officer.[1]
2. That it was notified by him to the defendant.
3. And that, if not a known officer, he offered to show his deputation.
4. That the defendant resisted the execution of the process (1 Whar. Cr. L. secs. 1289, 1290, 1293; 1 Russ. Cr. 569 *et seq.*).

With regard to the first proposition, the burden is satisfied by showing an apparently legal process, *ex. gr.*, one signed in blank and filled up (McNally, Ev. 488, 489); but if issued from a court of limited jurisdiction, it must be made to appear that the court acted within its jurisdiction (1 Whar. Cr. L. sec. 1293).

On the second proposition, see 1 Whar. Cr. L. secs. 1289, 1290.

The third proposition the author deems clearly deducible from the others, as well as sound upon the reason of the thing.

[1] Bishop asserts that it is indictable to resist an officer *de facto* (1 Bish. Cr. L. sec. 464).

The fourth needs no explication.

Escape. — In criminal actions against officers for escapes, it must be shown: —

1. That the party who escaped was legally charged with some indictable offence.

2. That a warrant or capias therefor was delivered to the officer.

3. That thereafter the officer had the party charged in custody. And

4. That he escaped thereout (Arch. Cr. Pl. 551, 552).

Or, if the action be against a jailor, the prosecution must prove the conviction, and that the escaped party was committed or remanded to the custody of the defendant, and his escape thereout (*ib.* 553).

This measure of proof is applicable to a criminal action against a party charged as for a voluntary escape (*ib.*).

Breach of Prison. — The prosecution must prove that the escaping party was lawfully committed to prison and actually lodged therein, and that, whilst thus in custody, he broke jail and escaped (*ib.* 552).

Every place used to detain prisoners is a prison for this purpose (*ib.*; 2 Hawk. P. C. chap. 18, sec. 4).

Rescue. — The burden herein requires proof that the party rescued was in lawful custody, either by virtue of process or in cases where an officer or private person is authorized to arrest, by showing the facts from which such authority is inferable; and that, whilst so in custody, the defendant rescued such party by taking him from his custodian (Arch. Cr. Pl. 561; Cr. Cir. Com. 403 *et seq.*).

Receiving Stolen Goods. — This offence was, at common law, only a misdemeanor, and devolved the burden on the prosecution of showing the conviction of the principal felon and the receipt of the stolen goods by the defendant from him, knowing them to have been stolen (Fost. Cr. L. 373, 374); that is, believing them to have been stolen (2 Bish. Cr. L. sec. 1138; Arch. Cr. Pl. 270, 274).

The receiving has been, by several English statutes (gener-

ally adopted in the United States) constituted a substantive felony or misdemeanor, and it may be here conveniently stated that, in criminal actions based upon these statutes, by their terms, the burden of proving the conviction of the principal felon is discharged; but, on the other hand, the burden is enhanced by requiring proof of the larceny, as upon an indictment therefor (Arch. Cr. Pl. 270; 1 Bish. Cr. L. secs. 699, 700).

Compounding Felony.[1] — The burden requires proof of the felony as upon an indictment therefor, and that the defendant received money or money's worth from the thief to forbear a prosecution, or cease one already commenced (1 Bish. Cr. L. chap. 49; Arch. Cr. Pl. 587).

Barratry. — It is sufficient to charge the defendant as a common barrator (Stark. Cr. Pl. 85; Whar. Cr. Pl. & Pr. sec. 155).[2] The burden requires proof of at least more than two instances (Case of Barratry, 8 Rep. 366).

Maintenance. — It is sufficient to charge maintenance by the equivalent of the old Latin word *manutenuit* (Stark. Cr. Pl. 174).

It may consist, according to the ancient common law, either: —

1. In assisting another, in the country, to take or hold possession of his lands by force or subtilty.

2. Or in stirring up quarrels and suits in matters in which the party has no concern.

3. Or when a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either the party with money or otherwise, in the prosecution or defence thereof (1 Russ. Cr. 254).

It is obvious from this definition that the prosecution must prove under the first head: —

That the party aided, being out of possession, was assisted by the defendant to regain possession; or being in possession, to retain it by force or fraud.

[1] Anciently called theft-bote (4 Black. Com. 133).

[2] It is the settled practice of the prosecutor to furnish defendant before trial with a bill of particulars (Case of Barratry, 8 Rep. 376, note *A*).

Under the second head, that he induced a party who had some claim but not then prosecuting the same, to do so, and that the defendant had no concern therein.

Under the third head, that a suit was depending, and that the defendant assisted one of the parties with money or otherwise, in the prosecution or defence of such suit (see 2 Bish. Cr. L. chap. 9).

Champerty. — The prosecution must prove that a suit had been commenced, or was in contemplation, and that the defendant agreed with one of the parties, in consideration of "working up" the case, to receive a part of the thing in suit, or some profit growing out of it (2 Bish. Cr. L. sec. 131; 4 Black. Com. 135).

Compounding Information. — The prosecution must show that a suit had been brought to enforce a penalty, and that the defendant compounded the same (4 Black. Com. 136; 1 Russ. Cr. 197, 198).

Conspiracy. — The prosecution must prove that two or more of the persons indicted agreed together, either: —

1. To falsely charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling toward such party, or, for the purpose of extorting money from him; or

2. To wrongfully injure or prejudice a third person, or any body of men, in any other manner; or

3. To commit any offence punishable by law; or

4. To do any act with intent to pervert the due course of justice; or

5. To effect a legal purpose with a corrupt intent, or by illegal means; or

6. To raise wages (Arch. Cr. Pl. 673); and such proof must be made either by direct evidence, or circumstances from which it may be inferred (*ib.* 676).

Perjury. — All matter of inducement (which cannot be rejected as surplusage) must be proved as laid; also: —

1. The matter sworn.

2. That the oath was taken before a competent officer.

3. In a judicial proceeding.

4. That the matter sworn was touching a material point.

5. That it was corruptly false.

6. And the proof must be made by two witnesses (*ib.* 571, 572; 4 Black. Com. 137).

Subornation of Perjury. — The burden requires the perjury itself to be proved as above stated, and that the defendant solicited or procured the affiant to make the false statement (Arch. Cr. Pl. 577).

Bribery. — The offence of bribery consists in the giving or receiving a reward of anything of value, in corrupt payment for any official act done, or to be done (2 Bish. Cr. L. sec. 85; 4 Black. Com. (Cool.) 139, note 24).

It is incumbent on the prosecution to show, as to giving a bribe, that the person alleged to have received it was a public officer, and that the defendant gave him money, or its equivalent, to do or forbear some act connected with his office; or as to receiving one, that the defendant, whilst holding a public office, received compensation to do, or refrain from doing, some act touching his office; or it may be proved, if the indictment be framed for an attempt to bribe, that an offer was made to give compensation for the performance or neglect of some duty, whether the same was accepted or not (Arch. Cr. Pl. 581).

Embracery. — In embracery, the burden is satisfied by showing the fraudulent solicitation of any juror, either by money, promises, letters, threats or persuasion, to give his verdict for the party soliciting (1 Hawk. P. C. chap. 85; 4 Black. Com. 140), and does not require proof that the verdict was corruptly or improperly given (2 Bish. Cr. L. sec. 384).

Malfeasance, etc., Officers. — In the case of malfeasance, etc., there must be evidence of some order or precept; that the same was made known or delivered to the defendant; that the defendant was legally bound[1] to obey the same, and that

[1] Archbold does not lay it down that this proof should be made, but it would seem to require *some* evidence, *ex. gr.*, as that the defendant was a known officer, or that he endorsed the receipt thereof, or the process or the

he either abused the process or neglected to obey its commands. This statement may be regarded as very general, but it is adopted on account of the impracticability of embracing all the various shades of this offence, in their entirety, in any definition, and it is deemed sufficient for the intelligent lawyer (Arch. Cr. Pl. 582–585). The act must be shown to have been wilful or at least contemptuous, and when a *justice* (magistrate) is charged with malfeasance,[1] corruption must be proved (Arch. *ubi supra;* 2 Bish. Cr. L. sec. 975 *et seq.*). If the allegation be of a false return, the facts must be alleged, wherefrom, the return can be seen to be false, and the proof must correspond (2 Bish. Cr. Pro. sec. 828).

Extortion. — If charged against an officer, there must be evidence that the defendant held an office, or was exercising the duties of an office, supported by fees, and that he, by virtue of his power as such officer, either exacted a fee when none was due, or a greater fee than the law allowed (Arch. Cr. Pl. 581). The burden requires the intent to be proved; it must be shown to have been exacted corruptly (2 Bish. Cr. L. chap. 18, IV.).

Libels reflecting on Courts. — This subject will be treated under the head of *Public Peace*, sub-head **Slanderous Words**.

Public Peace.

Slanderous Words. — If the charge be the uttering of slanderous words to a magistrate touching the discharge of his duties, the prosecution must prove: —

1. The charge before the magistrate.

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like. There is an averment, of being an officer, in Archbold's Precedents, 582 *et seq.;* it may be that the fact of the defendant holding the office, is, in England, taken notice of *ex officio* (McNally, Ev. 488; 1 Leach, Cr. L. 515).

[1] Bishop lays it down that, unless the facts alleged show that the act was clearly illegal, it must be shown that the neglect proceeded from corrupt or culpable motives (2 Bish. Cr. Pro. 788, note 2).

Dr. Wharton declares that to lay intent in negligent offences is a fatal error (Whar. Cr. Pl. & Pr. sec. 163 (4); see Stark. Cr. Pl. chap. 9; State *v.* Zachary, Busb. 432; Rex *v.* Borron, 3 B. & A. (5 E. C. L. R.) 432).

2. And that whilst the magistrate was in the execution of his office, the defendant addressed him and spoke words, which would support a civil action for slander of an officer (Arch. Cr. Pl. 588, 589; 2 Bish. Cr. L. sec. 265).

Unlawful Assembly. — To support this charge, it must be shown that three or more persons assembled with a preconcerted purpose to do some unlawful act (4 Black. Com. 146; Arch. Cr. Pl. 591).

Rout. — The same proof is required for rout, and in addition thereto that some advances were made toward accomplishing the object (Arch. Cr. Pl. *ib.*; 4 Black. Com. 146).

Riot. — The same proof will sustain a criminal action for a riot, with the addition that the unlawful purpose was accomplished (*ib.*). But though three or more assemble peacefully, if upon a dispute arising they form themselves into parties with promises of mutual assistance and then fight, it constitutes a riot (1 Hawk. P. C. chap. 65, sec. 3; Arch. Cr. Pl. *ib.*).

Affrays. — According to all the text-books within our reach, the burden requires proof that two or more defendants fought in a public place (1 Hawk. P. C. chap. 63, sec. 1; Arch. Cr. Pl. 564; 1 Russ. Cr. 406; 2 Whart. Cr. L. sec. 2473; 2 Bish. Cr. L. chap. 1; 4 Black. Com. 145). In North Carolina, on proof of a fighting by mutual consent, any one of the defendants may be convicted of an assault (Busb. Cr. Dig. 38). The burden may also be satisfied by showing that the defendant went armed with unusual or dangerous weapons to the terror of the people (1 Russ. Cr. 407; 1 Hawk. P. C. chap. 63, sec. 4).

Forcible Entry, etc. — HAWKINS asserts that if a party was disseized of his lands, he might regain possession of them by force (1 Hawk. P. C. chap. 64, sec. 1).

This position seems to be corroborated by the Stat. 5 Rich. 2, chap. 8, which prescribed that "none from *henceforth* make any entry into lands," etc., etc. (Mart. Coll. Br. Stats. 91; 1 Hawk. P. C. chap. 64, sec. 6; 2 Bish. Cr. L. sec. 492; Alex.

Br. Stats. 184). Perhaps, such entry was indictable even at common law, if effected with "a strong hand."

ARCHBOLD, a very accurate author, inserts these words in his form of indictment at common law (Arch. Cr. Pl. 600). Mr. ALEXANDER (a thorough lawyer) states that it is indictable at common law (Alex. Br. Stats. 185, in note; see also Cr. Cir. Com. 199; 3 Chitty, Cr. L. 1124; Rex *v.* Wilson, 8 T. R. 357).

Unquestionably, if the forcible entry was made without title, it would be indictable at common law, as tending to a breach of the peace. However indictable, the prosecution must prove: —

1. Possession of prosecutor.
2. That the defendant entered with a strong hand (Arch. Cr. Pl. 601).

A display of numbers may supply the proof of actual force (State *v.* Fisher, 1 Dev. 504).

Detainer. — The proof must extend to show that the prosecutor had been turned out of possession, and that the defendant by force[1] or display of force, kept the prosecutor out of possession (1 Hawk. P. C. chap. 64, sec. 30; 1 Russ. Cr. 427; 2 Bish. Cr. L. sec. 503).

Challenging to Fight. — The prosecution must prove that the defendant challenged, that is, demanded of the prosecutor by word or letter to fight; if by letter, the delivery of the letter[2] must be shown, and proof of the handwriting made.

Libels. — The date of publication is immaterial, but the libel must be strictly proved as laid; it must be also shown that the defendant published the libel, and in the county in which the indictment is laid (Arch. Cr. Pl. 527, 615).

Forestalling. — It must be proved that the provisions were purchased on their way to market and bought by defendant (Cr. Cir. Com. 205; 2 Chitty, Cr. L. 532), or that he dis-

[1] That is, by keeping in defence an unusual number of people, or unusual weapons, or by threats, etc.; see 1 Russ. Cr. 427.

[2] The actual receipt need not be shown, the sending constituting the gist of the charge (Arch. Cr. Pl. 604).

suaded persons from bringing their goods to market (4 Black. Com. 158; 2 Chitty, Cr. L. 527, note *g*; Arch. Cr. Pl. 589).

Regrating. — Regrating is indictable at common law (1 Hawk. P. C. chap. 80, sec. 1; 1 Russ. Cr. 252). The proof must show that the defendant purchased and resold an article of provisions in the same market (Arch. Cr. Pl. 590).

Engrossing.[1] — The prosecution must prove that the defendant bought up large quantities of dead victuals with intent to sell the same again for profit (*ib.*).

Selling Impure Food. — It must be shown: —

1. That the food sold was in fact unfit to be eaten.

2. That the defendant when he sold it knew its condition (2 Chitty, Cr. L. 556, note *d*; 2 East, P. C. 821; 1 Bish. Cr. L. secs. 491, 558).

Public Police and Economy.

Nuisances. — Nuisances may be created in so many different ways that it is difficult to embrace all in one criterionic definition. The prosecution must prove: —

The doing or failing to do some act, the doing or failing to do which, operated to injure the health, or was so offensive as to detract considerably from the enjoyment of life or property in its vicinity, or in some way diminished to others their constitutional right of the enjoyment of life, liberty, or property; and that the injury complained of affected a particular community in general, as distinguished from a particular person; at least it must be of *a nature* to injure all (4 Black. Com. 167; 1 Bish. Cr. L. sec. 243; Arch. Cr. Pl. 635, 636; 1 Russ. Cr. 435 *et seq.*).

This sub-title is applicable to so many of the affairs of life, that it is deemed pertinent to refer the reader for consultation to the following authorities: those cited *supra*; 2 Chitty,

[1] In our modern commercial phrase this is equivalent to "making a corner." The references to Arehbold on this page, before Nuisanees, are to the 4th Am. from 7th Lon. ed., being omitted from the edition heretofore cited, the English statutes touching Forestalling, etc., having been repealed before publication of the 5th Am. ed.

Cr. L. 426 *et seq.*, 565 *et seq.*; 1 Bish. Cr. L. secs. 236, 265, 316, 317, 419, 422, 490, 491, 1138, 1144; Cr. Cir. Com. 301 *et seq.*

Disorderly and Bawdy-House. — BISHOP says that the term disorderly house includes a bawdy-house, but this is hardly accurate, for while a bawdy-house in common parlance is a disorderly house, there may be a disorderly house without being a brothel.

The characteristics are distinct. The criminal action for the one is based upon the noise, confusion, etc., even though no incontinence is indulged, whereas the gravamen of the other is the keeping of lewd women for the promiscuous enjoyment of men, and is indictable though not a sound issue therefrom (1 Russ. Cr. 446; Ros. Cr. Ev. 795, 796; 4 Black. Com. 168; Arch. Cr. Pl. 636).

As, in the days of our ancestors,[1] rows were almost inseparable from the keeping of a bawdy-house, a practice sprang up of framing indictments charging acts of disorder, and also of incontinence, as proof of either would make out a crime (Arch. Cr. Pl. (1st ed.) 362; Cr. Cir. Com. 302).

With regard to disorderly houses, the prosecution must prove, by direct or circumstantial evidence, that the defendant suffered frequent disorders in his house, or if an innkeeper, that he usually harbored thieves (Ros. Cr. Ev. 795).

As to bawdy-houses, if indicted as such, there must be proof that the defendant kept a house for the purpose of promoting fornication; generally, this can rarely be done except by circumstantial evidence embracing various facts pointing to the charge (Ros. Cr. Ev. 796; Arch. Cr. Pl. (1st ed.) 362, 363).

As to either house, some courts hold that the charge can be proved by general reputation (Rathbone's Case, 1 Rogers, Rec. 27; State *v.* McDowell, Dud. (S. C.) 346), but, on principle, such evidence would seem not to be competent, as

[1] In these latter days many such houses are kept with all the outward observances of decorum. *Ex. Rel.*

substantive, though possibly, as corroborative evidence (2 Bish. Cr. Pro. secs. 112–117).

Gaming-Houses. — Gaming-houses are indictable at common law (Arch. Cr. Pl. (1st ed.) 364; 1 Bish. Cr. L. secs. 504, 1135).

The burden requires proof, direct or circumstantial, sufficient to satisfy the jury that the defendant kept a house for the public to play at games for money[1] or money's worth, though the defendant is not screened by keeping such house for a select circle or a particular class of persons. The offence implies, *proprio vigore*, that to some extent it should have been resorted to more than once (Ros. Cr. Ev. 795; Arch. Cr. Pl. (1st ed.) 363, 364).

Cock-Pit. — The same observations are applicable to the common-law offence of keeping a cock-pit (Ros. Cr. Ev. 796; 1 Russ. Cr. 444).

Play-Houses. — Play-houses are not, when conducted properly, obnoxious to the criminal law, but if it be alleged and proved that such representations were put on the boards as were calculated to sap the morals of the community, or to shock the religious sense, the keepers or managers would be liable to punishment at common law (1 Russ. Cr. 444, 445; 1 Hawk. P. C. chap. 75, sec. 7; Ros. Cr. Ev. 796, 797; 4 Black. Com. 168; 1 Bish. Cr. L. secs. 504, 1146, and note 3); or when the performance is calculated to draw unusual crowds upon the streets, or by its very character, to produce loud noises (see authorities *ubi supra*). It would seem, however, hardly compatible with our notions of liberty to treat such uproarious merriment, as *Joe Jefferson* always produced in his presentation of Rip Van Winkle, as indictable.[2]

Refusal to receive Guests. — If the keeper of an inn[3] refuse without sufficient grounds to receive a guest, he is liable to

[1] Archbold's form says "for large and excessive sums of money." This allows "a shilling a corner" — the English custom.

[2] Possibly skating-rinks, as generally conducted, might be regarded as nuisances. Such is the opinion of the author.

[3] The corresponding word used in this country is *hotel*.

indictment (1 Hawk. P. C. chap. 78, sec. 2; 1 Russ. Cr. 444; 4 Black. Com. 168; Ros. Cr. Ev. 795; Rex *v.* Ivens, 7 C. & P. (32 E. C. L. R.) 213).

The author, with great respect, doubts whether this doctrine is applicable to hotels in this country, unless licensed. Ivens' Case was at *nisi prius* — no adjudication cited, and none are cited in the text-books.

The case from Palmer's Reports cited by Hawkins was an action on the case which is clearly maintainable. The intimation of that eminent *juris-consultus*, BISHOP, is in accordance with this view (1 Bish. Cr. L. sec. 532).[1]

The burden requires evidence that the defendant kept or held himself out as keeping a hotel, and that he refused to receive the prosecutor as a guest.

If on demand the price for entertainment is not paid, or if the party demanding hospitality was not, on account of any legal ground, a proper person to receive, *ex. gr.*, one drunk, etc., this may be shown in defence.

Eaves-Dropping. — Eaves-dropping is noted as an offence at common law, but in the evolution of society, customs and manners have so much changed, that it is deemed hardly worth while to discuss the matter (see 4 Black. Com. 168; 1 Russ. Cr. 452; Ros. Cr. Ev. 797).

Common Scold. — It is said that the proof must extend to show that the woman is *always* scolding (1 Russ. Cr. 452; Ros. Cr. Ev. 798; J'Anson *v.* Stuart, 1 T. R. 748, *per* Buller, J.), but Bishop puts it more accurately, by substituting the word "frequently" (1 Bish. Cr. L. sec. 1102).

The burden would require proof of several instances so as to constitute it an injury *ad commune nocumentum*.

Gaming. — Gaming is certainly not indictable at common law unless cheating was done thereat. There is some confusion in the books as to whether even cheating at games is indictable at common law. In the affirmative we find: 1

[1] Bishop seems to regard this as a thing of the past; but, if the English doctrine be correct, it may become at any time a practical question of great moment, if the refusal be put upon the ground of race or color.

Russ. Cr. 455, citing Bac. Ab. title Gaming (A), and 2 Roll. Ab. 78; and see precedent at common law, Cr. Cir. Com. 174; 1 Hawk. P. C. chap. 71, sec. 1; 2 Bish. Cr. L. 157; but the precedents in Chitty and Archbold conclude *contra formam statuti* (2 Chitty, Cr. L. 680; Arch. Cr. Pl. 657; 1st ed. 377).

Bishop lays it down that gaming is not indictable at common law (1 Bish. Cr. L. sec. 504).

Cheating at Games. — It must be shown that the defendant won a sum of money or money's worth at some game, and (at common law) that it was won by some deceitful practice, as false dice and the like; or, if the indictment be predicated upon the statute of 9th Ann., which, it is believed, is generally re-enacted in this country, then by some shift, fraud, cozenage, circumvention, deceit, unlawful device, or ill-practice (Arch. Cr. Pl. 656).

Exhumation. — It must be proved that the defendant either dug up the body, or that the body having been interred was thereafter found in the defendant's possession (Arch. Cr. Pl. 666).

Indecency. — Indecency must be proved as laid, and it must be laid to have been done publicly (Arch. Cr. Pl. 655). Bathing in view of houses or people may constitute this offence.[1]

Bigamy. — Bigamy, more accurately termed polygamy, must be established by proof: —

1. The first marriage by eye-witnesses or other direct proof, that the defendant and other party alleged to have become the first husband or wife agreed by words of the present tense to be man and wife, or by words in the future tense, followed by cohabitation; or, if a statute has prescribed other pre-requisites, a compliance with them must be shown. Reputation is inadmissible (Arch. Cr. Pl. 629).

2. The second marriage must be proved as the first, and that it took place within the jurisdiction of the court (Arch. Cr. Pl. 631).

3. That the first husband or wife was alive at the time the second marriage was contracted (Arch. Cr. Pl. 632).

[1] To what extent besides the private parts should be shown to have been exposed, the authorities do not decide (see 1 Bish. Cr. L. sec. 1132 and cases cited).

Disturbing Religious Services. — There must be evidence that, while a congregation was engaged in religious services, the defendant by some improper behavior disturbed in some way the persons or some of them, so engaged, as by loud noises or laughter or grimaces, gestures, etc. (*ib.* 668).

Refusing Office. — As the offence is of such rare occurrence [1] in this country, it need only be said that there must be proof: —

1. Of the election or appointment of the defendant to some public office.

2. Notice to him to appear and qualify, or where notice is not prescribed, a refusal or failure by him to qualify (*ib.* 669).

Offences against Property.

Larceny. — There must be direct or circumstantial evidence sufficient to satisfy the jury that the person, arraigned or on trial, actually committed the offence (Arch. Cr. Pl. 170).

Articles Stolen. — Articles stolen must be proved as alleged, that is, as to the species of goods, and must be shown to be tangible personal property. Not that all tangible personal property is the subject of larceny at common law: for the exceptions see *ib. et seq.*

Value. — At common law in order to convict of grand larceny, the value of the stolen goods must be shown to be above 12*d.*; but, as the distinction between grand and petit larceny has been, and is rapidly being abolished, the only proof of value now required is to show that the goods were of some value (*ib.* 176).

Ownership. — It must be proved that the goods are the absolute or special property of the prosecutor (*ib.*).

Name. — The proof with regard to the name of the prosecutor must correspond with the pleading, unless it be *idem sonans*, or that he is as well known by one name as the other (*ib.* 100, 176).

Feloniously. — The trespass must have been done *animo*

[1] The author has only met with one case of the kind in the American decisions, and expects that to be the last (London *v.* Headen, 76 N. C. 72).

furandi, or, as better expressed in the civil law, *lucri causa* — to be more explicit, it is sufficient to show, in this behalf, that the defendant knowingly and wilfully took and carried away the goods without any claim or pretence of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use (*ib.* 179, 189). The intent must be concomitant with the taking; for, if taken honestly, a subsequent fraudulent appropriation will not constitute it larceny (State *v.* Roper, 3 Dev. 473; Arch. Cr. Pl. 188 *et seq.*; Warren *v.* State (Tex.), 1884, reported in 19 Rep. 351).

Taking. — Either an actual or constructive taking must be shown: actual, where the goods have in fact been taken out of the owner's possession against his will or without his consent; constructive, where the owner delivers the goods, but, either, thereby, divests himself of the legal possession, or the possession of the goods has been obtained from him by fraud and in pursuance of a previous intent to steal them (Arch. Cr. P. 182).

Asportavit. — A bare removal, and indeed a very slight removal, will satisfy the burden, as removing a cask from the head to the tail of a wagon; drawing a book an inch above the pocket where kept (Arch. Cr. Pl. 192, 193).

Stealing Horses, etc.[1] — In addition to the ordinary proof, it must be shown that the defendant led or drove away the animal, and the proof as to the kind of animal must strictly correspond with the allegation (Arch. Cr. Pl. 195, 196).

Dwelling-House. — In a criminal action for breaking into a dwelling-house and stealing therefrom, the proof is the same as in common larceny, except that there must be shown to have been an actual and not merely constructive taking, and that value need not be proved. The proof as to the allegation of the house being the dwelling-house of the prosecutor, and as to the breaking, must be the same as in burglary, except that it need not be shown to have occurred in the

[1] The stealing of domestic animals is larceny at common law, the punishment being enhanced by statute. Archbold concludes his form at common law.

night-time (*ib.* 240). The burden, as to stealing in a dwelling-house, as to the larceny, is as at common law, and as to being the dwelling-house, either that fact or that it was in a house connected or communicating therewith must be shown (*ib.* 412).[1]

Shop or Store. — As to breaking into a shop or store, substantially the same proof as in house-breaking is made (*ib.* 247).

Silk. — In a criminal action for stealing silk in process of manufacture, the larceny must be proved as at common law, except that the taking must be shown to be an actual, not constructive, taking; also, that the goods were stolen from the building, field, etc., alleged, situate as described, and that when stolen the goods were laid in the building, or exposed, etc., as alleged, and were in a certain stage of manufacture (*ib.* 248).

Vessels. — In a criminal action for stealing from a vessel, the larceny must be proved as at common law, except that the taking must be shown to be an actual taking and that the vessel was at the time upon the river mentioned (*ib.* 250).

Docks. — So, as to stealing from docks only, that (under the English statute) the asportation must be completely from the dock; also, that the dock was adjacent to a navigable river (*ib.* 251).

Robbery. — Robbery is defined to be the felonious taking from the person of another, or in his presence and against his will, any chattel, money, or other valuable security of any value, by violence or putting him in fear.

Bodily Fear. — The prosecution must prove either that the prosecutor was actually put in bodily fear, or such circumstances from which the jury may presume such a degree of apprehension of danger as would induce him to part with his property (*ib.* 253, 254).

Property and Value. — It must be shown that the thing so taken was of some value to the party robbed, and was the absolute or special property of the prosecutor (*ib.* 257).

[1] Archbold concludes his indictment at common law; reason stated, Arch. Cr. Pl. 56.

From the Person. — The goods must be proved to have been taken either from the person of the prosecutor or in his presence (*ib.*).

Against the Will. — It must appear, also, that they were taken from the prosecutor by force and violence, or surrendered under the impression of that degree of fear and apprehension which is necessary, as before stated to constitute robbery (*ib.*).

Feloniously. — Also that they were taken feloniously, as in ordinary larceny (*ib.*).

Take and carry away. — An actual taking must be proved, and the burden demands that it shall be shown that the robber actually obtained possession of the goods; and an asportation must be shown, as, where a man snatched an earring from a woman's ear, and it dropped amongst her curls (*ib.* 258).

Stealing from the Person. — The larceny must be proved, as in ordinary cases, except that the proof must extend to an actual taking, and that the goods were severed from the person (*ib.* 262).

False Scales. — It must be shown that the defendant carried on the business specified; that he used scales that did not indicate true weight, but short (*ib.* 296, 297).

Burglary. — Burglary is the breaking into one's habitation in the night with the intent to commit a felony therein.

Night-Time. — It must be shown to have been committed in the night, or at a time when there is not enough of the *crepusculum* whereby to discern a man's face, and it must be shown that both the breaking and entering were effected in the night-time (*ib.* 298, 299).

Dwelling-House. — The proof on this point extends to showing that the prosecutor resided in the building entered. Proof that any one slept therein, even in an outhouse used in connection with the mansion-house, or in a set of chambers, will be sufficient (*ib. et seq.*). The ownership must be proved as laid — though, presumptively, proof of a freehold title is not required — as by uncontradicted evidence of possession as a

residence, from which, ownership will be presumed (*ib.* 302 *et seq.*). The locality of the house must be proved as laid (*ib.* 305).

Break. — There must be evidence of a breaking, actual or constructive. Actual breaking may be shown by proof of the lifting of a latch or turning the bolt by using the knob (*ib.* 305, 306).

Constructive, where the offender, with intent to commit a felony, obtains admission by some artifice or trick to effect it, or if, having effected an entrance without breaking, the burglar should break open an inner door (*ib.* 306).

Entry. — The least degree of entry with any part of the body, or with any instrument held in the hand, is sufficient proof (*ib.* 307, 308).

Intent. — It must be proved that the burglar entered with intent to commit some felony (either common-law or statutory) in the dwelling-house; and it must be proved as laid (*ib.* 308, 309).

Arson. — The offence of arson, at common law, consists in the feloniously and maliciously setting fire to a dwelling-house or outhouses parcel thereof or used therewith, though it has been extended by statute to various other buildings.

Locality. — Locality must be proved as laid (*ib.* 313).

Intent. — It must be shown that it was done wilfully and maliciously [1] (*ib.* 314).

Burning. — The consuming of any part of the house will satisfy the burden in this behalf (*ib.* 314).

Dwelling-House. — It must be shown that the building fired was either a dwelling-house, or an outhouse used in connection therewith (*ib.* 315 *et seq.*).

Ownership. — Ownership must be proved as in burglary, *supra* (*ib.*).

Malicious Mischief. — The burden of proof requires evidence:

1. That the defendant destroyed, or committed an injury to, the personal property of the prosecutor.

[1] If, however, the act of burning be established, the intent will be inferred therefrom (Arch. Cr. Pl. 316).

2. With malice towards the owner (*ib.* 325, 326).[1]

Forgery.[2] — It must be proved that the defendant either wrote the whole instrument, or altered that written by another[3] (*ib.* 359).

Intent. — The intent to defraud the person presumptively liable or presumptively benefited, must also be shown, though the burden does not require proof that such person actually suffered loss (*ib.* 363, 364).

Instrument. — The instrument must be strictly proved as laid (*ib.* 362), and must be shown to bear such a resemblance to the handwriting forged as to be calculated to deceive the general run of the community (*ib.* 362, 363).

Uttering. — If the charge be that the defendant uttered the instrument, the evidence must show that the defendant tendered, or attempted to pass or make use of it (*ib.* 365); but the merely making of a false instrument, with a fraudulent purpose, is forgery, and proof thereof will sustain an indictment, unless it be averred that the instrument was uttered thereby enhancing the quantum of evidence (Elliott's Case, 1 Leach, Cr. L. 175; Arch. Cr. Pl. (1st Am. ed.) 189, in note; also page 205).

Scienter. — Scienter is rarely capable of direct proof, but, by that or circumstantial evidence, it must be proved that the defendant knew the writing to be forged.

Personation. — It must be shown that the defendant pretended that he was some other person, with intent to defraud. It is not necessary to show that the attempt was successful (Arch. Cr. Pl. 400; 2 East, P. C. 1010).

[1] Archbold states that malice against the owner need not be proved, but this is predicated of an indictment founded on 7 & 8 Geo. 4, which dispenses with that averment and proof thereof. In his first edition (published in 1824), before the passage of the statute, he lays down the doctrine of the text, p. 182.

[2] The author has ranked this offence under the common-law head, as it was a crime at common law (Cr. Cir. Com. 214 *et seq.*; Arch. Cr. Pl. (1st Am. ed.) 205; 2 East, Cr. L. 861, 862; 3 Chitty, Cr. L. 1022). The offence has, by various statutes, been extended to other subjects-matter, and will be treated of in that light, under the head of STATUTORY CRIMES.

[3] One found in the possession of a forged order, in his own favor, is presumed to have forged it (State *v.* Lane, 80 N. C. 407. S. P. State *v.* Morgan, 2 D. & B. 348).

Offences against the Person.

Murder. — The crime of murder consists in the killing of a human being, or as my LD. COKE puts it "a reasonable creature in being" (3 Inst. 50), with malice aforethought.

Killing. — The prosecution must prove that the prisoner slew the person alleged to have been killed, that is, the death of a human being must be proved, and, also, that such death was caused by the act of the prisoner (Arch. Cr. Pl. 408, 409), and that the death occurred within a year and day.

Means. — The means[1] employed to compass the death must be proved substantially as laid (*ib.* 406 *et seq.*).

Wound. — The wound must be proved, but need not be, as strictly, as laid (*ib.* 408).

Malice. — Proof of the slaying satisfies the burden in regard to malice, if no extenuating or exonerative facts accompany it (*ib.*); but if the circumstances attending the homicide are calculated to rebut the presumption, the prosecution is driven to proof of express malice (*ib.* 413 *et seq.*).

According to principle deducible from the rules of pleading, the plea of not guilty ought to devolve the onus probandi upon the prosecution throughout. It is inaccurate to speak of the burden of proof being shifted to the defendant; hence the discussion of the onus in criminal actions has been confined to the measure of proof required from the prosecution.

But in murder, at least, perhaps out of regard for human life, the courts have, from time immemorial, made a departure, and the books lay it down with great unanimity, that, upon proof of the homicide as charged, all matter of excuse or justification, unless appearing upon the evidence for the prosecution, must proceed from the defence; and, by the great majority of courts, it is held that the prisoner must prove such matters by a preponderance of the testimony —

[1] The means employed in murder are so various, that it is deemed best to assert the doctrine in this general form, referring the reader to Archbold, 406 *et seq.*

that the burden is shifted. Hence it is deemed pertinent to state the law in this behalf. The prisoner, then, taking the burden, may prove that the homicide was either justifiable or excusable, or only amounted to manslaughter.

Justifiable. — There are three ways of showing justification, either of which will satisfy the burden : —

1. That he, as the proper officer, killed the deceased by executing him in conformity to a judicial sentence of a court of competent jurisdiction (Arch. Cr. Pl. 409).

2. That he, as an officer, slew the deceased in the legal exercise of his duty, or as one of the *posse comitatus*, when the party slain was resisting such authority (*ib.*), or was making a "running fight" (State *v.* Garrett, 1 Winst. 144).

3. That he slew the deceased to prevent a forcible and atrocious crime (Arch. Cr. Pl. 409).

Excusable. — Or, by way of excuse : —

1. That he was performing a lawful act without any intention of hurt and killed by accident.

2. That he slew upon a sudden rencounter, merely in self-defence or in defence of wife, child, parent, possibly servant (*ib.* 409, 410).

Involuntary Manslaughter. — He may prove : 1. That he accidentally committed a homicide while doing an unlawful but unfelonious act (*ib.* 410).

Voluntary Manslaughter. — 2. Or that he slew upon sudden provocation (*ib.*).

Manslaughter. — Manslaughter is the wilful and felonious slaying of another without malice.

The burden of proof is the same as in murder, except that in murder the prosecution need only prove the homicide without going into evidence of the circumstances under which it was committed, whereas, in manslaughter, evidence must be given of all the facts of the case, so as to prove the homicide to be manslaughter (*ib.* 441).

Assault. — An assault is an attempt or offer to commit a crime against the person of another (*ib.* 442).

The prosecution must prove that the defendant made an

attempt, or offer to commit a battery, murder, robbery, rape, etc., on the person of the prosecutor, from such a standpoint, that the violence threatened would have been consummated but for some interfering circumstance (*ib.*).[1]

Battery. — ARCHBOLD defines it to be every touching (however trifling) of an another's person in an angry, revengeful, rude, or insolent manner, and it might be added, reckless manner (*ib.* 442).

As to aggravated assaults, the burden is not enhanced, but the prosecution failing to prove the aggravating facts may rest on the ordinary proof, though ARCHBOLD recommends the addition of a count as for a common assault (*ib.* 442, 446).

False Imprisonment. — All that is required is to prove that the party named in the indictment was imprisoned, and proof of any forcible restraint of a man's locomotion is sufficient (*ib.* 471). For the various points of defence, see Arch. Cr. Pl. 471 *et seq.*

Rape. — There are two salient points necessary to satisfy the burden: —

1. It must be proved that the defendant had carnal connection with a woman forcibly and against her will.

2. Penetration (if not implied by what has just been stated) and emission of seed[2] (*ib.* 481, 482).

Sodomy. — The burden of proof of sodomy is the same as in rape with two exceptions: —

1. No force need be shown.

2. Both agent and patient are equally guilty (if consenting), unless committed on a boy under fourteen, or girl under twelve (*ib.* 486).

Bestiality. — Carnal knowledge is proved as in sodomy (*ib.*).

[1] Fire-arms seem to form an exception, as the pointing of an unloaded pistol, etc., within carrying distance is *per se* an assault; see subject discussed, Part I. title ASSAULT AND BATTERY.

[2] Statute 9, Geo. 4, dispenses with proof of emission, and its provisions in this behalf have been generally adopted in the United States.

II. Statutory Crimes.

It may be stated preliminarily that whatever *must* be alleged, as an element of the offence, must also be proved. As to indictments for offences created by statute, the statute contains a definition of the offence, and the offence consists in the commission or omission of certain acts under certain circumstances, and, in some cases, with a particular intent. An indictment, therefore, for an offence against the statute, must with certainty and precision, charge the defendant to have committed or omitted the acts, under the circumstances and with the intent mentioned in the statute (Arch. Cr. Pl. 50; Bish. Stat. Cr. sec. 378 *et seq.*; 1 Bish. Cr. Pro. (3d ed.) secs. 611, 612; Stark. Cr. Pl. 86, 87). And these allegations must be proved as laid (Arch. Cr. Pl. 99). Not, but that other evidence *may* also be given of facts, not alleged, but, which *tend* to prove them (*ib.* 108 *et seq.*).

The doctrine above stated is thus expressed by an eminent author: "Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offence in the words of the statute, and for this purpose it is essential that these words should be used. In such case the defendant must be specially brought within all the material words of the statute, and nothing can be taken by intendment" (Whart. Cr. Pl. & Pr. sec. 220). There are exceptions which are enumerated by Dr. Wharton, to which the reader is referred (*ib.* sec. 221 *et seq.*; 1 Bish. Cr. Pro. secs. 612).

So much, touching criminal pleading, is premised as a general guide in framing indictments; for, whether an indictment is properly framed by following the language of the statute, or by using other words descriptive of the offence, the proof must correspond with the material allegations (Arch. Cr. Pl. 51).

Some general principles have already been discussed as to the proof on certain points as to time, place, etc., and it may be added that where an offence is laid to have been com-

mitted in a certain way, it is, in general, incumbent on the prosecution to prove it as laid; thus, for instance, in a criminal action for obtaining money by false pretences, if the pretence is alleged to have been made in one way, the proof must correspond (*ib.* 99). So where the charge under the Stat. 15 Geo. 2, was stealing a cow, proof of the larceny of a heifer was held to be a fatal variance (*ib.*). So where the charge was, under Stat. 43 Geo. 3, for cutting, and the proof was stabbing, it was held to be a fatal variance; the statute using both the words "cut" or "stab" (*ib.*). See many other illustrations in Arch. Cr. Pl. 99 *et seq.*

So, if words, being the gist of the offence, are laid as spoken in the third person, and proved to have been spoken in the second person, the variance is fatal; or laid as spoken affirmatively and proved to have been spoken interrogatively (*ib.* 104). So the intent must be proved as laid (*ib.*).

But, on the contrary, if one be charged as principal in the first degree, proof that he was principal in the second degree will suffice; also, in conspiracies and high treason, not only acts of the defendant himself, but also the acts and declarations of his accomplices, done or said in the furtherance of the common object, no matter where done or said, is competent evidence. As a foundation therefor, however, the existence of the conspiracy must be first proved; secondly, evidence must be given to connect the defendant with the conspirators; and thirdly, it must be proved, that the person whose acts and declarations are proposed in evidence, was connected with the defendant in the same conspiracy (*ib.* 105).

And more especially with regard to indictments upon statutes, where an exception or proviso is mixed up with the description of the offence in the same clause of the statute, the indictment must aver negatively that the party or matter pleaded does not fall within the meaning of such exception or proviso (*ib.*).

As to the proof touching such averment, the old rule seemed to have been to require proof thereof by the prosecutor; but the correct rule seems to be that where the

averment relates to the defendant personally or is peculiarly within his knowledge, such negative averments need not be proved by the prosecution (*ib.*); but if they do not relate to the defendant personally, or be not peculiarly within his knowledge, or relate personally to the prosecutor, or be peculiarly within his knowledge, or be as much within his knowledge as that of the defendant, the burden is upon the prosecution to prove them[1] (*ib.*; Whart. Cr. Pl. & Pr. sec. 240 *et seq.*; 1 Bish. Cr. Pro. (3d ed.) sec. 634 *et seq.*; Stark. Cr. Pl. 192–194).

It may be further stated that it is also necessary to prove the offence charged to the whole extent laid, provided the facts proved constitute a punishable offence of the same *quality* as that specified, as an indictment for a felony will not support a conviction for a misdemeanor (Arch. Cr. Pl. 106).

It may not be amiss to state that the maxim of *utile per inutile non vitiatur* applies to indictments in a modified degree, *i.e.*, to allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge or vitiating the indictment (*ib.* 107, 108); but if such allegations be descriptive of the identity of that which is legally essential to the charge, they must be proved as laid, *ex. gr.*, if the charge be for stealing a black horse, proof must show that color (*ib.*).

The rules as to the medium of proof are, in general, the same as those applicable to civil actions; but in one instance, namely, dying declarations, they are confined to criminal actions for homicide (1 Bish. Cr. Pro. sec. 1207).

Let us now pass in review the doctrine of the onus probandi as applicable to a number of statutory crimes, selecting for this purpose such as are of most importance and generally prevalent in the United States, as well as a few arising under the acts of Congress. It should be borne in mind that, in the discussion to follow, it is assumed that the necessary proof, independent of that particularly demanded by the lan-

[1] As to exceptions, see Starkie, *ubi supra*.

guage of the statute, shall have been given, and the observations will be confined to what proof is required to substantiate the words employed in the statute.

Adultery. — Adultery is not a crime at common law.

There are variant statutes in the States making adultery indictable, with different modifications of the criterion of the offence.

When carnal intercourse is so denounced, the burden is satisfied by proof of a single act of copulation between persons married, but not to each other, and in some of the States it is sufficient to show that one only of the parties was married.[1]

The general principle would apply in the absence of clear language, viz., that when a word of well-known signification is used at common law, it shall be understood in the same sense when employed in a statute, and hence if the unqualified word adultery is used, it would not be applicable to the case of intercourse between a married man and a single woman, or between two single persons; nor even to a single man having criminal conversation with a married woman.[2] He could only be guilty of fornication, an offence of much lower grade as viewed by the ecclesiastical courts, for, anciently, marriage was a sacrament (Bouv. L. Dict. title Adultery).

Webster states it correctly when he says that criminal conversation between two married persons is *double* adultery; but when one is unmarried, it is *single* adultery (Webster, Unb. Dict. — Adultery).

Of course a statute can torture words out of their received sense, but the intention must be manifested by explicit lan-

[1] It may be and usually is proved by circumstantial evidence, and the maxim of the civil law is eminently applicable, *nudus cum nuda non præsumuntur orare Deum.*

[2] Criminal statutes must be strictly construed, and, of course, the well-settled principle above stated must be applied to them. Courts cannot allow their notions of morality to unsettle the ancient foundations of the law — Mr. Bishop's suggestions to the contrary notwithstanding (Bish. Stat. Cr. sec. 654 *et seq.*).

guage. Hence they may declare that the intercourse between a single and a married person shall constitute adultery as to both.

These views are thrown out suggestively, as the statutes differ so widely that the practitioner must be guided by the language of the local act (Bish. St. Cr. chap. 28, *passim*), and the constructions placed upon it by the local adjudications.

If such expressions as "live in adultery;" "lewdly and lasciviously associate," "bed and cohabit together," and the like, be used, it would seem that the prosecutor should show the act to be habitual. In North Carolina the criterion adopted is that there must be such an habitual surrender of the person of the woman to the gratification of the man as usually takes place in the marriage state (State *v.* Jolly, 3 D. & B. 110).

Where there is no qualifying word to adultery, the prosecution must prove marriage of both or one of the parties, according to the distinction pointed out above (Bish. *ubi supra*).

In defence, the one, or indeed both of the parties, may show that it was committed under an honest mistake of fact[1] (Bish. *ubi supra;* and see *contra*, May, Cr. L. sec. 46).

Embezzlement. — The words of the statute are "if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master" (Stat. 7 & 8 Geo. 4, chap. 29, sec. 46). The prosecution must prove: —

1. That the defendant was the clerk or servant of the prosecutor at the time of the alleged commission of the offence.

2. The larceny as laid.

3. That the thing appropriated belonged to, or was in the possession or power of the master — either being sufficient (Arch. Cr. Pl. 194; 2 Bish. Cr. Pro. sec. 335 *et seq.*).

[1] This principle does not apply to intentional polygamy, even though committed under a *bona fide* fanciful religious dogma.

Sec. 47 of same act declares: —

"That if any clerk or servant or person employed for the purpose, or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security for, or in the name or on account of his master, and shall fraudulently embezzle the same or any part thereof, shall be deemed to have feloniously stolen the same from his master, although such chattel, etc., was not received into the possession of such master otherwise than by the actual possession of his clerk, etc." Under the statute it is necessary to prove: —

1. That the defendant, at the time he received the chattel, etc., was clerk, etc.

2. That he received the money, etc., for, or in the name, or on the account of his master, by virtue of his employment as such clerk and before it reached his master, etc.

3. That he embezzled, that is, appropriated or converted, the chattel or money, etc. (Arch. Cr. Pl. 277–281).

As to embezzlement by bankers, etc., see statute, Arch. Cr. Pl. 282. In a criminal action based upon that statute it must be shown: —

1. That the defendant was a banker, agent, etc., as stated.

2. That the money, etc., was entrusted to him.

3. That directions in writing were given for the application of the money, etc.

4. The conversion (2 Bish. Cr. Pro. sec. 341; Arch. Cr. Pl. 284). See also as to the burden of proof in criminal actions against bankers, etc., for embezzling goods entrusted to them for safe-keeping (*ib.* 285), embezzlement by factors (*ib.* 286), by bankrupts (*ib.* 288).

Cheats; False Tokens. — On a criminal action, predicated upon the statute 33 Hen. 8, chap. 1, concerning cheating by false tokens, and which was probably re-enacted in all of the old thirteen States, it is necessary to prove: —

1. That the defendant by means of some false token (2 East, P. C. 826) or counterfeit letter, procured money or money's worth from another.

2. That the pretence was made in the name of another (2 East, Cr. L. 689, citing Rex *v.* Pear;[1] *ib.* 819, 827; Stark. Cr. Pl. 103, 444 note *a*).

3. The scienter (Cr. Cir. Com. 173, 179; Arch. Cr. Pl. 162, (1st Am. ed.);[2] 2 East, Cr. L. 826, 827).

This statute, however, has been superseded by the statutes of 30 Geo. 2 and 52 Geo. 3 (Cr. Cir. Com. 174; Arch. Cr. Pl. (1st Am. ed.) 159).

False Pretences. — These statutes, in *pari materia*, created the then new crime of cheating by false pretences, as distinguished from false tokens (Arch. Cr. Pl. (1st Am. ed.) 159; 2 East, Cr. L. 827). The former prescribes "that all persons who, knowingly and designedly by false pretence, shall obtain . . . any money, goods, wares, or merchandises, with intent to cheat or defraud any person of the same" shall be guilty of a crime. The latter extends the subject of the cheat to bills, bonds, etc. (Arch. Cr. Pl. (1st Am. ed.) 159).

The burden requires proof of: —

1. The pretence *as laid*.

2. That the goods, etc., were obtained from the prosecutor by means of the pretence as charged.

[1] The author doubts this position, though it seems to be sanctioned by the authorities (Pear's Case, 1 Leach, Cr. L. 212, reported more fully in 2 East, Cr. L. 685–689, per Perryn, B., delivering the opinion of seven judges). Archbold throws no light, as he has no precedent under the stat. of Hen. 8, and the Cr. Cir. Com., in stating the evidence to be adduced on an indictment under this statute, not only omits to lay down such a rule, but states that the selling of the flesh of an unbaited bull as and for steer beef falls under it. Thus confining the words "made in another's name" to the precedent words "counterfeit letter," by reference to the subsequent words under the maxim *ex antecedentibus et consequentibus fit optima interpretatio*. Such is our view, but when confronted with an authority like East, as against Cr. Cir. Com., we feel compelled to state the law from East. The silence of Chitty, though citing Pear's Case, is a negative pregnant of the utmost weight (3 Chitty, Cr. L. 996 *et seq.*). The preamble to the statute seems to corroborate the author's idea (Mart. Coll. Brit. Stats. 238).

[2] The citations have been taken mainly from the 5th Am. ed. of Archbold. The author has not noted them separately, citing always marginal paging, and did not discover until he came to this particular subject that the marginal paging does not correspond in the two editions. As, however, there is a measurably good index to all of the editions, the reader can easily find the citations.

3. The intent, which is in general inferrible from proof of the two former.

4. That the pretence made use of was false in fact (*ib.* 160, 161).

These statutes were followed by the statute 7 & 8 Geo. 4.

This statute was caused by the result produced from the proof being often *too rank*, so as to show an original felonious intent, and constitute larceny, whereby, the misdemeanor being merged, defendants were sometimes acquitted (*ib.* 161; *ib.* (5th Am. ed.) 295).

This statute, after reciting that a failure of justice frequently arises from the subtle distinction between larceny and fraud, enacts, that if any person shall, by any false pretence, obtain from any other person any chattel, etc., with intent to cheat or defraud any person of the same, he shall be guilty of a crime — with a proviso that if, on the trial, the facts shall amount to a larceny, he may, nevertheless, be convicted, but shall not thereafter be tried as for the larceny (*ib.* (5th Am. ed.) 289). It is apprehended that this statute has been quite generally re-enacted in the United States.

In criminal actions predicated thereon, the burden requires the prosecution to prove: —

1. The pretence as laid, and the pretence must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property (Arch. Cr. Pl. 293).[1]

2. That the goods, etc., were obtained from the prosecutor by means of these pretences (*ib.* 294).

3. The intent, which is generally inferrible from the other constituent facts (*ib.* 295).

4. That the pretences were, in substance at least, false in fact (*ib.*).

Burglary: Breaking out. — The statute prescribes that if any person shall enter the dwelling-house of another, with intent to commit a felony, or being in such house, shall commit any felony, and shall, in either case, break out of said dwelling-

[1] Hereafter, unless otherwise stated, the reference to Archbold should be understood to be the 5th Am. ed., marginal paging.

house in the night-time, such person shall be guilty of burglary.

The burden demands that the prosecution shall prove: —

1. The larceny committed in a dwelling-house, — which has been already sufficiently discussed (*ib.* 310).

2. A breaking out of the house by the defendant in the night-time, in order to escape therefrom (*ib.*).

Or, if no felony was actually committed, then, that the defendant entered without breaking, with intent to commit a felony (*ib.*).

Under a statute making it a capital felony to commit a burglary and also an assault with intent to murder, the prosecution must prove: —

1. The burglary as stated *ante* 468.

2. The assault.

3. The intent to murder (Arch. Cr. Pl. 311). As to the manner of proving this fact, see Arch. Cr. Pl. 104.

And so, substantially, a charge of burglary and stabbing (*ib.* 311).

Larceny of Particular Property. — The only difference required in the proof, from that of common larceny, is as to the thing stolen.

It must not only be shown that the thing stolen is one of those enumerated in the statute; but it must, as we have seen, be proved as laid, and, if an animal, that it was alive (*ib.* 196). There are some nice distinctions taken (see *ib.*).

Stealing Records, etc. — The statute of 7 & 8 Geo. 4, chap. 21 enacts that, if any person shall steal, or shall, for any fraudulent purpose, take from its place of deposit for the time being, or from any one having the lawful custody thereof, or shall unlawfully or maliciously obliterate, injure, or destroy any record, etc., belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or any bill, etc., of, or belonging to, any court of equity, etc., etc., he shall be guilty of a crime (*ib.* 200). For convenience, the provisions will be discussed by segregating them.

Stealing. — The prosecution must prove a larceny as in ordinary cases (*ib.* 201). This of course includes proof of its being a record, but no proof of property is required (*ib.* 200).

Taking, etc. — 1. That there was a record, etc., of the court, as laid, deposited, as laid, and that such was the proper place of deposit, or, if so charged, that the person from whose custody the records, etc., is charged to have been taken, was entitled to have, and in fact had, *possession* of it at the time of the abstraction (*ib.* 201).

2. That the defendant took it from the place or person, as laid (*ib.*).

3. That he took it for a fraudulent purpose (*ib.*).

Obliterating, etc. — The same proof must be made as stated under Nos. 1 and 2 just above, and that the defendant obliterated, etc., as charged.

3. That it was done maliciously or unlawfully (*ib.* 201, 202).

Stealing, etc., Wills. — The same proof substantially is required in criminal actions for stealing, destroying, or concealing, *mutatis mutandis*, a will (*ib.* 203).

Stealing Deeds, etc.; Realty. — It must be proved: —

1. That the defendant stole the paper or parchment on which the writing was inscribed.

2. That such document was evidence of a title, or, a link in the chain of title to the realty specified in the indictment, or a part thereof.

3. That at the time of the larceny the prosecutor had a present interest, legal or equitable, in the realty, of his title to which the written paper or parchment is evidence (*ib.* 204). As to what evidence constitutes a present interest, see *ib.* 204.

Stealing Ore, etc. — Statute 7 & 8 Geo. 4 enacts that if any person shall steal, or, sever with intent to steal, certain ores, he shall be indictable. Under this statute it is necessary to prove: —

1. The larceny of the ore mentioned in the indictment.

2. Or, if the charge be a severance with intent to steal, the severance and intent, the latter being proved by circumstances.

3. That the mine from which the ore was taken was in the possession or occupancy of the prosecutor. And

4. That it is situate as described in the indictment (*ib.* 205).

Substantially the same proof is required under a statutory criminal action for stealing or cutting trees (*ib.* 207).

And the same observation may be addressed to various enactments making the stealing or destruction of various articles indictable, which by reason of their savoring of the realty, were not the subjects of a criminal action at common law, *ex. gr.*, plants in gardens (*ib.* 211), lead, etc., from buildings (*ib.* 212), metal fixed in land (*ib.* 212, 213).

Stealing Negotiable Instruments. — The statute 7 & 8 Geo. 4, chap. 29, sec. 5 enacts "that if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom of Great Britain or of Ireland, or of any foreign state, or in any fund of any corporate company or society, or to any deposit in any savings-bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing," he shall be deemed guilty of a crime. It is presumed that this statute has been substantially re-enacted throughout the United States. The prosecution, in a criminal action based upon it, must prove: —

1. The larceny of the bill, or other thing alleged to have been stolen, as in common larceny (*ib.* 214).

2. That it was one of those specified in the statute (*ib.* 215).

3. There must be evidence of signatures, and that the thing stolen was a valuable security (*ib.* 216).

Stealing from Wreck. — The water-bounded States have, generally, statutes making it indictable by some extraordinary punishment, to steal property from wrecked vessels. The prosecution must prove: —

1. That the craft was stranded or cast on shore as described in the indictment.

2. If the name of the owner be known, that she was his property.

3. The larceny of the goods whilst she was stranded or cast on shore.

4. That the goods were part of or belonged to the craft, as it may be stated in the indictment. And

5. If the name of the owner of the goods be known, that they were his property (*ib.* 227).

Stealing by Lodgers. — The same statute enacts that if any person shall steal any chattel or fixture let to be used by him in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on their behalf, etc., the offending party is guilty of a crime. Under this statute — and similar ones are assumed to be prevalent here — it is necessary to prove: —

The larceny of the chattel, if it be so laid; or if laid for the stealing of a fixture, then proof must be made tending to show that, although apparently annexed to the freehold, it was, in contemplation of law, a fixture (*ib.* 235, 236).

Breaking Church. — The same statute enacts that if any person shall break and enter any church or chapel, and steal therein any chattel; or, having stolen any chattel in any church or chapel, shall break out of the same, he shall be guilty of a crime.

Breaking in. — The prosecution must prove: —

1. The breaking, as in burglary, except that it need not be shown to have been committed in the night-time.

2. The larceny as laid.

3. The situation of the church or chapel as laid (*ib.* 237).

Breaking out. — 1. The larceny as laid.

2. The breaking out, as in statutory burglary.

3. The situation, etc. (*ib.* 238).

If the church is private property, that fact must be alleged and proved (*ib.* 237).

House-Breaking. — The same statute enacts, that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value

whatever [or to the value of five pounds], he shall be guilty of a crime, with a proviso, excepting buildings within the curtilage, unless there shall be a communication between them and such dwelling-house. In a criminal action, founded on this, the prosecution must prove: —

1. The dwelling-house to be that of the prosecutor, as in burglary (*ib.* 240).

2. The breaking and entering, as in burglary, except as to the night-time (*ib.*).

3. An actual and not merely constructive taking (*ib.*).

4. If the house is not the actual dwelling-house, but within the curtilage, that it communicated with such dwelling-house, either immediately or by means of a covered or inclosed passage leading from one to the other (*ib.*).

5. The local description of the house (*ib.*).

The same proof, substantially, is necessary under the statute 7 & 8 Geo. 4, chap. 29 for breaking into an out-house within the curtilage, as in housebreaking *supra*, except that the communication need not be shown, but in lieu thereof that the house was within the curtilage, and occupied by the prosecutor with his dwelling-house (*ib.* 244, 245).

Breaking Shop, etc. — The same proof substantially is also required in a criminal action upon statute 7 & 8 Geo. 4 for breaking shop, warehouse, or counting-house *q.v.* (Arch. Cr. Pl. 247).

Robbery. — There are quite a number of statutory robberies, but it may suffice to group them, mentioning, that in all, the robbery, as at common law, must be established, and then, the collateral facts superadded by the statute.

Stabbing. — In stabbing, the wounding must be proved (*ib.* 253–259).

By One Armed. — That the prisoner when he committed the robbery was armed with an offensive weapon (*ib.* 259).

Attended with Violence. — That the defendant immediately before, at the time of, or immediately after the robbery, used personal violence towards the prosecutor (*ib.* 260).

Stealing from the Person. — The prosecution must prove: —

The larceny as at common law, except that the burden requires proof of an actual, and not merely a constructive, taking, and that the goods were actually severed from the person (*ib.* 262).

Assault with Intent to rob. — The prosecution must prove: —

1. That the defendant assaulted the prosecutor, as in common assaults, no proof of a battery being required.

2. The intent, which may be inferred from the circumstances (*ib.* 263).

Demanding Money with Menaces, etc. — The prosecution must prove a demand by the defendant of the money or other thing, as laid in the indictment, by means of menaces or force made with intent to steal it (*ib.* 264).[1]

Let us now consider the onus probandi with reference to crimes as created by acts of Congress, confining ourselves to such as are of most frequent occurrence.[2]

Piracy. — In a criminal action based upon Rev. Stat. U. S. sec. 5368 *et seq.*, it will be observed that the punishment for piracy, as defined by the law of nations, is prescribed. The burden of proof with reference to the kind of piracy has been already discussed. But there are many acts enumerated in the Revised Statutes and made piracy thereby. The sections will be discussed *seriatim.*

Sec. 5324 provides for the punishment of receivers of piratical vessels, etc. The proof under it is substantially similar to that for receiving stolen goods, *supra.*

Sec. 5369. — The proof under this action must extend to showing: —

1. That the defendant was a seaman, and while such, on an occasion when the vessel or cargo was attacked, laid violent hands, *i.e.*, committed a battery, on his commander,

[1] This is an offence created by 7 Will. 4 and 1 Vict. chap. 87, sec. 7, and the statute uses the language "demand by menaces or force" "with intent to steal."

[2] At first blush it may seem as if too much space was devoted to this subject, but, on careful observation, it will be discovered that less could not be said without omitting mention of matters of as much consequence to the practitioner on the criminal side of the docket as that class just before discussed. The author felt reluctant to make too close a discrimination.

2. With intent thereby to hinder or prevent him from fighting in defence of the vessel or goods.

Sec. 5370. — The burden requires proof: —

1. That the vessel, etc., was on the high seas or open roadstead, etc.

2. That whilst thus situated the defendant committed a robbery upon the vessel, etc. (U. S. *v.* Palmer, 3 Wh. 610; U. S. *v.* Jackalow, 1 Black, 484; U. S. *v.* Baker, 5 Blatch. 6).

Sec. 5371. — The burden requires proof: —

1. Of a piratical cruise or enterprise, and that the defendant was engaged therein, or

2. That the defendant was one of the crew of a piratical vessel, and

3. In either case, that he landed from the vessel and committed a robbery.

The proof under the adjectival expressions "piratical cruise," "piratical vessel," can be determined from the law relating to piracy (*ib.*).

Sec. 5372. — It must be shown under this section that the defendant committed: —

Either on the high seas or in any river, etc., the same being shown to be out of the jurisdiction of a State, murder, or robbery, or any other offence, such other offence being punishable with death by the laws of the United States (U. S. *v.* Palmer, 3 Wh. 610; U. S. *v.* Klintock, 5 Wh. 144; U. S. *v.* Furlong, 5 Wh. 184; U. S. *v.* Holmes, 5 Wh. 412; U. S. *v.* Ross, 1 Gall. 624; U. S. *v.* Kessler, 1 Bald. 15; U. S. *v.* Gilbert, 2 Sumn. 19; U. S. *v.* Jones, 3 Wash. C. C. 209; U. S. *v.* Howard, 3 Wash. 340, 344; U. S. *v.* Henry, 4 Wash. C. C. 428).

Sec. 5373. — The prosecution must show: —

1. That a citizen of the United States committed murder, or robbery, or an act of hostility against the United States, or against any citizen [1] thereof, on the high seas. The proof

[1] These terms are quite vague. The act was doubtless framed by some layman, as, an act of hostility against a citizen, is, to the legal apprehension, incomprehensible. Lawyers speak of hostility to the rights of another; the

as to murder and robbery we have already considered. The other terms are so exceedingly vague and untechnical that it would not be safe to give them any meaning — at least, the author does not trust himself to do so.

2. That the defendant did the act under color of a commission from some foreign prince, or state, or on pretence of authority from any person (U. S. *v.* Baker, 5 Blatch. 6).

Sec. 5374. — The prosecution must prove: —

1. That a citizen or subject of a foreign state, was taken upon the sea whilst making war upon the United States, or cruising against the vessels or property thereof, or upon the citizens thereof.

2. That the acts were done contrary to the provisions of a treaty existent between the United States and the state of which the defendant is a citizen or subject.

3. That by such treaty such acts are declared to be piratical.[1]

Secs. 5375, 5376, 5377, 5378, 5379, 5380, 5381, 5382. — These sections, it is presumable, fall[1] with the cesser of slavery.

Sec. 5383. — The prosecution must prove: —

1. That the defendant being a captain, officer, or mariner on the high seas, or within the admiralty and maritime jurisdiction of the United States, piratically or feloniously ran away with the vessel, or with the goods or merchandise thereof, to the value of fifty dollars.

2. Or being such captain, etc., yielded such vessel to a pirate voluntarily (U. S. *v.* Tully, 1 Gall. 247; U. S. *v.* Ross, *ib.* 624; U. S. *v.* Kessler, 1 Bald. 15; U. S. *v.* Haskell, 4 Wash. 402).

Sec. 5384. — The prosecution must prove: —

That the defendant attempted to corrupt a commander, master, officer, or mariner to yield up or run away with any vessel or with any goods,[2] or to turn pirate, or to go over to,

other expression is crude, and, if understood in its popular sense, it would include murder and robbery. Why name them?

[1] This section is subject to the same criticism as sec. 5373, as expressed in the previous note.

[2] Evidently refers to goods on board.

or confederate with, pirates, or in some wise to trade with a pirate, knowing him to be such, or to furnish a pirate with any ammunition, stores, or provisions of any kind, or fit out any vessel knowingly and with design to trade with, supply, or correspond with, or confederate with, such pirate, knowing him to be guilty of any piracy or robbery; or, if being a seaman, that the defendant confined the master of a vessel.[1] It is deemed as well here to run over the list of crimes against the peace and dignity of the United States, other than treason, etc., which have already been discussed.

Sec. 5333. — The prosecution must prove: —

1. That the defendant owed allegiance to the United States, and having [possessing] knowledge that a treason had been committed against such government, concealed and failed, at the earliest opportunity, to disclose the same to the President, or to some Federal Judge, or Governor, or some Justice of some State (U. S. *v.* Wiltberger, 5 Wh. 76).

Sec. 5334. — The prosecution must prove: —

That the defendant either incited, or set on foot, or assisted, or engaged in rebellion or insurrection against the authority, or laws of the United States, or gave aid or comfort thereto.[2]

Sec. 5335. — The prosecution must prove: —

1. That the defendant whilst a citizen of the United States, commenced, or carried on, a verbal or written correspondence with a foreign government, or some officer, or agent thereof.

2. That he did so with intent to influence the policy of such government, or officer, or agent, in relation to a dispute between such government and the United States, or with the intent to defeat the measures of the government of the United States.

3. That the defendant, if a citizen or resident, advised, counselled, or assisted therein with like intent.

[1] Of course such a provision as "knowing him to be guilty" would be assumed to be the emanation of a brain of a former period.

[2] This is an illustration of the careless aggregation of synonyms and useless tautology.

The negative authority upon principles already stated need not be proved, but is a matter of defence.

Sec. 5336. — The prosecution must prove : —

That two or more persons in a State or Territory[1] conspired to overthrow, by force, the government of the United States, or to levy war against it, or to oppose by force the authority thereof, or by force, to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof. It will be observed that a similar conspiracy as against a statal government would have been indictable at common law. To make it indictable as against the United States required such legislation (*Ex parte* Lange, 18 Wall. 163).

Sec. 5337. — The prosecution must prove : —

1. That the defendant either recruited, that is, engaged by contract, men to serve as soldiers or sailors within the United States, to engage in armed hostility against the same ; or,

2. That he opened a recruiting station within the same territory with like purpose. In the latter instance the crime is complete by opening a recruiting station, whether any one was recruited or not.

Sec. 5338. — The prosecution must prove : —

That the defendant enlisted, that is, agreed to serve, as a soldier or sailor, with intent to engage in armed hostility against the United States.

Sec. 5339. — The prosecution must prove : —

1. That the defendant committed a murder — the proof, to constitute which, is the same as at common law. It should not be lost sight of that, with one or two exceptions, the criminal jurisdiction of the courts of the United States must be conferred by act of Congress; and when a well defined crime at common law is made punishable because of its committal in a certain place, the common law, as to the quantum

[1] This evidently means residents of the State or Territory.

of proof of the crime, attaches (1 Abb. U. S. Prac. 288 *et seq.*).

2. That the crime was committed within some of the places specified in the section (U. S. *v.* Bevans, 3 Wh. 336; U. S. *v.* Furlong, 5 Wh. 184; U. S. *v.* Holmes, 5 Wh. 412, and other cases cited under this section in Rev. Stats.; Rap. Fed. Dig. title criminal law, *passim*).

Sec. 5341. — The prosecution must prove: —

1. A case of manslaughter.

2. That it was committed within the places specified in sec. 5339 (U. S. *v.* Imbert, 4 Wash. 702).

Sec. 5342. — The prosecution must prove: —

1. An attempt to do that, which, had the attempt been consummated, would have constituted murder or manslaughter, in like manner as at common law, except that the assault should not be shown to have been made with a dangerous weapon.

2. That it was committed in some of the places specified in sec. 5339.

Sec. 5344. — The prosecution must prove: —

1. That the defendant while captain, etc., of a steamboat or vessel, through misconduct, negligence, or inattention to his duties, caused the death of a person.

2. Or, that being the owner, inspector, or other public officer of such steamboat, or as having functions in connection therewith, by fraud, connivance, misconduct, or violation of law, caused the death of a person[1] (U. S. *v.* Farnham, 2 Blatch. C. C. 528; U. S. *v.* Warren, 4 McL. 463; U. S. *v.* Taylor, 5 McL. 42).

Sec. 5345. — The prosecution must prove: —

1. That the defendant committed a rape, as in common-law trials.

2. That it was committed within some of the places specified in sec. 5339.

[1] It will be observed that this is a badly-framed statute, *non constat*, but that its language embraces steamboats plying on inland waters. What is meant by "inspector or other public officer" it is hard to conceive.

Sec. 5346. — The prosecution must prove: —

1. That the defendant made an assault upon another with a dangerous weapon, or with intent to perpetrate a felony.

2. That it was made within the places specified in this section.

3. That it was done on board of a vessel belonging in whole or part to the United States, or a citizen thereof.

The word "felony" — by the settled rule that when a word of well-known signification at common law is used in a statute, it must receive the same interpretation as at common law — means any felony (U. S. *v.* Grush, 5 Mas. 290).

Sec. 5347. — The prosecution must prove: —

1. That the defendant being the master, or other officer, of any American[1] vessel, whilst on the high seas, or other places named in this section, beat, or wounded, or imprisoned, or withheld suitable food or nourishment from, or inflicted cruel and unusual punishment upon, any of the crew of such vessel.

2. That he did so from motives of malice, hatred, or revenge, and without justifiable cause.

As this last expression conveys the legal idea of malice, it is fair to infer, especially when found confined to the other words, that the word "malice" must be predicated of express malice,[2] *i.e.*, grudge, ill-will, covered by the two other words (U. S. *v.* Freeman, 4 Mas. 511; U. S. *v.* Taylor, 2 Sumn. 584; U. S. *v.* Winn, 3 *ib.* 209; U. S. *v.* Collins, 2 Curt. C. C. 194).

Sec. 5348. — The prosecution must prove: —

1. That the defendant committed a maim maliciously, by cutting off an ear, or cutting out, or disabling, the tongue, or putting out an eye, slitting the nose, cutting off the nose or lips, or by cutting off or disabling any limb or member of the person.

2. That he did it with intent to maim or disfigure.

3. That the act charged was committed within the territorial or admiralty jurisdiction of the United States Courts.

[1] This was evidently meant for United States.

[2] This view was maintained on a statal statute containing much weaker expressions as to intent (State *v.* Phifer, 90 N. C. 721).

The malice specified most probably means implied malice; as the statute is quite similiar in structure to 7 Wm. 4 & 1 Vic. chap. 85, sec. 4 (Arch. Cr. Pl. 450), and such was the holding under that statute (*ib.* 451).

Secs. 5349 and 5351. — The prosecution must prove: —

1. That the defendant whilst master, etc., of any American vessel, seduced a female passenger, and had carnal knowledge of her body.

2. That this occurred during a voyage of the vessel and on board thereof.

3. That the seduction was induced by either a promise of marriage, or by threats, or the exercise of authority,[1] or solicitation, or by gifts.[2]

This offence is condoned by marriage, and the same may be pleaded in bar. The intensity of the proof requires that there should be other testimony than that of the party seduced, that is, in addition to hers. The prosecution must be instituted within one year after the arrival of the ship at her port of destination.

Sec. 5352. — The prosecution must prove: —

1. That the defendant contracted marriage.

2. That whilst the same was subsisting, he, within some place over which the United States has exclusive jurisdiction, married a second time. The proof must be the same as in bigamy, with the superadded fact of the locality of second marriage.

Sec. 5353. — The prosecution must prove: —

1. Either that the defendant actually transported the substances therein named, or caused the same to be delivered or transported on board of a vessel or land carriage employed in the conveying of passengers, between the points therein specified.

2. That he knew the nature of the substance at the time of such delivery, etc.

[1] Whatever that may mean.

[2] Remarkable that the employment of spirituous liquors, drugs, etc., was not included.

Sec. 5354. — The prosecution must prove: —

1. The facts necessary to convict under the next preceding section, and

2. That the death of a person was caused by the explosion of the substance specified in the indictment.

Sec. 5355. — The proof under this section is the same as under section 5353 (except that it need not be shown to have been placed on a conveyance for passengers) and it must also be shown that the article specified in the indictment was not, when delivered for transportation, securely packed, or if so received, and the indictment be against the carrier, was allowed to remain, not securely packed and labeled, as in the act set forth, this circumstance must be shown.

Sec. 5356. — The prosecution must prove a larceny, as at common law, and that the crime was committed either on the high seas or in some place under the exclusive jurisdiction of the United States. This statute, it will be observed, uses, substantially, the terms applicable to a common-law larceny, and does not therefore embrace money or choses in action, nor did the one next succeeding as originally passed (1 Abb. U. S. Prac. 20, § 17). A later statute was enacted, extending the latter section to money, bank-notes, etc., but did not touch the section under consideration (U. S. *v.* Davis, 5 Mas. 356).

Sec. 5357. — The prosecution must prove a receiving of the money, etc., as stated *supra*, and that it was received in the places as prescribed by sec. 5356.

Sec. 5358. — The proof is substantially the same as in criminal actions under sec. 5361, *infra*, except as to the place, which must be the same as under sec. 5356, *supra* (U. S. *v.* Coombs, 12 Pet. 72; U. S. *v.* Kessler, 1 Bald. 15).

Sec. 5359. — The prosecution must prove: —

1. That the defendant was one of the crew of an American [U. S.] vessel.

2. That while such vessel was upon the high seas or other waters within the admiralty jurisdiction of the United States:

He either (1) endeavored to make a revolt or mutiny on

board of such vessel, or (2) combined with some other person on board to make it, or (3) solicited or incited any other of the crew to disobey or resist the lawful orders of some officer of the vessel, or (4) to refuse, or neglect, to perform their proper duty on board, or (5) to betray their trust, or (6) that he assembled with others in a tumultuous and mutinous manner, or (7) committed a riot on board, or (8) unlawfully confined the commanding officer (see authorities cited in Rev. Stat. margin to this section).

Sec. 5360. — The prosecution must make proof as in Nos. 1 and 2 just above, and that the defendant (1) unlawfully, and with force, or (2) by fraud, or (3) by intimidation, usurped the command of the vessel from the officer in command, or (4) deprived him of his authority and command on board, or (5) resisted him in the free and lawful execution thereof, or (6) transferred such authority and command to another, not being lawfully entitled thereto (U. S. *v.* Kelly, 11 Wh. 417; U. S. *v.* Smith, 3 Wash. 78; U. S. *v.* Stevens, 4 *ib.* 547; U. S. *v.* Haskell, *ib.* 402; U. S. *v.* Forbes, 1 Crabbe, 558; U. S. *v.* Borden, 1 Sprague, 374; U. S. *v.* Peterson, 1 Wood. & M. 305).

Sec. 5361. — The prosecution must make proof: —

1. That the defendant did, upon the high seas or other waters within the maritime jurisdiction of the United States, and out of the jurisdiction of a State, either (1) by a surprise or (2) open force, maliciously attack any vessel belonging to another.

2. That the same was done with intent to plunder such vessel or to despoil any owner thereof of his moneys, goods, etc., on board.

Sec. 5362. — 1. The prosecution must make proof as in No. 1, *supra*, as to the place, and

2. That the defendant broke or entered a vessel, or cut, spoiled, or destroyed any cordage, etc.

3. That the same was done with intent to commit a felony.

Sec. 5363. — The prosecution must prove: —

1. That the defendant was master or commanding officer of a vessel.

2. That the same, in whole or part, belonged to a citizen of the United States.

3. That while such vessel was abroad, the defendant maliciously, and without justifiable cause, (1) forced an officer or some of the crew to go on shore, or (2) refused to bring them home.

4. In the latter alternative, that they were in a condition and willing to return, when the vessel was ready to proceed homeward.

5. With intent to leave them in a foreign port or place (U. S. *v.* Ruggles, 5 Mas. 192; U. S. *v.* Coffin, 1 Sumn. 394; U. S. *v.* Netcher, 1 Story, 307; U. S. *v.* Riddle, 4 Wash. 644).

Sec. 5364. — The prosecution must show: —

1. That the defendant corruptly conspired with some person to cast away or destroy a vessel.

2. That such conspiracy, as to the defendant, was entered into, either on the high seas or within the United States.

3. That it was done with intent to (1) injure an underwriter of the vessel or cargo, or (2) to injure any person lending on bottomry or *respondentia* bonds.

4. Alternatively: that the defendant built, or aided in building, a vessel within the United States.

5. With like intent, as above stated (U. S. *v.* Cole, 5 McL. 513; U. S. *v.* Hand, 6 *ib.* 274).

Sec. 5365. — The proof under this section is substantially like that of sec. 5364, except that it must be shown that the defendant was the owner, or part owner, and that he destroyed the vessel either with the intent above specified or with intent to injure the co-owner, and that the same was done wilfully and corruptly[1] (U. S. *v.* Johns, 4 Dall. 412; U. S. *v.* Amedy, 11 Wh. 392; Beaston *v.* Farmers' Bank, 12 Pet. 102; U. S. *v.* Johns, 1 Wash. 363).

Sec. 5366. — The prosecution must prove: —

1. That the defendant destroyed a vessel upon the high seas.

[1] It is amazing in so many acts of Congress that such redundant expressions are employed. If an owner destroys a vessel with intent to defraud the insurer, the act, *ex vi termini*, imports wilfulness and corruption.

2. That he did so wilfully and corruptly (U. S. *v.* Johns, 1 Wash. 363; U. S. *v.* Van Rantz, 3 *ib.* 146).

Ownership, it is conceived, is matter of defence.

Sec. 5367. — The prosecution must prove: —

1. That the defendant wilfully set fire to a vessel on the high seas.

2. With intent to destroy the same.

Alternatively: that he otherwise attempted the destruction thereof.

Ownership, it is conceived, is matter of defence.

Sec. 5385. — The prosecution must prove: —

1. That within the places specified in the section, the defendant burned some of the buildings there situate.

2. Maliciously and wilfully (State *v.* Phifer, 90 N. C. 721).

Sec. 5386. — The proof under this section is substantially the same as that under sec. 5385, except as to the property enumerated as the subject of burning.

Sec. 5387. — The prosecution must prove: —

1. That the defendant, maliciously, either (1) set fire to, or (2) burned, or (3) destroyed, a vessel of war of the United States.

2. That when done, the vessel was upon the high seas, an arm of the seas, or on waters within the admiralty jurisdiction of the United States.

Sec. 5388. — The prosecution must prove: —

1. That the defendant either (1) cut, or (2) aided in cutting, or (3) wantonly destroyed, or (4) procured to be wantonly destroyed, any timber[1] standing on the public domain of the United States.

2. That it was on such of the domain as might be reserved or purchased for military or other purposes.

3. If the charge be cutting, that it was done unlawfully; if destruction, that it was done wantonly.[2]

Sec. 5389. — The prosecution must prove: —

[1] This evidently means timber trees.

[2] An instance of careless legislation to require a greater intensity of proof for the destruction than a mere injury like cutting.

Secs. 5390–5395, 1023, 3158; Rich. Supp. p. 350; Art. of War, Sec. 60.

1. That the defendant in a place within the exclusive jurisdiction of the United States, either (1) sold, or (2) lent, or (3) gave away, or (4) in any manner exhibited, or who (5) offered to do the same, or (6) published, or (7) offered to publish, or (8) had in his possession for any such purpose, some of the obscene books or other articles specified in the statute.

2. Or (1) that the defendant had advertised the said articles for sale, or (2) wrote or printed, or caused to be written or printed, a card, etc., stating when, where, how, or from whom, or by what means, any of such articles could be purchased, etc.

3. Or that the defendant (1) manufactured, or (2) drew, or (3) printed, or (4) in anywise made such articles.

Sec. 5390. — This section provides for misprision of felony, and the proof is the same as stated, *ante*, 449, except that it must be shown, that the felony, the commission of which was concealed, was committed either on the high seas or within the admiralty jurisdiction of the United States.

Secs. 5392, 5393, 5395, 1023, 3158; Rich. Supp. chap. 190, sec. 6; Art. of War, sec. 60. — These sections and others provide for the punishment of false swearing, and while all the adverbial expressions used in the common-law definitions are not employed in the statutes, it is apprehended that the quantum of proof necessary to support an indictment thereunder, must be commensurate with that required at common law, in its substantial elements; it must, in addition, be shown that the oath was taken in some cause or proceeding in the United States Courts, or in some matter in which the interests of the United States were involved (U. S. *v.* Bailey, 9 Pet. 238; U. S. *v.* Wood, 14 *ib.* 430; U. S. *v.* Nickerson, 17 How. 204; U. S. *v.* Clark, 1 Gall. 497; U. S. *v.* Babcock, 4 McLean, 113; U. S. *v.* Stanly, 6 *ib.* 409; U. S. *v.* Passmore, 4 Dall. 372; U. S. *v.* Kendrick, 2 Mas. 69).

There are several matters of common-law proof, which are allowed to be pretermitted, by virtue of sec. 5396, being substantially the same enactment as has been commented on,

ante, 455, in marginal title Perjury. The same remark is applicable to the proof required in subornation of perjury with reference to sec. 5397.

Sec. 5398. — The proof is substantially the same as stated, *ante* 452 (marginal title Obstructing Process), except that it must be shown that the resistance was to the process of the United States, in the hands of its officer (U. S. *v.* Lowry, 2 Wash. C. C. 169; U. S. *v.* Lukins, 3 *ib.* 335; U. S. *v.* Slaymaker, 4 *ib.* 169; U. S. *v.* Tinklepaugh, 3 Blatch. 425; U. S. *v.* Stowell, 2 Curt. C. C. 153; U. S. *v.* Keen, 5 Mas. 453).

Sec. 5399. — The prosecution must prove: —

1. That the defendant either (1) influenced, or (2) intimidated, or (3) impeded, either (1) a witness, or (2) an officer in any court of the United States in the discharge of his duty.

2. That the act was done, either (1) corruptly, or (2) by threats, or (3) by force.

3. That the defendant, either (1) obstructed, or (2) impeded, or (3) endeavored to obstruct or impede the due administration of justice therein.

4. That the act charged was done, either (1) corruptly, or (2) by threats, or (3) by force.

Sec. 5400. — The prosecution must prove: —

1. That a capital convict was either (1) being led to the place of execution, or (2) was undergoing execution.

2. That the defendant by force rescued such convict.

Sec. 5401. — The proof is substantially the same as *ante*, 453, marginal title Rescue.

Sec. 5402. — The prosecution must prove: —

1. That the marshal was conveying the dead body of a convict for dissection, or that such dead body had been deposited for dissection.

2. That the defendant, by force either (1) rescued, or (2) attempted to rescue, such body out of such custody.

Sec. 5403. — The proof under this section is substantially the same as statutory crimes, marginal title Stealing Records, etc., *ante*, 482.

Secs. 5404, 5405. — The proof is substantially similar as *ante*, 456, marginal title Embracery.

Sec. 5406. — The proof under this section is the same substantially as stated under marginal title Misprision, *ante*, 449.

Sec. 5407. — The prosecution must prove: —

1. That two or more persons within the United States or its Territories conspired to either (1) impede, (2) obstruct, or (3) defeat the due course of justice in any State or Territory.

2. With the intent and so as to deny to any citizen either (1) the equal protection of the laws, or (2) to injure him or his property for (1) lawfully enforcing, or (2) having lawfully attempted to enforce, the right of any person or class of persons to the equal protection of the laws.[1]

Sec. 5408. — The prosecution must show: —

1. That the defendant was an officer in whose legal custody a record, etc., was placed.

2. That while thus in his custody, he either (1) took the same away, or withdrew, or (2) destroyed it.

3. That the act was done fraudulently.

Secs. 5409, 5410. — The same proof substantially required as stated *ante*, 453, marginal title Escape, except that under these sections, the proof must show a voluntary,[2] as contradistinguished from a negligent, escape.

[1] This act was based upon the 14th Amendment to the Constitution. That amendment creates (if it did not exist before) citizenship under the United States Government. It would seem to follow that Congress possessed, *ex vi termini*, the power to protect such citizen, and whilst the language, as applied to the objects of protection, is broader than perhaps warranted, yet a criminal action based upon the statute would probably be upheld if the indictment should charge the person injured to be a citizen of the United States, and the proof corresponded.

The word "person" is the generic term, and ought to include the more specific one of citizen — *major in se minus continet.*

[2] This section uses as the only qualifying adjective the word "voluntary," whereas the Stat. 4 Geo. 4, c. 64, § 44, uses no qualifying expression.

Archbold states that it is not necessary to prove that the escape was voluntary; but, as our statute employs the word, the author inclines to the opinion that it thereby necessitates the proof, as stated in the text, under the maxim *expressio unius exclusio alterius.*

Secs. 5411, 5412. — A discussion of these sections is omitted, as each is purely local in its provisions.

Secs. 5413–5435. — The proof is substantially the same under these sections as stated *ante*, 470, marginal titles Forgery, and Personation. The additional proof being adduced to show that the papers, etc., forged were issued under the authority of the United States.

Sec. 5436. — The prosecution must prove: —

1. That the defendant, knowingly or fraudulently,[1] either (1) demanded, or (2) endeavored, either (1) to obtain some share in the public stocks of the United States, or (2) to have a part thereof transferred, etc., or (3) to have an annuity, dividend, pension, prize-money, wages, or other debt due from the United States, or any part thereof, delivered or paid to him.

2. That to attain this end he presented a false, forged, or counterfeited power of attorney, etc., purporting to authorize such, his action.

Sec. 5437. — The prosecution must prove: —

1. That the defendant was one of the officers of an expired corporation enumerated in the act, or that he was a trustee thereof, or agent of such trustee, or that he had possession or control of the property of such corporation for the purpose of paying its debts.

2. That while standing in this relation, he knowingly (1) issued, (2) re-issued, or (3) uttered as money, or in any other way knowingly put in circulation a bill, note, check, draft, or other security purporting (1) to have been made under the authority of such corporation, or (2) by any officer thereof, or (3) purporting to have been made under authority derived therefrom.

3. Or that the defendant aided in the commission of the crime.

Sec. 5438. — The prosecution must prove: —

First Branch: —

1. That the defendant made, or caused to be made, or

[1] Taken with the context, they are synonymous terms.

presented, or caused to be presented, for payment or approval, to some officer of the United States, he being the proper officer to audit the same, any claim against the government of the United States, or against any department or officer thereof.

2. That he knew said claim to be false or fictitious.

Second Branch: —

3. Or that the defendant for the purpose, that is, with the intent, of obtaining, or aiding to obtain, the payment or approval of such claim, made, used, or caused to be made or used, a false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition.

4. That he knew the same to contain a fraudulent or fictitious statement or entry.

Third Branch: —

5. That the defendant conspired to defraud the government of the United States, or some department or officer thereof, in such obtaining, etc.

Fourth Branch: —

6. That he had the charge, possession, custody, or control of any money or other public property used, or to be used, in the military or naval service of the United States, and delivered, or caused to be delivered, to some other person, entitled to receive the same or any part thereof, less than the amount for which he received a receipt or certificate.

7. That he did the act with intent either (1) to defraud the United States, or (2) wilfully to conceal such property.

Fifth Branch: —

8. That the defendant being the person authorized to receive the property so delivered, as just stated, gave a receipt as above specified, and delivered the same without a full knowledge of the truth of the facts therein stated.

9. With intent to defraud the United States.

Sixth Branch: —

10. That the defendant, knowingly, either (1) purchased, or (2) received in pledge to secure an indebtedness from a soldier, etc., arms, etc.

11. That such soldier, etc., did not have the legal right to sell or pledge the same.

Sec. 5439; Rich. Supp. c. 144, s.s. 1, 2. — Under this section there must be proof: —

1. That the defendant either (1) stole, or (2) embezzled, or (3) knowingly applied to his own use, or

2. Unlawfully sold, conveyed, or disposed of any ordnance, etc., being the property of the United States.

3. That the same was furnished, or to be used, for the military or naval service.

Sec. 5441. — The proof must show: —

1. That the defendant wilfully did some act, or (1) aided, or (2) advised the same, touching the custody, sale, etc., of property captured as prize, or (3) documents relating thereto.

2. With intent to defraud, etc., (1) the United States, or (2) the claimant.

Sec. 5442. — The proof must show: —

1. That the defendant was one of the officers mentioned in the section.

2. That while such officer, he knowingly and falsely certified to an invoice, etc., to which his official signature was necessary.

Sec. 5443. — The proof must show: —

1. That the defendant wilfully concealed, or destroyed any invoice, etc., relating to merchandise liable to duty.

2. That an inspection thereof had been demanded by the proper collector.

3. That the defendant destroyed such invoice, etc., with intent to suppress evidence of fraud therein contained.

Sec. 5444. — The proof must show: —

1. That the defendant was an officer of the external revenue.

2. That whilst such, he knowingly admitted, or aided in admitting to entry, goods, etc., for less amount of duty than was chargeable thereon.

Sec. 5445. — The prosecution must prove: —

That the defendant by the means, and in the manner alleged, effected an entry of goods (1) at less than the true weight or

measure, or (2) upon a false classification thereof as to quality or value, or (3) by payment of less than the legal duty.

Sec. 5446.—The prosecution must prove, that while property was in custody of a revenue officer, it was rescued, or attempted to be rescued, out of his possession by the defendant.

Sec. 5447. — The prosecution must prove (1) assault upon, resistance to, impeding of, or interfering with a revenue officer, as such, or (2) the rescue, destruction or removal of property by defendant, which had been seized or was liable to be seized by the government.[1]

Sec. 5448. — The prosecution must prove, a false personation of a revenue officer, *ante*, 470, and that defendant (1) demanded, or (2) received, by means of such personation, money or other article of value, as for (3) a duty or tax due to the United States, or (4) as accrued by reason of a violation or (5) pretended violation of any revenue law.

Secs. 5449, 5450, 5451, 5452. — The proof is substantially as stated, *ante*, 456, Bribery.

Comment on sections 5453 and 5454 is pretermitted, as they are of exceptional use, and it is our desire to present the bearing of the onus, only, as to the more prominent statutes.

Sec. 5455; Rich. Supp. c. 69, par. 181. — The prosecution must prove, that the defendant (1) enticed or (2) procured, or attempted to entice or procure a soldier, seaman, or other person,[2] to desert, or (3) that he aided him to desert, or (4) that he harbored, or (5) protected, or (6) assisted a deserter, and in the last three instances, that he knew him to have deserted, or (7) that the defendant refused to surrender such soldier on demand made by the proper party.

Sec. 5456. — This section makes it indictable to steal the personal property of the United States. Any kind of personal estate is embraced. The proof should be the same as in Robbery and Larceny respectively, *ante*, 467, 465.

[1] The latter part of this section is almost a repetition, thus: — or (3) the discharge of a deadly or dangerous weapon, in resisting such officer, with intent to injure him, or prevent him from discharging his duty.

[2] This must mean some person of a class *ejusdem generis*.

Secs. 5457, 5458; Rich. Supp. 259, Chap. 24. — The proof under these sections, is substantially the same as under Counterfeiting, *ante*, 448, 449 (U. S. *v.* Gardner, 10 Pet. 618; U. S. *v.* Marigold, 9 How. 560; U. S. *v.* King, 5 McL. 208; U. S. *v.* Burns, *ib.* 23; U. S. *v.* Morrow, 4 Wash. 733).

Sec. 5459. — The prosecution must prove: —

1. That defendant in any of the modes specified, altered, (1) the coin of the United States, or (2) lawful foreign coin.

2. That he did it fraudulently.

Sec. 5460. — For practical reasons comment is omitted.

Secs. 5461, 5462. — The proof under these sections need only show: —

That the defendant (not being authorized by law) either (1) made, or (2) passed coins, etc. The intent is immaterial.

Sec. 5463. — The proof should be substantially as in forgery in other cases — the prosecution having the onus to show the collateral fact that the money-order system prevailed at the time, between the points, from and to which, the forged order applied to.

Secs. 5464, 5465. — Comment omitted as the reduction of postage has rendered them substantially a dead-letter.

Sec. 5466. — Cases arising on this section are of such rare occurrence that discussion is omitted.

Sec. 5467. — This is a very important section.

The prosecution must prove: —

1. The character of the defendant, as having been, at the time of the commission of the offence, an employee in the postal service.

2. That while holding such position he either (1) secreted, or (2) embezzled, or (3) destroyed any letters, etc., which came into his possession, and which was intended to be conveyed under the postal system.

3. That the same contained a note, draft, or some of the various articles specified in the section.

4. That, alternatively, the defendant took any such money or other articles out of such letter, etc., *i.e.*, with felonious intent.

5. It is immaterial whether the letter, etc., came into his hands as postal agent or otherwise. The defendant may show, taking the burden, that the larceny, etc., was not committed until after the delivery of the letter, etc., to the addressee (see authorities collected in margin to the section in Rev. Stats.).

Sec. 5468. — It is sufficient to show that such letter was deposited in some postal depository.

Sec. 5469. — The prosecution must prove: —

1. Either that the defendant stole the mail, *i.e.*, the bag or box containing the mail; or

2. That he stole from out of some mail depository, some part thereof; or

3. That the defendant took the mail; or

4. Some part thereof, and in either case, *afterwards* did (1) open, (2) embezzle, or (3) destroy the same.

5. That the mail contained some of the articles specified in this section; or

6. That the defendant did by (1) fraud, or (2) deception obtain, from a person having custody thereof, any *such* mail, letter, etc.

Under this last phase it is immaterial whether the mail, letter, etc., when so obtained, was or not in the lawful custody of the actual possessor (see authorities collected in margin to this section in Rev. Stats.).

Sec. 5470. — The proof under this section is substantially similar to that under Receiving Stolen Goods, *ante*, 453 (U. S. *v.* Hardyman, 13 Pet. 176).

Sec. 5471. — Of too seldom occurrence to need comment.

Secs. 5472, 5473. — Proof substantially similar to that of Robbery, *ubi supra*, 467, and so as to the attempt.

Sec. 5474. — The prosecution must prove lawful custody of the mails, and failure to deliver at destination.

Sec. 5475. — The prosecution must prove larceny or embezzlement as *supra*, or an actual conveying away of the property, for gain, to the detriment of the public service, and that the

value exceeded twenty-five dollars, if the higher punishment is claimed.[1]

Sec. 5476. — The prosecution must prove: —

1. The injury to the article specified, and as alleged.

2. That the same was done either with, (1) intent to rob, or (2) steal the mail, or (3) to render it insecure.

Sec. 5477. — The prosecution must prove: —

1. (1) The stealing of a post-office key or lock, or (2) the embezzlement thereof, or (3) the obtaining thereof by a false pretence.

2. Or, that the defendant knowingly forged or counterfeited any such key or lock.

3. Or, that the defendant had in possession such key or lock with intent improperly to use, sell, or otherwise dispose thereof, or,

4. That the defendant being engaged in the manufacture of such mail locks or keys, (1) delivered any finished or unfinished key or lock, (2) either used, or designed for use in the postal department, or (3) the interior part of such lock, to any person who was not authorized, by writing under the hand of the Postmaster-General and his official seal, to receive the same.

Sec. 5478. — The prosecution must prove: —

1. That the defendant forcibly broke into a post-office or building used, in part, as such.

2. With the intent to (1) commit a larceny therein, or (2) other depredation.

Sec. 5479. — The prosecution must make the same proof substantially as in Counterfeiting, *ante*, 448, 449.

Sec. 5480. — The prosecution must prove: —

1. That the defendant had devised some scheme to defraud.

2. That, in executing such scheme, he sent or received letters or packages through the mail.

The proof as required under Rev. Statutes, title 70, chap. 6, will be found *infra*, 514 *et seq.*

[1] The provisions are extended to records, etc., without reference to a minimum value (Act March 3d, 1875, Rich. Supp. 183).

Sec. 5506. — The prosecution must prove: —

1. That the defendant by unlawful means (1) hindered, (2) obstructed, or (3) prevented a citizen of the United States, either from (1) doing any act required to be done to qualify him to vote, or (2) from voting at any of the elections specified in this section.

2. Or conspired with others to effect the same object.

Sec. 5507. — The prosecution must prove: —

1. That the defendant (1) prevented, (2) hindered, (3) controlled, or (4) intimidated [1] a colored citizen of the United States from exercising, or in exercising, his right of suffrage.

2. By (1) bribery, or (2) threats of deprivation of employment, or (3) turning him out of rented premises, or (4) refusing to re-lease, or (5) of renewing contracts of labor, or (6) by threats of violence to him or his family.

Sec. 5508. — The same proof is required as in cases of conspiracy, *ante*, 455, all of which vary with the circumstances.

Sec. 5509. — If, in committing the offences denounced by the two preceding sections, some other crime was committed, the onus requires proof of the commission of the crime, as required under said sections as above stated, and then the proof of the additional crime in accordance with the general principles of criminal jurisprudence.

Sec. 5510. — The object of this law was to place colored citizens, with regard to their amenability to the law, on the like footing with their superior race; but the onus probandi is not discharged by showing, merely, that some colored citizen was deprived of any of his civil rights by an oppressive act, personal to the party committing it, such as the corrupt action of ministerial or judicial officers, in selecting juries, etc., but that it was done under color of some statute, ordinance, or custom, which, *proprio vigore*, operated to create the invidious distinction (Blyew *v.* United States, 13 Wall. 581).

[1] In this, as in a great many sections, language is used declaring indictable the advising, procuring, aiding, counselling of the *acts* made indictable; but as any one so acting is a principal, the author has omitted any discussion of these expressions.

Sec. 5511. — The prosecution must prove: —

1. That at an election for representative or delegate to Congress, the defendant either (1) knowingly personated some elector and voted in his name, or (2) knowingly attempted to do so, or (3) (in either case) in the name of a non-existent person, or,

2. Voted at a place where he was not entitled; or

3. Voted without having the right to do so; or

4. Did some unlawful act (specified in the indictment) to secure an opportunity for himself or some other person to vote, or,

5. By (1) force, or (2) threats, or (3) intimidation, or (4) bribery, or (5) offer thereof, prevented a qualified voter from freely exercising his right of suffrage; or

6. By any such means, induced such voter to refuse to exercise such right; or

7. (1) Compelled, or (2) induced, by any of such means, any election officer to receive the vote of any one not entitled to vote; or

8. Interfered, in some manner (as charged in the bill), with such officer in the discharge of his duties; or

9. Induced such officer whose duty it was to announce the result, etc., by such or any unlawful means (and if the latter, as charged) to (1) violate, or (2) refuse to comply with his duty or any law regulating the same; or

10. That being an officer authorized to receive votes, he either (1) received the vote of one not entitled to vote, or (2) refused to receive the vote of one entitled[1] (U. S. *v.* Souders, 2 Abb. C. C. 456).

Sec. 5512. — The burden of proof under this section need not be stated as, *mutatis mutandis*, it is substantially the same. As to what is deemed a sufficient registration, see sec. 5513 (U. S. *v.* Quinn, 8 Blatch. 48; S. C., 1 Bond, 48).

Sec. 5514. — Makes the casting of a ballot, for certain statal officers, by one not entitled, in which the name of a

[1] See foot-note to page 509.

candidate for Congress might have been properly put, *prima facie* evidence of guilt.

Sec. 5515. — This section is directed against the unlawful or fraudulent acts or omissions of officers of election, in which members of Congress may be voted for, and provides for quite a variety of offences.

The prosecution must prove: —

1. That the defendant was such officer.

2. That so being, he either (1) neglected, or (2) refused to perform his duty, or (3) violated his duty, or (4) knowingly did unauthorized acts with the intent to affect the result of such election, — the proof, in such cases, corresponding to the infractions of duty as charged in the indictment.

3. That he fraudulently made a false certificate of the result.

4. That he (1) withheld, (2) concealed, or (3) destroyed any such certificate.

5. That he (1) neglected, or (2) refused to make, or (3) to return such certificate (U. S. *v.* Clayton, 19 Am. L. Rep. 737).

Secs. 5516, 1984, 1985. — The prosecution must prove: —

1. That a person had been appointed, in writing, by the commissioners provided for by Rev. Stat. title 24, to execute process in cases arising thereunder, or that the process was directed to and received by a marshal, etc.

2. That the defendant wilfully (1) obstructed, or (2) hindered, or (3) prevented (1) the directee of such process, or (2) his assistant, from executing the same; or

3. That the defendant (1) rescued, or (2) attempted to rescue, the defendant in the process, from the custody of the officer; or

4. That he (1) aided, or (2) assisted, or (3) abetted the defendant to escape thereout; or

5. That he (1) harbored, or (2) concealed the defendant named in the process, so as to prevent his discovery and arrest; also that he knew that a warrant had been issued for the arrest of such harbored person, when he so harbored him.

Sec. 5517. — The prosecution must prove: —

1. That the defendant was performing the duties of marshal.

2. That while such officer, he refused to receive process, when tendered to him, which had been issued under sec. 1985; or

3. That having received it, he (1) refused, or (2) neglected to use all proper means to diligently execute the same.

Sec. 1980. — The prosecution must prove: *First:* —

1. That the defendant conspired, to prevent by (1) force, (2) intimidation, or (3) threats, a person from (1) accepting, or (2) holding any (1) office, (2) trust, or (3) place of confidence under the United States; or

2. From discharging the duties thereof; or

3. That the defendant (having conspired to that end), by like means, induced an officer of the United States (1) to leave his place of duty, or (2) conspired to injure him in (1) his person, or (2) his property, on account of the lawful discharge of his duties or while engaged in the discharge thereof; or

4. To injure his property so as to (1) molest, or (2) interrupt, (3) hinder, or (4) impede him in the discharge of his duties.

Second: —

1. That the defendant, by like means, conspired, to deter a witness (1) from attending a federal court, or (2) from testifying freely, fully, and truthfully; or

2. To injure any party or witness in his (1) person, or (2) property, on account of his having (1) attended court, or (2) testified; or

3. To influence the (1) verdict, (2) presentment, or (3) indictment of any (1) grand or (2) petit juror; or

4. To injure such juror in his (1) person, or (2) property, on account of (1) such verdict, etc., or (2) his having been such juror; or

5. That the defendant conspired to (1) impede, (2) hinder, (3) obstruct, or (4) defeat, the due course of justice in any State or Territory, with the intent (1) to deny to any citizen the equal protection of the laws, or (2) to injure

(1) him, or (2) his property for lawfully (1) enforcing, or (2) attempting to enforce, the right of (1) any person, or (2) class of persons to the equal protection of the laws.

Third : —

Clause third is what is known as the Ku Klux Act. Its consideration is omitted, as the cause for such legislation has, in consequence of the current of political events, ceased; and it is confidently predicted, or at least earnestly hoped, that the last indictment under this act has long since been disposed of.

Secs. 5518, 5519, 5520. — The proof under these sections is governed by the principles laid down *ante*, 455, as to Conspiracy.

Sec. 5521. — The proof is substantially the same as *ante*, 456, 457, with reference to Official neglect.

Sec. 5522. — The proof is substantially similar to that under 5506 *et seq.*

Sec. 5523. — The prosecution must prove: —

That the defendant, during the progress of a verification of the list of persons registered, or who have voted, (1) refused answer, or (2) answering, gave false information with respect to any inquiry lawfully made.

Secs. 5524, 5525, 5526, 5527. — Substantially obsolete.

Sec. 5528. — The prosecution must prove: —

1. That the defendant was in the civil, military, or naval service.

2. That while such, he either (1) brought or (2) kept or had under his authority (1) troops or (2) armed men

3. at a place where an election is being held. The fact that such a force was necessary, to repel enemies or keep the peace at the polls, must be negatived.

Secs. 5529, 5530. — The prosecution must prove: —

1. That the defendant was in the military or naval service of the United States.

2. That he, by (1) force, (2) threat, (3) order, (4) advice, (5) or otherwise, (1) prevented, or (2) attempted to prevent, any qualified voter from freely exercising his right of suffrage.

3. Or that he prescribed, etc., in any way, the qualification of voters.

Sec. 5531. — The prosecution must prove: —

1. That the defendant was in such service.

2. And that he by (1) force, (2) threat, (3) order, or (4) otherwise (1) compelled, or (2) attempted to compel, an inspector of elections to receive the vote of one not entitled to cast it;

3. or (1) imposed, or (2) attempted to impose, any regulation for conducting any election different from those prescribed by law;

4. or who, in any[1] manner, interfered with any election officer with regard to the discharge of his duty.

Sec. 5481. — The same proof substantially is required as in criminal actions at common law for Extortion, *q.v.*, 457; of course, proof as to the defendant's office must be made.

Sec. 5482. — The same proof substantially as above will suffice.

Sec. 5483. — The prosecution must prove: —

1. That the defendant was an officer charged with the payment of any appropriation made by Congress.

2. (1) That he paid to an employee a sum less than what was due him, (2) and required such employee to give him a voucher for a greater amount than paid.

Sec. 5484. — The prosecution must prove: —

1. That the defendant received money, etc., either (1) under threat of giving information of some violation of the internal-revenue law, or (2) as a consideration for refraining from informing thereunder.

Sec. 5485. — The prosecution must prove: —

1. That the defendant was (1) an agent, (2) an attorney, (3) or a person instrumental in prosecuting any claim, for (1) pension, or (2) bounty land.

2. That the defendant (1) contracted for, or (2) received, or (3) retained a greater[2] compensation, in prosecuting such claim, than is allowed by law.

[1] This, of course, would not apply to advice or suggestion made *bona fide*.

[2] As to claim-agent procuring arrears of pensions, the word "any" is employed instead of "a greater" (Rich. Supp. 386, 396, 602).

3. That he (1) wrongfully withheld, any part of the pension or claim allowed, or (2) the land warrant which was issued, from the beneficiaries.

Sec. 5486. — The prosecution must prove: —

1. That the defendant was a guardian of a pensioner and, *virtute officii*, had the charge and custody of the pension of his ward.

2. That he embezzled the same; the proof being substantially the same as in Embezzlement, *ante*, 478.

Sec. 5487. — The same proof, substantially, is required as in Extortion, *ante*, 457, but the proof must extend to showing the receipt of money in connection with the payment of the pension.

Sec. 5488. — The prosecution must prove: —

1. That the defendant was a disbursing officer, and

2. That, as such, he deposited public moneys (1) in some place, or (2) manner (as charged), not authorized by law, or,

3. Converted the same to his own use, or

4. Lent the same, or

5. For any purpose not sanctioned by law, withdrew the the same from its legal depository, or

6. For like purpose (1) transferred, or (2) applied any portion of the same.[1]

Sec. 5489. — The prosecution must prove: —

1. That the defendant filled one of the offices specified.

2. That, as such, he received moneys from any of the different officers specified.

3. That he failed to safely keep the same.

Sec. 5490. — This section is in its essential features like the preceding.

Sec. 5491. — The prosecution must prove: —

That the defendant being either (1) an officer, or (2) agent, received public money over his salary, etc., and failed to render an account thereof.

Sec. 5492. — The prosecution must prove: —

Officer, etc., and a failure to deposit moneys with a public

[1] This, it seems to the author, is clearly covered by the precedent terms of the statute.

depositary on request made by (1) the Secretary of the Treasury, or (2) other head of any other proper department, or (3) by the accounting officers of the treasury.

By section 5493 the five preceding sections apply to all persons charged with the safe-keeping, transfer, or disbursement of the public moneys, and by section 5494 a transcript from the treasury department is made evidence, and by section 5495 it is provided that the refusal of any person charged with the safe-keeping, transfer, or disbursement of the public money, to pay a draft, etc., drawn on him by the proper officer, or to transfer or disburse such money promptly, upon the legal requirement of the proper officer, shall be deemed *prima facie* evidence of embezzlement.

It is also provided by section 5496, that if any disbursing officer shall accept, receive, or transmit to the treasury department, to be allowed in his favor, any receipt or voucher from a creditor of the United States, without having paid to such creditor, in the proper funds for that purpose, the full amount specified in such receipt or voucher, every such act shall be deemed an act of conversion by such officer to his own use of the amonnt specified in the receipt or voucher.

Sec. 5497. — The prosecution must prove: —

1. That any unauthorized depositary of public moneys, knowingly, received public funds from an agent or officer of the United States.

2. That it was other than in payment of a national debt; or

3. That the defendant (1) used, (2) transferred, (3) converted, or (4) appropriated the same; or

4. That he applied any portion of the public money to any purpose not prescribed by law.

5. If any officer of any bank is the defendant, the same proof must be made.[1]

Sec. 5498. — The prosecution must prove: —

1. That the defendant was (1) an officer, or (2) held a position of profit or trust under the executive or legislative branch of the United States Government.

[1] Provisions substantially extended to Internal revenue officers (Rich. Supp. 406).

2. That while such, he (1) acted as an agent or an attorney for prosecuting any claim against the United States, or (2) that he, in any manner or by any means, other than officially, aided in the prosecution or support of any such claim, or (3) that he received any (1) gratuity, or (2) any share, or (3) interest in any claim against the United States, or (4) that on account of his assistance, he received a consideration.

Sec. 5499. — The prosecution must prove: —

1. That the defendant being a judge (1) accepted, or (2) received,[1] (3) any sum of money, or (4) other bribe, gift, promise, or (5) the delivery or conveyance of anything of value.

2. With the intent to be influenced in (1) any opinion, (2) judgment, or (3) decree, in (4) any suit, (5) controversy, (6) matter, or (7) cause depending before him.

3. Corruption need not be proved, being implied from the act.

Sec. 5500. — The prosecution must prove: —

1. That the defendant being a member of Congress (1) asked for, or (2) accepted, or (3) received, (1) any money, or (2) promise, contract, or (3) security for the payment of money, or (4) for the delivery or (5) conveyance of anything of value either (6) before, or (7) after his qualification, with intent to have his vote, or (8) decision, or (9) influence, on any question, matter, cause, or proceeding which was at any time pending (10) in either house or (11) before any committee.

Sec. 5501. — Proof substantially the same as in sec. 5500, *mutatis mutandis*.

Sec. 5503. — The prosecution must prove: —

1. That the defendant, being an officer of the government, knowingly[2] contracted to pay for any public improvement, a larger sum than that appropriated for such purpose.

[1] It is evident that this word was used to express a different meaning than "accept"; doubtless to cover the case of money left within the control of the judge, without previous bargain, but which he retains and appropriates.

[2] It will be observed that, differently from sec. 5499, these sections require affirmative proof of intent or guilty knowledge.

Sec. 5504. — The prosecution must prove: —

1. That the defendant being an officer of a court of the United States (1) failed forthwith to deposit in their proper place and in the name and to the credit of such court, funds belonging in the registry of the court, or (2) thereafter paid into court or received by the officers thereof; or

2. That he retained or converted such funds to his own or another's use.

Sec. 5505. — Proof substantially same as sec. 5497, *mutatis mutandis.*

Sec. 5440; substitute Rich. Sup. 484, Chap. 8. — The onus is substantially discussed elsewhere. See marginal title, Conspiracy, *ante*, 455 (see authorities cited in Rich.).

Sec. 5394. — The prosecution must prove: —

1. That the defendant feloniously (1) stole, (2) altered, or (3) otherwise avoided any (1) record, (2) writ, (3) process, or (4) other proceeding in any court of the United States, and that in consequence thereof, a judgment was reversed, made void, or did not take effect; or

2. That the defendant acknowledged, or procured to be acknowledged, in any such court, any (1) recognizance, (2) bail, or (3) judgment, in the name of any other person not privy or consenting to the same.

The criminal statutes enacted subsequent to the Revised Statutes will now be treated of, the reference being made to the supplement by RICHARDSON of 1874–1881, in the margin, by page and section or chapter.

P. 78, Sec. 7. — The prosecution must prove: that the defendant, being an officer of the United States, (1) accepted, or (2) contracted for any portion of the money accruing to an informer.

P. 79, Sec. 12. — The prosecution must prove that the defendant, being an (1) owner, (2) importer, (3) consignee, (4) agent, (5) or other person, made or attempted to make, a fraudulent entry of imported merchandise into any port, by means of a fraudulent or false (1) invoice, (2) affidavit, (3) letter, or (4) paper, or (5) by any false statement, written or

verbal, whereby the United States was deprived of its lawful duties or any part thereof.

P. 81, Sec. 19. — The prosecution must prove that the defendant being an officer of the United States, compromised or abated any claim arising under the custom laws, for (1) fine, (2) penalty, or (3) forfeiture incurred by a violation of the same.

P. 102, Chap. 461. — The prosecution must prove: —

1. That the defendant (1) wilfully or (2) maliciously (1) injured or (2) destroyed any of the (1) works, (2) property or (3) material of any telegraph line constructed or in process of construction, and (1) owned, or (2) occupied and controlled, by the United States.

2. That the defendant (1) wilfully or (2) maliciously interfered, in any manner, with the working or use of such line.

3. That the defendant (1) wilfully and (2) maliciously (1) obstructed, (2) hindered, or (3) delayed the transmission of any communication over such line.

P. 132, Sec. 16; R. S. Sec. 3242. — The prosecution must prove that the defendant carried on one of the occupations specified in this section (1) without having paid the special tax required, or, (2) that being a distiller, failed to give the bond required, or, (3) being a distiller, defrauded the United States of the tax imposed on spirits.

P. 132, Sec. 17; R. S. Sec. 3326. — The prosecution must prove that the defendant affixed, or caused to be affixed to or upon any cask or package containing or intended to contain distilled spirits, any (1) imitation stamp, or (2) other engraved, printed, stamped or photographed label, device or token, which is similar or like or has a resemblance or general appearance of any internal revenue stamp required by law to be affixed to said cask or package.

P. 134, Sec. 25; R. S. Sec. 3386. — The prosecution must prove:

1. That the defendant fraudulently claimed, or sought to obtain, an allowance or drawback on duties of any manufactured tobacco; or

2. Fraudulently claimed any greater allowance or drawback thereon, than the duty actually paid.

P. 67, Sec. 10; R. S. Secs. 2079, 2110, 3739. — The prosecution must prove that the defendant, being an agent or employee of the United States, while in the course of official duty, interested himself either directly or indirectly, contingently or absolutely, near or remote, in any contract (1) made, or (2) under negotiation with the Government, or (3) with the Indians, for (1) the purchase, or (2) the transportation, or (3) delivery of goods, or (4) supplies for the Indians, or (5) for the removal of the Indians.

P. 183, Chap. 144, Sec. 1; R. S. Secs. 1342, Art. 60; 1624, Art. 14; Secs. 5439, 5453, 5475, 5477, 5483, 5488–5496, 5504. — The prosecution must prove that the defendant (1) embezzled, or (2) stole, any (1) money, (2) property, (3) record, (4) voucher, or (5) valuable thing whatever, belonging to the United States.

P. 186, Sec. 1; R. S. Sec. 2461. — The prosecution must prove that the defendant knowingly and unlawfully (1) cut, or (2) aided, assisted, or (3) was employed therein, or (4) wantonly destroyed or injured, or (5) caused the same to be done, any [1] tree upon any land of the United States, which, by law, was reserved or purchased by the Government for public use.

P. 186, Sec. 2. — The prosecution must prove that the defendant knowingly and unlawfully broke or destroyed any enclosure, or part of same, around lands reserved or purchased by the United States.

P. 186, Sec. 3. — Proof should be made substantially the same as in section 2, *mutatis mutandis;* of course, also prove the act of driving in stock for the purpose of destroying grass and trees.

P. 229, Chap. 186, Sec. 1; R. S. Sec. 3893. — The prosecution must prove: —

1. That the defendant mailed, or knowingly caused to be deposited for mailing, anything declared by this section to be non-mailable; or

[1] This word *any* is an extension of the former acts, as is the subject-matter as to the land on which, etc.

2. Took or caused the same to be taken from the mails for the purpose of circulating or disposing of the same or aiding therein.

P. 238, Sec. 246. — The prosecution must prove that the defendant was a surety as specified, and knowingly and wilfully swore falsely to any statement embraced in this section.

P. 239, Sec. 251. — The prosecution must prove: —

1. That the defendant bid for the transportation of the mails on any route which was advertised to be let.

2. That the defendant received an award of the contract for such service.

3. That the defendant wrongfully refused and failed to enter into a contract with the Postmaster-General, in due form, to perform the services described in his bid or proposal; or

4. That the defendant having entered into such contract, wrongfully refused and failed to perform such service.

P. 458, Sec. 27. — The prosecution must prove: —

1. That the defendant, being an employee of the postal service, collected and failed to account for the postage due upon *any* article of mail matter which he delivered.

2. That the defendant failed to affix and cancel the proper stamp upon such matter.

P. 458, Sec. 28. — It is apprehended that there is so little practical utility for this section, that its consideration is pretermitted.

P. 241, Chap. 274. — As the Supreme Court of the United States has decided the trade-mark law to be unconstitutional, the consideration of this subject is omitted (Trade-mark Cases, 100 U. S., 82).

P. 288, Sec. 5. — The violation of this section must be a matter of too infrequent occurrence to need comment.

P. 299, Chap. 122, Sec. 2; R. S. Sec. 2291. — The prosecution must prove that the defendant either being a witness or an applicant, making an affidavit or oath concerning the provisions of this section, wilfully and corruptly swore falsely as to said matter.

P. 272, Sec. 2, Par. 86; R. S. Sec. 2865, Act, June 22, 1874, Chap. 391, §§ 12, 13, 16. — The prosecution must prove: —

That the defendant, knowingly and wilfully, with the intent to defraud the Government, smuggled or clandestinely introduced into the United States, any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without (1) paying, or (2) accounting for the duty, or (3) made out or passed or attempted to pass through the custom house any (1) false, (2) forged, or (3) fraudulent invoice, or was accessory thereto.

P. 363, Sec. 15. — The prosecution must prove: —

That the defendant wilfully employed any part of the army as a *posse comitatus* or otherwise for the purpose of executing the laws, and that it was not done as prescribed in the Constitution or Acts of Congress.

There are a number of statutory crimes which are extended to the District of Columbia, but a recapitulation is deemed unnecessary, as the onus probandi, with reference to such cases, has already been substantially discussed *ante*, and is, *mutatis mutandis*, the same, applicable to the crimes provided for, as hereinbefore expressed.

Revenue. — It is deemed unnecessary to give further explication of the crimes occurring under the revenue law, as they are so multiform and their treatment would occupy too much space.

Census. — The consideration of crimes concerning the taking of the census is pretermitted as being practically inuseful for years to come.

CRIMINAL INFORMATIONS.

There is such a repugnance to this mode of prosecution, on this side of the Atlantic, that, while permissible in some of the States, it is seldom resorted to, and may practically be termed a dead letter (2 Story, Const. (2d ed.) § 1786).

When, however, it is employed, the burden of proof is the

same as in criminal actions by indictment, except that the evidence is confined to the fact which constitutes the offence (Cole. Cr. Inf. Part I. 91; Whart. Cr. Pl. & Pr. secs. 87, 88).

In the United States Courts, its use is restricted by the Constitution to capital or infamous crimes (Amendt. art. 5); see *Ex parte* Wilson, U. S., reported in 19 Rep. 643, for a full discussion of the law touching criminal actions by information.

FIFTH DIVISION.

EMINENT DOMAIN.

As this right can only be conferred by the legislature under constitutional restrictions, the correlative right and obligation is to be governed by the local law (Mills, Em. Dom. Chap. 10). If a condition precedent is required to be performed as preliminary to the creation of the right, the onus, upon principle, to show such performance, would lie with the party claiming this extraordinary prerogative (Mills, Em. Dom. sec. 89). In most of the States a strict rule has grown up requiring the payment of compensation before entry; hence, in those States, the onus lies with the party claiming the right to condemn (Mills, Em. Dom. sec. 89). If, by the local law, the initiative is given to the owner, the burden of showing damages is upon him (Mills, Em. Dom. sec. 89). There is much diversity in the decisions as to whether the compensation should precede, or should be made contemporaneously, or secured before the taking or after (Mills, Em. Dom. sec. 124). And the principle, as held, must govern the onus in this respect. The subjects of the acquisition of easements or rights by dedication or adverse user, etc., more appropriately fall under other titles, and will there be found discussed.

Part V.

THE SHIFT OF THE BURDEN.

A single issue, either produced as the logical result of the pleading at common law, or, as eliminated and settled under the reformed procedure, necessarily imports the cast of the burden. In technical contemplation, the burden of proof throughout, lies upon the party alleging the affirmative; yet, practically, proof may be conveniently said to shift from one side to the other, according to the exigency of the occasion during the progress of the trial. Thus, if to an action on a single bill, the defence is *non est factum*, the burden of proof is upon the plaintiff to show the execution of the bond. This satisfies the burden, and entitles him to the verdict if no more evidence be adduced. Suppose, however, that the defendant then offers evidence tending to show that he was, at the time of the execution of the paper-writing, an infant, the burden of proof is practically shifted to the plaintiff, — though technically it never left him. By way of further illustration, let us suppose that, to an action of assumpsit instituted before the new rules, the plea was *non assumpsit*, the burden was cast upon the plaintiff. Suppose, however, that the defendant should offer in evidence, a release, the burden of proof is practically shifted to the defendant; and thereupon, suppose that the plaintiff should undertake to show that the release was procured by duress, practically the burden would be shifted to him.

It is in this sense that we should understand a learned author, when he lays it down that the burden of proof is

shifted by presumptions of law, presumptions of fact of the stronger kind, and evidence strong enough to establish a *prima facie* case (Best, Ev. 300).

It would only amount to a re-hash of the views dispersed throughout this treatise, to attempt a statement of the shift of the burden in all instances. The more satisfactory course is, it is deemed, to illustrate it: first under the heading of presumption, and, then, under that of a *prima facie* case. A man is presumed to intend the natural consequence of his act — see various illustrations, Law. Pres. 262 *et seq.* As a corollary thereto, malice is presumed from the use of a deadly weapon. In murder, therefore, tried on not guilty, upon proof of the slaying merely, without more, there is raised a presumption of malice (Law. Pres. 266 *et seq.*); but, if a specific intent is required to constitute an offence, the commission of the act does not raise the presumption that it was done with such specific intent (*ib.*).

Now, in the first illustration, upon proof of the slaying with a deadly weapon, the charge is made out, and the burden is shifted to the defendant; whereas, in the latter, the burden of proof devolves upon the plaintiff the duty of showing not only an act done from which ordinarily such intent would be inferable, but the existence, as an evidential fact, of such intent. Thus, suppose a statute prescribes that the burning of a house with *intent to injure the owner* should be indictable, and it is shown that the defendant deliberately set fire to the house; if the ordinary presumption prevails, no more proof would be required; but, in such case, it must be shown that, notwithstanding the evident, nay, even necessary effect of his act, he fired the building with the particular intent (State *v.* Phifer, 90 N. C. 721). On the subject of presumable intent from acts, — let us take the case of burglary, — proof being of breaking in the night-time into a dwelling-house; this evidence raises a presumption[1] of the felonious

[1] So put by Judge Lawson, but, perhaps too broadly, as ordinarily there must be some evidence *aliunde* of the felonious intent.

intent, and shifts the burden, which the defendant may meet by showing that he was too drunk to be capable of forming an intent (Law. Pres. 274 *et seq.*), and thereupon the burden is shifted. So, where possession of stolen goods, recently after the theft, is shown, the defendant may prove that they were placed on his premises without his knowledge or approbation, or other reasonable explanation, and shifts the burden (Law. Pres. 522 *et seq.*). Suppose a crime is proved, and the defendant shows that at the time of its commission he was under fourteen, the burden shifts; then if the prosecution shows the *malitia* supplying the *ætatem*, it again shifts. If it be proved against a woman charged with crime that she committed it, she may show that it was committed in the presence of her husband — his coercion being thereupon presumed — the burden shifts to the prosecution. Suppose the contention to be whether a child is a bastard. The plaintiff proves it to be the child of a woman who was at one time married; the burden shifts; the defendant proves non-access; the burden shifts, and the plaintiff may show a divorce and subsequent marriage consummated more than ten months preceding the birth of the child (Law. Pres. 279 *et seq.*). The holder of negotiable paper need show only possession; as he is presumed to be a *bona fide* holder, the proof of possession shifts the burden to the defendant. He may, thereupon, show that the instrument was procured by fraud upon him, and then the burden is shifted to the plaintiff to prove that he gave value (Law. Pres. 79).

It is often misleadingly said that fraud is never presumed; but, when confidential relations are admitted, as they often must be, fraud is frequently presumed, at least, to the extent of the cast of the burden necessitating exculpatory proof (see *ante*, Part I. title FIDUCIARIES).

Bonds are presumed to be paid after the lapse of twenty years.[1] If it shall appear that the bond was over twenty years old when the action was commenced, the burden is cast

[1] In some States in less time by statute.

upon the plaintiff to rebut the presumption; the plaintiff may show a part payment endorsed to that end; this again shifts the burden, and the defendant may show that no payment was in fact made, but that the same was colorable only, and entered by the obligee for the purpose of rebutting the ordinary presumption. Indeed, it may be stated, generally, that whenever an agreed or proved state of facts is shown, from which a presumption as to some ultimate fact arises, the burden of proof is thereby shifted, and, in its practical operation, may alternately shift from one party to the other. The reader is referred, for a clear and comprehensive elucidation of the force and effect of presumptions, to the recent admirable treatise of Judge Lawson on that subject.

The shift of the burden may likewise be called into operation when a *prima facie* case shall have been made. We content ourselves with a few illustrations of this point, as the subject ramifies every department of the law — predicating all upon the defence of a general denial.

Take an action for the recovery of real estate: —

The plaintiff produces a grant from the State, shows possession and value of *mesne* profits. This makes a *prima facie* case, and shifts the burden. Or, suppose under the rule of practice-estoppel, the plaintiff shows that both parties claim from a common source; this shifts the burden of proof. The defendant may then show a presumptively superior outstanding title, provided he connects himself with it; this would shift the burden, and the plaintiff might show that such prior title had become barred by length of possession by himself, or those under whom he claimed.

In trespass to realty, a *prima facie* case is established by showing possession and entry without authority or against assent; the burden being shifted, the defendant may show ownership, for an owner cannot be guilty of a civil trespass on his own property; the burden being shifted, the plaintiff may, in reply, show a lease from the defendant covering the period of the alleged trespass, and being thus shifted, the defendant may show a forfeiture thereof for condition broken

and entry therefor. In trespass to the person, the plaintiff establishes a case by proof of any compulsory restraint of his locomotion, or the least touching of his person in a rude manner. The burden being shifted, the defendant may show that he arrested the plaintiff by virtue of a warrant directed to him as an officer. This shifts the burden, and the plaintiff may show excessive and undue force and violence.

In actions for negligence, the plaintiff, upon showing a case of negligence, devolves the burden of proof on the defendant; the defendant may then show contributive negligence and shift the burden, and the plaintiff (where allowable) on the re-shift, may show what is termed comparative negligence (see Part I. title CONTRIBUTORY NEGLIGENCE).

In seduction, on proof of service and debauchment, the burden is shifted, and the defendant may show that the plaintiff exposed the party to the wiles of the seducer.[1]

Suppose an infant be sued in assumpsit under the old system: upon proof of the contracting of the debt, the burden is shifted; the defendant on proof of his infancy, shifts the burden, and the plaintiff may show ratification after majority, which again shifts the burden, and the defendant may show that such ratification was obtained by duress. Under the common-law system of pleading, the shift was accomplished by the pleading, the logical effect of which was to lead to the production of a single issue consisting of an affirmation and denial (see Part VI. title ONUS AS AFFECTED BY THE PLEADING). Suppose, after any *prima facie* case made, the defendant offers evidence of his own insanity, this shifts the burden of proof, and the plaintiff may show that the act, which forms the gravamen of his suit, was performed during a lucid interval.[2]

[1] The author has read an answer to an action for seduction, in which the attorney solemnly alleges that "if the defendant did debauch the said Jane, the plaintiff was guilty of contribntory negligence." Mark Twain was not the attorney, and it was not inserted in the spirit of humor, but in dead cold earnest.

[2] The more accurate term would be a temporary cesser of the lesion, as there cannot be a disease of an incorporeal faculty.

These illustrations will perhaps answer our purpose. They operate as *criteria*, when the defence or reply is in confession and avoidance, *mutatis mutandis*. When the cause of action embraces *per se*, as a necessary ingredient, the *scienter*, the burden is rarely, if ever, shifted from the plaintiff upon a general denial. So, in actions for defamation, malicious prosecution, trover, detinue, and many others where every constituent element of a faultless case has to be brought out in the first instance, the burden is not even practically shifted on a general denial. It all comes at last, to the criterion to be deduced from Amos *v.* Hughes, 1 Mood. & Rob. 464, to which we have had occasion to advert in the beginning of this work. Suppose no evidence or only a certain quantum to be adduced, for whom should the verdict be given? In the class of cases we have first considered, the plaintiff establishes an apparent right, and thereby shifts the burden of proof; whereas in the last, the burden never leaves him. The necessity for some observations on this subject is emphasized, when the wide and novel scope that is allowed by the codes of remedial justice to the reply is considered. Under the former system it must have been framed, either by way of traverse or in confession and avoidance, and could not embrace both, as the statute of Anne allowing double pleading, only extended to the plea.[1]

But, under the code-system, an anomaly in pleading is established, it being therein prescribed that "the allegation of new matter in the answer, not relating to a counter-claim, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."[2] By virtue of this provision, the shift of the controversy is, in

[1] Except when the plea was set-off. Then, on the equity of the statute, its provisions were extended to the replication, the set-off being in the nature of a cross-action.

[2] This provision was not contained in the original draft of the Code of New York — the genesis of reform (see First Report of the Commissioners, 1848, 157, § 144). And in the note to the section concerning a reply, § 131, exactly the opposite view is taken by the commissioners. The "anomaly" was ingrafted by an amendment in 1852.

great measure, eliminated from the pleadings and transferred to the evidence, and such must necessarily be the case in Equity and Admiralty causes, and in proceedings *in*, and *quasi in rem*. The following authorities will repay consultation: Whart. Neg. (2d ed.) secs. 422–430, and latter part of second note 2, to sec. 553; Best, Begin, notes 1, 2, § 3; 1 Dan. N. I. secs. 815, 818; Marine Ins. Co. *v.* Haviside, L. R. 5 H. of L. 624, reported in 4 E. R. (Moak) 17 and note 27; Ogletree *v.* State, 28 Ala. 693; Bassett *v.* Porter, 10 Cush. 418; Com. *v.* Stow, 1 Mass. 54; Piper *v.* Wade, 57 Ga. 223; Mitchell *v.* U. S. &c. Co., 46 Iowa, 214; Rixford *v.* Miller, 49 Vt. 319; Spuryer *v.* Hardy, 4 Mo. App. 573.

PART VI.

MISCELLANEOUS.

APPELLATE PROCEEDINGS.

While, strictly speaking, the title of this work is inapplicable to such proceedings, yet, the author deems it not inappropriate to discuss the proposition as upon whom the burden to show error lies.

The subject is governed by the maxim *ei incumbit probatio, qui dicit, non qui negat.*

The appellant or plaintiff in error is the actor, and it devolves upon him to show error (Pow. App. Pro. 125, sec. 17; 128, sec. 19; 193, sec. 116, IV.; 200, sec. 123, VIII.; 138, sec. 35 *et seq*).

This is the almost universal rule, the only exception being that of an appeal in a criminal action or from a ruling on a general demurrer (Broom, L. M. 910; Mayor &c. *v.* Atto. Gen'l., 6 H. L. C. 310, 333; Winslow *v.* Newlan, 45 Ill. 145; Fox *v.* Matthews, 33 Miss. 433; State *v.* Stanley, 4 Nev. 71; Beard *v.* Murphy, 37 Vt. 99; *Ex parte* Donaldson, 44 Mo. 149; Wise *v.* Ringer, 42 Ala. 488; Sorg *v.* First German Congregation, 63 Pa. 156; People *v.* Best, 39 Cal. 690; Tracey *v.* Warren, 45 Ala. 408; Easley *v.* Camp, 40 Ga. 698; Tomlinson *v.* New York, 44 N. Y. 601; Bishop *v.* Carter, 29 Iowa, 165; Kent *v.* Gray, 26 Ark. 142; Ritchie *v.* Schenck, 7 Kan. 170; Ryan *v.* Topeka Bridge Co., *ib.* 207; Campbell *v.* Dooling, 26 Ark. 647; Ashley *v.* Stoddard, *ib.* 653; Graham *v.* Rice, 23 La Ann. 393; People *v.* McAuslan, 43 Cal. 55;

Servanti *v.* Lusk, *ib.* 238; Moore *v.* Massini, *ib.* 389; Dainese *v.* Allen, 45 How. (N. Y.) Pr. 434; Edwards *v.* State, 47 Miss. 581; State *v.* Keith, 9 N. Y. 15; Basey *v.* Gallagher, 20 Wall. 670; Henri *v.* Grand Lodge, United A. O. of Druids, 59 Mo. 581; Gardner *v.* Landcraft, 6 W. Va. 36; Hart *v.* Balto &c. R. R. Co., *ib.* 336; Ornn *v.* National Bank, 16 Kan. 341; Corbus *v.* Teed, 69 Ill. 205; Howell *v.* Morlan, 78 *ib.* 162; Commissioners of Henry Co. *v.* Slatter, 52 Ind. 171; Henry *v.* Halloway, 78 Ill. 356; Sherman *v.* Madison &c. Ins. Co., 39 Wis. 104; Dickerman *v.* Ashton, 21 Minn. 538; Torrence *v.* Strong, 4 Oreg. 39; Murphy *v.* Crayton, 51 Ind. 147; Partee *v.* Bedford, 51 Miss. 84; Huffaker *v.* National Bank of Monticello, 13 Bush (Ky.), 644; Barden *v.* St. Louis &c. Ins. Co., 3 Mo. App. 248; Green *v.* Pittsburgh &c. R. R. Co., 11 W. Va. 685; Baker *v.* Armstrong, 57 Ind. 189; Collins *v.* Loyal, 56 Ala. 403; Davis *v.* State, 6 Tex. App. 196; St. Louis *v.* State, 8 Neb. 405; Hearn *v.* State, 62 Ala. 218; Brown County Commissioners *v.* Roberts, 22 Kan. 762; Brennan *v.* Shinkle, 89 Ill. 604; Carr *v.* Miner, 92 *ib.* 604.

On appeals in criminal actions the Court will, *ex mero motu*, examine the whole record to ascertain if there be error (Dunn *v.* State, 2 Ark. 229; State *v.* Pratt, 20 Iowa 267; Young *v.* State, 39 Ala. 357; State *v.* Scott, 12 La Ann. 386; Pow. App. Pro. 294, 340, sec. 74).

When in either a civil or criminal action, the judgment appealed from has been rendered on general demurrer, the appellate court must examine the whole record and render judgment against that party who committed the first fault in pleading, *ex. gr.*, if the declaration be open to general demurrer, but the defect is passed by in the pleading, and a demurrer is interposed to the rebutter, however well laid, the court must render judgment against the plaintiff by reason of his defective *narr* (Steph. on Plead. 144 (9th Am. ed.); 164 (1st Am. ed.); Gould on Plead. Chap. 9, secs. 36, 37, 38; Bliss, Code Plead. sec. 417).

CONFLICTING PRESUMPTIONS.

The relative weight of conflicting presumptions of *law*, is, of course, to be determined by the court, who should also direct the attention of the jury to the burden of proof as affected by the pleadings and evidence in such case; and although the decision of questions of fact constitutes the peculiar province of the jury, still they ought, especially in civil cases, to be guided by those rules regulating the burden of proof and the weight of conflicting presumptions, which are recognized by law, and have their origin in natural equity and convenience.

The following rules appear sound in principle, and likely to be serviceable in practice.

RULE I. — *Special presumptions take precedence of general ones.*

This is the chief rule on the subject, and rests on the obvious principle that as all general inferences (except, of course, such as are *de jure*) are rebuttable by positive evidence, they will naturally be affected by that which comes nearest to direct proof, namely, specific or proximate facts or circumstances which give rise to special inferences negativing the applicability of the general presumption to the particular case. Thus, although the owner of land is presumed to be entitled to the minerals found under it, the presumption may be rebutted by that arising from non-enjoyment and the use of those minerals by others (Best, Pres. 52, where a number of other illustrations can be found).

A general presumption, however, will not be set aside by a circumstance too slight to shift the burden of proof.

RULE II. — *Presumptions derived from the ordinary course of nature are stronger than casual presumptions.*

This is a very important rule, derived from the constancy and uniformity observable in the works of nature, which render it probable that human testimony or particular circumstances, which lead to a conclusion at variance with these laws, are, in that particular instance, fallacious. Charges of

robbery brought by a strong person against a child, or of rape by an athletic female against an old or sickly man, are refuted in this way.

So, sanity is presumed. So, when a parent advances money to a child, it is supposed to be by way of gift, and not by way of loan (Best, Pres. 56, where see other illustrations of this rule).

RULE III. — *Presumptions are favored which tend to give validity to acts.*

On an indictment for the murder of a constable, the fact of the deceased having been known and acted as constable is sufficient proof of his having been such without producing his appointment (Best, Pres. 57, where see other illustrations of this rule).

RULE IV. — *The presumption of innocence*[1] *is favored in law* (Best, Pres. 58 *et seq.;* Law. Pres. 582, Rule 122 *et seq.*, where a number of cases are given in illustration of this rule).

The legal presumption of the continuance of life is not so strong as the presumption of innocence, and where the two conflict, the former must yield to the latter (Lockhart *v.* White, 18 Tex. 102; Spears *v.* Barton, 31 Miss. 547).

The contrary doctrine is held in Oregon (Murray *v.* Murray, 6 Oreg. 17).

EXTRADITION.

Upon an application for the surrender of a fugitive from justice, etc., the onus is clearly with the applicant.

He must show to the court or to the executive that the party sought to be extradited has committed some crime in the foreign state, for which, under the treaties or acts of Congress, he should be surrendered, and that he is fleeing from justice (Gard. Inst. 153 *et seq.;* Bowy. U. P. L. 188; Curt. Com. sec. 86 *et seq.;* Wheat. Int. L. 181 *et seq.;* 1 Phill. Int. L. Pt. III. Chap. 21; 1 Abb. U. S. Prac. 471 *et seq.;* 2 *ib.* 202 *et seq.;* Hurd, H. C. 577 *et seq.*).

The onus embraces a mixed burden of law and fact. The

[1] *i.e.* non-committal of crime.

fact itself is proved by an exemplification of the indictment (Hurd, H. C. 605).

But whether the offence charged be such as should subject the offender to be delivered up, is a question of law; see the subject discussed, Hurd, H. C. Book 3, sec. 2.[1]

It may be added that in the proceeding to extradite a strictly foreign criminal, it is prudent, if not necessary, to show that a demand has been made upon the executive authority (2 Abb. U. S. Prac. 204; Hurd, H. C. 608).

HOMESTEAD.

This is a matter of purely statutory or constitutional creation.

The manner of the assertion of this claim is as variant as the divergent provisions of the creating laws. But, in whatever form the local law may require its assertion, the burden of proof to establish the right, in accordance with the local law, is upon the claimant (Thomp. Hom. secs. 701, 796, 879). Where it is made an exception from levy under execution, the burden rests upon the party claiming it as so exempt (Lambert *v.* Kinnery, 74 N. C. 348). As to chattel exemptions, there is a diversity; see Thomp. Hom. Chap. XV., *passim*.

INTENSITY OF THE PROOF.

Although this title does not strictly fall within the discussion of the onus probandi, yet, it is so intimately connected therewith, as to deserve some general notice.

[1] For the benefit of practitioners where this point has not become *res adjudicata*, the author diffidently suggests that the true construction of the words "treason, felony, or other crime," should be governed by the principle of *ejusdem generis*. The literal interpretation could extend extradition to a common assault.

It is a well-established rule in the construction of statutes, that, where particular words are followed by general ones, the latter are to be held as applicable to cases of the same kind as those which are expressly mentioned (Pott. Dwar. Stat. 236, 247, 248; Sedg. C. & S. L. 423; Broom, L. M. 625; Bish. Stat. Cr. secs. 245, 246).

It is proposed to treat it first with reference to criminal actions; and secondly, with regard to civil actions.

I. Criminal Actions.

The title, with reference to criminal actions generally, is treated of in Part IV. titles Alibi and Crimes.[1]

It is only proposed to discuss here the title in connection with what is commonly, though inaccurately, termed the plea of insanity.

We have seen, title Insanity, *ante*, that three views, as to the burden of proof, where insanity is the gravamen of the defence, have been taken by the courts of England and America.

1. That the burden is upon the defendant, and that he must prove his insanity beyond a reasonable doubt.

This view is held by the courts of Delaware (State *v.* Pratt, 1 Houst. Cr. Cas. 249, reported in Law. Cr. Def. 327; State *v.* Danby, *ib.* 167, reported in Law. Cr. Def. 331; State *v.* Draper, *ib.* 291; State *v.* West, 1 *ib.* 371; State *v.* Thomas, *ib.* 511; see State *v.* Henley, 1 *ib.* 28). It was once so held by the courts of New Jersey (State *v.* Spencer, 21 N. J. L. 196, reported in Law. Cr. Def. 335), but that court has lately ranged itself under the second view (Graves *v.* State, 16 Vroom, 347; State *v.* Martin, 10 Wash. L. Rep. 33; S. C., 3 Cr. L. Mag. 44).

2. That the burden is upon the defendant to establish his insanity by a preponderance of the testimony.

[1] The intensity of the proof, when circumstantial, or more accurately speaking, presumptive, evidence is relied upon, must amount to an exclusion, to a moral certainty, of every hypothesis except the one proposed to be proved (1 Stark. Ev. 510); or, as otherwise expressed, the force and effect of such depends upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact it is adduced to prove (Wills, C. Ev. 17).

The circumstances must be as strong and clear as if derived from the evidence of one credible witness (State *v.* Swink, 2 D. & B. 9).

It is true that the doctrine, laid down in the case last cited, has since been disapproved by the same court that gave it utterance (State *v.* Parker, Phil. 473, 477), but the principle as stated in Swink's case is too consonant with common sense and humane justice to be discarded, although rejected by the court of its creation.

This view is held by the courts of England (1 Whart. Cr. Law, sec. 60, and authorities there cited; Wharton, Am. L. Hom. § 666; 2 Greenl. Ev. § 373; Rex *v.* Higginson, 1 C. & K. 129, 130; Rex *v.* Stokes, 3 C. & K. 185; 1 East, Cr. Law, 224–230; Hawk. P. C. chap. 31, sec. 32; 4 Black. Com. 201; Rex *v.* M'Naghten, 10 Cl. & Fin. 200; S. C., 8 Scott, N. R. 595, reported in Law. Cr. Def. 150; Rex *v.* Layton, 4 Cox, C. C. 149; Foster, Crown Law, 255 *et seq.*; Rex *v.* Turton, 6 Cox, C. C. 385; see also Browne's Med. Juris. Ins. § 520).

The same view is held in the following States: —

Alabama. — (Boswell *v.* State, 63 Ala. 307, reported in 35 Am. Rep. 20; S. C., 2 Cr. Law Mag. 32; Law. Cr. Def. 352; Ford *v.* State, 16 Rep. 647).

Arkansas. — (McKenzie *v.* State, 26 Ark. 335, reported in Law. Cr. Def. 533).

California. — (People *v.* Wreden, 59 Cal. 341, reported in 12 Rep. 682, affirming People *v.* Myers, 20 Cal. 518; People *v.* Coffman, 24 Cal. 220; People *v.* McDonnell, 47 *ib.* 134; People *v.* Wilson, 49 *ib.* 13; People *v.* Bell, 49 *ib.* 485; People *v.* Hamilton, 62 *ib.* 377, reported in 2 Ohio L. J. 653; S. C., 9 Pac. L. J. 632; 14 Rep. 46; People *v.* Ferris, 55 Cal. 589, reported in 2 Crim. L. Mag. 18; People *v.* Messersmith, 57 Cal. 575).

In California the court holds that the words "clearly preponderate" do not mean more than preponderance, but only that the preponderance must be "plainly apparent," or must be "distinctly perceptible."

But while such construction is given to the adverb "clearly" in California, the court of Connecticut hold that the expression in a charge of "clearly prove" requires a higher degree of proof than a mere preponderance (Beach *v.* Clark, cited *infra*, under *Felonious Trespass*).

Connecticut.[1] — (State *v.* Johnson, 40 Conn. 136, reported in

[1] We are not unaware that Connecticut is otherwise aligned by some of the writers, but it is thought, upon a careful consideration of the decisions, it is properly classified here.

State *v.* Hoyt, without citing Johnson's Case, presents an irreconcilable conflict with the decision of that case on this point.

Law. Cr. Def. 603; State *v.* Hoyt, 46 *ib.* 330, reported in 8 Wash. L. Rep. 140; S. C., 6 Week. Jurist. 787; 9 Rep. 206).

Georgia. — (Holsenbake *v.* State, 45 Ga. 57; Carter *v.* State, 56 *ib.* 463; Brassell *v.* State, 64 *ib.* 318).

Iowa. — (State *v.* Felter, 32 Iowa, 49, reported in Law. Cr. Def. 371). And by a bare preponderance (State *v.* Bruce, 48 Iowa, 530; State *v.* Jones, 52 Iowa, 150, reported in 17 N. W. Rep. 911).

Kentucky. — (Ball *v.* Com. (Ky.), reported in 18 Rep. 49; Smith *v.* Com., 1 Duv. 224, reported in Law. Cr. Def. 669; Jane *v.* Com., 2 Met. 30; Kriel *v.* Com., 5 Bush, 363, reported in Law. Cr. Def. 379; Graham *v.* Com., 16 B. Mon. 587, reported in Law. Cr. Def. 373; Brown *v.* Com., 14 Bush, 398).

Louisiana. — (State *v.* Coleman, 27 La. Ann. 691). But where temporary insanity is alleged, proof must extend beyond a reasonable doubt (State *v.* D'Rance, 34 La. Ann. 186, reported in 14 Rep. 208).

Maine. — (State *v.* Merrick, 19 Me. 398; State *v.* Lawrence, 57 *ib.* 574, reported in Law. Cr. Def. 386).

Massachusetts. — (Com. *v.* Rogers, 7 Met. 500, reported in 41 Am. Dec. 458; S. C., 1 Bennett & Heard's Lead. Cas. Crim. Law, 95; Law. Cr. Def. 158; Com. *v.* McKee, 1 Gray, 61; Com. *v.* Eddy, 7 *ib.* 583, reported in Law. Cr. Def. 517, and 19 Law Rep. 611; Com. *v.* Heath, 11 Gray, 303; Com. *v.* York, 9 Met. 93, reported in 43 Am. Dec. 373. See, however, Com. *v.* Pomeroy, 117 Mass. 143, reported in app. to Whart. Am. L. Hom. No. VII.).

Minnesota. — (Bonfanti's Case, 2 Minn. 123; State *v.* Gut, 13 *ib.* 341, reported in Law. Cr. Def. 189; State *v.* Grear, 27 Minn. *ib.* 221).

Missouri. — (State *v.* Redemeier, 71 Mo. 173, reported in 36 Am. Rep. 462; S. C., Law. Cr. Def. 424; 1 Cr. Law Mag. 456, affirming the previous cases; State *v.* Klinger, 43 Mo. 127, reported in Law. Cr. Def. 410; State *v.* Hundley, 46 *ib.* 414, reported in Law. Cr. Def. 417; State *v.* Smith, 53 *ib.* 267, reported in Law. Cr. Def. 413; State *v.* Simms, 68 *ib.* 305; State *v.* Erb. 74 *ib.* 199, reported in Law. Cr. Def. 10;

State *v.* Baber, 74 *ib.* 292; State *v.* McCoy, 34 *ib.* 531, reported in Law. Cr. Def. 408; State *v.* Holme, 54 *ib.* 153; State *v.* Huting, 21 *ib.* 464; Baldwin *v.* State, 12 *ib.* 223).

North Carolina. — (State *v.* Starling, 6 Jones, 366; State *v.* Brandon, 8 *ib.* 463, reported in Law. Cr. Def. 144; State *v.* Payne, 86 N. C. 609, reported in 14 Rep. 504).

Ohio. — (Loeffner *v.* State, 10 Ohio St. 598, reported in Law. Cr. Def. 432; Silvus *v.* State, 22 Ohio, 90; Bond *v.* State, 23 *ib.* 349; Bergin *v.* State, 31 *ib.* 111; Clark *v.* State, 12 *ib.* 483, reported in 40 Am. Dec. 481; Farrar *v.* State, 2 Ohio St. 70, substantially reported in Law. Cr. Def. 258).

Pennsylvania. — (Ortwein *v.* Com., 76 Pa. 414, reported in 18 Am. Rep. 420; S. C., 2 C. L. J. 121; Law. Cr. Def. 438; Lynch *v.* Com., 77 Pa. 205, reported in Law. Cr. Def. 146; Brown *v.* Com., 78 *ib.* 122; Myers *v.* Com., 83 *ib.* 141; Pannell *v.* Com., 86 *ib.* 260; Sayres *v.* Com., 88 *ib.* 291; Coyle *v.* Com., 100 *ib.* 573, reported in 45 Am. Rep. 397; S. C., Law. Cr. Def. 441; 15 C. L. J. 415; Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Haggerty, 4 Clark, 187, reported in Lewis, Cr. C. 402; Laros *v.* Com., 84 Pa. 200, reported in Law. Cr. Def. 824).

South Carolina. — (State *v.* Stark, 1 Strobh. 479).

Texas. — (Webb *v.* State, 9 Tex. App. 490, reported in Law. Cr. Def. 835; King *v.* State, 9 *ib.* 515, reported in Law. Cr. Def. 844; Webb *v.* State, 5 *ib.* 596, reported in Law. Cr. Def. 869; Clark *v.* State, 8 *ib.* 350; Carter *v.* State, 12 *ib.* 500, reported in Law. Cr. Def. 588; Johnson *v.* State, 10 *ib.* 571; Jones *v.* State, 13 *ib.* 1).

Virginia. — (Boswell's Case, 20 Gratt. 860, 876; Baccigalupo *v.* Com. 33 Gratt. 807, reported in 36 Am. Rep, 795; Dejarnette *v.* Com., 75 Va. 867, reported in 2 Crim. L. Mag. 348).

West Virginia. — (State *v.* Strauder, 11 W. Va. 745, 823, reported in 27 Am. Rep. 606; State *v.* Robinson, 20 W. Va. 745).

Judge Curtis held this view on the Circuit (U. S. *v.* McGlue, 1 Curt. C. C. 7, reported in Law. Cr. Def. 54). The learned Dr. Wharton argues for this rule (1 Whart. Cr. Law, sec. 62).

Rape. — Boy under fourteen.

In New York, prior to the case of Brotherton *v.* People, 75 N. Y. 159, the leaning of the decisions would seem to indicate that the courts had adopted the second rule; but that case, while not expressly overruling or even noticing the previous decisions, squarely aligns her courts under the third rule.

By recurring to the principles applicable to a well-settled practice in criminal actions, the third view may be analogically illustrated and perhaps strengthened.

Take the case of rape. One of the elements is force, and this, as an integral part of the offence, must be proved beyond a reasonable doubt. Suppose the testimony *pro* and *con* on this point is in equipose, is not the defendant entitled to the instruction, that, before he can be convicted, the jury must be satisfied beyond a reasonable doubt from the whole testimony, not only that he had connection with the prosecutrix, but also that it was had by force?

In a criminal action against a boy under fourteen, the burden is held, in Iowa, to be on the State to show that the defendant had sufficient capacity to know that he was committing crime (State *v.* Fowler, 52 Iowa, 103).

In classifying the decisions, the expression, in several of the cases, that the prisoner must prove his own insanity to the satisfaction of the jury, has not been lost sight of, as being a somewhat vague expression under the circumstances; but, following several of the writers on the subject, these decisions have been arrayed under the second view.

This looseness gave rein to the reporter of 33 Grattan (Va.) to construe such expression in this way, in his syllabus to the case of Baccigalupo *v.* Com., viz., "When insanity is set up as a defence in a criminal action, the burden is on the defendant to prove it beyond a reasonable doubt," whereas there is no such expression in the opinion of the court.

These observations are intended as hints to the profession in those States where the question is *res integra*. The third view is supported by the editor of 1 Crim. Law Mag. in notes to State *v.* Redemeier, page 456; article in 16 C. L. J. 282.

3. That if upon the whole evidence there should be a rea-

sonable doubt as to the alleged insanity, there must be an acquittal.

For the authorities under this branch, see Part I. title INSANITY.

II. CIVIL ACTIONS.

The ordinary rule is, that only a preponderance of the testimony is requisite — but whether, when proof of a criminal, or *quasi* criminal act is involved in the issue, the quantum of proof is measured by the preponderance of the evidence, or by such a degree thereof as should exclude a reasonable doubt — there is a wide and irreconcilable discrepancy in the authorities.

These views, while to a great extent discordant, may yet be harmonized, in the main, by adverting to the decisions separately, and considering the particular facts upon which they were predicated. Before doing so, however, let us examine the point on principle.

What is the ground for the ordinary distinction as to the intensity or degree of proof required in criminal and civil actions?

The distinction is based upon our knowledge, experience, and observation of human nature.

We have the presumption of innocence, *i.e.*, a presumption that men are influenced against committing a crime by the fear of punishment here, and with some, an apprehension of being punished hereafter; by the force of public sentiment; in rare instances, from principle. The juries in a greater or less degree appreciate this philosophy. Now, in the main, the common law only punished offences which were *malum in se;* they were comparatively few, and their character early taught at the family hearthstone, the Sunday-school, and the Bible-class. So that the presumption of non-committal of crime early obtained.

With such a presumption imbedded in their minds, the juries would not convict without evidence satisfying them beyond a reasonable doubt. Why? Not because of the

severe punishment which would follow conviction, — such a consideration would be a reflection upon the integrity of the juror, — but, because a logical process of reasoning did not lead irresistibly to conviction. It was the *evidence*, not the *consequences* of the verdict, which swayed their *minds* as distinguished from their *feelings*. Acting upon an aggregate supreme knowledge of human nature (*aggregatio mentium*), the higher the grade of crime, weighed according to its religious or moral turpitude, in the inverse ratio, the stronger became their desire for "more light." It is purely a matter of mental ratiocination. Thus: A jury should more readily believe, that A assaulted B than that he murdered him, and the mind grades evidence in this inverse ratio. They are satisfied of the commission of the assault, upon, perhaps, slight evidence, because, as opposed to the presumption of innocence, their observation tells them that assaults are common, and not infrequent even with good men. But when the question of murder is involved, they will reason that this crime is unusual even with the wicked; that there is a natural repugnance to taking human life; that there must have been a powerful operating motive, etc., and they naturally demand a greater *quantum* of evidence, as distinguished from degree or *intensity* than in ordinary assaults. But, in either case, the intellectual process requires that the intensity of the evidence must exclude all reasonable doubt. Now, what influence can be exerted on the mental powers, which fails to satisfy a juror, in the criminal case, that a crime had been committed, but which, when the very identical question arises in a civil suit, produces assurance that such crime had been perpetrated? The reason of the law being the life of the law, no instruction ought to be treated as embodying it, which is repugnant to the usual and natural operations of the intellect.

These views were forcibly illustrated by Ruffin[1] (afterwards Chief-Justice), in his argument, as counsel, in the case

[1] "One blast upon *his* bugle-horn
Were worth a thousand men."

of Kincade *v.* Bradshaw, 3 Hawks, 63. But, when facts, not criminal at common law, are converted into a misdemeanor by statute, pursuing the criterion we have assumed, no greater degree of proof should be required when they form the basis of a civil action, or defence thereto, than before the enactment; though if declared a felony or crime involving infamous punishment, the rule should, perhaps, be modified.

Tested by the principle above stated, as we have said, many of the decisions may be reconciled.

We will now proceed to analyze the cases decided on different phases of the question arising on various subjects-matter, noticing the discrepancies as we proceed.

As to the doctrine in general that a preponderance is sufficient, see U. S. *v.* Lockman, 1 Law Rep. (N. S.) 151; Tatum *v.* Mohr, 21 Ark. 349; Williams *v.* Watson, 34 Miss. 95.

Adulterine Bastardy.

This need not be proved beyond a reasonable doubt, according to the decisions in Georgia and Maine (Wright *v.* Hicks, 12 Ga. 155, reported in 56 Am. Dec. 451; Knowles *v.* Scribner, 57 Me. 497), but, according to several of the courts, there should be adduced cogent facts and circumstances (Head *v.* Head, 1 Sim. & S. 150 (1 Eng. Cond. Ch. Rep.); Hargrave *v.* Hargrave, 9 Beav. 550, 552; Plowes *v.* Bossey, 2 Dr. & Sm. 145; S. C., 8 Jur. (N. S.) 352; 31 L. J. Ch. 681; 10 W. R. 332; Patterson *v.* Gaines, 6 How. 550; Vernon *v.* Vernon, 6 La. Ann. 243; Egbert *v.* Greenwault, 44 Mich. 245, reported in 38 Am. Rep. 260).

Other courts hold that the allegation should be proved beyond a reasonable doubt (Stegall *v.* Stegall, 2 Brock. 257, per MARSHALL, C. J.; Phillips *v.* Allen, 2 Allen, 453; Sullivan *v.* Kelly, 3 *ib.* 148; Cross *v.* Cross, 3 Paige, 139, reported in 23 Am. Dec. 778; Hemmenway *v.* Towner, 1 Allen, 209; Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375).

In Iowa the presumption of paternity must be rebutted by strong, satisfactory, and conclusive evidence (State *v.* Ro-

maine, 58 Iowa, 46; S. C., 3 Iowa Trans. No. 1, p. 46; 13 Rep. 778).

Assault.

Self-defence may be shown by a preponderance of the testimony.

Texas. — (March *v.* Walker, 48 Tex. 372).

Assault with Intent to commit Rape.

In a civil action, the gravamen of which is an assault with the intent to commit rape, that fact need only be proved by a preponderance of the testimony.

Michigan. — (Elliott *v.* Van Buren, 33 Mich. 49, reported in 20 Am. Rep. 668).

Bastardy.

The charge of bastardy may be sustained by a preponderance of the testimony.

Illinois. — (Mann *v.* People, 35 Ill. 467; Maloney *v.* People, 38 *ib.* 62; Allison *v.* People, 45 *ib.* 37; McCoy *v.* People, 65 *ib.* 439; People *v.* Christman, 66 *ib.* 162; McFarland *v.* People, 72 *ib.* 368; Lewis *v.* People, 82 *ib.* 104).

Indiana. — (Walker *v.* State, 6 Blackf. 1).

Iowa. — (State *v.* McGlothlen, 56 Iowa, 544, reported in 9 N. W. Rep. 893; S. C., 24 Alb. L. J. 519).

Massachusetts. — (Richardson *v.* Burleigh, 3 Allen, 479; People *v.* Makepeace, 103 Mass. 50).

Michigan. — (People *v.* Cantine, 1 Mich. N. P. 140; Semon *v.* People, 42 Mich. 141, reported in 3 N. W. Rep. 304).

Minnesota. — (State *v.* Nichols, 29 Minn. 357, reported in 13 N. W. Rep. 153; S. C., 26 Alb. L. J. 458).

North Carolina. — (State *v.* Rogers, 79 N. C. 609).

Tennessee. — (Stovall *v.* State, 9 Baxt. 597, reported in 3 L. & Eq. Rep. 490).

Wisconsin *aliter.* — In Wisconsin they hold, that the charge must be proved beyond a reasonable doubt (Baker *v.* State, 47 Wis. 111, reported in 2 N. W. Rep. 110; Van Tassel *v.* ——, 18 N. W. Rep. 328).

Bigamy.

In a civil action involving the charge of bigamy, the confessions of the alleged bigamist may be given in evidence against him as to the marriage (Gaines *v.* Hennen, 24 How. 553, 605).

Civil Damage Laws.

The facts sufficient to maintain an action brought under these statutes, though they may involve a criminal violation of law, need only be proved by a preponderance of the testimony.

Iowa. — (Welch *v.* Jugenheimer, 56 Iowa, 11, reported in 41 Am. Rep. 77, and 25 Alb. L. J. 271).

Illinois. — (Hall *v.* Barnes, 82 Ill. 228).

New York. — (Mead *v.* Stratton, 8 Hun (15 N. Y. Supreme Court), 148).

Ohio. — In Ohio the decisions are both ways (Lyon *v.* Fleahman, 34 Ohio, 17 (Preponderance); Mason *v.* Shay (Ohio), reported in 3 Am. L. Rec. 435 (Reasonable Doubt)).

Defamation.

On principle, it would seem, when the defence to libel or slander consists in a justification, and such justification imports the charge of some common-law offence (certainly, if one of the *crimen falsi*), that the same intensity of proof is demanded as would be required on a criminal action involving the like charge.

But there is quite a conflict of judicial opinion on this point, and we will endeavor to give the authorities *pro* and *con*.[1] The following text-books and adjudications take the view assimilated to, if not entirely correspondent with, those already suggested (Taylor, Ev. 97 [a]; Steph. Dig. Ev. art.

[1] Though some of the text-books, cited under this sub-title, do not discuss this particular subject, yet, as they hold, on the general question, the same view, without qualification, according to their alignment here, it is deemed sufficient to array them, in opposition, at the outset.

94; Cooke, Def. 164, 165; 2 Stark. Sland. 100, 101;[1] 2 Greenl. Ev. secs. 408, 426; Towns. Sland. sec. 404; 2 Leigh N. P. 1239; 2 Arch. N. P. 284; 3 Steph. N. P. 2084, 2252, 2253; Best, Begin (Crandall's ed.), 51, note 2; Bish. M. & D. § 644; 1 Hill. Torts (3d ed.), § 46; 1 Am. Lead. Cas. (5th ed.) [164], 189; 2 Add. Torts, sec. 1163).

England. — (Chalmers *v.* Shackell, 6 C. & P. 475 (25 E. C. L. R.); Willmett *v.* Harmer, 8 *ib.* 695 (34 E. C. L. R.); Richards *v.* Turner, 1 Car. & M. 414 (41 E. C. L. R.)).

California. — (Merk *v.* Gelzhaeuser, 50 Cal. 631).

Connecticut. — (Mix *v.* Woodward, 12 Conn. 262).

Delaware. — (Parke *v.* Blackinston, 3 Harr. 373, 378).

Illinois. — (Darling *v.* Banks, 14 Ill. 46; Crandall *v.* Dawson, 1 Gilm. 556).

Indiana. — (Lanter *v.* McEwen, 8 Blackf. 495; Wonderly *v.* Nokes, 8 *ib.* 589; McGlenery *v.* Keller, 3 *ib.* 488; Offutt *v.* Earlywine, 4 *ib.* 460, reported in 32 Am. Dec. 40; Byrket *v.* Monohon, 7 *ib.* 83, reported in 41 Am. Dec. 212; Swails *v.* Butcher, 2 Cart. 84; Landis *v.* Shanklin, 1 *ib.* 92; Shoulty *v.* Miller, 1 *ib.* 554; Gants *v.* Vinard, 1 *ib.* 476; Tucker *v.* Call, 45 Ind. 31; Wilson *v.* Barnett, 45 *ib.* 163).

Maine. — (Newbit *v.* Statuck, 35 Me. 315, reported in 58 Am. Dec. 706). The subsequent case of (Ellis *v.* Buzzell, 60 Me. 209, reported in 11 Am. Rep. 204, and 12 Am. L. Reg. (N. S.) 426), is generally cited in support of the contrary view, but the case of Newbit *v.* Statuck was not cited by counsel, but by the court, as not in conflict with the case under consideration.

Ellis *v.* Buzzell involved the point as to the quantum of proof required to sustain a charge of adultery, which we know was not a crime at common law, and its commission is not only not opposed to any presumption of innocence, but is

[1] Starkie says, it may indeed happen that more precise evidence may be necessary to support such a justification than would be sufficient to sustain an indictment; for, the proof in the former case is governed by the allegations in the plea, and, these may frequently require a degree of proof not necessary under a defence to an indictment.

consistent with the promptings of nature. So, Knowles *v.* Scribner, 57 Me. 497, was a bastardy proceeding which is a civil suit. This view is held also in North Carolina (State *v.* Pate, Busb. 244; State *v.* Thompson, 3 Jones, 365).

Missouri. — (Polston *v.* See, 54 Mo. 291).

New York. — (Woodbeck *v.* Keller, 6 Cow. 118; Clark *v.* Dibble, 16 Wend. 601; Hopkins *v.* Smith, 3 Barb. 592, 602; Bissell *v.* Cornell, 24 Wend. 354; see Mitchell *v.* Borden, 8 Wend. 570).

Ohio. — (Seely *v.* Blair, Wright, 683).

Pennsylvania. — (Steinman *v.* McWilliams, 6 Pa. 170, 177; Gorman *v.* Sutton, 32 *ib.* 247).

Tennessee. — (Coulter *v.* Stewart, 2 Yerg. 225; Steele *v.* Phillips, 10 Hump. 461).

Vermont. — (Dwinels *v.* Aiken, 2 Tyler, 78; see to same effect Bradish *v.* Bliss, 33 Vt. 326).

The following text-books[1] and adjudications favor the view, that such justification need only be proved by a preponderance of the testimony: 2 Whart. Ev. § 1246; May, Ins. § 583; Cooley, Torts, 208; articles in 10 Am. L. Rev. 642 and 12 Am. L. Reg. (N. S.) (notes to Ellis *v.* Buzzell) 426; Proffatt, Jury Trials, § 335; MacNally's Ev. 578.

Alabama. — (Spruil *v.* Cooper, 16 Ala. 791).

Colorado. — (Downing *v.* Brown, 3 Col. 591).

Iowa. — (Riley *v.* Norton (Iowa), reported in 19 Rep. 75, overruling the previous cases of Ellis *v.* Lindley, 38 Iowa, 461; Fountain *v.* West, 23 *ib.* 1; Forshee *v.* Abrams, 2 Clarke, 571;

[1] Perhaps it would be as well to state here, that Abbott's Trial Ev. 495, is non-committal, while Bliss, L. Ins. does not, in the faintest manner, touch the subject.

It is noticeable that a number of the decisions cited under this head lay some stress on the circumstance that, under the English procedure, when a defendant being sued for defamation justifies the words charged (imputing the commission of a felony), and his defence shall be sustained, the plaintiff may be tried, as for such felony, without the action of the grand jury (Cook *v.* Field, 3 Esp. 133). But no notice is taken of the matter in the English cases cited in the text.

See also the notes to Prosser *v.* Rowe, 2 C. & P. 421.

Bradley *v.* Kennedy, 2 Greene, 231, and reaffirming Welch *v.* Jugenheimer, 56 Iowa, 11).

Kentucky. — (Sloan *v.* Gilbert, 12 Bush, 51, reported in 23 Am. Rep. 708; Grimes *v.* Coyle, 6 B. Mon. 301).

Massachusetts. — In Massachusetts it is intimated that in actions for slander the rule contended for by the author may apply (Schmidt *v.* N. Y. &c. Co., 1 Gray, 529, 534). See Gordon *v.* Parmelee, 15 Gray, 413, 416; but on p. 417, the court fully sustains the doctrine of preponderance in all civil cases.

New Hampshire. — (Folsom *v.* Brawn, 25 N. H. 114; Mathews *v.* Huntley, 9 *ib.* 146).

New Jersey. — (Open question. Kane *v.* Hibernia &c. Co., 39 N. J. L. 697, reported in 23 Am. Rep. 239).

North Carolina. — (Kincade *v.* Bradshaw, 3 Hawks. 63; Barfield *v.* Britt, 2 Jones, 41, reported in 62 Am. Dec. 190: but see Jenkins *v.* Cockerham, 1 Ired. 309).

United States Circuit Court. — (Baker *v.* Kansas City Times (C. C. Mo.), 18 Am. L. Reg. 101).

Divorce.

The text-books are not agreed on this point.

Mr. Stewart straddles the subject when he says "that the burden is on the complainant to establish his case by a preponderance of proof, and even, it has been held, beyond a reasonable doubt" (Stew. M. & D. § 345; see Bish. M. & D. sec. 644).

Adultery in Divorce. — In several of the States the charge of adultery must be proved beyond a reasonable doubt (Berckmans *v.* Berckmans,[1] 17 N. J. Eq. 453; Freeman *v.* Freeman,

[1] The principle decided by this court is in conflict with the later case of Kane *v.* Hibernia &c. Co., 39 N. J. L. 697, and whilst not noticed in the latter case, should be considered as overruled by it.

The opinion in the latter case met with the unanimous concurrence of the judges, except Woodhull, J., who had tried the case below, and whose opinion, though reversed, would seem to be the better view, unless, indeed, a distinction can be taken between the degree of evidence required to sustain the allegation of adultery, and that of wilfully burning insured property.

The later case of Clare *v.* Clare, 19 N. J. Eq. 37, without referring to Berckmans *v.* Berckmans, somewhat tones down the doctrine there enunciated.

31 Wis. 235; see also Cooper *v.* Cooper, 10 La. (O. S.) 249; Edmond's Appeal, 57 Pa. 232; Caton *v.* Caton, 7 Ecc. & Mar. Cas. 15, in notes; Purcell *v.* Purcell, 4 Hen. & M. 507; Melile *v.* Lapeyrollerie, 16 La. Ann. 4).

While, in others, such charge, in civil actions, is sustained by a preponderance of the testimony (Chestnut *v.* Chestnut, 88 Ill. 548, 550; Carter *v.* Carter, 62 *ib.* 439, 449; Smith *v.* Smith, 5 Oreg. 186, 188).

Upon principle it would seem that it ought to be sufficient to establish the allegation of adultery and fornication by a preponderance of testimony. For here the presumption of innocence is weakened by the countervailing force of the natural propensity to copulate (especially if it arises in defamation of a single woman), and so to a great extent "sets the matter at large."

Cruelty. — In Illinois it is held, that the extreme cruelty alleged as a ground for divorce, must be proved beyond a reasonable doubt (Henderson *v.* Henderson, 88 Ill. 248).

Fatal Malpractice.

To sustain this kind of action, the evidence need only preponderate (Wright *v.* Hardy, 22 Wis. 348).

Felonious Trespass.

In an action in which the gravamen is a felonious trespass or trover, it is held by the following courts that the plaintiff need only establish his case by a preponderance of the testimony.

England. — (Vaughton *v.* L. & W. R. R., L. R. 9 Ex. 93).

Connecticut. — (Munson *v.* Atwood, 30 Conn. 102; Beach *v.* Clark, 51 *ib.* 200, reported in 18 Rep. 813; Mead *v.* Husted, 52 *ib.* 102, reported in 19 Rep. 587).

Indiana. — (Bissell *v.* West, 35 Ind. 54).

North Carolina. — (Rippey *v.* Miller, 1 Jones, 479, reported in 62 Am. Dec. 177).

Vermont. — (Burnett *v.* Ward, 42 Vt. 80; Weston *v.* Gravlin, 49 *ib.* 507; but see previous case of Bradish *v.* Bliss, 35 *ib.* 326).

But in **Iowa**, in such cases, it was held that the proof must exclude a reasonable doubt (Barton *v.* Thompson, 46 Iowa, 30, reported in 26 Am. Rep. 131). This case, however, is apparently overruled by Welch *v.* Jugenheimer, 56 Iowa, 11, reported in 41 Am. Rep. 77.

Whereas in **Maine**, it is held that, in an action for trover brought to recover damages for goods stolen, it is not necessary to prove the guilt of the defendant beyond a reasonable doubt, but the jury is to give a verdict according to the weight of the evidence, as in other civil cases (Sinclair *v.* Jackson, 47 Me. 102).

But in civil cases, where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict (Thayer *v.* Boyle, 30 Me. 475); but where there is no such issue, raised by the pleadings, the jury may decide upon the preponderance of the testimony (Sinclair *v.* Jackson, *supra*).

Forfeitures.

In a proceeding *in rem* for forfeiture, the charge upon which the same is based, need only be proved by a preponderance of the testimony (Lilienthal's Tobacco, 97 U. S. 237; Robert Edwards, 6 Wh. 187). See *ante*, 387.

Forgery.

In a civil action involving the charge of forgery, proof, beyond a reasonable doubt, is not required, but only a preponderance of the entire evidence (New York &c. Co. *v.* Gleason, 78 N. Y. 503; S. C., 7 Abb. N. C. 334; Hills *v.* Goodyear, 4 Lea, 233, reported in 40 Am. Rep. 5, S. C., 11 C. L. J. 288).

Fraud.

In the following courts it is held, where fraud is the question involved, that it may be proved by a preponderance of the testimony (Big. Fraud, 474–476; Kerr, F. & M. 384; Bump, F. C. 584–587; Wait, F. C. sec. 281).

England. — (Trenchard *v.* Wanley, 2 P. Wms. 166; Townsend *v.* Lowfield, 1 Ves. Sen. 35; McQueen *v.* Farquhar, 11 Ves. 467; Hamilton *v.* Kirwan, 2 Jones & Lat. 401; Pike *v.* Vigers, 2 Dr. & Wal. 267; Bowen *v.* Evans, 2 H. of L. Cas. 257; Pares *v.* Pares, 33 L. J. Ch. 218). The jury must be "quite satisfied" (Neeley *v.* Lock, 8 C. & P. 527 (34 E. C. L. R.)).

Alabama. — The rule is, that, when proved by circumstances, they must afford a strong presumption (Juzan *v.* Toulmin, 9 Ala. 662, reported in 44 Am. Dec. 448).

Arkansas. — (Hempstead *v.* Johnston, 18 Ark. 123).

California. — (Ford *v.* Chambers, 19 Cal. 143).

Florida. — (Alston *v.* Rowles, 13 Fla. 117).

Georgia. — (Schnell *v.* Toomer, 56 Ga. 168; Greer *v.* Caldwell, 14 *ib.* 207, reported in 58 Am. Dec. 553).

Illinois. — (Bryant *v.* Simoneau, 51 Ill. 324; Carter *v.* Gunnells, 67 *ib.* 270).

Indiana. — (Farmer *v.* Calvert, 44 Ind. 209; Mahoney *v.* Hunter, 30 *ib.* 246).

Iowa. — A learned and eminent judge (Dillon) held that fraud must be proved by clear and satisfactory evidence (Geib *v.* Ins. Co., 1 Dill. C. C. 443). See also Fifield *v.* Gaston, 12 Iowa, 218.

Kentucky. — (Marksbury *v.* Taylor, 10 Bush, 519).

Massachusetts. — (Gordon *v.* Parmelee, 15 Gray, 413).

Michigan. — (Buck *v.* Sherman, 2 Doug. 176; Watkins *v.* Wallace, 19 Mich. 57; O'Donnell *v.* Segar, 25 *ib.* 367; but see People *v.* Marion, 29 *ib.* 31).

Minnesota. — (Burr *v.* Willson, 22 Minn. 206).

Mississippi. — (White *v.* Trotter, 14 S. & M. 30, reported in 53 Am. Dec. 112; Doe *v.* Dignowitty, 4 S. & M. 57; Parkhurst *v.* McGraw, 24 Miss. 134).

Missouri. — (Waddingham *v.* Loker, 44 Mo. 132; King *v.* Moon, 42 Mo. 551).

New Hampshire. — (McConihe *v.* Sawyer, 12 N. H. 396).

New Jersey. — In procuring the making of a will, the evidence as to fraud must exclude a "serious" doubt (*In re* Will of Vanderveer, 20 N. J. Eq. 463).

New York. — (Payne *v.* Solomon (U. S. Dist. Ct.), 14 Bank Reg. 162.) It was held by CHANCELLOR KENT that the evidence must be clear, strong, and satisfactory (Boyd *v.* McLean, 1 Johns. Ch. 582; Gillespie *v.* Moon, 2 *ib.* 585, reported in 7 Am. Dec. 559; see also Henry *v.* Henry, 8 Barb. 558; Jaeger *v.* Kelley, 52 N. Y. 274).

North Carolina. — (Lee *v.* Pearce, 68 N. C. 76, 89).

Ohio. — (Strader *v.* Mullane, 17 Ohio, 624; Jones *v.* Greaves, 26 *ib.* 2, reported in 20 Am. Rep. 752).

Pennsylvania. — In Pennsylvania they confine the degree of proof to strict preponderance (Painter *v.* Drum, 40 Pa. 467; Abbey *v.* Dewey, 25 *ib.* 413; Kaine *v.* Weigley, 22 Pa. 179). But the later case of Young *v.* Edwards, 72 *ib.* 257, seems, perhaps, to favor a reasonable doubt, though classified by Bigelow as only requiring a preponderance. See also Cummins *v.* Hurlbut, 92 *ib.* 165.

Texas. — (Sparks *v.* Dawson, 47 Tex. 138; Linn *v.* Wright, 18 *ib.* 317).

West Virginia. — In West Virginia, fraud must be clearly proved (Van Bibber *v.* Bierne, 6 W. Va. 168; Lockhard *v.* Beckley, 10 *ib.* 87; Hunter *v.* Hunter, *ib.* 321).

United States Circuit Court. — But in the United States Circuit Court, there is some conflict on this point. In the First and Seventh Circuits it has been held that fraud should be established beyond a reasonable doubt (Phettiplace *v.* Sayles, 4 Mas. 312; Gould *v.* Gould, 3 Story, 537; Hubbard *v.* Turner, 2 McLean, 519), and in others, that a preponderance is sufficient (Wickham *v.* Morehouse, 16 Fed. Rep. 324; Babbit *v.* Dotten, 14 Fed. Rep. 19).

Supreme Court of the United States. — The Supreme Court of the United States seem to favor the preponderance view (Rea *v.* Missouri, 17 Wall. 532; Gregg *v.* Sayre, 8 Pet. 224; Clarke *v.* White, 12 *ib.* 178).

Fraud — Confidential Relations.

Confidential Relations. — The burden to establish the fairness of a transaction must extend beyond a reasonable doubt

(Kerr, F. & M. 386; Big. Fraud, 190 *et seq.*; Gibson *v.* Jeyes, 6 Ves. 266; Benson *v.* Heathorn, 1 Y. & C. 326; Alfrey *v.* Alfrey, 1 Mac. & G. 87; Billage *v.* Southee, 9 Hare, 540; Moore *v.* Prance, *ib.* 303; Cooke *v.* Lamotte, 15 Beav. 240; Smith *v.* Kay, 7 H. of L. Cas. 750).

Judge Bigelow lays it down, that the party complained of must establish the perfect fairness and honesty of the transaction, and show that he made a full and adequate disclosure to the party complaining, before the transaction (Big. Fraud, 493).

Insurance.

When the defence to an action on policy of insurance is suicide by the insured, or, in fire or marine, the wilful destruction of the *res*, we encounter another class of conflicting decisions.[1]

Those favoring the view, that such defence must be proved beyond a reasonable doubt are: —

England. — (Thurtell *v.* Beaumont, 1 Bing. 339 (8 E. C. L. R.)).

Scotland. — (Hercules &c. Co. *v.* Hunter, 15 Court Sess. Cas. 800).

Canada. — (Richardson *v.* Canada West &c. Co., 16 U. C. Com. Pleas, 436).

Florida. — (Shultz *v.* Pacific &c. Co., 2 Ins. L. J. 495).

Illinois. — (McConnell *v.* Delaware Ins. Co., 18 Ill. 228).

Maine. — (Butmann *v.* Hobbs, 35 Me. 227; see Decker *v.* Somerset &c. Co., 66 *ib.* 406; Knowles *v.* Scribner, 57 *ib.* 497).

Ohio. — (Lexington Ins. Co. *v.* Paver, 16 Ohio, 324).

The following-named courts hold that the charge need only be established by a preponderance of the testimony: —

Kansas. — (Kan. Ins. Co. *v.* Berry, 8 Kan. 159).

Kentucky. — (Ætna &c. Co. *v.* Johnson, 11 Bush, 587, reported in 21 Am. Rep. 223).

[1] Wood says that, by the weight of both American and English authority, this defence must be established beyond a reasonable doubt (Wood, F. I. secs. 101, 504, 506).

Louisiana. — (Hoffman *v.* Western &c. Co., 1 La. Ann. 216, 219; Wightman *v.* Same, 8 Rob. 442; Regnier *v.* La. I. Co., 12 La. 336).

Massachusetts. — (Schmidt *v.* N. Y. &c. Co., 1 Gray, 529).

Missouri. — (Rothschild *v.* Am. &c. Co., 62 Mo. 356; Marshall *v.* Thames &c. Co., 43 *ib.* 586).

New Jersey. — (Kane *v.* Hibernia &c. Co.,[1] 39 N. J. L. 167, reported in 23 Am. Rep. 239, and 17 Alb. L. J. 226).

United States Circuit Court. — (Huchberger *v.* Merchants &c. Co., 4 Biss. 265). That great Judge (Dillon) also held, that a preponderance of evidence was sufficient (Scott *v.* Home Ins. Co., 1 Dill. C. C. 105). See also Bayly *v.* Lancashire &c. Co. (C. C. La.), 4 Ins. L. J. 503; Sibley *v.* St. Paul &c. Co. (C. C. Ill.), 8 *ib.* 461; Howell *v.* Hartford &c. Co. (C. C. Ill.), 3 *ib.* 653; Mack *v.* Lancashire &c. Co. (C. C. Mo.), 4 Fed. Rep. 59; S. C., 2 McCrary, 211; 9 Ins. L. J. 680; 10 Rep. 800; Prather *v.* Michigan &c. Co. (C. C. Ind.), 7 Rep. 293.

West Virginia. — (Simmons *v.* Ins. Co., 8 W. Va. 474).

Wisconsin. — (Washington &c. Co. *v.* Wilson, 7 Wis. 169; Blaeser *v.* Milwaukee &c. Co., 37 *ib.* 31, reported in 19 Am. Rep. 747. This last case explained and qualified Pryce *v.* Security Ins. Co., 29 Wis. 270).

Letters-Patent.

A preponderance of testimony is sufficient (Nor. L. P. 206).

Penalties.

It was held in the case of Cooper *v.* Slade, 6 H. of L. Cas. 746 (reversing S. C. on appeal from the Exchequer Chamber, 6 El. & Bl. 447), that a preponderance of evidence was sufficient in an action for a penalty under the bribery act.

That act makes the same facts a penalty and a misdemeanor.

The following courts hold the same view: —

Ireland. — (McClory *v.* Wright, 10 Ir. C. L. R. 514; Magee *v.* Mark, 11 *ib.* 449).

[1] The reasoning of the court is antagonized by that adopted in the earlier case of Berekmans *v.* Berckmans, 17 N. J. Eq. 453.

New Hampshire. — (Hitchcock *v.* Munger, 15 N. H. 97).

Supreme Court of the United States. — But the Supreme Court of the United States hold that the proof must exclude a reasonable doubt (Chaffee *v.* U. S., 18 Wall. 516, 545).

Vermont. — And the same view is held in Vermont (White *v.* Comstock, 6 Vt. 405; Brooks *v.* Clayes, 10 *ib.* 37; Riker *v.* Hooper, 35 *ib.* 457).

Resulting Trusts. — *Ante*, 365.

Survivorship in a Common Calamity.

There is no presumption, and the allegation is sufficiently sustained by a preponderance of the testimony, *ante*, 76.

Tax-Titles.

The intensity of proof required to sustain a tax-title is discussed *ante*, 276 *et seq.*

Usury.

This defence must be established, by proof, beyond a reasonable doubt.

New Jersey. — (Taylor *v.* Morris, 22 N. J. E. 606;[1] Conover *v.* Van Mater, 18 *ib.* 481).

Oregon. — (Poppleton *v.* Nelson, 20 Rep. 152).

Tyler lays it down, without citing authority, that the evidence must be clear and convincing (Tyler, Usury, 374), but that it does not exact proof beyond a reasonable doubt (*ib.*, citing Porter *v.* Mount, 45 Barb. 422, 427; see also Ewing *v.* Howard, 7 Wall. 499).

New York. — In New York it was held that a preponderance was sufficient (Aeby *v.* Rapelye, 1 Hill, 9).

Wills. — See *ante*, 390, 391, 395, 424.

See further discussion of this subject in titles, PRELIMINARY PROCEEDINGS and PRACTICE ON TRIAL.

[1] There seems to be an irreconcilable conflict between the law and equity decisions in New Jersey.

PRACTICE AT CHAMBERS.

It seems that the orders made at Chambers at common law were, technically, *brutum fulmen* (3 Chitty, Gen. Prac. 19).

The practice is almost universally, in this country, regulated by statute; and, when involving merely ministerial questions, confined to the clerks and prothonotaries.

There are three subjects, however, which are confined to the judges of the courts, viz.: —

1. Applications for a writ of *habeas corpus*.
2. Applications for writs or orders of injunctions.
3. Applications for the appointment of receivers.

The last two are classified under Part I. EQUITY DIVISION.

As to the practice before the clerks, see *infra*, title PRACTICE BETWEEN TERMS.

HABEAS CORPUS.

Upon the hearing of a writ of *habeas corpus ad subjiciendum*, the burden of proof is, on a non-demurrable return, upon the petitioner. Presumptively, it is true that every one is entitled to his liberty of locomotion, but, at common law, the return could not be traversed (Hurd, H. C. 263), though its statements might be confessed and avoided (*ib.* 269, 270). In those jurisdictions where the law, as to the traverse of a return, is relaxed, it is treated as presumptively true and casts the burden of proof on the petitioner (*ib.* 277 *et seq.*).

It is true that the courts are not bound down to the technical rules of evidence, and may, *ex mero motu*, upon slight evidence, shift the burden of proof. Indeed, the proceeding rests so much in the sound discretion of the court as to be almost eliminated from the doctrine of the onus probandi (see generally Gard. Inst. 31, 32, 283–288, 293, 294, 460, 693; Hurd, H. C. Book 2, Chap. 5, sec. 2).

PRACTICE BETWEEN TERMS.

The constitutions and laws of the different States are variant as to conferring jurisdiction in divers matters of litigation. The subjects, to be presently considered, were, generally, before the introduction of the code system, adjudicated in the courts, and usually also by petition. The cast and devolution of the onus probandi is not altered by the procedure, and as these matters under the improved system are now generally confided to the clerks, it has been deemed appropriate to classify them under this title.

Probate Matters. — On application for letters of guardianship, the binding of apprentices, letters testamentary and of administration, touching the laying out of highways or cartways, homesteads, liquor-license, bridges, ferries, and subjects *ejusdem generis*, it is incumbent upon the applicant to show, by affidavit, in the terms of the local law, the compliance with the respective pre-requisites as therein prescribed. It would swell the volume without adequate recompense to attempt even an approximate enumeration, as the statutes are not *in ipsissimis verbis*, and the matters involved are rarely the subject of contentious litigation.

He must in general show: —

1. That a condition of things *quoad* the subject-matter exists, requiring the action of the appropriate tribunal.

2. That he is the person, or one of a class of persons, who are entitled to call for the intervention of the court. This particular subject, though of wide range, is dismissed by referring the reader to McCall's, Abbott's, and Jenkin's Clerk's Assistant, *passim*.

Ancillary Remedies. — These remedies embrace: Injunction, Receiver, Attachment and Arrest and Bail. The subjects of Injunctions and Receivers are treated under Part I. EQUITY DIVISION. The subject of Original Attachment is also treated in Part I. COMMON LAW DIVISION, title ATTACHMENT, FOREIGN.

Attachment; Arrest. — The warrant of attachment, as well as

that for arrest, under many of the statutes, and notably under the codes of remedial justice, is treated as a proceeding in the cause.

There are different grounds on which to base an application therefor, which will be found in the local statutes. It would be idle to attempt an enumeration in detail, but there is one phase of the onus probandi which is alike applicable to all, viz.: —

In general, when extrinsic and collateral facts are relied on as the basis for the motion, according to the weight of authority, the burden is upon the applicant to allege in his affidavit not merely the language of the statute, but to state also the facts and circumstances upon which his belief is grounded[1] (Hoff. Pro. Rem. 47, 48, 420 *et seq.*; 2 Abb. Forms, 279, note *a*, 316, 317; McGilvery *v.* Morehead, 2 Cal. 607; 1 Wait, Pr. 636 *et seq.*; 1 Whit. Pr. 505 *et seq.*; Kneel. Attach. secs. 435, 436; Painter *v.* Houston, 28 N. J. L. 121; Gillett *v.* Thiebold, 9 Kan. 427; Garner *v.* White, 23 Ohio, St. 192; Creasser *v.* Young, 31 *ib.* 58; Brown *v.* Crenshaw, 5 Baxt. 584).

There are, however, authorities to the effect that it is sufficient to follow the language of the statute. There is also an intermediate class which hold that, while as to any progressing or contemplated act, as provided for by statute, the affidavit must set forth the facts and circumstances, yet, when predicated upon a *fait accompli*, an affidavit, stating the commission of the past act in the language prescribed or its equivalent, is sufficient (Gorton *v.* Frizzell, 2 Ill. 291; Stafford *v.* Low, 20 *ib.* 152; Zeigler *v.* Cox, 63 *ib.* 48; Hughes *v.* Person, 63 N. C. 548; 64 *ib.* 108, 150; 65 *ib.* 645; 71 *ib.* 291; 74 *ib.* 335; 76 *ib.* 428; see 1 Wait, Prac. 637 *et seq.*).

The plaintiff must, in general, state his cause of action, amount due, etc., positively; and to that end, when not cognizant, he should procure the affidavit of one who is; failing in this, he may state such failure, and then state his cause of

[1] The other decisions seemed to have been more lax.

action on information and belief (Kneel. Attach.[1] secs. 438–440).

Vacating. — Supposing the plaintiff's papers to be in due form — on a motion to vacate (Kneel. Attach. sec. 518) the defendant's affidavits are governed by the same considerations as have been stated with regard to the initiatory affidavits (*ib.*).

In general, the plaintiff may reply by counter affidavits, and the general burden is cast upon the plaintiff, perhaps, however, *not to the extent* as if the case were up for final determination; for, if upon the whole testimony, it appears to the court that there is a fair *presumption* in support of the attachment, the original order will not be disturbed; at least, such is the rule in New York, and in such matters, it is the pivotal State (Kneel. Attach. sec. 521).

The defendant may also move to vacate upon showing that he has filed bond with sureties as is generally prescribed by the codes (Kneel. Attach. 522).

Garnishment. — If the garnishee declines or fails to give a certificate, under the codes of remedial justice he is compellable to undergo an examination, and, in analogy to the relief, by the equity confessed, in chancery, the plaintiff must endeavor to establish the indebtedness therefrom; but if the garnishee persists in denial, according to every principle of justice as well as the analogy to the old system, the plaintiff should be entitled to make up collateral issues: whereupon the controversy becomes assimilated to ordinary actions (Kneel. Attach. secs. 479, 480; Hoff. Pro. Rem. sec. 236).

Vacating Order of Arrest. — There is, as usual in practice matters in New York, a conflict of authority as to the burden of proof on a motion to vacate, but it seems to have simmered down to these *criteria:* —

1. If the arrest is based upon an affidavit stating extrinsic collateral facts, the burden of proof is upon the plaintiff, where there are opposing and conflicting affidavits.

[1] Much credit is due to Mr. Kneeland for disentangling this knotty subject and presenting it in a systematic and readable shape.

2. But if the affidavit for arrest is a rehash of the complaint, then the onus is with the defendant when the motion is entertained at all, and he must, to satisfy the burden, make "a very clear case" (Voor. Code, § 205, in notes; Hoff. Pro. Rem. 93 *et seq.*).

The defendant may move for his discharge, upon showing that he has perfected bail as required by the local law (Hoff. Pro. Rem. 57).

Inspection of Papers, etc. — To obtain an order for the inspection of books, documents, papers, etc., material to the applicant's case or defence, he must apply by affidavit and motion therefor, and it is incumbent on him to prove by affidavits: —

1. That the books, etc., are, as he is advised and believes, material evidence in support of his case or defence,[1] as the case may be, in a *lis* depending.

2. That he has requested a copy, or leave to inspect and copy the same, from the opposing party, and that the same is based upon a just demand thereof.

3. That he has no counterpart or copy thereof (3 Chitty, Genl. Prac. 434–436 and note).

Postponing Trial. — The codes of remedial justice generally provide for the hearing of a motion to postpone between terms. The cast and character of the burden is the same, when so made, as if at term.

Supplying Papers. — When papers in a cause are lost, the party affected by such loss may apply, upon affidavit, to cause them to be supplied. He must show by his affidavit: —

1. That due search has been made in the proper archives, and wherever else they may have been carried.

2. That the loss was not occasioned by his agency.

3. That a copy annexed or exhibited is a true, full, and, at least, substantially perfect transcript thereof.

[1] Chitty confines the benefit of this procedure to plaintiffs, but the codes universally confer it on both parties.

Special Proceedings.[1]

This is a term of modern invention, and embraces, generally, that class of litigation which, under the old system, was initiated by petition, citation, or motion, *ex gr.*, partition, auditing accounts, settlements by fiduciaries, and various matters growing out of the public police and economy.

It would fill quite a volume to enumerate the various cases falling within the meaning of the term, and discuss the question of the burden of proof with reference thereto.

The scientific lawyer can easily determine the onus by applying the analogy as to other forms of litigation herein treated.

PRACTICE ON TRIAL.

The onus probandi as applied on the trial, has, to some extent, been developed under the title Preliminary Proceedings, Part VI.

Under the improved modern systems of procedure, matters collateral to the trial have been eliminated, and provisions enacted for their adjustment before trial, *ex gr.*, passing upon depositions, etc. In those jurisdictions where the practice as to any collateral matter is regulated on the trial, the principles adverted to under the title of Preliminary Proceedings apply. So, if the point was not discoverable before trial, — such as the improvement of a witness, — it must be settled *ex necessitate rei* on the trial; and the same rule governs when thus determined, as if urged preliminarily.

And as the competency of witnesses is not necessarily in all instances discoverable before trial — as where the witness is notoriously incompetent — if it be proposed to restore his competency by release, pardon, etc., the point, in general, cannot be raised before the trial.

Improper Conduct of the Jury. — So, the improper conduct of

[1] Whenever the classification is doubtful, the analogy of codes of remedial justice has been followed.

a jury is not discoverable until after they should have been empanelled. This must occur, if at all, during the trial, though the discovery thereof may not be made until after the rendition of the verdict. If discovered, it would rest in the discretion of the court, on proof of the fact, to order a new trial, and though unusual, it might be suggested during the progress of the trial, as a time-saver, in order that the court might intimate to counsel to have a juror withdrawn.

Of course, the burden of proof of misconduct is upon the party alleging it (2 Arch. Pr. 254 *et seq.*).

Secondary Evidence. — Ordinarily, the best evidence that a fact is susceptible of is required; but, when that is not legally obtainable, the law permits substitutionary, or, as it is usually termed, secondary evidence to be given; but, in order to lay the foundation for the reception of this kind of evidence, it is incumbent upon the party offering it to show: —

That the production of the primary evidence is not within his power (1 Greenl. Ev. sec. 84; Best, Ev. 94; Powell, Ev. 295).

Accordingly, if a party ascertains that an original document necessary to his case is in the hands of the adverse party, who will not voluntarily produce it, his first step should be, after obtaining an inspection and copy, if necessary or allowable according to the local practice, to give his adversary notice to produce the original at the trial (Pow. Ev. 295).

He must, therefore, prove the service of the notice according to the local rule. But, even then, before he can introduce secondary evidence, he must prove, or raise by evidence at least a reasonable presumption, that the original is in the hands of the adverse party, or of a third person in privity with him (*ib.*). Or, if it concern a document, that search was made for it in places where it was most reasonable to expect it to be deposited (Pow. Ev. 302).

As to inspection and copy, see *ante*, 562.

Confessions. — On the trial of a criminal action, if it be

proposed to offer confessions in evidence, the burden rests upon the prosecution to show, preliminarily, to the satisfaction of the court, that the declarations were made without force, or threats, or the inducement of hope (see Part IV. title CONFESSIONS).

PRELIMINARY PROCEEDINGS.

The subject may be treated of: —

Firstly, with reference to criminal actions.

Secondly, with reference to civil actions.

I. CRIMINAL ACTIONS.

Preliminary Warrants. — When a crime has been committed, the facts may be preliminarily investigated: —

1. Either by a coroner's inquest; or
2. By a warrant issued by a committing magistrate; or
3. Through the medium of a writ of *habeas corpus;* or
4. By a grand jury.

The first class will be found discussed under the title of OFFICE FOUND, and the third indirectly under that of HABEAS CORPUS.

State's Warrant. — When a supposed criminal shall have been brought before a committing magistrate, whether an ordinary justice of the peace, commissioner, or judge, the burden of establishing the commission of the crime charged upon the defendant is manifestly upon the prosecution, but not to the extent that is required, either by a grand jury or on the trial.

According to the English doctrine, if there appears upon the evidence a presumption of guilt, or a probable cause of suspicion, the burden is satisfied, unless upon the whole evidence, it manifestly appears that either no such crime was committed by any person, or that the suspicion entertained of the prisoner was wholly groundless (1 Chitty, Cr. Law, 67, 89).

As to the granting or refusal of bail and the proof necessary to that end, see 1 Chitty, Cr. Law, 96, 97.

The statute of Philip and Mary regulating the examination, etc., it is conceived, has been generally re-enacted in the United States, with more or less modification; but it is wholly without the scope of this treatise to attempt an enumeration or discussion of these statutes.

Search Warrants. — It is deemed needless to discuss the question of proof under search warrants, as it is taken *ex parte*, or if goods are found, the suspected party is brought before the magistrate, and the question of his guilt or innocence tried as in ordinary State's warrants (1 Chitty, Cr. Law, 67).

Grand Jury. — Formerly, it was held that the grand jury ought to find the bill upon probable evidence, but great authorities have taken a more merciful view, and hold that the grand inquest should be convinced, that is, satisfied, of the defendant's guilt (1 Chitty, Cr. Law, 318, citing 3d St. Trials, 416, 4 St. Trials, 183, 5 St. Trials, 3; 2 Wood. Lec. 559; 2 Hale, 61), or, as expressed by our great master: —

A grand jury ought to be thoroughly persuaded of the truth of the indictment so far as their evidence goes; and not to rest satisfied with remote probabilities (4 Black. Com. 303). Bishop declares that it is sufficient to establish a *prima facie* case (1 Bish. Cr. Proc. (1st ed.) sec. 736).

A dereliction of duty, however, in this respect is not inquirable into (*ib.* sec. 740).

It may be added, as applicable to all criminal preliminary investigations, that the onus probandi is on the prosecution, in all cases, where a greater degree of proof is required than the testimony of one witness, as in treason, perjury, etc., to produce it (1 Chitty, Cr. Law, 320).

II. Civil Actions.

While possibly, applications for injunctions or the old original attachments, etc., might be regarded as preliminary proceedings, it seems to the author, that they are substantially ancillary rather than preliminary, and he has therefore treated of them elsewhere. The author confines himself to

only that class of proceedings, which fall, with the strictest propriety, under this title.

Pros. Bond. — The laws of the States, generally require security for the prosecution from the plaintiff, and in some instances from the defendant.

Such security must be given *in limine*, and it lies upon the applicant for original process to produce and establish the validity of the same. If exceptions should be filed to the security, the burden shifts, and it lies on the defendant to show the insufficiency thereof.

In Forma Pauperis. — If one, being advised that he has good cause of action, is unable from extreme poverty to procure surety or security (as the local statutes may prescribe), he is allowed by virtue of an old English statute, 11 Hen. 7, chap. 12, to sue, without giving the same, upon certain terms.

The burden, in England, rests upon such applicant to show by his affidavit and petition, that he is not worth five pounds, excepting his wearing apparel and the matter in question in the cause (3 Black. Com. 400; 2 Arch. Prac. 169); generally also counsel's certificate of merits; and he must also disclose by his petition facts sufficient to constitute a good cause of action (Alex. Brit. Stats. 263, note; *In re* Cobbett, 27 L. J. (Exch.) 199; Miazza *v.* Calloway, 74 N. C. 31; Sears *v.* Tindell, 15 N. J. L. (3 Green) 399; M'Clenahan *v.* Thomas, 2 Murph. 247). Even then, in England, the order will not go for actions of slander (2 Arch. Pr. 169).

Nor to actions for penalties (Hewes *v.* Johnson, 1 Y. & J. 10; Alex. Brit. Stats. 263 in note); nor to actions brought in a representative character (McKiel *v.* Cutlar, Busb. Eq. 139; Green *v.* Harrison, 3 Sneed, 131).

It is observable that the English statute uses the language "by the discretion of the chancellor" (Alex. Br. Stats. 262; Mart. Coll. Br. Stat. 166).

The provisions of Stat. 11 Hen. 7, have been modified in several of the States to such an extent, that perhaps the right to sue *in forma pauperis* extends to all actions.

If the statutes confer the right in express terms, without qualification, it would embrace all actions.

This depends upon the phraseology of the statutes of the different States with which the local practitioner is familiar.

If security for the prosecution be given primarily, and a rule is obtained to show cause why other security should not be given, the party, at least according to some authorities, may apply to continue the action without giving other security, the onus being satisfied, in such case, by an affidavit of poverty merely (Brunt *v.* Wardle, 2 M. & G. 534 (42 E. C. L. R. 282); Doe *d.* Ellis *v.* Owens, 9 M. & W. 455; Alex. Br. Stats. 263, note;[1] Holder *v.* Jones, 7 Ired. 191; Biggerstaff *v.* Cox, 1 Jones, 534; Martin *v.* Chasteen, 75 N. C. 96).

Upon a motion to dispauper, the motioner[2] is the actor, and the burden of proof is upon him to show that the suitor has sufficient means to enable him to secure costs (Brumley *v.* Hayworth, 3 Yerg. (Tenn.) 421).

Continuance. — When an application is made for continuance, the party moving it takes the burden of proving that his motion is authorized by the local law. In England, the burden extends to proving by affidavit: —

1. That an absent witness is a material witness, setting forth the substance of his supposed testimony; and,

2. Either (1) that proper inquiries and endeavors were made in due time to subpœna him, without success, or (2) that he is so ill as to be unable to attend (3 Chitty, Gen. Prac. 871, 1st Am. Ed.). In the United States, the matter is regulated by statutes of the different States. In many, the burden is held discharged, by affidavit setting forth the materiality of the witness, that he is under subpœna, and that he is absent without the consent or procurement of the affiant.

Changing Venue. — Changing venue is generally confounded with the removal of a cause; but it is apprehended that the subject can be better understood by segregating the

[1] The reader will find an able and exhaustive treatment of this subject in note to Alexander's British Statutes In Force In Maryland, p. 263.

[2] Webster marks this word as obsolete, but, as there is no substitute, the author adopts it, as it clearly conveys the sense, whatever objections there may be to its *sound*. Why not use it as well as petitioner?

two matters, confining the one under consideration to applications to remove the action because it was not brought to the proper place.

Viewed in this light, the burden of proof is upon the motioner, before plea or answer, to show by affidavit that the cause of action arose and is triable in some other place than that where brought, *ex. gr.*, that it is an action to try title to realty elsewhere situated (3 Chitty, Gen. Prac. 646 *et seq.*). The subject of the venue of actions, is regulated in the United States by statute, and need not be enlarged upon, as the character of the onus probandi is easily discernible by a reference to the statute, and in the application of the criterion above stated, under some of the codes where the erroneous venue is self-apparent, no affidavit is required, but the venue must be changed upon demand of the party (2 Abb. Forms, 245, note *f.*).

Removal. — The application to change the venue after plea pleaded, is generally termed a motion to remove the cause. The distinction being that in the first application we have been considering the venue was wrong, while with regard to these latter, the venue is correct as laid, but, it is deemed desirable to change the place for trial for collateral reasons.

The motioner must prove by affidavit: —

1. That either the convenience of witnesses requires; or

2. That the ends of justice would be promoted by the change. Under the first branch the motioner must show either that the witnesses are old or infirm, or that the motioner is unable to pay their expenses, or other ground tending to convince the court that the trial where the suit was brought would operate as a great hardship on the witnesses; and he must also show their materiality (3 Chitty, Gen. Prac. 652).

Under the second branch he must show that, owing to local adverse influence or prejudice, a fair trial could not well be expected in the place where the suit was brought (*ib.*).

In general, a criminal action will not be removed for the convenience of witnesses, though it may be, on account of local prejudice (People *v.* Harris, 4 Den. 150).

The current of authority is to the effect that the motion is addressed to the sound discretion of the court; in some States the motion is allowed to be traversed by counter-affidavits, and some require notice of the motion. In some it is held that criminal actions may be removed by consent; in others, not.

There is another class of removals, wholly independent of the original idea of venue.

These are actions originally commenced in the statal courts, which are prayed to be removed to the United States Courts.

These will be discussed *seriatim*: —

Character of Parties; R. S. Sec. 639. — 1. Under this subdivision the burden of proof is upon the applicant to show by petition that the amount in controversy exceeds five hundred dollars, and either (1) that the defendant is an alien, or (2) that he is a citizen of a State other than that wherein the suit is brought, and that the plaintiff is a citizen of such latter State.

2. That (1) the applicant, defendant, is an alien, and his co-defendant is a citizen of the State where suit is brought, or (2) that one of the defendants is a citizen of the State where suit is brought, and the other a citizen of another State.

3. That the applicant is a party and a citizen of another State, and that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in the statal court (2 Abb. U. S. Prac. 38, 39; Bump, F. P. 175 *et seq.*).

In all of the foregoing instances, in addition to the proof required as above, the applicant must tender security conditioned for his filing copies of the pleadings, etc., on the first day of the next session of the United States Court, and for entering bail, if such bail was originally required.

R. S. Sec. 640. — Under this section the applicant must prove: —

1. That the suit is brought against (1) a corporation (other than banking) organized under the laws of the United States, or (2) against a member thereof, as such member, for an alleged liability of such corporation, or of such member, as such.

2. And that the defendant has a defence arising under (1) the Constitution, or (2) treaty, or (3) laws of the United States (2 Abb. U. S. Prac. 39 *et seq.*; Bump, F. P. 212 *et seq.*).

R. S. Sec. 641. — Under this section the applicant must prove: —

1. That being a defendant he is (1) denied, or (2) cannot enforce in the statal court some right secured to him by the act of Congress, commonly termed the Civil Rights Act, but the expression "denied" or "cannot enforce," requires of him, to prove more than local prejudice, or the improper or corrupt execution of the law.

He must show to the court that he is thus denied or cannot enforce his rights, in consequence of some law, the provisions whereof operate in such injurious manner (Blyew *v.* U. S., 13 Wall. 581; Bump, F. P. 239 *et seq.*); or,

2. That he is sued or prosecuted as an officer for some act done in the assertion or protection of such rights, pursuant to the purview of the Civil Rights Act.

It will be observed that no bond is required as under Sec. 639 (2 Abb. U. S. Prac. 37).

R. S. Sec. 643. — Under this section the defendant must prove: —

1. That he was an officer of the revenue, or was acting thereunder by authority of some officer thereof.

2. That he is prosecuted on account of some act done (1) under color of his office, or (2) of such law, or (3) of some right, title, or authority, claimed by him under such law.

3. Or, that he being sued, holds property or estate by title derived from such officer, and that it involves the question of the validity of such law.

4. Or, that he was an officer of the United States, or that the defendant was one acting under his authority, and that the suit or prosecution is brought on account of (1) some act done under the provisions of the law relating to the elective franchise, or (2) on account of some right, title, or authority claimed by such officer or other person under any provision of said law. The facts in these regards must be

particularly set forth, so that the court may see that the charge is deducible therefrom.

The applicant must also produce the certificate of counsel of a court of record of the State where the suit is depending, or of the United States, stating that he has examined the proceedings and carefully inquired into all the matters set forth in the petition, and that he believes them to be true (2 Abb. U. S. Prac. 35, 37; Bump, F. P. 243 *et seq.*).

R. S. Sec. 644. — Under this section the applicant must prove: —

1. That he is an officer in the civil service of the United States, and a non-resident of the State wherein the suit is depending.

2. That the plaintiff is an alien. There must be a petition particularly setting forth these facts and a certificate of counsel (2 Abb. U. S. Prac. 41 *et seq.*).

R. S. Sec. 647, and Rich. Supp. 174, Sec. 3. — Under this section the applicant must prove: —

1. That the title to land is involved in the suit.

2. That the subject-matter exceeds the sum or value of five hundred dollars.

3. That both parties are citizens of the State wherein the suit is depending.

4. That he will rely upon a right or title to the realty, under a grant from another State.[1]

5. The grant, or an exemplification thereof, unless prevented by a destruction of the public records.

6. He must also move the court that the adverse party be

[1] The act of March 3d, 1875, contains a repealing clause, but by a comparison with the provisions of the Revised Statutes it will be seen that the act only amounts to some change in the former law (Hess *v.* Reynolds, 113 U. S. 73; S. C., 19 Rep. 257). Mr. Bump in a foot-note to page 250 of his Federal Procedure states that sec. 647 R. S. is superseded by the act of 1875; but, upon comparison, it will be observed that the only substantial change made is, that whereas under the Revised Statutes the applicant was bound to claim under a foreign and the other under a domestic grant, under the present law all that is necessary is, to show that such party claims under a grant from some State other than that under which the adverse party claims.

required to inform the court, as to whether he claims a right or title to the realty under a grant from the State other than that under which the applicant claims. Thereupon such adverse party must give such information, or be debarred from pleading such grant or giving the same in evidence.

If he admits that he does so claim, the applicant may then cause the suit to be removed on motion (Town of Pawlett *v.* Clark, 9 Cranch, 292; 2 Abb. U. S. Prac. 33, 34, 35; Bump, F. P. 250 *et seq.*). The act of Congress touching the removal of suits commenced against army officers for arrests made during the late civil war, is omitted from the Revised Statutes, its force having been spent. The same remark is applicable to the Carriers' Act of 1869. For forms under this section see 2 Abb. U. S. Prac. 362 *et seq.*; Bump, F. P. 907 *et seq.*

Rich. Supp. 173, Chap. 137, Sec. 2; Act March 3d, 1875. — The onus requires proof under this section: —

1. That in an action at law or suit in equity of a civil nature, depending in a statal court, the matter in dispute exceeds the sum or value of five hundred dollars.

2. And that the same arose under either (1) the Constitution, or (2) laws of the United States, or (3) under treaties.

3. Or, that in such action or suit (1) the United States is a party plaintiff, or (2) that the same is constituted between citizens of different States (see authorities cited in margin of Richardson).

Of course the value as above stated must also be proved.

4. Or, that it is between citizens of a State and foreign states or citizens or subjects (Bump, F. P. 215 *et seq.*).

Remanding; Rich. Supp. 175, Sec. 5. — Provision is made for the remanding of actions improperly removed.

If the error should be apparent upon the face of the record, no proof is required; but if the error consists in some fact, the burden of proof will rest upon the motioner to show the same (Hancock *v.* Holbrook, 112 U. S. 229; R. R. Co. *v.* Swan, 111 U. S. 379).

There are some provisions to be found in the laws of the

United States, as to the removal of causes on account of the interest or disability of the judge; but, as orders therein are invariably made *ex mero motu*, the discussion thereof is omitted.[1]

Habeas Corpus ad test. — If a witness should be in custody or in the military or naval service, and cannot or does not wish to attend, the writ of *habeas corpus ad testificandum* may be introduced to enforce his appearance.

Criminal Actions. — In criminal actions it is generally obtainable on motion of the prosecuting officer without oath (1 Greenl. Ev. sec. 312).

Civil Actions. — In civil actions the applicant therefor must show: —

1. The nature of the suit.
2. The materiality of such witness' testimony.
3. The circumstances of restraint.
4. If not an actual prisoner, and willing to attend, that fact should also be shown (*ib.*).

Entering Forfeitures, etc. — When a witness fails to appear on being called, the party for whom he was subpœnaed, must have him solemnly called by the crier who proclaims for him to appear and give testimony, or that his default will be recorded.

The statement of the crier, must be supplemented by proof of a seasonable service of the subpœna, that his fees were tendered or tender expressly waived, and that everything else required by the particular *lex fori* has been complied with (3 Chitty, Genl. Pr. 834; 1 Greenl. Ev. sec. 319).

No tender of fees is necessary in criminal actions (1 Greenl. Ev. 311).

If the witness had been recognized, it is presumed that proof of tender of fees, would be dispensed with; such is conceived to be the English practice.

[1] The author is aware of only one instance in which the *locum tenens* of the bench would not exchange circuits, although in his circuit there were many cases in which he was interested. His action caused the passage of a compulsory law.

In some courts of the Union, it is held that in civil actions no fees need be tendered (Smith *v.* Barger, 9 Yerg. 322), though the contrary rule is the prevalent practice (Connett *v.* Hamilton, 16 Mo. 442; Wayman *v.* Hazzard, 2 Ind. 165; Robinson *v.* Trull, 4 Cush. 249).

Instead of proceedings in contempt, in several of the States a forfeiture is given to the party who has taken the proper measures to have a defaulting witness in court, sometimes as a judgment *nisi* for a certain sum, sometimes in the nature of a penalty, sometimes it is provided that the recovery shall enure to the State (Maclin *v.* Wilson, 21 Ala. 670), and sometimes to the party summoning him.

Whatever proof may be required in proceedings to enforce the forfeiture, it is deemed that the necessary proof to initiate proceedings in that behalf, has been sufficiently discussed.

Depositions. — The common law did not admit of but one mode for the examination of witnesses, which was *viva voce* (3 Black. Com. 383; 1 Greenl. Ev. sec. 320); even those depositions, taken on preliminary examinations before committing magistrates, were pursuant to the provisions of the statute of Phil. and Mary.

The right is now universally extended to all civil actions, but the practice as to the mode of opening and passing upon the depositions is variant.

In the United States Courts the procedure as to equity and admiralty causes, is regulated by the rules adopted by the Supreme Court and R. S. Title XIII. chapter 17.

On the law side, technically taken *de bene esse*, there must be proof of (1) the death of the witness, or (2) that he has left the United States, or (3) that he has gone to a greater distance than one hundred miles from the place where the court is sitting, or (4) by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to appear in person (Rev. Stats. sec. 865).

As to depositions taken *in perpetuam rei memoriam*, the practice is assimilated to that of the statal courts (Rev. Stats. sec. 867). According to the English chancery prac-

tice there must be a publication of the depositions by the clerks, either by consent or on rule (2 Dan. Ch. Pr. 562).

The States have statutory regulations touching the mode of publication, which are presumably familiar to the local practitioner, and need not here be recapitulated.

Quashing the Panel. — In England a preliminary motion for quashing the panel was permissible in a very few cases; we need only notice two.

1. If the sheriff has acted corruptly in the selection of the panel. Upon proof of this or any other fact which shows that the *venire facias* should have been directed to the coroners or elisors, a challenge to the array would be allowed (3 Black. Com. 359).

2. If an alien be a party to a suit, and upon a rule obtained for a jury *de medietate linguæ* such an one be not returned upon proof thereof, such alien has the right to have the panel quashed (*ib.* 360).

The former was grounded upon the fact that the sheriff, at common law, selected the jury (3 Black. Com. 351), and the latter was based upon statutes.

In the United States, generally, if not universally, the jury are drawn by lot, out of a large number of names, so that it may be assumed that no challenge for that cause is allowable here. As to the latter ground, it depends wholly upon whether the British statutes in that behalf have been re-enacted.[1]

Challenges to the Polls. — Challenges to the polls are reducible in this country to three heads: —

1. *Propter Defectum.*
2. *Propter Affectum.*
3. *Propter Delictum.*

(3 Black. Com. 361.)

Under the first head it is incumbent on the exceptant to show that the juror challenged is, for any reason known to the common law or prescribed by local legislation, incompetent or at least exceptionable (*ib.* 362).

[1] The statute was declared in force in North Carolina (Mart. Coll. Br. Stats. 76).

Under the second head, he must prove that the juror excepted to is biased against him; the grounds of such exception are divisible into two heads.

(1) One termed a principal challenge.

(2) And the other a challenge to the favor.

Under the first sub-heading he must show either (1) that the juror is of kin to the opposite party within the ninth degree, or (2) that he has been an arbitrator on either side, or (3) that he has an interest in the cause; or (4) that there is an action depending between him and the challenger, or (5) that he has taken money to give his verdict, or (6) that he has formerly been a juror in the same cause, or (7) that he is the opposing party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him (*ib.* 363).

The foregoing challenges constitute questions of law, and are not addressed to the discretion of the court.

The latter are triable as questions of fact, at common law, by triors.

Under the second sub-division he must show to the satisfaction of the triors, some probable circumstances of suspicion, as friendship and the like (*ib.* 363).

Under the third head, he must prove that the juror has been guilty of some such infamous crime as has deprived him of his *lex libera.*

As to all these grounds of challenge, the proof can either be made by the juror's oath if not to his discredit, or by independent testimony (*ib.* 364).

Witnesses presumptively Incompetent. — If a party desires to offer the testimony of witnesses, apparently *non sui juris* on inspection, the burden is cast upon him to show that notwithstanding appearances, the witness is competent to give testimony, as in cases of deaf-mutes and infants of tender years (1 Greenl. Ev. secs. 366, 367).

Atheists, etc. — Presumptively all rational[1] men believe in God, so that the objection to a witness on the score of defect

[1] The fool hath said in his heart, there is no God. — Psalm XIV.

of religious belief, must come from the objecting party upon whom the onus lies to make good his exception (1 Greenl. Ev. sec. 370).

Requiring Bail. — It sometimes happens, more especially in criminal actions, that the bail given is insufficient, whereupon the party on bail may be required either by rule or motion, according to the local practice, to justify or give other bail.

In such preliminary proceedings, the exceptant is the actor, and the burden of proof is upon him to satisfy the court of the alleged insufficiency.

The maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium* applies.

Affidavit of Merits. — In some jurisdictions, for different purposes, an affidavit of merits is required (3 Chitty, Gen. Pr. 66, 388, 543–545; 1 Arch. Pr. 100; 2 *ib.* 30; 2 Abb. Forms, 692; 2 Wait, Pr. 630, 631). According to the English practice, and it is presumably followed here, the motioner, upon filing a proper affidavit obtains a rule *nisi*, and thereupon the party ruled files opposing affidavits. Upon the argument, the party ruled has the burden of proof (Smith, A. at L. 32, 33).

Improving Witness. — If it should be discovered, that the witness, either: —

1. From defect of understanding,
2. A condition of intoxication,
3. Tender years,
4. Or defect of education, is then not in a present condition for examination, the party calling him may move the court that he be subjected to such treatment mentally and physically as may fit him to give intelligent testimony.

The motion is, of course, addressed to the discretion of the court, and the burden is with the motioner to satisfy the conscience of the court of the propriety of such a course (3 Chitty, Gen. Pr. 826; 1 Whart. Ev. (2 ed.) secs. 405, 406).

Pardon. — In those jurisdictions, where a witness is excluded by reason of the commission of some crime, the burden is upon the objecting party, to show the record of conviction, and, thereupon, if the convict has received a pardon, the

party offering him must produce it, or if other circumstances should, by the local law, amount to a rehabilitation of the witness' standing, *ex. gr.*, serving out his sentence, then he must show that fact (3 Chitty, Gen. Pr. 826, 827).

Release. — The same practice substantially applies to a release (*ib.*).

Production of Documents. — The party demanding production of documents must show: —

1. Such notice as is prescribed by the local law; or if there be no rule, then, that it was served in reasonable time.

2. That the document is probably in the possession of the party so notified, and he wilfully witholds it (*ib.* 834–836).

Notice of Defence. — Under the common-law practice, or, at least, such as prevailed after the statute of Anne allowing double pleading, and before the New Rules, and which, it is believed, yet prevails to some extent in the United States, it is prudent, though not essential, to serve a notice of the intended defence. If the defendant concludes to follow this course, he must prove that he gave reasonable notice thereof [1] (*ib.* 836, 837).

Separating Witnesses. — According to the English practice in criminal actions, the Crown has a right to demand a separation [2] (1 Chitty, Cr. Law, 618; Fost. Cr. Law, 47; Bac. Ab. Ev. D.; 4 Har. St. Tr. 754; 6 *ib.* 800; Rex *v.* Cook, 13 How. St. Tr. 348; Rex *v.* Vaughn, *ib.* 494; Rex *v.* Goodere, 17 *ib.* 1015; 3 Stark. Ev. 1733), and the same order may be made on the application of the defendant, as a matter of indulgence, but not of right (1 Chitty, Cr. L. 618). It is apprehended that in this country the practice is the same whether

[1] This is a precautionary step to make his verdict "stick," for courts will more readily set aside a nonsuit, or grant a new trial if the verdict should be against the plaintiff, upon the objection, which had, presumably, taken him by surprise (3 Chitty, Gen. Pr. 837).

[2] The earliest recorded instance of this practice is to be found in the story of Susannah in the Apocrypha, with which, it is presumed, as in general with reference to Biblical learning, the profession is familiar.

That was a remarkable instance, in which, in the language of the immortal Scotch bard, "the elders were brought to disgrace and public shame," and dire punishment, too.

the motion comes from one side or the other; and that, in either case, the allowance rests in the sound discretion of the *nisi prius* court (State *v.* Sparrow, 3 Murph. 487; Corn *v.* Knapp, 9 Pick. 496, reported in 20 Am. Dec. 491, 493; Laughlin *v.* State, 18 Ohio, 99, reported in 51 Am. Dec. 444; U. S. *v.* White, 5 Cr. C. C. 38; King *v.* State, 1 Mo. 717; McLean *v.* State, 16 Ala. 672; Nelson *v.* State, 2 Swan, 237; State *v.* Brookshire, 2 Ala. 303; Atty. Gen'l *v.* Bulpit, 9 Price, 4; Pleasant *v.* State, 15 Ark. 624; Sartorious *v.* State, 24 Miss. 602; Porter *v.* State, 2 Carter, 435; People *v.* Sprague, 53 Cal. 491; Shields *v.* State, 8 Tex. App. 427; Rex *v.* Murphy, 8 C. & P. (34 E. C. L. R.) 297).

This same rule applies in civil actions (2 Steph. N. P. 1768; 2 Phil. Ev. (3 ed.) 395, note 361 on p. 711, Vol. 4; 1 Greenl. Ev. sec. 432, and note 1; Swift, Ev. 512; Fortescue, De Laud. Leg. Angl. chap. 26; 3 Stark. Ev. 1733; Pow. Ev. 377;[1] Norris' Peake, 270 note *; Rosc. Dig. N. P. 93; Keith *v.* Wilson, 6 Mo. 435, reported in 35 Am. Dec. 443; Sanders *v.* Johnson, 6 Blackf. 50, reported in 36 Am. Dec. 564; Patton *v.* Janney, 2 Cr. C. C. 71; Larue *v.* Russel, 26 Ind. 386; Lelfe *v.* Isaacson, 1 F. & F. 194; Southey *v.* Nash, 7 C. & P. (32 E. C. L. R.) 632).[2]

Interpreter. — If the witness proposed is either a deaf-mute, a foreigner, a native who can only speak an unintelligible *patois*,[3] or one afflicted with temporary or permanent affonia, and the party calling him shall make it so appear, he is entitled to have an interpreter appointed and sworn[4] (1 Whart.

[1] Powell says "although apparently not absolutely a matter of right, is never refused to the applicant" (Pow. Ev. 377).

[2] But the practice is not extended to parties or attorneys (Larue *v.* Russell, 26 Ind. 386; Crow *v.* Peters, 63 Mo. 429, reported in 4 C. L. J. 213; Chernock *v.* Dewings, 3 C. & K. 378; Chandler *v.* Horne, 2 Moo. & Rob. 423; Pomeroy *v.* Baddeley, R. & M. 430; Everett *v.* Lowdham, 5 C. & P. (24 E. C. L. R.) 91; Constance *v.* Brain, 2 Jur. (N. S.) 1145 Ex.), nor to witnesses after they shall have been examined (U. S. *v.* Woods, 4 Cr. C. C. 484).

[3] *Ex. gr.*, A Yorkshireman in London.

[4] Indeed, in chancery, when a deposition abroad is to be taken, unless the party takes with his commission an order for the appointment of an interpreter, the deposition would not be received (2 Swanst. 261 note).

Ev. Secs. 407, 493; Taite, Ev. 343; Tam. Eq. Ev. 45; 2 Danl. Ch. Pr. 484; 1 Greenl. Ev. sec. 366; Pow. Ev. 17; 1 Phil. & A. Ev. 4; Rex *v.* Rushton, 1 Leach, Cr. Cas. 408; Thomas Jones' Case, 1 Leach, Cr. Cas, 452, note *b*; Vandevoort *v.* Smith, 2 Caines, T. R. 155; Morrison *v.* Lennard, 3 C. & P. (14 E. C. L. R.) 127; Snyder *v.* Nations, 5 Blackf. 295; Norberg's Case, 4 Mass. 81; Amory *v.* Fellowes, 5 *ib.* 219).

Bill of Particulars. — In all[1] actions in which the plaintiff declares generally, without specifying the particulars of his cause of action, he will be required, on the application of the defendant, to furnish a bill of particulars; and the like practice obtains in favor of a plaintiff as applied to the defence of set-off. It was, at common law, usually obtained by taking out a judge's summons for that purpose. No affidavit is required to obtain the summons.[2] The burden rests upon the party summoned to show cause against the allowance (2 Arch. Pr. 221 *et seq.*; 3 Chitty, Genl. Pr. 611 *et seq.*; Tidd's Appendix (by Caines), 151 *et seq.*).

Such is the English practice, and is presumably followed, except in those States which have adopted the code of remedial justice. Under the code system the practice is, for the party claiming the bill, to demand of the opposite party such bill; whereupon it is obligatory on such noticed party to furnish the same within a certain number of days. Should he fail to deliver any, or a defective bill, then the party desiring it must apply to the court, and the burden will rest upon him to show, by affidavits, if not apparent on the face of the pleading, that he is entitled thereto (Voor. Code (ed. 1868), 315, sec. 158, and notes).

[1] Archbold says "in all actions" but Chitty qualifies this general statement (3 Chitty, Genl. Pr. 613).

[2] An affidavit was formerly required in the Exchequer, but the practice in this country has been generally based upon that of the King's Bench.

THE ONUS AS AFFECTED BY THE PLEADING.

Common-Law Pleading. — The common-law system of pleading, even as amended by the statute of 4 Anne, chap. 16, sec. 4, was purely logical, and, by a syllogistic process, necessarily led to the production of an issue. Let us first consider the relation of the onus to this system. Pleading is defined to be "the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence" (1 Chitty, Pl. 213). The principles governing such pleading were formulated into rules, with many of which we have no concern. The subject under discussion mainly hinges upon the doctrine of variance. The proof must correspond with the allegation, and to the extent of such requirement, according to the rules, the burden of proof goes (Steph.[1] Pl. 107, 213, 339). If the facts pleaded do not amount in law to a cause of action, *ex. gr.*, if A should sue B for sinking a shaft in his (B's) soil, whereby the supply of water to A's well is cut off (Broom, Leg. Max. 364, 365; Acton *v.* Blundell, 12 M. & W. 324), the question of the burden of proof, as distinguished from the burden of argument, does not arise, as, in such case, the defendant can demur, move in arrest of judgment, or bring a writ of error. If, on the contrary, the declaration states a cause of action defectively, unless a special demurrer should be interposed, the pleader may nevertheless proceed and prove his case — certainly under the exercise of the power of amendment (Garrett *v.* Trotter, *infra;* Steph. Pl. 168-9). For the distinction between the statement of a defective cause of action and the defective statement of a cause of action, see 1 Chitty, Pl. 681; Garrett *v.* Trotter, 65 N. C. 430. Even if a special demurrer be interposed, an amendment is allowable whilst the proceedings are in paper (1 Tidd, Pr. 709, 710).

Let us consider, then, the relief of the onus by demurrer. It is well settled that a demurrer admits all such matters of fact as are sufficiently pleaded (Steph. Pl. 161; Gould, Pl.

[1] The edition of Stephen cited is the first American.

chap. 9, secs. 3, 4; Tuck. Pl. 102; 1 Chitty, Pl. 662), and it almost amounts to a confession of such matters informally pleaded as are remedied and helped by the statutes of jeofails and amendment (Arch. Civ. Pl. & Ev. 350). The burden of proof is thus discharged, and the burden of argument imposed on the demurrant.

Supposing that the pleading sets forth facts sufficient to constitute a cause of action or ground of defence, the general rule is that the onus is upon the party so pleading, to establish such facts. And it is sufficient if the substance of the issue be proved (1 Greenl. Ev. sec. 56). And this burden may be uselessly incurred by the statement of unnecessary matter: thus, if a party take upon himself to allege a particular estate, where it was only required of him to show a general or even less estate, title, or interest, the adversary may traverse the allegation, and if it be untrue, the party will fail (1 Chitty, Pl. 228, 229 and notes). So, material matter may be alleged with such unnecessary detail of circumstance or particularity, the essential and immaterial parts being so interwoven, as to expose the whole allegation to a traverse and the consequent necessity of proof to the full extent to which it is carried by the pleading (*ib.* 229); but, if the matter be wholly foreign and irrelevant to the cause, it will be rejected as surplusage under the maxim *utile per inutile non vitiatur* (*ib.* 229 *et seq.;* Steph. Pl. 419; 1 Greenl. Ev. sec. 60 and note 4; Arch. Pl. & Ev. 111; Broom L. M. 604, note 3; 1 Saund. Pl. & Ev. 416; Gould, Pl. chap. III. sec. 170). And the want of a *videlicet* will, in some cases, make an averment material that would not otherwise be so, and necessitate its proof (1 Chitty, Pl. 317, 318, note 2; 1 Greenl. Ev. sec. 60; Arch. Civ. Pl. & Ev. 127; Steph. Pl. 312; but see Gould, Pl. chap. III. secs. 35–41).

Suppose the general issue to be interposed: we will then inquire upon whom, and to what extent, is devolved the burden of proof. In doing so, however, the author proposes to omit all mention of real actions, and all that class of actions which have never obtained in the United States, such as formedon, *quare impedit*, etc., etc.

Account. — Debt. — Detinue. — Trespass. — Assumpsit.

In an action of account, where the plea of the statute of limitations is interposed, the plaintiff replies that the accounts were merchants' accounts; to which the defendant rejoins that the accounts were not open and current, but were liquidated and closed more than six[1] years before action brought, which the plaintiffs traverse, the issue is substantially framed, not on the replication, but on the rejoinder, and therefore, the burden of proof is not on the plaintiff to show that the accounts continued open, but on the defendant to show that they were liquidated and closed (McClellan *v.* Crofton, 6 Me. (6 Greenl.) 308).

In debt on specialty and in covenant, *non est factum* denies the deed alleged; under this the plaintiff has the burden to offer evidence of the execution of the deed, after which the defendant may show either that he never executed it or that its execution was void in law (Steph. Pl. 176, 177).

In debt on simple contract, the general issue puts the plaintiff to proof of the debt, whereupon the defendant may show a release, satisfaction, arbitrament, and many other other defences (Steph. Pl. 177, 178).

In detinue the general issue devolves upon the plaintiff proof of property and detention, and in some instances demand and refusal; for, the defendant, under this plea, may show either as a fact that he does not detain, or, that the goods are not the goods of the plaintiff (Steph. Pl. 178).

In trespass, the plaintiff has the onus, upon not guilty pleaded — the defendant, except in trespass *quare clausum fregit*, being confined to showing that he did not, as a fact, commit the trespass.

In assumpsit, the burden is upon the plaintiff to show, under the general issue, the contracting of the debt or demand, the inducement, contract, or agreement itself; that it was made with plaintiff and by the defendant; that it was founded on a sufficient legal motive, inducement, or consideration; that the subject-matter of it was to perform some

[1] Or, the number prescribed by the local statute.

legal act, or omit to do something, the performance whereof is not required by law; that the plaintiff has performed all conditions precedent, and, if necessary, given defendant notice of an act, or requested him to perform the contract; that the defendant has not performed it; and the damages (1 Saund. Pl. & Ev. 140). The defendant under *non assumpsit* could show release, performance, or any other circumstance, by which the debt or liability was disproved. Thus, although the general issue is that he did not assume, etc., he is allowed to show under it, matters strictly in confession and avoidance, and thus prevent the shift of the burden (Steph. Pl. 179 *et seq.*). The same principle is applicable to the action of trespass on the case (Steph. Pl. 182, 183), so far as the defendant is concerned.

The general issue in replevin imposes on the plaintiff the burden of showing the taking of the property in the place stated in the declaration (2 Saund. Pl. & Ev. 767; Steph. Pl. 183).

If *non cepit* be not interposed, the onus is with the defendant (*ib;* 2 Saund. *ubi supra*).

In this action upon avowry or cognizance, the defendant becomes the actor, and the plaintiff the reus, thus postponing the order of pleading one step (Steph. Pl. 218, note *o*), and the defendant, as stated above, holds the burden of proof.

We will now proceed to state the instances in which, by virtue of the rules of pleading, the pleader is relieved from proof of facts alleged. When a demurrer or dilatory plea is not interposed, the pleading resolves itself either into a traverse or a pleading in confession and avoidance. When a traverse is used, except perhaps the special traverse with the *absque hoc*, the burden of proof is cast upon the party whose pleading is traversed. When a pleading in confession and avoidance is resorted to, the facts of the next precedent pleading are admitted, and the onus shifted. We will now proceed to illustrate these views.

When the defence is by a plea in confession and avoidance, the plaintiff is relieved of the onus, and it is devolved upon

the defendant, as it is of the essence of this plea to confess the plaintiff's cause of action (Arch. Civ. Pl. & Ev. 217; 1 Chitty, Pl. 526) — sometimes styled "giving color" (Steph. Pl. 220 *et seq.*; Tuck. Pl. 105) — even though the proof should be elicited on cross-examination (Foster *v.* Hall, 12 Pick. 89, reported in 22 Am. Dec. 400).

Again, it is a rule of pleading that every pleading is taken to confess such traversable matters alleged on the other side, as it does not traverse, to the extent even of creating an estoppel (Steph. Pl. 234; Gould, Pl. chap. 3, sec. 167; Tuck. Pl. 149).

This rule gave rise to the protestation. Again, if one of the parties expressly avers or confesses a material fact before omitted on the other side, the omission is cured (Gould, Pl. chap. 3, sec. 192).

As to the allegation of title, the plaintiff must aver and prove his own title with accuracy (Steph. Pl. 321 *et seq.*), but need not allege and consequently prove the title of his adversary more precisely than is necessary to show a liability in the party charged (Steph. Pl. 336, 372 *et seq.*).

The reason being, that a party is presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own. It is, in general, sufficient to allege "a title of possession" but the burden can only be discharged by proving some present interest in chattels or actual possession of land (Steph. Pl. 336, 337). Title, except as involving an estoppel, must be strictly proved as laid (Steph. Pl. 338); wherein it differs from the allegations of time, place, quantity, and value, which are not required to be proved, as laid, if averred under a *videlicet* (Steph. Pl. 339); but if not laid under a *videlicet*, they must be proved as alleged (Steph. Pl. (time) 312, (place) 309, (quality and value) 318 and 339).

With regard to the name of a party sued, if inaccurate, it can only be taken advantage of by a plea in abatement, and is waived by a plea in bar (Steph. Pl. 320). And here it may be stated that all dilatory pleas impose the burden of proof on the party pleading them, where they involve a

question of fact as, *ex. gr.*, a misnomer — though they more often embrace a question of law — *ex. gr.*, a plea to the jurisdiction. So authority must be shown strictly (Steph. 342).

The pleader need not state many matters, such as evidential facts, the public law, and facts of which the court takes notice, *ex officio*, and many other matters which are enumerated in the text-books (Steph. Pl. 348, 351, 353, 354; 1 Chitty, Pl. 214, 220, 221), and consequently they need not be proved. Nor, matter which would come more properly from the other side (Steph. Pl. 354; 1 Chitty, Pl. 222–225), unless in the pleas of estoppel and alien enemy (Steph. Pl. 357).

Nor, is it necessary to allege and consequently to prove circumstances necessarily implied (*ib.*).

Nor, what the law will presume (Steph. Pl. 358).

Where profert must be alleged in pleading, the party so pleading must make it (Steph. Pl. 439 *et seq.*).

In trespass in ejectment, as noticed *ante*, 302 in note, as by rule of court the fictitious lease, entry and ouster are admitted, the lessor of the plaintiff has only the burden of proving title — which he must do as against all the world or as against the defendant, by estoppel — and possession by defendant at the commencement of the action.

Not only is the plaintiff relieved from the burden of proof, when a plea in confession and avoidance is interposed, but, if such plea is faulty on general demurrer, he is entitled to a judgment as upon confession, even after a verdict found in favor of such plea; such judgment being styled *non obstante veredicto*, though, more accurately, a judgment as upon confession (Steph. Pl. 117, 118; 1 Chitty, Pl. 656, 657; 2 Tidd, Prac. 921, 922; 2 Arch. Prac. 261; Kerr, A. at L. 292; Smith, A. at L. 161; Broom, L. M. 138, 139; Gilbert, C. P. 126; 3 Steph. Com. 629; Gould, Pl. chap. X. sec. 46).

This, however, is only allowable in very clear cases.

If the attorney should, in his pleading, switch off to the side track of immaterial issues, the record will be backed on to the main track of true pleading, by the award of a repleader — see principle discussed in the text-books last cited, in im-

mediate connection with judgments *non obstante*, and Gould, Pl. chap. X. sec. 29 *et seq.*

We will conclude the discussion of the common-law pleadings by an illustration of the shift of the burden thereunder.

Declaration; on a single bill.

Plea; infancy.

Burden assumed by the defendant.

Replication; ratification, in writing under seal after arrival at full age.

Burden shifts to plaintiff.

Rejoinder; ratification extorted under duress.

Burden shifted to defendant.

Sur-rejoinder; re-execution after the cesser of the duress.

Burden shifted to plaintiff.

Rebutter; arbitrament and award for defendant.

Burden shifted to defendant.

Sur-rebutter; countermand of submission by plaintiff.

Burden shifted to the plaintiff.[1]

We will next discuss the subject of the hearing of the onus upon equity pleading.

Equity Pleading. — The answer itself may admit the allegations of the bill, or enough of them to entitle the plaintiff to a decree, but, if it contains a denial of the statements of the bill, commonly termed "swearing away the equity," the plaintiff has imposed upon himself the burden of proving his case — which he is not permitted to do, as at law, by one witness, but is required to produce two witnesses, or, one with corroborating circumstances (Tam. Ev. 1; Gres. Eq. Ev. 4; Adams, Eq. 21, note 2; 2 Dan. Ch. Prac. 404; 1 Smith, Ch. Prac. 348; Kerr, F. & M. 389; Sands' Suit in Equity, sec. 201; 3 Greenl. Ev. sec. 289 and note 5; *ib.* sec. 354; 2 Story, Eq. Juris. sec. 1528; Hughes *v.* Blake, 6 Wheat. 453; Zeigler *v.* Scott, 10 Ga. 389, reported in 54 Am. Dec. 395).

As to the quantum of proof required to overcome the posi-

[1] If the reader should desire to call a halt here with a hearty laugh, he is referred to the case of Stradling *v.* Stiles, appendix to Warren's Law Studies and Chap. XXI. (Pleading) of the Comic Blackstone.

tive denial of the answer, that matter need not be further discussed.

The rule with regard to pleas is different.

Pleas are either affirmative, negative, or anomalous, and are used to reduce the litigation to a single point or issue, and apply to various matters with which we have no concern (see, however, Adams, Eq. 336 *et seq.*, and the other text-books cited, title PLEAS).

The burden of proof, when a plea has been allowed or replication filed, is stated, in the books, to be upon the defendant (2 Dan. Ch. Prac. 223, 224; Adams, Eq. 342; Story, Eq. Pl. sec. 697; Hughes *v.* Blake, 6 Wheat. 453; Mitford, Pl. 243, 302).

It is quite surprising that we nowhere find the reasons given for this imposition of the onus. We can readily see it when addressed to affirmative pleas, as they are, *proprio vigore*, in confession and avoidance; but to hold that the defendant is bound to prove a negative plea seems to violate both analogy and principle. It may have arisen from the fact that for some time negative pleas were not allowed, and as the expression that the defendant must prove his plea was then strictly correct, it was inadvertently brought forward in the text-books after negative pleas were established. We have the high authority of Mr. Beames for the position that the analogy, on principle, between pleas in equity to the relief, and pleas at law, is sufficiently uniform, and may generally be appealed to (Beames, Pl. in Eq. 123–128).

In Phelps *v.* Sproule, 1 My. & K. 231 (7 Cond. E. Ch. 19), it seems to be assumed that the plaintiff would have the burden; the plea being overruled because it did not give the plaintiff an issue to try. The author has examined nearly all of the text-books, including books of evidence, and finds nothing more than is hereinbefore stated touching the burden of proof as to negative pleas. There seems to be an obvious reason why the burden should be upon the plaintiff in an issue based on a negative plea. It is this: if the defendant answers and denies, he not only forces the burden on the

plaintiff, but to the extent of two witnesses, or, one with corroborating circumstances; then, *cui bono*, file such a plea, if by so doing, although the issue presented is precisely the same, he loses the advantage of forcing the burden — and such a heavy burden — upon the plaintiff, and becomes obliged to take it upon himself? If such had been the English practice, the negative plea would never have been resorted to.

Pleading in Ecc. Courts. — Concerning the burden of proof, as affected by the pleadings in the English ecclesiastical courts, little need be said. The only two subjects which could be used, even by way of reference, in this country, being the probate of wills, and divorce and alimony.

The former has been discussed very fully under the titles INSANITY and WILLS, and the others under titles DIVORCE and ALIMONY.

The pleadings in this court are framed upon precedents in the civil and canon laws, and do not necessarily lead to the production of an issue.

There is no trace of analogy between them and common-law pleadings, and but little to the system of equity pleading. They may be termed *sui generis*. As these courts not only allow, but encourage, the averment of evidential facts, which is a mode of pleading condemned as repugnant both to the common-law and code systems (Bliss, Code Pl. sec. 206 *et seq.*), no useful purpose can be subserved by a discussion of that system in its bearing on the subject-matter of this treatise.

Admiralty Pleading. — The onus as affected by the pleading, which obtains in the courts of admiralty, will now be considered.

Its proceedings are, in form, according to the method of the civil law, like those of the ecclesiastical courts (3 Black. Com. 69); but, in general, the rules as to the burden of proof are the same as at common law (3 Greenl. Ev. 402).

In these courts, the generally recognized rule is, that the obligation of proving any fact is, ordinarily, incumbent on him who alleges it (*ib.* sec. 404).

And, generally, where the law presumes the affirmative, the

proof of the negative is thrown on the other side; and when any justification is set up, the burden of proof is on the party justifying (*ib.*).

The pleading on the part of the actor is styled a libel, information, or libel of information; that, on the part of the defendant, is termed an answer, or, claim and answer.

The defendant is required, as in equity, to answer under oath (*ib.* sec. 395), and the libellant may be required to answer under oath interrogatories propounded at the close of the answer (Rules Sup. C. U. S. No. 32); but the rule requiring two witnesses, or one with corroborating circumstances to countervail the answer, does not obtain in these courts (3 Greenl. Ev. sec. 413).

No replication is allowed, but is presumed where new facts are alleged in the answer (Rules, No. 51).

In general, when a denial is set up by the answer, the burden of proof is upon the libellant; but if the defence be substantially in confession and avoidance, the burden is devolved upon the defendant or claimant (3 Greenl. Ev. sec. 404; The Short Staple, 1 Gall. 104; Ten Hds. Rum, *ib.* 188).

In reference cases arising under the laws of the United States, the onus is imposed, *sub modo*, upon the claimant, by statute.

Where the fact is clear and the explanation doubtful the court judges by the fact (The Union, 1 Hagg. 36; The Paul Sherman, 1 Pet. C. C. 98).

Pleading in Courts-Martial. — We will next advert to the onus as affected by the pleading in courts-martial.

They are, in general, bound to observe the rules of evidence, by which the ordinary courts of criminal jurisdiction are governed (3 Greenl. Ev. sec. 476; Judge Ad. V. M. chap. IX.; De Hart, C. M. 334).

The pleading on the part of the government is by way of charge and specifications; that of the accused, by way of answer, which may be dilatory or peremptory, by way of traverse, or in confession and avoidance (3 Greenl. Ev. secs. 472, 473; Judge Ad. V. M. chap. VI.; De Hart, C. M. 138 *et seq.*, 284).

Code Pleading.

As, in other courts, it lies upon the prosecution to prove the substance of the issue or charge (3 Greenl. Ev. sec. 480; Judge Ad. V. M. sec. 344; De Hart, C. M. 364).

Time and place need not be proved as strictly as in the ordinary courts (Judge Ad. V. M. secs. 345–347); but, if the jurisdiction of the court is limited to a particular territory, the offence must be alleged and proved to have been committed therein (3 Greenl. Ev. sec. 481).

Code Pleading. — We now come to discuss the subject of the burden of proof as affected by the code system so generally prevalent in the United States.

The general principles by which the burden of proof is assumed, cast, or shifted, which flow from the common-law system, are, alike, applicable to the system prescribed in the codes of remedial justice.

The form of the pleading, owing to the abolition of the distinction between the forms of suits in equity and actions at law, is not necessarily strictly analogous to either that which prevailed under the common-law or equity system. It is a statement of the facts, from which, assumed to be true, a cause of action flows. If the facts are such that, under the former system, the courts of common law could have taken jurisdiction, then the pleading is assimilated to that which obtained in those courts. If, however, the facts show such a legal grievance, as, under the former system could not have been brought before those tribunals, but one which the courts of equity would have taken cognizance of and administered, then, the pleadings should be modelled after those which prevailed in the latter courts.

And where there are several causes of action, which, by the provisions of the local code may be joined, and some of them would have been cognizable in one, and, some in the other of those courts, they should be stated as separate causes of action, in analogy to separate counts, and framed, *mutatis mutandis*, according to the distinction above pointed out.

But these codes have gone a step further, and substantially abrogated many of the highly technical rules of the common

law, and, in doing this, have relieved the pleader, in many instances, from the burden of proof cast upon him under the former system.

As the pleadings under this system do not so converge as to cause the logical production of an issue, it must be eliminated by the attorneys, or, on disagreement, by the court. As this is done, after ample time allowed, it is rare that an instance will occur of a judgment *non obstante veredicto*.

The common-law doctrine of variance has been greatly modified, for, it is provided that, if the variance is such as not to have misled the opposite party, it is deemed innocuous (Pom. Rem. sec. 553).

There is one distinguishing feature, necessitated by the blending of the two former systems, and, which operates to relieve the burden. It is provided in the code that all material allegations, not controverted, are deemed admitted for the purpose of the action. This resulted in a judgment of *nil dicit* at common law; but, in equity, if an answer, failing to respond to material allegations, was not excepted to, the plaintiff was driven to his proof and lost the benefit of discovery (Pom. Rem. sec. 617).

In this, as in the former system, it is not necessary to allege or prove: —

1. Facts which the law presumes (Bliss, C. Pl. sec. 175);
2. Facts necessarily implied (Bliss, C. Pl. sec. 176);
3. Facts of which the court will take judicial notice (Bliss, C. Pl. sec. 177);
4. Or, conclusions of law (Bliss, C. Pl. sec. 210);
5. And irrelevant or redundant matter may be treated as surplusage (Bliss, C. Pl. secs. 214, 215).

Time need not be proved as laid, nor place in general, and no force is allowed to a *videlicet* (Bliss, C. Pl. secs. 282, 283). Bliss lays it down that, in actions touching real property, the complaint must allege, and consequently it must be proved that the realty is situate within the county where suit is brought (Bliss, C. Pl. sec. 284); but he cites no authority, and in view of the fact that the codes generally provide, as in the

New York code (Voorhies' Code, sec. 126), that if the county designated in the *complaint* be not the proper county, the action may nevertheless be tried therein; unless removed by the court on demand, it would seem that place is not a necessary averment, so as to impose the proof thereof and penalty of variance on the plaintiff.

It is presumed that allegations of quantity and value need not be proved strictly as laid.

In whatever form title may be alleged, it must be proved, as laid; and in an action by the assignee of non-negotiable, or, without endorsement, of negotiable, paper, the plaintiff must allege a transfer by sale or gift, and, of course, prove it (Bliss C. Pl. sec. 231; Abb. Tr. Ev. 1; Pom. Rem. sec. 128 *et seq.*).

Indeed, as the code system has, in effect, abolished champerty, the same rule applies to the transfer of any chose in action (Pom. Rem. secs. 125 and 144 *et seq.*).

If the action be brought by a plaintiff, holding the legal title for the benefit of others, he must allege and prove that he is a trustee of an express trust (Bliss, C. Pl. sec. 262 *et seq.*; Abb. Tr. Ev. 4 (7)).

In a suit by a corporation, according to Bliss, its capacity to sue must be stated with particularity (Bliss, C. Pl. sec. 246 *et seq.*; but see Abb. Tr. Ev. 18). But, when sued, it is sufficient to aver and prove its existence — as a party is presumed to know his own title, but not that of his adversary (Bliss, C. Pl. secs. 260, 310).

In actions upon parol contracts, the consideration must generally be averred and proved (Bliss, C. Pl. sec. 268).

With regard to conditions precedent, it is sufficient to aver performance generally, but this indulgence is only applicable to the pleading, and does not extend to the proof; the burden of showing performance resting upon the party pleading, in as full a degree, as at common law (Bliss, C. Pl. secs. 301, 302; Voorhies' Code, sec. 162 and notes).

So, in pleading judgments, the pleader is not required to state the facts conferring jurisdiction; but it cannot be pre-

sumed that this provision was intended to release the proof as required at common law (Bliss, C. Pl. sec. 303).

So, the mode of pleading private statutes has been materially changed, but the proof is left as before (Bliss, C. Pl. sec. 304). In libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff. This provision of the codes sweeps away the inducement, *colloquium* and *innuendo*, so far as they relate to the application of the defamatory words to the plaintiff, but, it is conceived that, this provision does not dispense with the proof, as theretofore required (Bliss, C. Pl. sec. 305; Voorhies' Code, 225, note *e*).

In an action or defence, founded upon an instrument for the payment of money only, it is sufficient, under the code system, to insert in the pleading a copy of the instrument, and to state that there is due to the plaintiff thereon, from . . . the adverse party, a specified sum which he claims (Bliss, C. Pl. sec. 306). If traversed, however, the burden of proof, as at common law, is not changed. This rule, however, is confined to the immediate parties to the transaction, and, where the liability is dependent upon facts *dehors* the paper, such facts must be alleged and proved (Bliss, *ubi supra*).

The consideration, in actions founded upon contract, may be averred in general terms (Bliss, C. Pl. sec. 308), but the proof, it is conceived, remains as it was before.

The foregoing remarks, as to the burden of proof, are predicated upon the supposition that the complaint or petition is traversed. If a pleading be so ambiguous or uncertain that the bearing of the onus cannot be discovered, it may be made certain by amendment; special demurrers, as at common law, being unknown to this system (Pom. Rem. sec. 596). The demurrer, under the new system, is general in *effect* — special in *form*.

We come now to consider the onus with reference to the

defence. The defence, under the code system, is threefold: —

First, A denial.

Second, New matter constituting a defence.

Third, New matter constituting a counter-claim.

It will be remembered that under the common-law system, the general issue amounted to a traverse of the facts stated in the declaration. The general issue, in form, is, under the code system, abolished, and if a traverse is adopted, it must be addressed to each allegation of fact, though, according to the weight of authority, the general issue may be substantially pleaded by denying "each and every allegation" of the complaint (2 Abb. Forms, 17), or "that no allegation thereof is true" (3 Tiff. & S. 128, No 170; Kellogg *v.* Church, 4 How. Prac. 339; Radde *v.* Ruckgaber, 3 Duer. 684; Bliss, C. Pl. sec. 327 *et seq.;* Pom. Rem. sec. 613; *contra*, Schehan *v.* Malone, 71 N. C. 440; Lewis *v.* Coulter, 10 Ohio St. 451).

If this form be permitted, or if the defendant, as once required in North Carolina, denies *seriatim* each allegation; in either case, the pleading amounts, substantially, to the general issue, and imposes on the plaintiff the burden of proof as heretofore stated. However, as the new procedure requires a statement of facts only, the scope of the denial is restricted to the facts as alleged, and not to the denial of collateral facts, which would tend to disprove the plaintiff's right (Bliss, C. Pl. sec. 327).

Thus, if the complaint alleges the making of a contract, and this is denied, the defendant cannot show coveture, as in *non assumpsit* at common law, but is restricted to the proof of facts which go *directly* to disprove the fact denied (Bliss, C. Pl. *ubi supra*, sees. 329, 352).

Evidence of facts, which admit the act charged but which avoid its force or effect, or, which discharge the obligation, is inadmissible; but facts may be shown, though apparently new matter, which, instead of confessing and avoiding, tend to disprove those alleged by plaintiff (Bliss, C. Pl. *ubi supra*).

Thus, in ejectment, the defendant, under a general denial,

may prove title in himself (Bliss, C. Pl. sec. 328, where various illustrations are given).

A different rule prevails in Missouri (Greenway *v.* James, 34 Mo. 327; Corby *v.* Weddle, 57 Mo. 452), and in some States, by statute, as in California (Bliss, C. Pl. sec. 329), but the weight of authority fully sustains the doctrine of the text.

This matter has an important bearing upon the burden of proof; for, if the rule be as held in Missouri, the burden remains with the plaintiff; but, if as held by the current authority, the defendant is driven to adopt a specific allegation in justification, or confession and avoidance, and, thereupon, the onus is shifted. The protestation is useless and giving color idle, as the pleadings are controlled by the inflexible provision that, whatever is not denied is admitted for the purposes of the action. And, as the answer is required to be verified if the complaint should also be, the statute of 4 Anne can be of but little avail, except as to defences founded in truth.

If the defendant, in his answer, makes a specific denial, the onus will remain with the plaintiff as to the controverted facts.

But, suppose the defendant answers by way of confession and avoidance, then, as we have seen, he will have admitted the facts pleaded by the plaintiff, by *failing to controvert them.* Then, the plaintiff needs no proof, and the burden is devolved upon the defendant (Pom. Rem. secs. 687, 692). The same principle, or rather statutory regulation, is applicable to the reply to a counter-claim; if the facts therein stated are not controverted, they are deemed admitted, and hence where the reply is by way of confession or avoidance the burden is shifted to the plaintiff, in whole or part, as dependent upon whether there is a single issue or several issues. We may, then, confidently lay it down that, under the remedial system, whenever to a complaint or counter-claim, respectively, there is only an answer or reply in avoidance filed, the burden is immediately taken by the defendant or plaintiff, as the case may be, to prove the facts so alleged in avoidance.

But as, under this system, it is the substance and not the shadow which is regarded, if the matter pleaded as an avoidance would really have been admissible in evidence under a general or specific denial, the answer would be treated as in denial, or, an amendment allowed to change its form. The codes generally provide that the court shall, at any stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party. Such an answer is analogous to a special plea under the former system, which amounted to the general issue but was faulty for want of color (Steph. Pl. 414); in which, however, had a fictitious color been inserted, the fault would have been cured (*ib.* 226–229).

Such a defect, at common law, was usually suggested by a special demurrer, but the defendant was generally allowed to withdraw it and plead the general issue. Now, if it amounts, substantially, to the general issue or general denial, why should it not, under the liberal system, be treated according to its legal effect? In this, as in other matters connected with the subject of pleading, it should also be remembered that the codes have abrogated the maxim of the common law *ambiguum placitum interpretari debet contra proferentem* and prescribe that, in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties (Pom. Rem. sec. 625 *et seq.* and sec. 546 *et seq.*). The doctrine of variance is applicable to trials under the reformed system in a modified form. The general rule is that the proof must correspond with the allegation, but not with that exact accuracy which obtained at common law — the variance to be obnoxious must be so glaring and substantial as to have misled the adverse party, that is, such should be its logical effect; otherwise the variance is regarded as immaterial (Pom. Rem. sec. 553 *et seq.*). The discussion of this point is without the scope of this treatise, and the reader is referred to the able treatise of Professor POMEROY ON REMEDIES AND REMEDIAL RIGHTS, for an exhaustive and comprehensive exposition of

this as well as all matters arising under the new procedure. If the pleading of new matter be not merely defensive, but amounts to a counter-claim, the defendant, *quoad hoc*, becomes an actor; and, if it be the *only* pleading employed by the defendant, he becomes *the* actor. In either case, he, by this mode of answer, takes upon himself the burden of proving the allegations contained in his counter-claim, to the same extent and with like measure of proof, as if they formed the subject-matter of a complaint; but, the right to open and conclude will depend upon whether the counter-claim is the only defence set up.

There is one peculiarity, growing out of the new system, which is anomalous, and, that is, when the answer does not state facts constituting a counter-claim, it is deemed replied to as upon a denial or avoidance as the case may require; so that the plaintiff forces proof from the defendant when his defence is in avoidance, although the facts to be used in reply amount to an avoidance — being thus entitled to a double chance.

As discovery is abolished under the reformed system, the answer in denial is not required to be overcome by two witnesses or one with corroborating circumstances, as in the equity practice.

Under all these systems of pleading there is one criterion furnished by the case of Amos *v.* Hughes (1 M. & Rob. 464), namely: suppose no evidence should be given, for whom ought the verdict to be rendered? This case may, therefore, with reference to the imposition or devolution of the onus probandi, be aptly styled our polar star.

Statute of Limitations.

In general when the plea of the Statute of Limitations is interposed, the burden of proof is upon the plaintiff (Abb. Tr. Ev. 822), but in trover it seems to be otherwise (1 Arch. N. P. 464).

THE RIGHT TO OPEN AND CONCLUDE.

Part VII.

THE RIGHT TO OPEN AND CONCLUDE.

This right is one highly prized in *nisi prius* trials. It not only confers the opportunity to make an impression at the outset that, with weak juries especially, may never be entirely effaced, but also, that boon, so coveted, in all controversies from the kitchen to the Senate — the last word. One has but to recur to the adjudged English cases, if his own observation is defective on the point, to appreciate the value of this right.

The case of Doe d. Bather *v.* Brayne, cited *infra*, a leading case on one point, is a complete illustration. There, in consequence of the erroneous ruling on the first trial, the defendant, being allowed this right, obtained the verdict; on the second trial the plaintiff, being allowed it, succeeded; and to like effect was Pool *v.* Huskinson, 11 M. & W. 827, note. The right is termed in the English authorities, the "right to begin"; but, as it embraces the right to conclude also, the more restricted title is discarded.

For illustrations of the value of this right, the reader is referred to the Appendix, which concludes this treatise.

It may be premised that in the Equity, Ecclesiastical, and Admiralty Courts, indeed, in all where the jury trial does not obtain, the point rarely, if ever, arises,[1] as a judge, who has,

[1] When there was bill and cross-bill and answers, the plaintiff was allowed to open and conclude by a very able court (Murphy *v.* Stults, 1 N. J. Eq. (Sax.) 560). Upon a rehearing, the party complaining of the decree is entitled to open and close (Sills *v.* Brown, 1 Johns. Ch. 444). And on appeal

presumably, accomplished the *viginti annorum lucubrationes,* and who, before his elevation, formed himself one of the forensic *dramatis personæ*, is not apt to be influenced by burning eloquence or pyrotechnic oratory,[1] and, even if exceptionally warmed up somewhat, he generally takes "cooling time" before delivering his opinion. It may be added that this right cannot form the subject of a bill of exceptions in the United States courts, but its determination is addressed to the discretion of the trial court (Day *v.* Woodworth, 13 How. 363; Hall *v.* Weare, 92 U. S. 728, 732). And in some of the States the subject is regulated by rules. In England the subject was formerly regulated, in a great measure, by the pleading rules of 3 & 4 Wm. 4, and now by the new pleading rules of Hil. Term, 16 & 17 Vict. (Pow. Ev. 171).

But, in reference to our own country, where no rules except in a few of the States have been promulgated, and even where they have been, in order to direct the judicial discretion, we shall have to recur to the principles of the common law, as applicable to the subject. As Best says, there are few points of practice more unsettled, and on which a larger number of irreconcilable decisions have taken place.

It is sometimes said that as the plaintiff is the party who brings the case into court, it is only natural that he should be first heard with his complaint, and in one sense of the word the plaintiff always begins, as, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But, as it seems agreed on all hands that the order of proving depends on the burden of proof, if it appears on the statement of the pleadings that the plaintiff really has nothing to prove — that the defendant has admitted *everything* alleged and takes on himself to prove

from a dismissal of a bill on demurrer, the plaintiff opens (Bishop *v.* Day, 13 Vt. 81). If a cause be submitted on bill, answer, and general replication, the defendant is entitled to the conclusion (Fall *v.* Simmons, 6 Ga. 265). Sands says the plaintiff usually opens and closes (Sand's Suit in Eq. 110, § 235; Guerry *v.* Perryman, 6 Ga. 119). We have been unable to find the point anywhere discussed in the English authorities.

[1] "He looks and laughs at a' that."

something which will defeat it — he ought to be allowed to begin, as the burden of proof lies on him. But, as already observed, the authorities on this subject present almost a chaos. This much is certain: if the onus of proving the issues, or even any one issue, lies on the plaintiff, he is entitled to begin; it seems, also, that if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff *could* recover are either nominal or mere matter of computation, here, also, the defendant may begin. But the difficulty is, where the burden of proving the issue lies on the defendant, and the onus of proving the amount of the damage lies on the plaintiff.

A series of cases (not, however, unbroken, for there were several authorities the other way), concluding with that of Cotton *v.* James, in 1829, established the position that the onus of proving damages made no difference, and that, under such circumstances, the defendant ought to begin.

Of these the most remarkable is that of Cooper *v.* Wakley, in Dec., 1828, where it was held by Lord Tenterden, C. J., Bayley, Littledale, and Parke, JJ., that in an action by a surgeon for libel, in imputing to him unskilfulness in performing a surgical operation, if the defendant pleads a justification, he is entitled to begin.

Thus matters stood until the case of Carter *v.* Jones, in 1833, which was also an action for libel, to which a justification was pleaded, and, on the right to begin being claimed by the defendant, Tindal, C. J., before whom the case was tried, said that a rule on the subject had been come to by all the judges. He then stated *verbally* the nature of that rule, but his language is given very differently in the two reports of the case. In the 6 Carrington & Payne, it is thus: "The judges have come to a resolution that justice would be better administered by altering the rule of practice, and that in future the plaintiff should begin in all actions for personal injuries, and also in libel and slander, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. It is most reasonable that the plaintiff who brings his case into court should be heard first to establish his complaint."

Celebrated Rule.

In the 1 Moody & Robinson it is thus: "A resolution has recently been come to by all the judges, that in case of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant."

Many questions, as might have been expected, arose as to the extent of this rule, and especially its applicability to actions of contract; but a new light was thrown on the whole subject in the case of Mercer *v.* Whall, which came before the Court of Queen's Bench in 1845. LORD DENMAN, C. J., in delivering the judgment of the court, stated that the rule promulgated by Chief Justice Tindall, in Carter *v.* Jones, had originally been reduced to writing, and signed with the initials of the judges, and was then in his own possession; that its terms were that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." His lordship added "that the rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old, which had been broken in on by Cooper *v.* Wakley, and that class of cases. Since Mercer *v.* Whall, the subject seems better understood, and whether the rule in Carter *v.* Jones is to be considered as declaratory or enacting, it certainly is a great step in the right direction, of restoring to the plaintiff his natural right of beginning, whenever he has really anything to prove" (Best, Ev. 475–477 *et seq.*; 3 Chitty, Gen. Prac. 872 *et seq.*; 1 Arch. N. P. Introd. 4 *et seq.*; 1 Greenl. Ev. secs. 75, 76; 2 Phil. & Am. Ev. 834 *et seq.*; Roscoe, Dig. Ev. 131–133; 1 Arch. Pr. 191; Norr. Peake, 8, star note; 1 Stark. Ev. 382 *et seq.*; Best,[1] Begin, *passim*; Greenl. Over. Cases, title Mills *v.* Barber.

[1] The profession, especially the younger branch, are under great obligations to Mr. Crandall for republishing, with discriminating notes, Mr. Best's little treatise on the "Right to Begin." It ought to be in the hands of every student. It is a matter of regret that the learned editor should have failed to correct proof of the table of cases; the alphabetical arrangement is not correct, and the names often blunderingly spelled.

In those jurisdictions where the former system of pleading prevails, a criterion was, in general, furnished by principles which may be thus formulated: —

RULE I. *The party who adds the similiter*[1] *has the right to open and conclude* (Arch. N. P. Introd. 5; Best, Beg. §§ 34, 114); or, as it may be otherwise stated,

RULE II. *The party on whom, by the record, the burden of proof lies, has generally and prima facie such right* (Best, Begin, § 33; List *v.* Kortepeter, 26 Ind. 27; Harvey *v.* Ellithorpe, 26 Ill. 418; Tipton *v.* Triplett, 1 Met. (Ky.) 570.

Or, the general principle laid down in the celebrated rule first promulgated by ALDERSON B. in Amos *v.* Hughes, 1 Moo. & Rob. 464, furnishes a test.

RULE III. *The party who would fail, if no evidence were given, shall open and conclude* (Best, Ev. 294; 3 Field, Law Briefs, sec. 310; 1 Arch. N. P. Introd. 5; Best, Beg. § 7, and note 1; Mills *v.* Barber, 1 M. & W. 426; Leete *v.* Gresham &c. Co., 15 Jur. 1161, reported in 7 E. L. & Eq. R. 578; Rogers *v.* Diamond, 13 Ark. 474; Colt *v.* Beaumont, 31 Mo. 118; Viele *v.* Germania &c. Co., 26 Iowa, 9). Or, it may be put thus: —

RULE IV. *The party who has to maintain or prove the only affirmative, or all of the affirmatives, must open and conclude* (3 Chitty, Gen. Pr. 873).

Or, subject to modification: —

RULE V. *Wherever, from the state of the record, there is anything to be proved by the plaintiff he is entitled to open and conclude* (Best, Beg. § 70, and note 1).

In criminal prosecutions, there is a difference between the English and American practice, and a discrepancy in the de-

[1] Perhaps it may not be considered impertinent to state, for the benefit of the young practitioners under the code system, as the *similiter* is unknown to it, that under the common-law system of pleading, the rule was, that upon a traverse, issue must be tendered by this formula: "And of this the said —— puts himself upon the country." And then, by virtue of another rule, viz., that when issue is well tendered it must be accepted, the opposing party must do so in this form: "And the said A B doth the like." This was called the *similiter* (Steph. Pl. 247, Rule II. 253, Rule III).

cisions under the latter. As to the English practice, the principle may be thus formulated: —

Rule VI. *In ordinary prosecutions tried upon not guilty pleaded (not conducted by the attorney or solicitor-general), if the prisoner offers no evidence, he is entitled to begin; but, when conducted by those officers, they have the right to reply, although no evidence be offered for the defence* (1 Chitty, Cr. Law, 627, 628; Rex *v.* Abingdon, 1 Esp. N. P. 226; Norr. Peake, Ev. 8, star note; Reg. *v.* Radcliffe, 1 Wm. Black. 3;[1] Best, Beg. §§ 114, 141, 142; Reg. *v.* Gardner, 1 C. & K. 628 (47 E. C. L. R.); Reg. *v.* Toakley, 10 Cox, C. C. 406; Reg. *v.* Barrow, *ib.* 407; State *v.* Millican, 15 La. Ann. 557; U. S. *v.* Bates, 2 Cranch, C. C. 405; Reg. *v.* Briggs, 1 F. & F. 106). The rule above stated was formerly applied to all cases when the defendant offered testimony (Best, Beg. §§ 134–136), but under 6 & 7 Wm. 4, the judges adopted a rule allowing counsel for the prosecution the reply when evidence was given by the defence, but therein suggesting that such counsel exercise a cautious discretion in the assertion of such right (see rule, Best, Beg. § 136).[2] Since then it has been held that, when the evidence is confined to character, the prosecution shall not open and close (Patteson's Case, 2 Lew. C. C. 262; Reg. *v.* Dowse, 4 F. & F. 492; but see Rex *v.* Stannard, 7 C. & P. 673 (32 E. C. L. R.)). If the defendant offers no evidence[3] (except in England, when the prose-

[1] Our master, however, in his report, says that this was "contrary to all practice, as no evidence was given by the prisoner."

In Rex *v.* Christie, 1 F. & F. 75, Martin, B., intimated that he thought the reply on behalf of the crown a bad practice, and that he should confine the right to the attorney-general in person. As to the order of address where there are several defendants represented by different counsel, see Reg. *v.* Meadows, 2 Jur. (N. S.) 718; see also Reg. *v.* Holman, 3 Jur. (N. S.) 722; Reg. *v.* Thomas, 3 Jur. (N. S.) 272; Reg. *v.* Belton, 5 Jur. (N. S.) 276; Reg. *v.* Hazell, 2 Cox, C. C. 220; Reg. *v.* Martin, 3 Cox, C. C. 56.

[2] See Addenda to Best, Right to Begin.

[3] On a trial of an indictment against several, although only one offers testimony, this gives the right to reply, generally, to the prosecution; but if the evidence against two defendants affects them with different offences, such as larceny and receiving, and one calls witnesses, there is no right of reply against both (Reg. *v.* Blackburn, 3 C. & K. 330; 6 Cox, C. C. 333).

cution is conducted in person by the attorney or solicitor-general), he has the right, at least according to the weight of authority, to open and conclude (1 Chitty, Cr. L. 628, 629; Norr. Peake, Ev. 8, star note; State *v.* David, 4 Jones, 353).

On technical principle this view would seem to be erroneous as the prosecution adds the *similiter* (4 Black. Com. App. sec. 1).

It is likewise obnoxious to the test applied in Amos *v.* Hughes. It can only be supported upon the idea that the presumption of innocence attends the prisoner throughout the trial.

The doctrine seems to have been modified, however, in later cases (Reg. *v.* Blackburn, 3 C. & K. 330; Reg. *v.* Burton, 2 F. & F. 788; Reg. *v.* Christie, 7 Cox, C. C. 506). In one case denied (Reg. *v.* Taylor, 1 F. & F. 535).

RULE VII. *But if, instead of pleading not guilty, the prisoner pleads in abatement; to the jurisdiction; or in confession and avoidance, he has the right to open and conclude* (Rex *v.* Parry, 7 C. & P. 836 (32 E. C. L. R.); Best, Begin, § 114).

But this principle is not applicable to the defence of insanity, for, while practically this operates by way of confession and avoidance (unless otherwise prescribed by statute), it is admissible under the plea of not guilty (Loeffner *v.* State, 10 Ohio St. 598, reported in Law. Cr. Def. 432; State *v.* Felter, 32 Iowa, 49, reported in Law. Cr. Def. 371). If, however, the point is raised on an inquisition of insanity, in order to determine, as an independent question, whether by reason of mental alienation a prisoner should not be tried, or, having been tried, should be granted (if found insane) a new trial, the right to open and conclude is with the prisoner (U. S. *v.* Lancaster, 7 Biss. 440, reported in Law. Cr. Def. 897).

As to demurrers, the doctrine may be thus enunciated: —

RULE VIII. *In general, the demurrant has the right to open and conclude* (Man. Dem. 111; Bishop *v.* Day, 13 Vt. 81; Payne *v.* Hathaway, 3 *ib.* 212; State *v.* Rockafellow, 1 Halst. 334).

As to cross-demurrers, there are but three English cases

within our research, and they are diametrically opposed. In each, the defendant demurred first; in one he was allowed the privilege (Hilton *v.* Earl Granville, 5 A. & E. (N. S.) 701, 710) Ld. Denman observing "it is understood to be the practice that the party first demurring begins," whilst, in the other two, the right was accorded to the plaintiff, although the defendant demurred first (Parkison *v.* Whitehead, 2 Scott, N. R. 620; Williams *v.* Jarman, 13 M. & W. 128, 131). It is a noticeable coincidence that the first and last named cases were decided in the same year.

Rule IX. *In case of several issues raised, if the onus of proving any one of them lies on the plaintiff, he is always thereby entitled to the opening and conclusion* (Best, Beg. § 70).

In general, the right to open and conclude is governed by the principles formulated in the nine foregoing rules.

It may be stated conversely,—

Rule X. *If the only pleas are in confession and avoidance, the defendant begins.*[1]

And the rule applies to one of several defendants pleading affirmatively (Sodousky *v.* McGee, 4 J. J. Marsh. 267; Page *v.* Carter, 8 B. Mon. 192; Daviess *v.* Arbuckle, 1 Dana (Ky.), 525; Smith *v.* Sergent, 67 Barb. 243; Millerd *v.* Thorn, 56 N. Y. 402, 405; Elwell *v.* Chamberlin, 31 *ib.* 611; Hoxie *v.* Greene, 37 How. Pr. 97; Huntington *v.* Conkey, 33 Barb. 218).

"Thus, whenever the pleadings admit the plaintiff's whole cause of action, and attempt to avoid it by new matter, the defendant has the right to begin and close (Thurston *v.* Kennett, 22 N. H. (2 Fost.) 151; Ayer *v.* Austin, 6 Pick. 224). And so, if an answer admits the making and delivery of a promissory note, and sets up an affirmative defence, the affirmative is with the defendant, and he is entitled to open and close the case (Lindsley *v.* European Petroleum Co., 41 How. 56; Hoxie *v.* Greene, 37 *ib.* 97; Huntington *v.* Conkey, 33 Barb. 218). This rule applies where the sole defence to an action on contract is want of consideration (Hoxie *v.* Greene,

[1] It is well to be borne in mind that rules, on the subject, have been promulgated in North and South Carolina, Massachusetts, Indiana, and perhaps other States.

37 How. 97; Mills *v.* Oddy, 6 Carr. & Payne, 728); payment (Coxhead *v.* Huish, 7 *ib.* 63; Smart *v.* Rayner, 6 *ib.* 720); duress (Hoxie *v.* Greene, 37 How. 97); alteration (Barker *v.* Malcolm, 7 Carr. & Payne, 101); want of capacity to contract (Cannan *v.* Farmer, 3 Exch. 698); want of capacity to sue (Hoxie *v.* Greene, 37 How. 97); non-joinder of necessary party (Fowler *v.* Coster, 3 Carr. & Payne, 463); usury (Huntington *v.* Conkey, 33 Barb. 218; Elwell *v.* Chamberlin, 31 N. Y. [4 Tiff.] 611); counter-claim (Coxhead *v.* Huish, 7 Carr. & Payne, 63; Bowen *v.* Spears, 20 Ind. 146); or any of these defences combined (*ib.*; Hoxie *v.* Greene, 37 How. 97)" (3 Wait's Pr. 112, 113).

See also Best, Beg. §§ 33–36 and notes thereto; McRae *v.* Lawrence, 75 N. C. 289; Churchill *v.* Lee, 77 *ib.* 341; Hudson *v.* Wetherington, 79 *ib.* 3; Lexington &c. Co. *v.* Paver, 16 Ohio, 324; Brennan *v.* Security &c. Co., 4 Daly, 296; Birt *v.* Leigh, 1 C. & K. 611 (47 E. C. L. R.); Richardson *v.* Fell, 4 D. P. C. 10; Lacon *v.* Higgins, 3 Stark. 178 (3 E. C. L. R.); Woodgate *v.* Potts, 2 C. & K. 457 (61 E. C. L. R.); Smith *v.* Martin, 1 C. & M. 58 (41 E. C. L. R.); Brooks *v.* Barrett, 7 Pick. 94, 100; Phelps *v.* Hartwell, 1 Mass. 71; Blaney *v.* Sargeant, *ib.* 335; Crowninshield *v.* Crowninshield, 2 Gray, 524; Love *v.* Dickerson, 85 N. C. 5; Carrington *v.* Allen, 87 *ib.* 354.

Bills, Notes, etc. — On an affirmative plea defendant opens (Best, Beg. 90, note 1; Byles, Bills, 329; Smart *v.* Rayner, 6 C. & P. 721 (25 E. C. L. R.); Barker *v.* Malcolm, 7 C. & P. 101 (32 E. C. L. R.); Mills *v.* Oddy, 6 C. & P. 728; Bingham *v.* Stanley, 9 C. & P. 374 (38 E. C. L. R.); Lees *v.* Hoffstadt, *ib.* 599; Edge *v.* Hillary, 3 C. & K. 43; Smith *v.* Martin, C. & M. 58 (41 E. C. L. R.); S. C., 9 M. & W. 304; 1 D. N. S. 418; Mills *v.* Barber, 1 M. & W. 425; Cannan *v.* Farmer, 3 Exch. 698 (W. H. & G.); Warner *v.* Haines, 6 C. & P. 717 (25 E. C. L. R.); Faith *v.* McIntyre, 7 C. & P. 44 (32 E. C. L. R.); Edwards *v.* Jones, 7 C. & P. 633 (32 E. C. L. R.); Hoxie *v.* Greene, 37 How. Pr. 97; Lindsley *v.* European &c. Co., 3 Lans. 176; Ayrault *v.* Chamberlain, 33 Barb. 229; Brennan *v.* Security &c. Co., 4 Daly, 296; Morss *v.* Gleason,

64 N. Y. 204; Smith *v.* Sergent, 67 Barb. 243; Knight *v.* Pugh, 4 W. & S. 445; Huntington *v.* Conkey, 33 Barb. 218). If there are two counts, one on a bill, the other on an account stated — pleas, payment to bill, and non assumpsit as to the account — unless plaintiff will state that he proposes to offer evidence on the second count, the defendant begins (Best, Beg. § 76; Smart *v.* Rayner, 6 C. & P. 721 (25 E. C. L. R.).

Bonds. — On *solvit ad diem* the defendant begins (Sanford *v.* Hunt, 1 C. & P. 118 (11 E. C. L. R.); Brooks *v.* Clarke, 4 F. & F. 484; but as to penal bonds, see Sullivant *v.* Rearden, 5 Ark. 140).

Breach of Contract. — On any plea in confession and avoidance, the right is with the defendant (Steinkeller *v.* Newton, 9 C. & P. 313 (30 E. C. L. R.); Harnett *v.* Johnson, *ib.* 206; Coxhead *v.* Huish, 7 C. & P. 63 (32 E. C. L. R.); Rowland *v.* Bernes, 1 C. & K. 46 (47 E. C. L. R.); Patton *v.* Hamilton, 12 Ind. 256). On plea of exoneration, the right is with the defendant (Stanton *v.* Paton, 1 C. & K. 148 (47 E. C. L. R.); but see Harrison *v.* Gould, 8 C. & P. 580 (34 E. C. L. R.).[1] This action is embraced by the rule (Best, Beg. §§ 58, 66, 92).

Collision. — In collision, in admiralty, if the defendant by its plea makes no charge of contributive or other negligence, against the plaintiff's ship, but simply denies the averments of the petition, the plaintiff begins (Marpesia, L. R. 4 Priv. C. 212, reported in 3 E. R. (Moak) 92; Benmore, L. R. 4 Ad. & Ecc. 132, reported in 7 E. R. (Moak) 368).[2]

Covenants. — If the affirmative of the issue is on the defendant, he must begin, even though he concludes to the country[3] (Wootton *v.* Barton, 1 M. & Rob. 518; Lewis *v.* Wells, 7 C. & P. 221 (32 E. C. L. R.); Reeve *v.* Underhill, 6 C. & P. 773 (25 E. C. L. R.); Hill *v.* Fox, 1 F. & F. 136; Overbury *v.* Muggridge, *ib.* 137, note; Lewis *v.* Wells, 7 C. & P. 221; Norris *v.* Ins. Co., 3 Yeates, 84, reported in 2 Am. Dec. 360,

[1] This case was decided on the rule.

[2] Before the Marpesia the practice was the other way.

[3] Contrary to the general rule as to adding the *similiter* (1 Arch. N. P. 265).

362; Best, Beg. 118, in note, § 64 *et seq.* § 93). The rule does not apply to this action (Best, Beg. § 93).

Damages. — Let us next inquire what effect the claim for damages may have in determining the right to begin. All authorities agree that when the damages claimed, or rather claimable, are either nominal or liquidated, the right is not affected by their consideration (Best, Beg. §§ 46–49). The rock upon which the cases have split is when the damages are to be assessed within the discretion of the jury. In England, as we have seen, this matter, as to a certain class of actions, is governed by rule. But, as the matter is, in general, *res integra* in this country, let us inquire what the English and American cases hold with reference thereto.

The decisions prior to the Judges' rule were not in harmony (Best, Beg. §§ 42–45). In Hodges *v.* Holder, 3 Camp. 366, and Jackson *v.* Hesketh, 2 Stark. 518 (3 E. C. L. R.), both actions of trespass *q. c. f.*, the defendants having interposed affirmative pleas, were allowed to begin. In neither of these cases did the question of damages enter into the decisions as an element. The next case was Robey *v.* Howard, 2 Stark, 555. This was tort, to which defendant pleaded in abatement; it was held that the plaintiff should begin, as it was at all events incumbent on him to prove his damages.[1]

The same ruling, substantially, was made in Lacon *v.* Higgins, 3 Stark. 178 (3 E. C. L. R.). Although all four sounded in damages, no stress, in the first two, was laid upon that fact, perhaps for the reason assigned by Best (Best, Beg. § 44).

The next case was Bedell *v.* Russell, R. & M. 293 (21 E. C. L. R.). That was an action for assault, — plea in justification and replication *de injuria*. On the argument only the two earlier cases were cited, and the two later, *supra*, escaped notice. The defendant was allowed to begin. The next case was Fowler *v.* Coster, 3 C. & P. 463 (14 E. C. L. R.); S. C., M. & M. 241. This was an action on an acceptance, to which there was a plea in abatement, yet the defendant was

[1] See note to Best, Beg. 102.

allowed to begin, although the point of proving damages was pressed. The next case was Cooper *v.* Wakley, 3 C. & P. 474 (14 E. C. L. R.); M. & M. 248. That was an action upon a libel; pleas in justification, replication *de injuria.* The only cases noticed were the first two and the last. The defendant was allowed to open. The next case was Cotton *v.* James, 3 C. & P. 505; S. C., M. & M. 277 (22 E. C. L. R.). The action was trespass for taking goods — justification pleaded. The defendant was allowed to begin. Mr. Best says that the cumulative effect of the last three cases was to overrule Robey *v.* Howard and Lacon *v.* Higgins. The next we cite is Morris *v.* Lotan, 1 Moody and Robinson, 233. This was assumpsit for goods sold — plea in abatement; the plaintiff was allowed to begin. Mr. Best argues strongly, giving several reasons, why this case should be considered not as authority (Best, Beg. § 54).[1] Mr. Best arrives at this conclusion: that, with the exception of those instances provided for by the rule, the mere onus of proving damages, whether nominal, liquidated, or unliquidated, general or special, does

[1] "Now here it must be remarked that, as the case alluded to by the Lord Chief Justice is not before us, we can form no judgment as to its applicability to the question under consideration; and as to the case of Morris *v.* Lotan itself, it cannot now be considered as an authority, for the following reasons: First, it was decided by a single judge, and is in express defiance (for to reconcile them seems altogether out of the question) of *four* others, Bedell *v.* Russell, Cooper *v.* Wakley, Cotton *v.* James, and Fish *v.* Travers, one of which (viz., Cooper *v.* Wakley) was decided by four judges; and in another (viz., Cotton *v.* James) the practice on this point was declared by Lord Tenterden to be settled. But if it be said the case of Morris *v.* Lotan is more recent than those mentioned, and for that reason entitled to the greater weight, it may be observed that the case of Morris *v.* Lotan, if correctly decided, establishes this, that the onus of proving damages (at least such as are unliquidated) *always* confers on the plaintiff a right to begin; now it will be presently seen that, since the decision in that case, the whole fifteen judges have come to a resolution that the practice in this respect required to be *altered*, and that the onus of proving unliquidated damages should, *for the future*, at least in some cases, confer a right to begin; whereas, if Morris *v.* Lotan were correctly decided, not only would such a rule be perfectly nugatory, but it would follow that *all* the judges had taken an erroneous view of the then existing practice." (Best, Beg. (Am. ed.) § 54). In this connection consult Wood *v.* Pringle, 1 M. & Rob. 277.

not, of itself, confer on the plaintiff the right to begin, when the onus [1] of proving the facts, in issue, lies on the defendant (Best, Beg. § 56). The rule,[2] Mr. Best says, is to be considered as a species of statute law on the subject. As, it is apprehended that this rule has never been adopted in this country, it is deemed unnecessary to go into a discussion of the cases predicated upon it, but the inquiring reader is referred to Best, Right to Begin, § 59 *et seq.* See also Wood's Mayne, Dam. sec. 784.

The general current of authority in the United States is to the effect that the matter of damages does not affect the right to open and conclude (Best, Beg. 100, note 1; *ib.* 103, note 1; *ib.* 117, note 1; McKenzie *v.* Milligan, 1 Bay, 248; Goldsberry *v.* Slaterville, 3 Bibb, 345; Downey *v.* Day, 4 Ind. 53; Vance *v.* Vance, 2 Met. (Ky.) 581; Coleman *v.* Hagerman, 5 City Hall Rec. 63; Moses *v.* Gatewood, 5 Rich. 234; Ransone *v.* Christian, 56 Ga. 351; Jewett *v.* Davis, 6 N. H. 518; Fowler *v.* Byrd, 1 Hempst. 213).

But, there are some American cases which follow in the rut and go beyond the later English cases, in holding, that where the plaintiff has anything to prove on the question of damages he must begin [3] (Huntington *v.* Conkey, 33 Barb. 218; Thurston *v.* Kennett, 22 N. H. 151; Belknap *v.* Wendell, 21 *ib.* 175; Comstock *v.* Hadlyme &c., 8 Conn. 254; Lexington &c. *v.* Paver, 16 Ohio, 324; Bowen *v.* Spears, 20 Ind. 146; Balto. &c. Co. *v.* McWhinney, 30 Ind. 436, reported in 5 Am. Rail. R. Rep. 312; Young *v.* Highland, 9 Gratt. 16; Cox *v.* Vickers, 35 Ind. 27; Opdyke *v.* Weed, 18 Abb. Pr. 223; Hecker *v.* Hopkins, 16 *ib.* 301; Beatty *v.* Hatcher, 13 Ohio St. 115). The case of Young *v.* Highland goes a bowshot beyond all the other cases, and applies the criterion of damages as giving the plaintiff the right regardless of the character of the *lis*.

A distinction was contended for in Fish *v.* Travers, 3 C. &

[1] *i.e.*, as determined by the record.

[2] Not adopted in this country acc. to Mr. Crandall (note 1, Best, Beg. 114).

[3] "'Tis so English, you know."

P. 578, between those cases involving general damages and that class where special damages are claimed, but it was rejected by the court, and the right to begin was awarded to the defendant, he pleading in justification (Best, Beg. § 52).

It has been held, since the publication of the celebrated rule, that, if it can be collected from the pleadings and statements of counsel, that substantial damages are the object of the action, the plaintiff has the right to begin, though all the issues are on the defendant (Hoggett *v.* Exley, 9 C. & P. 324 (38 E. C. L. R.); S. C., 2 M. & Rob. 281; Chapman *v.* Rawson, 8 A. & E. (N. S.) 673 (55 E. C. L. R.); City &c. *v.* Cobb, 21 Ind. 492); *aliter*, if real damages are not the object of the action (Burrell *v.* Nicholson, 1 M. & Rob. 304; S. C., 6 C. & P. 202 (25 E. C. L. R.)). And where the substantial question to be tried is a custom or right only, on affirmative pleas the defendant is entitled (Bastard *v.* Smith, 2 M. & Rob. 129). The case of Mercer *v.* Whall, 5 A. & E. (N. S.) 447 (48 E. C. L. R.), is now the guiding and leading English case on this point. It is ably commented on in Notes to Recent Leading Cases to be found in the June No., 1846, of Law Library. See also the following case decided subsequently to the rule, and which held the right to be with the defendant (Chapman *v.* Emden, 9 C. & P. 712 (38 E. C. L. R.)).

Archbold says, alluding to Mercer *v.* Whall "that, now, in all cases for unliquidated damages, the plaintiff must begin, no matter what the pleadings may be" (N. P. Introd. 5).

On principle, it would seem that the question of damages ought not to control the right. It is true that the plaintiff, when seeking unliquidated damages, must offer proof; this burden, though, is not a burden of proof as to the issue, but is only required to the end that, in the event the jury should find the issue in favor of the plaintiff, they might assess the damages at the same time, thus dispensing with a writ of inquiry. Mr. Crandall in his notes to Best, cited *supra*, has discussed the subject and demonstrated this view in a masterful manner; and see 3 Chitty, Genl. Pr. 873, note *r*; 1 Stark. Ev. 384.

Defamation.

Defamation. — In July, 1883, the English judges promulgated a rule diversely reported[1] in Carrington & Payne, and Moody & Robinson; see Carter *v.* Jones, 6 C. & P. 64; 1 M. & Rob. 281; the interpretation was given by Ld. Denman in Burrell *v.* Nicholson, 6 C. & P. 202; S. C., 1 M. & Rob. 304 thus: "It applies to cases where damages are the object of the action, and a justification putting the issue on the defendant, is pleaded; there the plaintiff must begin." The same learned judge also spoke of a rule adopted by Ld. Lyndhurst, C. B., Bayley, J., Taunton, J., and himself in these words "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative of the issue is on the defendant" (Mercer *v.* Whall, 5 A. & E. (N. S.) 447, 462). The report in Carrington and Payne is probably the more correct; see their note to Aston *v.* Perkes, 9 C. & P. 231 (38 E. C. L. R.). It is apprehended that neither of these rules have been adopted in this country, unless perhaps in the State of New York.[2]

It is true that Ld. Denman says, in Mercer *v.* Whall, that the judges did not intend to make law by adopting those rules. Then, what was the governing principle before? Tested by the principle of adding the *similiter* or that laid down in Amos *v.* Hughes, it is clear that the case of Cooper *v.* Wakley, 3 C. & P. 474 (14 E. C. L. R.); S. C., M. & M. 248, overruled by Mercer *v.* Whall, was correctly decided. Whether the circumstance, that from the nature of the action unliquidated damages are sought, should affect the question, is discussed *infra*. Cooke, following the rule, lays it down that "according to the recent resolutions of the judges, the plaintiff shall begin in all actions for libel and slander; and this, though the general issue be not pleaded, and the affirmative of the issue lies on the defendant" (Cooke, Def. 169). Mr. Townshend says, "It is supposed that in actions for slander or libel, the plaintiff has, in every case, the right to begin" (Town. Sland. sec. 276). In Georgia the doctrine is

[1] See *ante*, 601, 602, for the diverse statements.

[2] See 3 Wait, Pr. 112; Best, Beg. 114, note 1.

held in accordance with the decision of Cooper *v.* Wakely (Ransone *v.* Christian, 56 Ga. 351), so in South Carolina (Moses *v.* Gatewood, 5 Rich. 234).

Debt on Penalty. — On a plea in confession and avoidance the right to open and close is with the defendant (Silk *v.* Humphrey, 7 C. & P. 14 (32 E. C. L. R.); Best, Beg. § 61).

Ejectment. — At an early period it was held by the English courts that in case of heir and devisee, the latter, admitting the seizin of the ancestor and that the plaintiff is heir, was entitled to begin (Goodtitle *v.* Braham, 4 T. R. 497; Doe *d.* Corbett *v.* Corbett, 3 Camp. 368; Doe *d.* Wollaston *v.* Barnes, 1 M. & Rob. 386; Doe *d.* Smith *v.* Smart, *ib.* 476; Sutton *v.* Sadler, 3 C. B. (N. S.) 87; Martin *v.* Johnston, 1 F. & F. 122). After several qualifying decisions (Doe *d.* Warren *v.* Bray, M. & M. 166; Doe *d.* Tucker *v.* Tucker, M. & M. 536; Fenn *d.* Wright *v.* Johnson, Ad. Eject. 238, foot p., and 1 Am. ed. 259), it was finally settled that the defendant could only become entitled to this right by admitting the *prima facie* case of the plaintiff (Doe *d.* Bather *v.* Brayne, 5 C. B. (M. G. & S.) 655[1] (57 E. C. L. R.); Best, Beg. §§ 35, 101 *et seq.;* Adams, Eject. 238 (4 Am. ed. reference to foot paging);[2] Doe *d.* Pile *v.* Wilson, 6 C. & P. 301; S. C., 1 M. & Rob. 323). The point is unnoticed by Mr. Tyler. Mr. Crandall, who has so ably edited Best's Right to Begin, fails to observe upon it, and no American case recognizing such practice has fallen under our observation. That it is wholly contrariant to principle there can be but little doubt. It forces the acceptance of prejudicial terms; violates the rule touching the *similiter;* the principle laid down in Amos *v.* Hughes; and is almost *sui generis.* The modification introduced by Bather *v.* Brayne has shorn the evil of its most objectionable features, but even that case violates all principle, and confirms, in a modified form, an exceed-

[1] The earlier line of cases had the effect to compel the lessor to accept an admission which he did not want, and to conduct his case in a manner different from that which the state of the record had prescribed for the parties (note to Bather *v.* Brayne).

[2] It is surprising that Adams does not cite the settling case of Bather *v.* Brayne.

ingly pernicious practice. The practice, according to Archbold, is not applicable to other actions (1 Arch. N. P. Introd. 8;[1] Pontifex *v.* Jolly, 9 C. & P. 202 (38 E. C. L. R.)); but there are several American decisions to the contrary (City &c. *v.* Cobb, 21 Ind. 492; Katz *v.* Kuhn, Abst. 9 Rep. 632).

Eminent Domain. — Whatever may be the form in which this right is asserted, the opening and conclusion belongs to the party whose property is affected (Mills, Em. Dom. sec. 92; Conn. &c. Co. *v.* Clapp, 1 Cush. 559; Winnisimmet Co. *v.* Grueby, 111 Mass. 543; Burt *v.* Wigglesworth, 117 *ib.* 302;[2] M. & E. &c. Co. *v.* Bonnell, 34 N. J. L. 474; C. C. Ry. Co. *v.* Phillips, 78 N. C. 49; *contra*, Neff *v.* City, 32 Ohio St. 216; 6 C. L. J. 156, Abst).

Estates. — When an executor or creditor seeks to establish a claim against a decedent's estate, he is entitled to open and conclude (Yingling *v.* Hesson, 16 Md. 112).

Habeas Corpus. — The right in this instance is with the relator (*Ex parte* Bridewell, reported in 8 Rep. 689).

[1] The only English case *contra* is Lacon *v.* Higgins, 3 Stark. 176 (2 E. C. L. R.), but it has never been followed, and is doubted in Hill *v.* Packard, 5 Wend. 375. In the cases of Hill *v.* Fox, 1 F. & F. 136, and Overbury *v.* Muggridge, *ib.* 137 note, cited by Mr. Crandall in note to Best, Beg. 92, the plea was substantially in confession and avoidance; and neither Greenleaf or Phillips support his broad proposition. The cases cited from Cushing are predicated upon a rule of court. There is a manifest distinction between admissions *upon the record*, which must be by the pleading, and oral or written proffers to admit, *made on trial*. Even where equity directs an action of trover to be brought, and orders an admission by defendant of the finding and conversion, this does not give him the right to begin (Turberville *v.* Patrick, 4 C. & P. 557 (19 E. C. L. R.)).

Owing to the wide range allowed to the evidence, on the general issue in assumpsit, before the New Rules, 3 & 4 Wm. 4, an express admission at the trial, of the amount claimed, was treated as if, instead of the general issue, under which the affirmative defence was admissible, the same had been advanced by a plea in confession and avoidance. This was more peculiarly applicable to the common counts, as no special plea was admissible, because amounting to the general issue (Chew *v.* Close, 9 Phil. (Pa.) 211; Seneca &c. Co. *v.* Auburn &c. Co., 5 Hill, 178; Bonfield *v.* Smith, 2 M. & Rob. 519; Tindall *v.* Baskett, 2 F. & F. 644; Hayward *v.* Radcliff, 4 *ib.* 500; Blackledge *v.* Pine, 28 Ind. 466; Goodpaster *v.* Voris, 8 Iowa, 334).

[2] These cases were determined after the rescinding of the Common Pleas Rule of that court.

Insolvent Debtor. — On the plea of discharge the right is with the insolvent (Lambert *v.* Hall, 9 C. & P. 506 (38 E. C. L. R.)), but, on an issue of fraud it is with the creditor (Johnson *v.* Martin, 25 Ga. 268).

Insurance. — The authorities are in conflict as to who should open and close, and, the courts seem to have lost sight of the cardinal principle that the affirmative, in substance, should control the point, and, to have allowed the device of counsel to swerve their judgments; thus: In the leading case of Huckman *v.* Fernie, 3 M. & W. 505, the declaration set forth the statement upon which the policy was issued and averred the truth of its contents; the defendants pleaded the untruth of the statement and it was held that the plaintiff should begin. The principle, thus announced, was reiterated in the subsequent cases of Geach *v.* Ingall, 14 M. & W. 95, and Ashby *v.* Bates, 15 *ib.* 589; S. C., 4 D. & L. 33. In the later case of Leete *v.* Gresham &c. Co., 7 E. L. & E. R. 578; S. C., 15 Jur. 1161, where the plaintiff did not set forth the declarations, but, only declared on the policy and averred compliance with the statements, it was held that the defendant should begin; and, one of the reasons assigned by that eminent jurist, Baron Parke, was, that the plaintiff did not show what were the statements made in the proposal. So these cases may be reconciled; but the previous case at *nisi prius*, before Lord Denman, of Craig *v.* Fenn, 1 C. & M. 43 (41 E. C. L. R.) appears to be in all respects similar to the case of Leete; and, yet, his lordship held that the plaintiff should begin. This case is not cited by either Bunyon or May, in this connection, but is by Mr. Bliss. Lord Denman put his decision upon the ground that the plea and replication were both in the affirmative, but that the affirmative reply was equivalent to a traverse, and it falls properly within the denunciation of affirmative pleas amounting to the general issue. In a later case than all where the policy was to be cancelled in case of suicide, and there was a plea that the assured committed suicide, the defendant was allowed to begin (Stormont *v.* Waterloo &c. Co., 1 F. & F.

22; Hill *v.* Fox, 1 F. & F. 136; see also Terry *v.* Ins. Co., 1 Dill. C. C. 403). The reader is also referred to Buny. L. Ins. chap. 5, and Bliss, L. Ins. §§ 374, 377.

Issues directed. — The issue, as framed, generally indicating the right to open, *ex. gr.*, whether A was of sound mind — the right is with the party affirming the soundness (Frank *v.* Frank, 2 M. & Rob. 314); validity of a devise — with the devisee (Handley *v.* Stacey, 1 F. & F. 253); so, as to wills generally (Raudebaugh *v.* Shelly, 6 Ohio St. 307; Green *v.* Green, 3 Ohio, 278).

Interpleader. — When a claim of interpleader is denied by the plaintiff in the action, although in affirmative form, the right to begin is with the plaintiff of record (Hudson *v.* Brown, 8 C. & P. 774 (34 E. C. L. R.); Willis *v.* Stamps, 36 Tex. 48; but see Randolph Bank *v.* Armstrong, 11 Iowa, 515).

Mandamus. — The party showing cause begins (Rex *v.* St. Pancras, 3 A. & E. 535 (30 E. C. L. R.)).

False Return. — In an action for a false return to a mandamus, when the defendant replies and justifies, he is to begin (Bowles *v.* Neale, 7 C. & P. 262 (32 E. C. L. R.)).

Motions, Rules, etc. — The party making a motion is to go forward with the argument (Tarbel *v.* White River Bank, 24 Vt. 665; Mitchell's M. & R. 29 Pa.); but, if the motion is in the nature of a *rule nisi*, with a *prima facie* case made against the party showing cause, he is entitled to close (Boyce *v.* Burchard, 21 Ga. 74). If a motion is made to nonsuit[1] on a point of law, and the plaintiff's counsel answers it, the defendant's counsel has the right to reply on the law only (Arden *v.* Tucker, 1 M. & Rob. 191; Shotwell *v.* Mali, 38 Barb. 445). If, in the course of the trial, an objection of law, or, a question as to the admissibility of evidence be raised, the counsel making the point is entitled to open and conclude (Best, Beg. § 164).

Quo Warranto. — Information for a *quo warranto* is gov-

[1] Of course this means when such a proceeding is permissible by the *lex fori*.

erned by the analogy of civil actions and, if the relator's title be denied, he opens (Cole, Cr. Inf. 221; Best, Beg. § 98; Rex *v.* Yeates, 1 C. & P. 323 (11 E. C. L. R.); State *v.* Hunton, 28 Vt. 594), but it would seem to be otherwise in *quo warranto* for usurping a franchise, as the sovereign has the *prima facie* title, and it lies with the defendant to show his warrant or title (People *v.* Utica &c. Co., 15 Johns. 358; High Ex. Rem. sec. 652; see Part IV., title QUO WARRANTO *passim*).

Replevin.[1] — The same principle applies to replevin as to other actions; for, if the burden of proving one issue lies upon plaintiff, he begins (Best, Beg. §§ 72, 107). In Colstone *v.* Hescolbs, 1 M. & R. 301 (17 E. C. L. R.) where the defendant pleaded that the property was not the plaintiff's but that of a third person, the right to open was given to the defendant. This plea amounted to the general issue, and, it seems that the plaintiff should have opened. Such is the doctrine, at any rate, in this country (Robinson *v.* Colloway, 4 Ark. 94; Tomlinson *v.* Collins, 20 Conn. 364; Simcoke *v.* Frederick, 1 Ind. 54; Howland *v.* Fuller, 8 Minn. 50; Redman *v.* Hendricks, 1 Sandf. 32; Lester *v.* McDowell, 18 Pa. 91; Chambers *v.* Hunt, 3 Harr. (N. J.) 339; Harwood *v.* Smithurst, 29 N. J. L. 195; Kennedy *v.* Clayton, 29 Ark. 270). But, upon a plea of property in the defendant, the plaintiff begins (Marsh *v.* Pier, 4 Rawle, 273, 283; Williamson *v.* Ringold, 4 Cr. C. C. 365; Pennington *v.* Chandler, 5 Harr. 394; Anderson *v.* Talcott, 6 Ill. 365; Turner *v.* Cool, 23 Ind. 56; Henderson *v.* Casteel, 3 Cr. C. C. 365).

Trespass. — In trespass, with a plea of *liberum tenementum*

[1] By the codes of remedial justice, now so prevalent, the action for claim and delivery has superseded replevin, and the noticeable distinction between them is, that the latter is, except as to the preliminary procedure, equivalent to detinue; hence it is deemed sufficient to merely refer to the authorities on replevin (Best, Beg. § 107 *et seq.*; Curtis *v.* Wheeler, 4 C. & P. 196 (19 E. C. L. R.); Birt *v.* Leigh, 1 C. & K. 611 (47 E. C. L. R.); Steinkeller *v.* Newton, 9 C. & P. 313 (38 E. C. L. R.); Aston *v.* Perkes, *ib.* 231; Harnett *v.* Johnson, *ib.* 206; Collier *v.* Clarke, 5 A. & E. (N. S.) 467 (48 E. C. L. R.); Tunnicliffe *v.* Wilmot, 2 C. & K. 626 (61 E. C. L. R.).

or any other pleas in confession and avoidance, the defendant opens (Pearson *v.* Coles, 1 M. & Rob. 206; Bedell *v.* Russell, R. & M. 293 (21 E. C. L. R.); Aston *v.* Perkes, 9 C. & P. 231 (38 E. C. L. R.); Davis *v.* Mason, 4 Pick. 156); nor, is this right affected by a denial as to the force merely, justifying otherwise (Best, Beg. § 73; Jackson *v.* Hesketh, 2 Stark. 518 (3 E. C. L. R.); Hodges *v.* Holder, 3 Camp. 366); but, if the plea of not guilty is not entirely withdrawn, the right is with the plaintiff (Price *v.* Seaward, 1 C. & M. 23 (41 E. C. L. R.); Barry *v.* Butlin, 1 Curt. 637 (6 E. Ecc. R.); Ayer *v.* Austin, 6 Pick. 225; Chicago &c. Co. *v.* Bryan, 90 Ill. 126; see also Best, Beg. § 95 and note 1).[1]

But, if the general issue be pleaded — although accompanied with a memorandum in justification, an admission of title once in plaintiff and a proffer by defendant to assume the onus of proving his justification — the plaintiff is entitled (Ayer *v.* Austin, *supra;* Bangs *v.* Snow, 1 Mass. 181; Lunt *v.* Wormell, 19 Me. 102).

Usury. — On the plea of usury the defendant opens and concludes (Huntington *v.* Conkey, 33 Barb. 218; Ayrault *v.* Chamberlain, *ib.* 229; Central Bank *v.* St. John, 17 Wis. 157).

Wills. — There is a manifest distinction, as to the right to begin, between cases wherein the validity of a will is tested by a caveat and where some collateral point, necessarily however, deciding upon such validity, is ordered out of chancery. The latter instances we have discussed *ante*, 396 *et seq.* and 617. The former will now be treated.

We have discussed the subject of the onus probandi at some length, Part III. title WILLS, *q.v.* Unquestionably, in those jurisdictions where the onus probandi is held to be with the propounder, he opens and concludes (1 Wms. Exrs. (6 Am. ed.), bottom page 21, note x^3 at close; Ware *v.* Ware, 8 Me. 42; Boardman *v.* Woodman, 47 N. H. 120; 3 Greenl.

[1] In citing the note of the learned editor the author does not commit himself to the implication that title may not be shown under not guilty. A party cannot be guilty of trespass on property to which he has the title and the then present right of entry.

Cruise, 16, note 1 to page 14); see authorities collected, as to when the burden of proof rests upon the propounder, in Part III. title WILLS, and Part I. title INSANITY.

But, there is a discrepancy in the decisions of those courts, holding that the burden of proof is upon the caveator, as to his right to open and conclude. Some holding that the caveator should open and conclude when he does not deny the formal execution of the will (Chandler *v.* Ferris, 1 Harr. 460, 461; Bell *v.* Buckmaster, and Cubbage *v.* Cubbage, *ib.*; Mayo *v.* Jones, 78 N. C. 402; Syme *v.* Broughton, 85 *ib.* 367; Townshend *v.* Townshend, 7 Gill. 10; Edelen *v.* Edelen, 6 Md. 293; Higgins *v.* Carlton, 28 Md. 115; Stocksdale *v.* Cullison, 35 Md. 324; Farrell *v.* Brennan, 32 Mo. 328; McClintock *v.* Curd, *ib.* 411; Van Cleave *v.* Beam, 2 Dana, 155; Hutley *v.* Grimstone, 41 L. T. R. (N. S.) 531). While, in some, it is held that as the propounder must prove the formal execution of the will, this gives him the right to open and conclude (Brooks *v.* Barrett, 7 Pick. 94).

As affected by the Shift of the Burden. — In England, it is held that, in an action of ejectment where the lessor made out his title as heir of A, the defendant put in the will of A; whereupon, the lessor introduced in evidence a subsequent inconsistent will, the defendant is allowed to reply to the new case, and the plaintiff is entitled to the general reply (Doe *d.* Goslee *v.* Goslee, 9 C. & P. 46 (38 E. C. L. R.)).

Miscellaneous Points of Practice.

Certiorari, etc.; Supersedeas. — The actor in such proceeding is entitled to open and close (Pearsall *v.* McCartney, 28 Ala. 110).

Verdict; Special Case. — The plaintiff begins (Den *v.* Stillwell, 10 N. J. L. 60; Den *v.* Demorest, 21 *ib.* 525; Reg. *v.* Speller, 1 Ex. 401).

Defendant failing to offer Testimony. — The rule in civil actions, however it may be as to criminal, gives the right to the plaintiff to begin,[1] on general denial pleaded, even though the

[1] Though not to conclude.

defendant offers no testimony (Worsham *v.* Goar, 4 Port. (Ala.) 441).

Two Causes of Action. — When there are two paragraphs in the complaint — to one of which only affirmative answers, and to the other the general denial are pleaded — if the plaintiff introduces proof tending to sustain the latter, he is entitled to begin (Shaw *v.* Barnhart, 17 Ind. 183).

Inquisition of Lunacy. — In such inquisitions, taken in the case of a party charged with crime, the prisoner is entitled to the opening and conclusion (U. S. *v.* Lancaster, 7 Biss. 440, reported in Law. Crim. Def. 897).[1]

Caveat. — On a caveat, filed under a statute authorizing a defendant to locate and obtain a patent for vacant land, the defendant is entitled to open and close (Records *v.* Nelson, 1 Houst. 139).

Appeal; Wills. — On an appeal from the Probate Court establishing a will on the ground of insanity, or undue influence, there are authorities to the effect that the opening and conclusion is with the propounder (Boardman *v.* Woodman, 47 N. H. 120; Ware *v.* Ware, 8 Me. 42).

Adjudged Cases.

In order to arrive at a more practical comprehension of the principles governing this subject, it is proposed to discuss it in the light of the adjudicated cases with reference to the pleading; and, an attempt will be made to draw some order out of the legal chaos.

The authorities supporting the doctrine that the party holding the sole issue, or all the affirmatives as ascertained by the record, has the right to open and conclude, besides those already cited, as applied to particular stages of the action, and to particular actions and subjects of actions, are thus classified: —

First, with reference to the pleadings.

General Denial. — We have seen that the general issue gives the right to begin to the plaintiff.

Pleas in Abatement. — On a plea in abatement, in general,

[1] This inquisition was ordered after a verdict of not guilty.

the defendant opens (Best,[1] Begin, § 85 *et seq.; ib.* 111, note 1; Jewett *v.* Davis, 6 N. H. 518; Shephard *v.* Graves, 14 How. 505, 512; Fowler *v.* Coster, 3 C. & P. 463 (14 E. C. L. R.) and M. & M. 241; Fowler *v.* Byrd, 1 Hempst. 213; Bonfield *v.* Smith, 2 M. & Rob. 519; Morris *v.* Lotan, 1 M. & Rob. 233; 1 Stark. Ev. 384).

The exceptions are elsewhere discussed.

If any issue is, by the record, on the plaintiff, he begins (Booth *v.* Millns, 15 M. & W. 669; Rawlins *v.* Desborough, 2 M. & Rob. 70; Mercer *v.* Whall, 5 A. & E. (N. S.) 447 (48 E. C. L. R.); Best, Begin, § 70 *et seq.;* § 161; Bertrand *v.* Taylor, 32 Ark. 470; Churchill *v.* Lee, 77 N. C. 341; Slauson *v.* Englehart, 34 Barb. 198).

Pleas amounting to the General Issue. — All sorts of shifts have been resorted to, in order to obtain this right; amongst others — pleas really amounting to the general issue were framed in affirmative form. The criterion, by which their true character is discovered, is their argumentativeness and the failure to give color (Steph. Pl. 414).

These pleas were not the subject of demurrer and could only be corrected on motion (*ib.* 416). Such pleadings cannot give the defendant the opening, as they are only affirmative, *in form.* They are under the corrective power of the court, and administering substantial justice in granting the right, the courts will look to the substantial issue. By keeping a lookout for this style of pleading and bearing in mind the rules governing it, real discrepancies in the books may be detected and apparent ones reconciled (Best, Begin,[2] 129 note 1, 139 note *a*, 140 note 1, 147 note, 148, 149; Denny *v.*

[1] Mr. Best takes a distinction between those pleas which allege the non-joinder of defendants and those that allege it, with reference to plaintiffs; but the learned editor shows conclusively that the authorities cited by the author do not bear him out (Best, Beg. note 1, p. 139, and note 1, p. 140).

[2] In Mr. Crandall's note last cited, he says that the plea of contributory negligence is a plea amounting to the general issue. For this position he cites a number of the New York and Massachusetts cases, holding that the burden of proof is on the plaintiff, but by reference to Part I. title CONTRIBUTORY NEGLIGENCE, it will be seen that the weight of authority, that the onus is with the defendant, comes with "overwhelming sweep"; and the English

Booker, 2 Bibb. 427; Young *v.* Haydon, 3 Dana (Ky.), 145; Van Zant *v.* Jones, *ib.* 464; Toppan *v.* Janness, 21 N. H. 232; Graham *v.* Gautier, 21 Tex. 111).

Substantial Affirmative. — In order to confer this right, upon the party pleading in the affirmative, it must be the affirmative in substance, and not merely in form (Arch. N. P. Introd. 7; Best, Begin, §§ 5–9, note 1, 10; Soward *v.* Leggatt, 7 C. & P. 613 (32 E. C. L. R.); Amos *v.* Hughes, 1 M. & Rob. 464; Jackson *v.* Pittsford, 8 Blackf. 194; Elwell *v.* Chamberlin, 31 N. Y. 611). As well put in a New York case "he only who holds the affirmative is entitled to open and close the case" (Coleman *v.* Hagerman, 5 City Hall Rec. 63); and see note to Cooper *v.* Wakley, 3 C. & P. p. 480; see also Ashby *v.* Bates, 15 M. & W. 589; Geach *v.* Ingall, 14 M. & W. 95; Huntington *v.* Conkey, 33 Barb. 218; Jackson *v.* Hesketh, 2 Stark. 518 (3 E. C. L. R.).

If the defendant's response is a substantial traverse, it is immaterial whether couched in the negative or affirmative form (Soward *v.* Leggett, *supra;* Osborn *v.* Thompson, 9 C. & P. 337 (38 E. C. L. R.); Smith *v.* Davies, 7 C. & P. 307 (32 E. C. L. R.); Belcher *v.* McIntosh, 8 C. & P. 720 (34 E. C. L. R.); Doe *v.* Rowlands, 9 C. & P. 734 (38 E. C. L. R.); Goss *v.* Turner, 21 Vt. 437).

New Assignments. — When to trespass, not guilty and justification are pleaded, to which a new assignment was replied, and to this the defendant pleaded payment, etc., it was held that as the general issue was not entirely withdrawn, the plaintiff should begin (Price *v.* Seaward, C. & M. 23 (41 E. C. L. R.).

Son Assault Demesne. — On a plea of *son assault demesne* the defendant begins (Bedell *v.* Russell, R. & M. 293 (21 E. C. L. R.); Best, Begin, § 45 and note 1; § 96 and note 1; Goldsberry *v.* Slatterville, 3 Bibb, 345; Downey *v.* Day, 4 Ind. 531; Vance *v.* Vance, 2 Met. (Ky.) 581; Coleman *v.* Hagerman, 5 City Hall Rec. 63; McKenzie *v.* Milligan, 1 Bay, 248).

cases, there cited, show the defence to be the subject-matter of a plea in confession and avoidance.

De Injuria. — Under the replication *de injuria*, in general, the defendant opens (1 Waterman, Tres. § 244; Bedell *v.* Russell, R. & M. 293 (21 E. C. L. R.); Cooper *v.* Wakley, 3 C. & P. 474 (14 E. C. L. R.); S. C., M. & M. 248; Chapman *v.* Emden, 9 C. & P. 712 (38 E. C. L. R.);[1] Faith *v.* McIntyre, 7 C. & P. 44 (32 E. C. L. R.); Rowland *v.* Bernes, 1 C. & K. 46 (47 E. C. L. R.); Fredrick *v.* Gilbert, 8 Pa. 454). But if the plea of not guilty be interposed with justification, and *de injuria* be replied to the justification and the trespass newly assigned, and the defendant pleads to the new assignment, payment, and relinquished so much of the general issue as could be deemed to traverse the trespasses newly assigned, it was held, that, as the plea of not guilty was not entirely withdrawn, the plaintiff had the right to begin (Price *v.* Seward, C. & M. 23 (41 E. C. L. R.); Burroughs *v.* Hunt, 13 Ind. 178).

Replication; New Case. — If a new case is made by the replication and a denial interposed, the defendant opens (Sutton *v.* Mandeville, 1 Cr. C. C. 187); but, if to the statute of limitation it is replied that the plaintiff came within the exceptions, the defendant opens (Thornton *v.* W. F. &c. Co., 29 Miss. 143).

Admissions. — It should be borne in mind, that, when a material fact alleged in the pleading is not traversed by the subsequent pleading, it is not therefore admitted, *as a fact*, so as to dispense with proof of it before the jury, — thus: in assumpsit on a note by indorsee; plea that indorsement was made in bad faith, and notice on plaintiff — replication denying knowledge — the defendant begins (Smith *v.* Martin, 9 M. & W. 304).

There are, however, conflicting rulings on this point (Bingham *v.* Stanley, 2 A. & E. (N. S.) 117 (42 E. C. L. R.); Robins *v.* Maidstone, 4 A. & E. (N. S.) 811 (45 E. C. L. R.)) holding *contra*. As to admissions to obtain a right to the opening, some observations are hazarded in discussing ejectment, *ante*, 614, under this title. As there said, Mr. Archbold confines the practice to ejectment.

[1] The cases occurring subsequently to these are governed by the celebrated rule, and the right is given to the plaintiff in actions of trespass for unliquidated damages (Best, Begin, § 44).

Mr. Chitty says, that where a statute gives the general issue and allows special grounds of defence to be given in evidence thereunder, the plaintiff has the *prima facie* right to begin, though perhaps, if the defendant's counsel will admit a *prima facie* case, it might be otherwise. No authority is cited, and this great lawyer puts it very doubtingly (3 Chitty, Genl. Prac. 877). Mr. Crandall, in his notes to Best's Right to Begin, 92, states the broad proposition, that, when the defendant, in open court before entering on the trial, admits the plaintiff's cause of action, he will be entitled to open and conclude. As already said, rules prevail in several of the States, as in Massachusetts, Indiana, North and South Carolina, and perhaps in others, as the reporters rarely inform us in their *syllabi* anything about a rule. The doctrine, independent of rule, cannot be maintained unless the admission be one of pleading.

Non-Joinder. — On this plea, in general, the defendant begins (Best, Begin, § 46). Morris *v.* Lotan, 1 Moody and Robinson, 233, is the other way, but is rejected, on principle and authority, by Best (Best, Begin, §§ 54–56).

Particular Phases of Pleading. — When to a plea in confession and avoidance in an action on an acceptance, the reply is *de injuria*, the right is with the plaintiff (Harvey *v.* Towers, 6 Ex. 656 (W. H. & G.); S. C., 15 Jur. 544).

In general, when any of the subsequent pleadings (there being but one plea), are in confession and avoidance, the party, so pleading, holds the right to open. See illustration carried to the sur-rejoinder (Hogarth *v.* Penny, 1 C. & K. 608 (47 E. C. L. R.)).

So, where to assumpsit the defendant pleaded that the promise was made to plaintiff and another and not to plaintiff alone; replication that the promise was made to plaintiff alone, it was held by Park, J., that the plaintiff should begin (Davies *v.* Evans, 6 C. & P. 619 (25 E. C. L. R.)).[1]

[1] Mr. Best speaks of this plea as in abatement (Begin, § 88); so does Chitty (1 Chitty, Pl. 13, note *u*, citing Davis *v.* Evans). So treated, as Mr. Crandall properly observes, the decision itself is palpably erroneous. As

Waiver of General Issue. — If a defendant waives his right to plead the general issue and to show thereunder circumstances in avoidance and shall plead the same facts formally in confession and avoidance, he entitles himself to open and conclude (Cross *v.* Pearson, 17 Ind. 612; Blackledge *v.* Pine, 28 Ind. 466).

But if the replication confesses and avoids the plea, and the rejoinder concludes to the country, the plaintiff begins (Scott *v.* Lewis, 7 C. & P. 347 (32 E. C. L. R.)).

So, upon a plea of payment into court, or payment and other special plea — replication of damages *ultra* — plaintiff begins (Cripps *v.* Wells, 1 C. & M. 489 (41 E. C. L. R.); Booth *v.* Millns, 4 D. & L. 52; 15 M. & W. 669; 15 L. J. (Ex.) 354).

So, a reply in confession and avoidance to the defence of set-off, plaintiff begins (Hall *v.* Weare, 92 U. S. 728, 732).

But, upon a traverse of a counter-claim, the defendant begins (Bowen *v.* Spears, 20 Ind. 146; Brown *v.* Kirkpatrick, 5 S. C. 267); but it must be a set-off pure (Goodpaster *v.* Voris, 8 Iowa, 334).

Although an answer in confession and avoidance includes an immaterial traverse, the right is with the defendant (Millerd *v.* Thorn, 56 N. Y. 402; Morss *v.* Gleason, 64 N. Y. 204; Best, Begin, 86, note 1).

If there is an affirmative on both sides, the plaintiff begins (Craig *v.* Fenn, 1 C. & M. 43 (41 E. C. L. R.)).

Where a material fact in pleading is not traversed by the subsequent pleading, it is not thereby admitted, and, the onus, as well as the right to begin, is with the party alleging the fact (Smith *v.* Martin, 9 M. & W. 304; 1 Dowl. (N. S.) 418; C. & M. 58 (41 E. C. L. R.)).

Where to an action on a check: —

the point could have been taken advantage of on the trial (1 Chitty, Pl. 13), it is more than probable that the judge treated it as a "feint" at the general issue. However it be, the case stands alone. That it was not a "feint" is shown by the interposition of the replication, causing the defendant to add the *similiter*. Mr. Crandall so treats it, but elsewhere he treats similar pleas as strictly in abatement (Best, Begin, p. 111, note 1).

1. Plea, illegal consideration known to plaintiff.
2. That plaintiff gave no value.

Replication, denying notice and averring that plaintiff gave value — the opening is with defendant (Bingham *v.* Stanley, 9 C. & P. 374 (38 E. C. L. R.)).

Discretionary. — When counsel, in opening, states facts but declines to call witnesses to prove them, the allowance of a reply is within the discretion of the trial court[1] (Naish *v.* Brown, 2 C. & K. 219 (61 E. C. L. R.); Rex *v.* Bignold, 4 D. & R. 70 (16 E. C. L. R.); Crerar *v.* Sodo, M. & M. 85 (22 E. C. L. R.)). See also Ashing *v.* Miles, 16 Ind. 329.

So when to one paragraph of plaintiff's declaration, the defendant pleads in avoidance merely and to another pleads general denial, the plaintiff fails to produce any evidence in support of the latter of his paragraphs, the defendant may be allowed, in the discretion of the court, to open and close the argument[2] (Zehner *v.* Kepler, 16 Ind. 290).

Recoupment; Counter-Claim, etc. — Where these are the only defences, or are employed in conjunction with affirmative defences, the defendant, upon a general denial, has the right to open and conclude[3] (Best, Begin, 119, 132, in notes; Waterman, Set-off, § 79; Bellinger *v.* Craigue, 31 Barb. 534; Brown *v.* Kirkpatrick, 5 S. C. 267; McRae *v.* Lawrence, 75 N. C. 289; Stronach *v.* Bledsoe, 85 *ib.* 473).

Tender.—On tender, alone, pleaded, the right is with the defendant (Auld *v.* Hepburn, 1 Cr. C. C. 122).

Exceptional Decisions.—In some courts, they hold that the

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[1] If, however, certain parts of a book are used to refresh the memory of a witness for plaintiff, and defendant's counsel observes upon the general state of the book and refers to other parts of it, such conduct does not give the plaintiff a right to the reply (Pullen *v.* White, 3 C. & P. 434 (14 E. C. L. R.)).

[2] It should be borne in mind that the subject in Indiana is regulated by Rules of Court, but the decision stated in the text is sound *per se*.

[3] *Quoad* the counter-claim, the position of the parties is reversed, the defendant becoming thereby the *actor*, and the plaintiff the *reus* (Waterman, Set-off, 102).

The case of Page *v.* Osgood, 2 Gray, 260, as ordinarily digested, would seem to be a radical departure, but the case was decided under a rule.

plaintiff is entitled to the opening and conclusion in every case, whatever be the form of the issue (Chamberlain *v.* Gaillard, 26 Ala. 504; Benham *v.* Rowe, 2 Cal. 387, reported in 56 Am. Dec. 342).

These are very remarkable decisions, and are opposed to the whole current of English and American authority.

The case of Page *v.* Osgood, 2 Gray, 260, seemingly in this direction, was decided under a rule of court.

Too Late.—It is too late after a reply has been made to raise the question as to the right to open and close (McKibbon *v.* Folds, 38 Ga. 235).

Right to Reply.

The general and almost universal rule is, that the party holding the right to open has the right to reply (Best, Begin, § 129 *et seq.*).

The limitations and exceptions are stated very lucidly by Mr. Best *ubi supra*, and have to a great extent been discussed before.

The right to a general[1] reply may be defeated or waived.

If the party who is to speak second, offers any evidence, however insignificant, the right to the general reply is saved to the opener (Best, Begin, §§ 132, 133; Rymer *v.* Cook, 1 M. & M. 86 (22 E. C. L. R.)).

If no evidence be given by the party to speak second, the right of the opener to reply is (in civil actions) defeated.

And even when evidence is offered in order to entitle the opener to a reply, such evidence must constitute evidence *to the issue* really and actually given by him (Best, Begin, §§ 137–141; Dowling *v.* Finigan, 1 C. & P. 587 (12 E. C. L. R.); Pullen *v.* White, 3 C. & P. 434 (14 E. C. L. R.)).

Whatever doubt, as suggested by Mr. Best, there may be as to this exclusion, under the English practice, of the right

[1] For the benefit of the novitiate, it may be stated that the general reply means a right to comment on the whole case, whereas a special reply must be confined to a discussion of the points made by the opposite party.

of the opener to reply when no evidence is given by the other side, the reasons are not applicable to the American practice.[1] Mr. Best puts what he calls the defendant's third predicament, namely "he may in his speech state some new facts or circumstances not previously proved on the opposite side, but adduce no fresh evidence to establish them" (Best, Begin, § 131). It is frequently said, and quite generally believed, that such conduct gives the counsel who began the right to reply, although it is not usual to exercise it; but Mr. Best contends that, if this opinion be tried by the two legitimate tests of principle and authority, it will be found to be, at least, questionable (Best; Begin, § 144).

The cases in support of this contention are Rex *v.* Home, 20 How. St. Tr. 662; Rex *v.* Bignold, 4 D. & R. 70 (16 E. C. L. R.); Rex *v.* Carlile, 6 C. & P. 636 (25 E. C. L. R.). Those opposed are Crerar *v.* Sodo, M. & M. 85 (22 E. C. L. R.); 3 C. & P. 10 (14 E. C. L. R.); Faith *v.* McIntyre, 7 C. & P. 44 (37 E. C. L. R.). Mr. Best concludes, and such seems to be the correct view, that such right is discretionary with the court (Naish *v.* Brown, 2 C. & K. 219 (61 E. C. L. R.)).

When the issue is on the plaintiff, and he has notice, by the pleading or otherwise, of the defence intended to be set up, he may either go into the whole case in the first instance; and, not only establish his own, but give evidence to rebut the intended defence; or, he may content himself with establishing a *prima facie* case, and reserve his evidence, in reply, till that of the defendant has been closed. If he shall have chosen the latter course — and the defendant, besides bringing evidence to impeach the plaintiff's case, sets up an entire new case, which again the plaintiff controverts by evidence — the defendant's counsel is entitled to a *special* reply; which (as he has already had an opportunity of commenting on the *prima facie* case of the plaintiff) must be confined to the new one

[1] According to the English practice the opening precedes the testimony, whereas the general rule here is, that no addresses are made until all of the evidence is in (3 Chitty, Genl. Prac. 884; 1 Stark. Ev. 381, note *o*).

set up by him; and then the plaintiff is entitled to the *general* reply (Best, Begin, §§ 79–81, 157).

We have already stated, that where proof of several issues is on the plaintiff, he is always entitled to begin; and the practice is for him to prove such issues as are incumbent on him, the defendant then does the same as to those on him; thereupon, the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; the defendant is then allowed a *special* reply on the fresh evidence in support of his own affirmative, and then the plaintiff has the general reply (Best, Begin, § 161; 1 Stark. Ev. 382 *et seq.*).

It seems discretionary with the court whether, after the plaintiff has closed his case, and the defendant has commenced his address to the jury or after the jury have retired the plaintiff's counsel can be allowed to go into a new case (1 Stark. Ev. 386; Parish *v.* Fite, 2 Murp. 258; S. C., 1 C. L. R. 238).

Practice. — It seems to be the English practice for the junior counsel for the plaintiff to open the pleadings and shortly state the substance of them to the court (Best, Beg. note to p. 81). Only one counsel on each side, to be heard on the right to begin, and the counsel for the defendant has the right to reply (Rawlins *v.* Desborough, 2 M. & Rob. 70), and the party adjudged to hold the affirmative and the right to begin, will be expected to observe the rule generally adopted in this country, requiring a strict opening on the part of the plaintiff and defendant — a summing up by one of the plaintiff's counsel, then by all of the defendant's counsel, and then a closing by the plaintiff's counsel (Blight *v.* Ashley, 1 Pet. C. C. 25); and when the defendant entitles himself to the opening, he is treated as the plaintiff opening.

"The party beginning will be expected to state, briefly — 1st, the nature of the action; 2d, the substance of the pleadings; 3d, the points in issue; 4th, the facts and circumstances of the case — the substance of the evidence to be adduced in its support; and, 5th, to state the nature of the defence, if it appears on the record, but no further (Ayrault *v.* Chamberlain, 33 Barb. 229).

"The rule now is, not to allow an opening in regard to the defence, except in an incidental way, but to wait and see whether the anticipated defence will, in fact, be attempted to be proved (Morris *v.* Wadsworth, 17 Wend. 103; Ayrault *v.* Chamberlain, *supra*). The counsel for the defendant, in opening his defence, will be confined to a statement of his answer to the plaintiff's case and the evidence he proposes to give to sustain it, and, in such opening, he should not comment, in the way of summing up, upon the plaintiff's evidence, any further than is essential to the proper understanding by the jury of defendant's evidence (State *v.* Zellers, 2 Halst. (N. J.) 220; Dodge *v.* Denham, 41 Ind. 188; Bedell *v.* Powell, 13 Barb. 183; see Best, Beg. 'Right to Reply,' chap. 3).

"In opening, the party should lay the foundation to exhaust all of his testimony in support of the issue on his side before closing, and can thereafter introduce evidence only in reply (Marshall *et al. v.* Davies, 78 N. Y. 414; Hastings *v.* Palmer, 20 Wend. 225; Ford *v.* Niles, 1 Hill, 300; Rex *v.* Stimpson, 2 Carr. & P. 415." (Best, Beg. 81, note.)

As to the course of procedure generally, as well as that particularly of the party adjudged *not* to be entitled to open and conclude, see Best, Beg. § 131 *et seq.*, and the exhaustive notes of the learned editor.[1]

Parliamentary Discussion. — The same general principles apply to parliamentary debate, and that occurring in all deliberative assemblies (Best, Begin, § 130).

Points of Law. — If points of law are raised in a reply argument, the other party has a right to discuss the question, subject to a reply to him[2] (Best, Begin, §§ 145, 162, 164; Arden *v.* Tucker, 1 M. & Rob. 191 (17 E. C. L. R.); Power

[1] As the price of this book is so trifling, and it is, in itself, a valuable adjunct, we apprehend that our readers will buy it, and therefore we have not cited authorities outside, to any considerable extent.

[2] The refusal to allow a reply, though, perhaps, could not be assigned for error, as it is discretionary with the court whether it will hear an argument on a question of law (Howell *v.* Com., 5 Gratt. 664).

v. Barham, 7 C. & P. 356 (32 E. C. L. R.); Harvey *v.* Mitchell, 2 M. & Rob. 366). As to the right of reply, when matter, not in evidence, is stated to the jury, etc., see Best, Begin, § 144 *et seq.* It appears to be purely discretionary (Naish *v.* Brown, 2 C. & K. 219 (61 E. C. L. R.); Crerar *v.* Sodo, M. & M. 85 (22 E. C. L. R.)).

Appeal. — Whatever doubts may have at one time existed (see Best, Begin, § 111 *et seq.*), it was settled in England by the case of Edwards *v.* Matthews, 11 Jur. 398; S. C., 16 L. J. (Ex.) 291, that an error, in respect to the allowance of this right, would be corrected when it sufficiently appears that, in consequence thereof, the course of justice has been interrupted, and some substantial injury, affecting the trial of the issue, has been sustained, — see also Doe *d.* Bather *v.* Brayne, 5 C. B. 655 (M. G. & S.); Brandford *v.* Freeman, 5 Ex. 734 (W. H. & G.).

In our country, on this point, there is no uncertain sound. If there be a wrong ruling (unless purely discretionary), it is reviewable on error or appeal[1] (Millerd *v.* Thorn, 56 N. Y. 402, 405; Heineman *v.* Heard, 62 N. Y. 448; Huntington *v.* Conkey, 33 Barb. 220; Davis *v.* Mason, 4 Pick. 156; Brooks *v.* Barrett, 7 *ib.* 94; Rohan *v.* Hanson, 11 Cush. 44; Robinson *v.* Hithcock, 8 Met. 64; Caskey *v.* Lewis, 5 B. Mon. 27; Haines *v.* Kent, 11 Ind. 126; Benham *v.* Rowe, 2 Cal. 387; Singleton *v.* Millet, 1 Nott & M. 355; Johnson *v.* Wideman, Dud. (S. C.) 325; Mercer *v.* Whall, 5 A. & E. (N. S.) 447; Geach *v.* Ingall, 14 M. & W. 95; Ashby *v.* Bates, 15 *ib.* 589).

In Iowa, it is held that to support an appeal there must appear a clear case of prejudice (Preston *v.* Walker, 26 Iowa, 205). It has, however, in a few of the States, been held that the ruling on the right to open and close was discretionary, and not revisable (Wade *v.* Scott, 7 Mo. 509; Reichard *v.* Manhattan &c. Co., 31 *ib.* 518).

[1] There have been doubting *dicta* (Richards *v.* Nixon, 20 Pa. 19, *per* Black, C. J.; Fry *v.* Bennett, 28 N. Y. 324). The law in New York has, however, since been decided in accordance with the text (Millerd *v.* Thorn, 56 N. Y. 402).

In Wisconsin the court has adopted the English rule (Marshall *v.* Wells, 7 Wis. 1).

Argument. — It is well settled, that the right to open and conclude is with the appellant or plaintiff in error (O'Connell *v.* Regina, 11 C. & F. (H. of L.) 155; 9 Jur. 25;[1] Rex *v.* Newbury, 4 T. R. 475, *per* Kenyon, C. J.; Millerd *v.* Thorn, 56 N. Y. 402; Herriter *v.* Porter, 23 Cal. 385; Todd *v.* Winants, 36 *ib.* 129; Reese *v.* Beck, 9 Ind. 238; Hughes *v.* State, 4 Iowa, 554; St. Louis &c. Co. *v.* Cohen, 29 Mo. 421; Grant *v.* Morse, 22 N. Y. 323; Mead *v.* Bunn, 32 *ib.* 275; Garner *v.* Pomroy, 11 Iowa, 149; Belt *v.* Davis, 1 Cal. 134; Dwelle *v.* Roath, 29 Ga. 733; N. Y. &c. Co. *v.* McIntosh, 5 Hill, 290; Johnson *v.* Collins, 17 Ala. 318; Nickerson *v.* Rugar, 76 N. Y. 279; Chambers *v.* Hunt, 3 Harr. (N. J.) 339, aff. 1 Zab. 620; Steadman *v.* Holman, 33 Miss. 550; Courtwright *v.* Staggers, 15 Ohio, 511; O'Keely *v.* Territory, 1 Oreg. 51; Piersons *v.* Burney, 15 Tex. 272; Chandos *v.* Com'rs, 20 L. J. R. (N. S.) Ex. 269, reported in 5 E. L. & Eq. R. 449; Sims *v.* Helling, 21 L. J. R. (N. S.) Chancery, 387, reported in 11 E. L. & Eq. R. 42; Neathway *v.* Reed, 17 Jur. 169, reported in 17 E. L. & Eq. R. 150; Geils *v.* Geils, 3 H. of L. C. 280, reported 14 E. L. & Eq. R. 1).

But, *aliter*, if the appeal does not embrace the costs as well as the other parts of the decree (Senhouse *v.* Hall, 27 E. L. & Eq. R. 350; Onslow *v.* Wallis, 13 Jur. 1085).

Overruled Cases.

It is deemed a proper caution to state, that several of the authorities cited are either overruled, doubted, or denied.[2]

Corbett *v.* Corbett. Substantially overruled by Bather *v.* Brayne, 5 C. B. 655.

Faith *v.* McIntyre. Denied by Pickles *v.* Hollings, 1 M. &

[1] The point was carried so far in this case as to deprive the counsel for the crown of the right to reply.

[2] For the benefit and information of students it may be stated that the term *overruled* is applied where the case is declared to be unsound law by the same or a supervisory court, and is said to be *denied* when some other court rejects it.

Rob. 468, and Creevey *v.* Bowman, *ib.* 496 (*nisi prius* decisions) and doubted by Best (Best, Beg. § 156).

Goodtitle *v.* Braham. Shaken, if not overruled, by Pile *v.* Wilson, 1 M. & Rob. 323; Lodge *v.* Phipher, 11 S. & R. 333; Bank Pa. *v.* Haldeman, 1 Pa. 161.

Lacon *v.* Higgins. Doubted in Hill *v.* Packard, 5 Wend. 375.

Morris *v.* Lotan. Condemned by Best (Best, Beg. § 56).

Robey *v.* Howard. Overruled by Cooper *v.* Wakley, 3 C. & P. 474. And the latter declared to be overruled by Mercer *v.* Whall, 5 A. & E. (N. S.) 447. See note to Fowler *v.* Coster, 3 C. & P. 463.

Young *v.* Highland is strongly condemned by the able editor of Best's Right to Begin. He pungently says it is of "unsound tissue" (note to p. 105). While agreeing with Mr. Crandall, we think that Young *v.* Highland is more consistent with assumed principle, than the English cases. For, if the claim for uncertain damages be, in itself, any criterion, it is equally applicable to actions arising *ex contractu*, as to those originating *ex delicto*.

Wollaston *v.* Barnes. Substantially overruled by Bather *v.* Brayne, *supra*.

APPENDIX.

APPENDIX.

We will now proceed to illustrate, by a few excerpts taken from famous speeches, the effectiveness of concluding arguments.

The subject is treated with reference, first, to congressional debate; secondly, argument on appeal; and, lastly, with reference to *nisi prius* trials.

CONGRESSIONAL DEBATE: AN EXCORIATING PHILLIPIC.[1]

A member of the National House of Representatives moved for and obtained the appointment of a committee of investigation of charges reflecting upon the official conduct of one of, if not the greatest, statesman that this country has ever produced. The committee was composed of members of both political parties, and returned a fully exonerating report. In concluding the debate, on a motion to accept the report and discharge the committee, the member moving the same, after pronouncing a splendid panegyric on the party charged (who was then a senator), spoke as follows: "But, Mr. Speaker, history repeats itself in all of the ramifications of society, and this futile attempt to find an Achillian heel is but an illustration of a scene that occurred in Isling-

[1] All names are suppressed, as the several actors have passed away from the stage of life. The account is given from recollection of reading the scene nearly forty years ago.

ton, and rendered immortal by the poet." Then, raising his figure to its full height and pointing to the Senate chamber, he exclaimed: "The MAN recovered of the bite" — then, walking down the aisle to the seat occupied by the prosecuting member, he faced him, and, pointing his finger directly toward him, shouted — "the DOG it was that died."

ARGUMENT ON APPEAL.

A masterly effort in an appellate court (argument of Hon. J. S. Black in the Milligan Case, 4 Wall. 2). From "Great Speeches by Great Lawyers." [1]

The attorney-general thinks that a proceeding which takes away the lives of citizens without a constitutional trial is a most merciful dispensation. His idea of humanity as well as law is embodied in the bureau of military justice, with all its dark and bloody machinery. For that strange opinion he gives this curious reason: that the duty of the commander-in-chief is to kill, and unless he has this bureau and these commissions he must "butcher" indiscriminately, without mercy or justice. I admit that if the commander-in-chief or any other officer of the government has the power of an Asiatic king, to butcher the people at pleasure, he ought to have somebody to aid him in selecting his victims, as well as to do the rough work of strangling and shooting. But if my learned friend will only condescend to cast an eye upon the Constitution, he will see at once that all of the executive and military officers are completely relieved by the provision that the life of a citizen shall not be taken at all until after legal conviction by a court and jury. You cannot help but see

[1] The title of this book shows the looseness with which the term "lawyer" is used. You cannot break non-professional men of the habit of applying this term indiscriminately to all attorneys, whether it be the correspondent of a commercial agency who never opens his mouth in the court-house, or W. M. Evarts, W. A. Beach, or the late Emory Storrs. But professional authors ought to discriminate between lawyers such as those named above and pyrotechnic orators like Curran, Prentiss, Choate, Stanton, O'Connor, Graham, Wirt, *et id omne genus*.

that military commissions, if suffered to go on, will be used for most pernicious purposes. I have criticised none of their past proceedings, nor made any allusion to their history in the last five years. But what can be the meaning of this effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial, which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does anybody pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? The counsel in this cause will not insult you by even hinting such an opinion. What righteous or just purpose, then, can they serve? None whatever.

But while they are utterly powerless to do even a shadow of good, they will be omnipotent to trample upon innocence, to gag the truth, to silence patriotism, to crush the liberties of the country. They will be organized to convict, and the conviction will follow the accusation as surely as night follows the day. The government, of course, will accuse none before such a commission except those whom it predetermines to ruin and destroy. The accuser can choose the judges, and will certainly select those who are known to be the most ignorant, the most unprincipled, and the most ready to do whatever may please the power which gives them pay, promotion, and plunder. The willing witness can be found as easily as the superserviceable judge. The treacherous spy and the base informer — those loathsome wretches who do their lying by the job — will stock such a market with abundant perjury, for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, will shock the world with the enormity of its crimes. Plied as it may be by the arts of a malignant priesthood, and urged on by the madness of a raving crowd, it will be worse than the popish plot, or the French revolution — it will be a combination of both, with Fouquier Tinville on the bench, and Titus Oates in the witness-box. You can save us from this

horrible fate. You alone can "deliver us from the body of this death." To that fearful extent is the destiny of this nation in your hands.

CONCLUDING SPEECHES. — EXTRACTS.

Erskine on the Trial of Williams for the Publication of Paine's "Age of Reason."

Gentlemen, I cannot conclude without expressing the deepest regret at all attacks upon the Christian religion by authors who profess to promote the civil liberties of the world. For under what other auspices than Christianity have the lost and subverted liberties of mankind in former ages been reasserted? By what zeal but the warm zeal of Christians, have English liberties been redeemed and consecrated? Under what other sanctions, even in our own days, have liberty and happiness been extending and spreading to the uttermost corners of the earth? What work of civilization, what commonwealth of greatness, has the bold religion of nature ever established? We see, on the contrary, the nations that have no other light than that of nature to direct them, sunk in barbarism, or slaves to arbitrary governments; while, since the Christian era, the great career of the world has been slowly but clearly, advancing higher at every step, from the awful prophecies of the Gospel, and leading, I trust, in the end, to universal and eternal happiness. Each generation of mankind can see but a few revolving links of this mighty and mysterious chain; but, by doing our several duties in our allotted stations, we are sure that we are fulfilling the purpose of our existence. You, I trust, will fulfil yours this day!

Choate in the Dalton Divorce Case.

I leave her case, therefore, upon this statement, and respectfully submit that for both their sakes you will render a verdict promptly and joyfully in favor of Helen Dalton — for both their sakes. There is a future for them both together,

gentlemen, I think; but if that be not so, if it be that this matter has proceeded so far that her husband's affections have been alienated, and that a happy life in her case has become impracticable, yet for all that, let there be no divorce. For no levity, no vanity, no indiscretion, let there be a divorce. I bring to your minds the words of Him who spake as never man spake: "Whosoever putteth away his wife" — for vanity, for coquetry, for levity, for flirtation? — "whosoever putteth away his wife for anything short of adultery, intentionally, willingly indulged, and that established by clear, undoubted and credible proof, — whosoever does it, causeth her to commit adultery." If they may not be dismissed then, gentlemen, to live again together, for her sake and her parents', sustain her; give her back to self-respect and the assistance of that public opinion which all of us require.

Stanton in Defence of Sickles.

If this be not the culminating point of adulterous depravity, how much farther could it go? There is no one point beyond. The wretched mother, the ruined wife, has not yet plunged into the horrible filth of common prostitution, to which she is rapidly hurrying, and which is already yawning before her. Shall not that mother be saved from that, and how shall it be done? When a man has obtained such a power over another man's wife that he can not only entice her from her husband's house, but separate her from her child for the purpose of guilt, it shows that by some means he has acquired such an unholy mastery over that woman's body and soul, that there is no chance of saving her while he lives, and the only hope of her salvation is that God's swift vengeance shall overtake him. The sacred glow of well-placed domestic affection, no man knows better than your Honor, grows brighter and brighter as years advance, and the faithful couple whose hands were joined in holy wedlock in the morning of youth, find their hearts drawn closer to each other as they descend the hill of life, to sleep together at its foot; but lawless love is short-lived as it is criminal, and the neighbor's wife so hotly pursued, by trampling down every human feel-

ing and divine law, is speedily supplanted by the object of some fresher lust, and then the wretched victim is sure to be soon cast off into common prostitution, and swept, through a miserable life and a horrible death, to the gates of hell, unless a husband's arm shall save her.

Who, seeing this thing, would not exclaim to the unhappy husband: Hasten, hasten, hasten to save the mother of your child. Although she be lost as a wife, rescue her from the horrid adulterer; and may the Lord who watches over the home and the family, guide the bullet and direct the stroke! And when she is delivered, who would not reckon the salvation of that young mother cheaply purchased by the adulterer's blood? Aye, by the blood of a score of adulterers? The death of Key was a cheap sacrifice to save one mother from the horrible fate which, on that Sabbath day, hung over this prisoner's wife and the mother of his child.

Curran in Crim. Con. Case.

There is another consideration, gentlemen, which, I think, most imperiously demands even a vindictive award of exemplary damages, and that is the breach of hospitality. To us peculiarly does it belong to avenge the violation of its altar. The hospitality of other countries is a matter of necessity or convention; in savage nations of the first, in polished of the latter; but the hospitality of an *Irishman* is not the running account of posted and legered courtesies, as in other countries; it springs, like all his qualities, his faults, his virtues, directly from his heart. The heart of an Irishman is by nature bold, and he confides; it is tender, and he loves; it is generous, and he gives; it is social, and he is hospitable. This sacrilegious intruder has profaned the religion of that sacred altar so elevated in our worship, so precious to our devotion; and it is our privilege to avenge the crime. You must either pull down the altar and abolish the worship, or you must preserve its sanctity undebased. There is no alternative between the universal exclusion of all mankind from your threshold, and the most rigorous punishment of him who is admitted and betrays. This defendant has been

so trusted, has so betrayed, and you ought to make him a most signal example. Gentlemen, I am the more disposed to feel the strongest indignation and abhorrence of this odious conduct of the defendant, when I consider the deplorable condition to which he has reduced the plaintiff, and perhaps the still more deplorable one that he has in prospect before him. What a progress has he to travel through before he can attain the peace and tranquillity which he has lost? How like the wounds of the body are those of the mind! How burning the fever! How painful the suppuration! How slow, how hesitating, how relapsing, the process to convalescence! Through what a variety of suffering, what new scenes and changes, must my unhappy client pass ere he can re-attain, should he ever re-attain, that health of soul of which he has been despoiled by the cold and deliberate machinations of this practised and gilded seducer? If, instead of drawing upon his incalculable wealth for a scanty retribution, you were to stop the progress of his despicable achievements by reducing him to actual poverty, you could not even so punish him beyond the scope of his offence, nor reprize the plaintiff beyond the measure of his suffering. Let me remind you that in this action the law not only empowers you, but that its policy commands you, to consider the public example, as well as the individual injury, when you adjust the amount of your verdict. I confess I am most anxious that you should acquit yourself worthily upon this important occasion. I am addressing you as fathers, husbands, brothers. I am anxious that a feeling of those high relations should enter into and give dignity to your verdict. But, I confess it, I feel a tenfold solicitude when I remember that I am addressing you as my countrymen, as Irishmen, whose characters as jurors, as gentlemen, must find either honor or degradation in the result of your decision. Small as must be the distributive share of that national estimation that can belong to so unimportant an individual as myself, yet do I own I am tremblingly solicitous for its fate. Perhaps it may appear of more value to me because it is embarked on the same bottom with yours; perhaps the community of peril, of common safety or common

wreck, gives a consequence to my share of the risk which I could not be vain enough to give it, if it were not raised to it by that mutuality. But why stoop to think at all of myself, when I know that you, gentlemen of the jury, when I know that our country itself, are my clients on this day, and must abide the alternative of honor or of infamy, as you shall decide. But I will not despond; I will not dare to despond. I have every trust and hope and confidence in you. And to that hope I will add my most fervent prayer to the God of all truth and justice, so to raise and enlighten and fortify your minds, that you may so decide as to preserve to yourselves while you live the most delightful of all recollections, that of acting justly, and to transmit to your children the most precious of all inheritances, the memory of your virtue.

EXTRACT FROM SHAK., HENRY VI. PT. II. ACT 3, SC. 2.

Shakspeare puts the force of circumstantial evidence in a strong light. It occurs in the drama of Henry VI.

DUKE HUMPHREY is found dead in his bed. EARL WARWICK calls in the KING to view the corpse. There are present besides WARWICK, the QUEEN, SUFFOLK, and the CARDINAL BEAUFORT.

War. — As surely as my soul intends to live
With that dread King, that took our state upon him,
To free us from his Father's wrathful curse,
I do believe, that violent hands were laid
Upon the life of this thrice-famed duke.
Suf. — A dreadful oath, sworn with a solemn tongue!
What instance gives Lord Warwick for his vow?
War. — See, how the blood is settled in his face! —
Oft have I seen a timely-parted ghost,
Of ashy semblance, meagre, pale, and bloodless,
Being all descended to the laboring heart;
Who, in the conflict that it holds with death,
Attracts the same for aidance 'gainst the enemy;
Which with the heart there cools, and ne'er returneth
To blush and beautify the cheek again.

But, see, his face is black and full of blood;
His eye-balls farther out than when he liv'd,
Staring full ghastly like a strangled man:
His hair upheav'd, his nostrils stretch'd with struggling;
His hands abroad display'd, as one that grasp'd
And tugg'd for life, and was by strength subdu'd.
Look on the sheets, his hair, you see, is sticking;
His well-proportioned beard made rough and rugged,
Like to the summer's corn by tempest lodg'd.
It cannot be, but he was murdered here;
The least of all these signs were probable.

Suf. — Why, Warwick, who should do the duke to death?
Myself, and Beaufort, had him in protection;
And we, I hope, sir, are no murderers.

War. — But both of you were vow'd Duke Humphrey's foes;
And you, forsooth, had the good duke to keep:
'Tis like, you would not feast him like a friend;
And 'tis well seen he found an enemy.

Q. Mar. — Then you, belike, suspect these noblemen
As guilty of Duke Humphrey's timeless death.

War. — Who finds the heifer dead, and bleeding fresh,
And sees fast by a butcher with an axe,
But will suspect 'twas he that made the slaughter?
Who finds the partridge in the puttock's nest,
But may imagine how the bird was dead,
Although the kite soar with unbloodied beak?
Even so suspicious is this tragedy.[1]

[1] In this short extract Shakspeare discriminates with great clearness between *belief*, *suspicion*, and the logical force of presumptive evidence.

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[Does not embrace references to the notes.]